SUPREME COURT OF FLORIDA

BONNIE BELAIR,

Petitioner,

vs.

MARY FRANCIS DREW,

Respondent.
_____/

CASE NUMBER: 96,168
District Court of Appeal
5th District - No. 99-1265

AMENDED
PETITIONER'S INITIAL BRIEF

KENNETH E. RHODEN, ESQUIRE
Attorney for Petitioner
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STATEMENT OF THE CASE and FACTS

This is an appeal from a July 5, 1999 opinion by the Fifth District Court of Appeal declining to issue a Writ of Certiorari.

On August 22, 1997 the trial court signed the Final Judgment dissolving the marriage. The Judgment awarded to Bonnie Belair, the Mother, sole care, custody and control of the minor child. The Former Husband was awarded visitation as determined solely by the Wife (App, pg. 28).

On May 11, 1998 the paternal grandmother, MARY FRANCIS DREW, field a Petition for Grandparent Visitation requesting the court award visitation to the grandmother regarding the minor child. The grandmother relied upon Florida Statute 752.01(1)(b) as authority for the Court to order visitation (App, pg. 31).

On February 1, 1999 the mother filed a Motion to Declare

Florida Statute 752.01(1)(b) Unconstitutional. The hearing was set for March 10, 1999 (App. pg. 35).

At the hearing the court declined to rule on the constitutionality of Florida Statute 752.01(1)(b) (pg. 9-10 tsp).

On April 21, 1999 the court signed the order denying the motion (App., pg. 38).

On May 12, 1999 the mother filed a Petition for Writ of Certiorari asking the Fifth District to review the trial courts order. (App., pg. 39).

On July 5, 1999 the Fifth District filed its opinion declining to issue a Writ of Certiorari (App., pg. 44). The court ruled that the mother would have an adequate remedy at the end of the case. The court certified conflict with William v. Spears, 719 So.2d 1236 (Fla. 1st DCA 1998) (App., pg. 45).

On July 26, 1999 the mother filed her Notice to Invoke

Discretionary Jurisdiction (App., pg 46). On August 12, 1999 this Court issued an order postponing a decision on jurisdiction and set deadlines for briefs on the merits (App., pg 47).

SUMMARY OF ARGUMENT

The Florida Constitution gives the citizens of Florida a right to privacy. Florida Statute 752.01 gives a grandparent a statutory right to seek visitation with a grandchild.

The Florida Supreme Court in Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996) and Von Eiff v. Azicri, 720 So.2d 510 (Fla. 1998) ruled Florida Statute 752.01(1)(e) and Florida Statute 752.01(1)(a), respectively, unconstitutional.

This case involves a divorced mother awarded sole parental responsibility. There is no reason she would have a lessor right to privacy than the parents in Beagle and Von Eiff.

ARGUMENT

Article 1, Section 23 of the Florida Constitution provides:

RIGHT TO PRIVACY

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

The privacy provision was approved on November 4, 1980. When reviewing a statue that infringes on the right to privacy the compelling state interest standard must be used. Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985).

Florida Statues 752.01 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 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 s. 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) In determining the best interest of the minor child, the court shall consider;

(a) The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents.
(b) The length and quality of the prior relationship between the child and

the grandparent or grandparents.

(c) The preference of the child if the child is determined to be of sufficient maturity to express a preference.

(d) The mental and physical health of the child.

(e) The mental and physical health of the grandparent and grandparents.

(f) Such other factors as are necessary in the particular circumstances.

(3) This act does not provide for grandparental visitation rights for children placed for adoption under chapter 63 except as provided in s. 752.07 with respect to adoption by a stepparent.

Under Florida Statute 752.01, upon filing of a proper petition, a hearing would be held to determine when it is in the child's best interest to award visitation.

Under Florida Statue 752.01 the court shall award visitation when the court determines it is in the child's best interest. The

only limitation on the visitation is that it be "reasonable". Visits for weekends, holidays or summer vacation are all left for a court to parcel out.

Florida Statute 752.01(2) requires a court to consider five specific factors plus one catch-all provision. The statue does not put any limits on what areas can be explored.

The Court would have to determine what days or partial days this child should be taken from his parent and placed under the care and control of a grandparent. The Court would have to inquire into the Petitioner's parenting decisions, weigh those against the Respondent's desires and decide what is in the child's best interest. As an example, if the Petitioner is Catholic and the Respondent Baptist can the Respondent take the minor child to her church. Can she give the child religious instruction, if so how much.

Holding such a hearing, allowing depositions and other discovery into a parents decision making process and certainly ordering visitation would violate a parent's right to privacy.

The Florida Supreme Court has addressed the constitutionality of Section 752.01(1)(e) in Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996). In Beagle, the Court found the statute unconstitutional because it failed to require a showing of harm to a minor child before any award of grandparental visitation. The Court said:

> The challenged paragraph does not require the State to demonstrate a harm to the child prior to the award of grandparental visitation rights. Based upon the privacy provision in the Florida Constitution, we hold that the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm.

678 So.2d at 1276.

The Florida Supreme Court next addressed the

constitutionality of Florida Statute 752.01 in Von Eiff. The Court found Florida Statute 752.01(1)(a) unconstitutional for the same reasons the Court in Beagle found Florida Statute 752.01(1)(e) unconstitutional. The Court said:

> In Beagle, this Court concluded that subsection 752.01(1)(e) was facially unconstitutional because "the challenged paragraph infringes upon the rights of parents to raise their children free from government intervention." 672 So.2d at 1272. We find that the reasoning in Beagle compels the same conclusion as to subsection 752.01(1)(a), which mandates that the Court "shall" award visitation to the grandparents when it is in the best interest of the child, if "one or both parents of the child are deceased."

23 FLW at S584.

Florida Statute 752.01(1)(b) is unconstitutional for the same reasons. The statute reads:

> (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:

b. The marriage of the parents of the child has been dissolved.

Again a Court "shall" award visitation when it is in the best interest of the child. Only the sub paragraph has changed.

Under Beagle and Von Eiff the death or divorce of a parent does not affect the right to privacy of the other parent. The parent "continues (emphasis supplied) to enjoy a right to privacy in his parenting decisions," Von Eiff at S586.

A court considering a child custody issue shall order shared parental responsibility unless the court finds that shared parental responsibility would be detrimental to the child. Florida Statute 61.13(2)(b)2. The court in the original divorce case obviously made that determination, gave the mother sole parental responsibility and further left visitation, if any, solely up to the

mother. (App. pg. 28).

The court decided the mother should make all parenting decisions for the minor child to the exclusion of the father.

A court making an affirmative finding that a father's parenting would be a detriment to a child, that does nothing to put the father's mother in a stronger position than the grandparents in Beagle and Von Eiff.

The court in Von Eiff quoting Fitts v. Poe, 699 So.2d 348 (Fla. 5th DCA 1997) stated "We are unable to discern any difference between the fundamental rights of privacy of a natural parent in an intact family and the fundamental rights of privacy of a widowed parent" Von Eiff at S586.

Similarly there is no distinction between a parent in an intact family or a widowed parent and a parent awarded sole parental responsibility.

CONCLUSION

Florida Statute 752.01(1)(b) is unconstitutional due to Florida's Right to Privacy found in Article 1, Section 23. The mother asks this court to declare 752.01(1)(b) unconstitutional and grant the mothers Motion to Dismiss.

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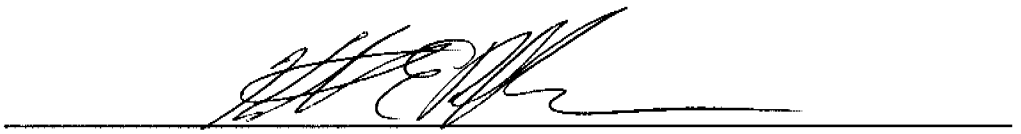
I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been sent via U.S. Mail to Alan Landman,

Attorney for Respondent, 2955Pineda Causeway, Suite 110, Melbourne, Florida 32940, this 8 day of September, 1999.



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APPENDIX

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FILE

IN THE CIRCUIT COURT IN AND
FOR BREVARD COUNTY, FLORIDA

CASE NO. 97-9645-FD-D

IN RE:
THE MARRIAGE OF:

BONNIE BELAIR,

Wife,

and

JARRETT CLARK,

Husband.
_____/

FINAL JUDGMENT DISSOLVING MARRIAGE

This action was heard on August 22, 1997, on Wife's Petition for Dissolution of Marriage, the Clerk of the Court having entered a Default against Husband and the Court being fully advised of the evidence. On the evidence presented the Court finds:

1. The Court has jurisdiction over the subject matter, the minor child and the parties.

Florida is the home state of the minor child and accordingly, it is the sole jurisdictional state to determine child custody and visitation under the Uniform Custody Jurisdiction Act.

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2. Petitioner has been a resident of the State of Florida for more than six months before the commencement of this action.

3. The parties were married on December 6, 1992 at Merritt Island, Florida and are not living together as Husband and Wife.

4. The marriage of the parties is irretrievably broken.

5. One child was born unto the parties, to wit:

KEITH CLARK, dob 5/8/93, male

6. It is in the best interest of the child that the Wife have sole parental responsibility for the minor child of the parties.

7. Wife is the sole owner of and is solely liable for a mortgage on real property located at 850 Richland Drive, Merritt Island, Brevard County, Florida, to wit:

Lot 7, Block 10, CATALINA ISLE ESTATES, UNIT 2-A, as recorded in Plat Book 18, Pages 112 and 113, of the Public Records of Brevard County, Florida.

Therefore, it is

ORDERED AND ADJUDGED:

1. The marriage of JARRETT CLARK, Husband, and BONNIE BELAIR, Wife, is dissolved and each spouse is restored to the status of being single and unmarried.

2. Wife is awarded sole care, custody, and control of the minor child of the parties.

3. Husband is awarded ~~supervised~~ visitation ~~with the~~ as determined solely by the Wife of the minor child of the parties, ~~upon prior notice to Wife,~~ No visitation until the Husband complies The Court Orders divorce ~~including holidays which should be shared as agreed upon~~ by ~~the parties~~ Seminar.

4. Husband is directed to pay to Wife as child support for the minor child of the parties the sum of $ 38.00 per week payable on the Fri day of each week commencing Aug 29, 1997, and continuing each Friday thereafter until the child attains the age of eighteen years or graduates from high school, as long as the child is progressing in school and will graduate before attaining the age of nineteen years, whichever occurs later, dies, marries, becomes self-supporting, or otherwise emancipated, at which time said support shall terminate for the child without further Order of the Court.

All payments shall be paid by cash, postal money order or certified check, payable to "Child Support" (delivered to the Clerk of the Court, Brevard County, Florida, PO Box 216,

Titusville, FL 32780) for disbursement to the Wife at 850 Richland Dr., Merritt Island, Florida 32953, together with the Clerk's costs of 4% of said payment, but not more than $5.25 per payment and not less than $1.25. All payments made must include Wife's name and the above Court Case Number.

5. Wife is directed to maintain medical and dental insurance for the minor children of the parties, as is reasonably available through her employer.

6. Wife is directed to pay all medical and dental expenses incurred for the benefit of the minor child which are not covered by insurance.

~~7. Husband is directed to maintain his current life insurance policy, in the event of his death, and to confirm Wife as beneficiary under the policy for the benefit of the minor child.~~

8. Wife is confirmed as sole owner of ~~the~~ all real and personal property in her possession free from any claims by Husband; and the Husband likewise is determined the owner of all such property in his present possession. Husband is directed to execute all documents necessary to confirm sole ownership of the property to the Wife. In consideration for the transfer, Wife is directed solely liable for the mortgage on the property, to hold Husband

harmless on any future claims against the property and to reimburse Husband for any damages, costs or attorney fees he may incur.

Husband has no rights or claims in the property, including special equity.

9. In the event this Judgment is for a conveyance, transfer, release or acquittance of real or personal property, this Judgment shall have the effect of a duly executed conveyance, transfer, release or acquittance that is recorded in the county where the judgment is recorded.

10. Wife's name is confirmed to her, to wit:

BONNIE BELAIR

11. The Court retains jurisdiction over the subject matter, minor child and the parties for all legal purposes.

DONE AND ORDERED in Chambers, at Viera, Brevard County, Florida this 22nd day of August, 1997.

EDWARD M. JACKSON
Circuit Court Judge

original mailed to:
Petitioner
Respondent
Donna Cathey, O.C.
Judith Hart, O.C.

STATE OF FLORIDA, COUNTY OF BREVARD
I HEREBY CERTIFY that the above and foregoing is a true copy of the original filed in this office.
SANDY CRAWFORD, Clerk Circuit and County Court
DATED 8-22-97 BY Donna Cathey

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FILE

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN
AND FOR BREVARD COUNTY, FLORIDA.

CASE NO: 97-9645-FD-D

BONNIE BELAIR,

Petitioner,

and

MARY FRANCIS DREW,
Paternal Grandmother,

Co-Petitioner,

and

JARRETT CLARK,

Respondent.
_____/

RENEE CLARK

PETITION FOR GRANDPARENT VISITATION, REQUEST FOR TEMPORARY RELIEF AND NOTICE OF HEARING

Co-Petitioner, **Mary Frances Drew,** by and through undersigned counsel, hereby files this Petition for Grandparent Visitation and Request for Temporary Relief and says:

1. **ACTION**: This is a request for grandparent visitation with a minor grandchild, to wit: **Keith Clark, dob: 5/8/93.**

2. **JURISDICTION**: The minor grandchild has been living in the State of Florida within the jurisdiction of this Court since 5/8/93.

3. **ADDRESS OF CHILD**: The minor child resided with the Petitioner at 850 Richland Avenue, Merritt Island, Florida at the time of the parties' dissolution of marriage and has continually resided with the Petitioner thereafter.

4. UCCJA:

A) Co-Petitioner does not know of and has not participated as a party, witness or in any other capacity in any other litigation or custody proceedings, in this State or any other state, concerning custody of the minor child subject to this proceeding other than the pending Modification action between the Petitioner and Respondent under the above case number.

B) Co-Petitioner does not know of any person not a party to this proceeding who has physical custody or claims to have custody or visitation rights with respect to the child in this proceeding.

C) Co-Petitioner is unaware of any **juvenile dependency** actions concerning the child in this or any other state.

5. CASE LAW:

A) Florida Statute **752.01** provides in pertinent part:

> "the court shall, upon a Petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to said child when it is in the best interest of the minor child if:
>
> **"the marriage of the parents of the child has been dissolved."**

6. RELATIONSHIP: The Co-Petitioner is the paternal grandmother of the minor child who is the natural child of the Respondent.

7. GROUNDS: The Petitioner and Respondent were divorced on 8/22/97 pursuant to a Final Judgment Dissolving Marriage under the above case number.

8. REASONS: The Co-Petitioner would represent it is in the minor child's best interest to afford her grandparent visitation rights for the following reasons:

A) The Co-Petitioner wishes to encourage a close relationship between the child and herself. The Co-Petitioner represents she has had significant meaningful visitation rights with said child subsequent to his birth.

B) The Co-Petitioner has always experienced a quality relationship with said child, and same should continue in the future.

C) The mental and physical health of the child and the Co-Petitioner indicates the appropriateness to establish the requested visitation rights.

9. VISITATION: The Co-Petitioner represents that the Petitioner at various times attempts to alienate the Co-Petitioner from the minor child depending upon her mood and her perceived relationship with the Respondent. As such, the Co-Petitioner requests specific court ordered grandparent visitation right to include but not be limited to **at least one time per week after school from approximately 3:00 p.m. through 7:00 p.m.** and other reasonable and liberal specific visitation rights the Court deems meet and just. In addition, the Co-Petitioner requests **specific authorization to provide pick up and return of the minor child during the Respondent's visitation.**

10. TEMPORARY RELIEF: A hearing is scheduled for temporary relief on the Co-Petitioner's request for immediate grandparent visitation rights on May 22, 1998. Subsequent to said hearing, the Co-Petitioner requests visitation rights pending final hearing.

WHEREFORE, the Co-Petitioner requests this court to conduct an evidentiary hearing and, in accordance with Florida Statute 752, grant her the visitation rights as requested herein.

Mary Frances Drew
MARY FRANCES DREW
Co-Petitioner

STATE OF FLORIDA
COUNTY OF BREVARD

The foregoing instrument was acknowledged before me on this 11th day of May, 1998 by Mary Frances Drew (✓) who is personally known to me or (___) who produced _____as identification and (___) who did or (___) who did not take an oath.

OFFICIAL NOTARY SEAL
HEATHER L CHARRON
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. CC2[illegible]3169
MY COMMISSION EXP. OCT. 11,1998

NOTARY PUBLIC: State of Florida
Sign: _____
Print: _____
Commission No: _____
My Commission Expires: _____

NOTICE OF HEARING
Time Reserved: 45 Minutes

PLEASE TAKE NOTICE that on the 22nd day of May, 1998 at 2:30 p.m., the undersigned will call up for hearing the above Motion before the Honorable Edward M. Jackson at the Moore Justice Center, Viera, Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Process Express on May 11,1998 for personal service on the Petitioner.

_____
ALAN LANDMAN, ESQUIRE.
2955 Pineda Causeway, Suite 110
Melbourne, Florida 32940
(407) 242-9800
Fla. Bar. No. 0745472
Attorney for Respondent & Co-Petitioner

FILED

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

IN RE: The Former Marriage of:

CASE NUMBER: 97-09645-FD-X

BONNIE BELAIR,

Petitioner/Former Wife,

and

MARY FRANCIS DREW
Paternal Grandmother

Co-Petitioner,

and

JARRETT CLARK,

Respondent/Former Husband.
_____/

MOTION TO DECLARE FLORIDA STATUTE 752.01(b) UNCONSTITUTIONAL

COMES NOW, the Petitioner, **BONNIE BELAIR**, by and through undersigned counsel, pursuant to Article I § 23 of the Florida Constitution, and moves this Honorable court to declare Florida Statute 752.01(b) unconstitutional and as grounds therefore would show:

1. Co-Petitioner has filed a Petition for Grandparent Visitation asking the Court to order grandparent visitation. Co-Petitioner cites 752.01(b) as authority.

2. Article I, Section 23 provides:

RIGHT TO PRIVACY

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as

> otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

3. The Florida Supreme Court has addressed the constitutionality of Section 752.01(e) in Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996). In Beagle, the Court found the statute unconstitutional because it failed to require a showing of harm to a minor child before any award of grandparental visitation. The Court stated:

> The challenged paragraph does not require the State to demonstrate a harm to the child prior to the award of grandparental visitation rights. Based upon the privacy provision in the Florida Constitution, we hold that the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm.

678 So.2d at 1276.

4. The Florida Supreme Court next addressed the constitutionality of Florida Statute 752 in Von Eiff v. Azicri, 23 FLW S583 (Fla. 1998). The Court found Florida Statute 752.01(1)(a) unconstitutional for the same reasons the Court in Beagle found Florida Statute 752.01(1)(e) unconstitutional. The Court stated:

> In Beagle, this Court concluded that subsection 752.01(1)(e) was facially unconstitutional because "the challenged paragraph infringes upon the rights of parents to raise their children free from government intervention." 672 So.2d at 1272. We find that the reasoning in Beagle compels the same conclusion as to subsection 752.01(1)(a), which mandates that the court "shall" award visitation to the grandparents when it is in the best interest of the child, if "one or both parents of the child are deceased."

23 FLW at S584.

5. Florida Statute 752.01(b) is unconstitutional for the same reasons. The statute reads:

(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:

b. The marriage of the parents of the child has been dissolved.

Again a Court "shall" award visitation when it is in the best interest of the child. Only the sub paragraph has changed.

6. The fundamental right of privacy is the same for a natural parent in an intact family (Beagle), where a parent is deceased (Von Eiff), or the instant case.

WHEREFORE, the Petitioner, **BONNIE BELAIR**, prays this Honorable Court grant the above Motion.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been sent via U.S. Mail to Alan Landman, Esquire, Attorney for Respondent, 2955 Pineda Causeway, Suite 110, Melbourne, Florida 32940, this 16 day of February, 1999.

KENNETH E. RHODEN, ESQUIRE
Attorney for Petitioner
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(407) 631-0506
Florida Bar No.: 0570362

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FILE

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

IN RE: The Former Marriage of:

CASE NUMBER: 97-09645-FD

BONNIE BELAIR,
Petitioner/Former Wife,

and

MARY FRANCIS DREW,
Paternal Grandmother,

Co-Petitioner,

and

JARRETT CLARK,
Respondent/Former Husband.
_____/

TONYA BRYANT

ORDER

THIS MATTER having come before the Court on March 10, 1999 upon Petitioner's Motion to Declare Florida Statute 752.01(b) unconstitutional and the Court being fully advised hereby **DENIES** Petitioner's Motion for the following reasons:

1. The Court following, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), declines to rule on the constitutionality of the statue.

2. Either party may now set a hearing to determine Co-Petitioner's visitation in accordance with the best interests of the minor child pursuant to Florida Statute 752.01(b).

DONE and ORDERED in Chamber, Brevard County, Viera, Florida, this 21st day of April, 1999.

BRUCE W. JACOBUS
Circuit Court Judge

cc: Kenneth E. Rhoden, Esquire
Attorney for Petitioner

Alan Landman, Esquire
Attorney for Respondent

0456F91.

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FILE

IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

Case Number:

BONNIE BELAIR,

Petitioner,

and

MARY FRANCIS DREW,

Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule. 9.100(c), BONNIE BELAIR, Petitions this court for writ of certiorari to review a non Final Order denying Petitioner's Motion to Declare Florida Statute 752.01(1)(b) Unconstitutional.

I
BASIS FOR INVOKING JURISDICTION

Article V, Section 4(b) of the Florida Constitution provides that the district courts of appeal have jurisdiction to issue writs of certiorari. See also Fla. R. App. P. 9.030(b)(2)(A). The Order to be reviewed in this case was rendered April 21, 1999 (App. pg 38). This Petition is timely under rule 9.100(c)(1).

II
STATEMENT OF FACTS

On August 22, 1997 the court signed the Final Judgment dissolving marriage. The Judgment awarded to the wife, Petitioner here, sole care, custody and control of the minor child. The Husband was awarded visitation as determined solely by the Wife (App, pg. 26-30).

On May 11, 1998 the paternal grandmother, MARY FRANCIS DREW, Respondent here, filed

a Petition for Grandparent Visitation requesting the court award visitation to the Respondent regarding the minor child. Respondent relied upon Florida Statute 752.01(1)(b) as authority for the Court to order visitation (App. pg. 31-34).

On February 16, 1999 Petitioner filed a Motion to Declare Florida Statute 752.01(1)(b) Unconstitutional. The hearing was set for March 10, 1999 (App. pg. 35-37).

At the hearing the court declined to rule on the constitutionality of Florida Statue 752.01(1)(b). The Court relied on Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) for authority that appellate courts decide the constitutionality of statutes and trial courts generally do not (Transcript of Hearing, App., pg. 10-11)

A hearing before the Circuit Court to delve into Petitioners child raising decisions and determine if they are in the child best interests is imminent.

III
RELIEF SOUGHT

Petitioner prays the court to issue its Order to Show Cause why the Writ of Prohibition should not issue, to declare Florida Statute 750.01(1)(b) facially unconstitutional or unconstitutional as applied to Petitioner's family and to issue its Writ of Prohibition foreclosing further proceedings on this cause below.

IV
ARGUMENT

Petitioner contends that by refusing to rule on the constitutionality of the statute the circuit court will conduct an inquiry that will invade the protected privacy interests of her family. This invasion of privacy is prohibited by Article I, Section 23 of the Florida Constitution. Deprivation of this right to privacy by conducting the hearing constitutes irreparable harm to Petitioner.

Hoffman dealt with a District Court's adoption of a comparative negligence doctrine thereby

overruling controlling precedent of the Florida Supreme Court. The Florida Supreme court ruled the District Court exceeded its authority.

This case involved statutory law. When a Court is presented with a statute that is conflict with the Constitution the Court is required to strike down the statute. Delmonico v. State, 155 So.2d 368 (Fla. 1963), failure to do so is a departure from the essential requirements of law.

A evidentiary hearing would be required to determine if grandparent visitation is in this minor child's best interest. The Court would have to determine what days or partial days this child should be taken from his parent and placed under the care and control of a grandparent. The Court would have to inquire into the Petitioner's parenting decisions, weigh those against the Respondent's desires and decide what is in the child's best interest. As an example, if the Petitioner is Catholic and the Respondent Baptist can the Respondent take the minor child to her church. Can she give the child religious instruction, if so how much.

Holding such a hearing, allowing depositions and other discovery into a parent's decision making process would result in irreparable injury that cannot be correct on appeal. No matter how the Court rules, the privacy of the Petitioner has already been violated. To order visitation would be a continuing violation of her right to privacy.

Petitioner has sole parental authority. She is the only one authorized to make parenting decisions for the minor child. This situation is similar to VonEiff v. Azicri, 23 FLW S583 (Fla. 1998) where there was also only one parent with authority to make parenting decisions.

Article 1, Section 23 provides:

RIGHT TO PRIVACY

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right to access to public records and meetings as provided by law.

The Florida Supreme Court has addressed the constitutionality of Section 752.01(1)(e) in Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996). In Beagle, the Court found the statute unconstitutional because it failed to require a showing of harm to a minor child before any award of grandparental visitation. The Court stated:

> The challenged paragraph does not require the State to demonstrate a harm to the child prior to the award of grandparental visitation rights. Based upon the privacy provision in the Florida Constitution, we hold that the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm.

678 So.2n at 1276.

The Florida Supreme Court next addressed the constitutionality of Florida Statute 752 in VonEiff. The Court found Florida Statute 752.01(1)(a) unconstitutional for the same reasons the Court in Beagle found Florida Statute 752.01(1)(e) unconstitutional. The Court stated:

> In Beagle, this Court concluded that subsection 752.01(1)(e) was facially unconstitutional because "the challenged paragraph infringes upon the rights of parents to raise their children free from government intervention." 672. So.2d at 1272. We find that the reasoning in Beagle compels the same conclusion as to subsection 752.01(1)(a), which mandates that the Court "shall" award visitation to the grandparents when it is in the best interest of the child, if "one or both parents of the child are deceased."

23 FLW at S584.

Florida Statute 752.01(1)(b) is unconstitutional for the same reasons. The statute reads:

> (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:
>
> b. The marriage of the parents of the child has been dissolved.

Again a Court "shall" award visitation when it is in the best interest of the child. Only the sub

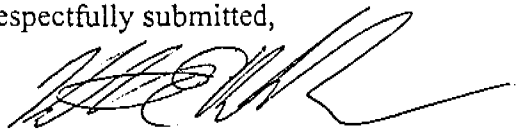
paragraph has changed.

Under Beagle and VonEiff the death or divorce of a parent does not affect the right to privacy of the other parent. The parent "continues (emphasis supplied) to enjoy a right of privacy in his parenting decisions," VonEiff at S586. There is no reason the right of privacy as to parenting decisions should be any different for a parent with sole custody.

V
CONCLUSION

For the reasons stated above Petitioner Bonnie Belair, respectfully requests the Court grant her Petition for Writ of Certiorari and declare Florida Statute 752.01(1)(b) unconstitutional thereby foreclosing further proceeding in the court below.

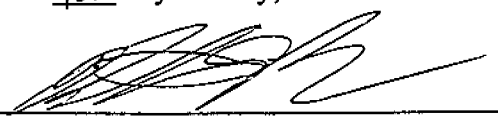
Respectfully submitted,



KENNETH E. RHODEN, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true a correct copy of the foregoing has been sent via Courier to the Honorable Bruce W. Jacobus, Moore Justice Center, 2825 Judge Fran Jamieson Way, Viera, Florida and via U.S. Mail to Alan Landman, Esquire, attorney for Respondent, 2955 Pineda Causeway, Suite 110, Melbourne, Florida 32940, this 12 day of May, 1999.



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0618F9L

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1999

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

BONNIE BELAIR,

Petitioner,

v. CASE NO. 99-1265

MARY FRANCIS DREW,

Respondent.

_____/

Opinion filed July 2, 1999

Petition for Certiorari Review of Order
from the Circuit Court for Brevard County,
Bruce W. Jacobus, Judge.

Kenneth E. Rhoden of Mario,
Moreau, Gunde, Helm & Rhoden,
Cocoa, for Petitioner.

No Appearance for Respondent.

DAUKSCH, J.

Petitioner seeks to have us issue a writ of certiorari to review an order denying a motion to declare unconstitutional, section 752.01(1)(b), Florida Statutes (1997). We decline to issue the writ to consider the issue because an adequate remedy will exist at the end of the case below and this court's intrusion into the trial court process is not shown to be warranted. We agree with the dissent of Judge Webster in Williams v. Spears, 719 So. 2d 1236 (Fla. 1st DCA 1998), wherein he rightly says that in the end the trial court may rule in such a fashion as to moot the point of whether the statute is constitutional. Courts are not wont to examine the constitutionality of a statute and especially reluctant to declare one

unconstitutional if not faced with the duty unavoidably. Crawford v. State, 662 So. 2d 1016 (Fla. 5th DCA 1995); Dennis v. Dep't of Health & Rehabilitative Servs., 566 So. 2d 1374 (Fla. 5th DCA 1990), rev. den., 577 So. 2d 1326 (Fla. 1991). In deciding to deny certiorari we certify conflict with Williams.

CERTIORARI DENIED.

HARRIS and THOMPSON, JJ., concur.

IN THE DISTRICT COURT OF APPEAL
OF THE SATE OF FLORIDA 5TH DISTRICT

BONNIE BELAIR,

Petitioner,

v.

MARY FRANCIS DREW,

Respondent.
_____/

CASE NUMBER: 99-1265

NOTICE TO INVOKE
DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that, **BONNIE BELAIR**, Petitioner, invokes the discretionary jurisdiction of the supreme court to review the decision of this court rendered July 2, 1999. The decision is certified to be in direct conflict with decisions of other district court of appeals.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail Alan Landman, Esquire, Attorney for Respondent, 2955 Pineda Causeway, Suite 110, Melbourne, Florida 32940, this 26 day of July, 1999.

KENNETH E. RHODEN, ESQUIRE
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0902F9L

Supreme Court of Florida

THURSDAY, AUGUST 12, 1999

BONNIE BELAIR,

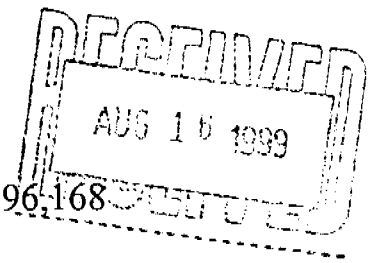
Petitioner,

vs.

MARY FRANCIS DREW,

Respondent.

* *



CASE NO. 96,168

District Court of Appeal,
5th District - No. 99-1265

ORDER POSTPONING DECISION ON JURISDICTION AND BRIEFING SCHEDULE

The Court has postponed its decision on jurisdiction. Petitioner's brief on the merits shall be served on or before September 7, 1999; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs. Per this Court's Administrative Order In re: Mandatory Submission of Briefs on Computer Diskette dated February 5, 1999, counsel are directed to include a copy of all briefs on a DOS formatted 3-1/2 inch diskette in WordPerfect 5.1 (or higher) format. **PLEASE LABEL ENVELOPE TO AVOID ERASURE.**

The Clerk of the District Court of Appeal, 5th District, shall file the original record on or before October 11, 1999.