IN THE SUPREME COURT
STATE OF FLORIDA

ELIZABETH SULLIVAN, individually and as personal representative of the Estate of FRANCES ADRIENNE SULLIVAN, deceased,

Appellant,

vs.

LANDON COLE SAPP,

Appellee.
_____/

Sup. Ct. Case No.: SC02-2490
D.C.A. Case No.: 1D02-450
Cir. Ct. Case No.: 2000-409-CA

On Appeal from the District Court of Appeal, First District.

APPELLEE'S ANSWER TO INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Appellee accepts the Appellant's representation of the case and facts in her initial brief with the following clarification:

The final judgment of the trial court was entered on January 22, 2002.

The trial court permitted the grandmother limited intervention to be "substituted as a party in these proceedings to represent the economic interest of FRANCIS ADRIENNE SULLIVAN, as to the economic issues left unresolved...." (emphasis supplied) (R. 87-88).

SUMMARY OF ARGUMENT

I

The First District Court of Appeals properly ruled Florida's constitutional right to privacy embodied in Art I, sec. 23, Fla. Const., renders § 61.13(2)(b)(2)(c) (2001), Fla. Stat., facially unconstitutional. The Father, in responding to the paternity action, did not abandon and waive his right to privacy embodied in the Florida Constitution. The ruling of the First District Court of Appeals in affirming the Final Judgment of the trial court should be sustained.

II

There is no ability to narrowly construe § 61.13(2)(b)(2)(c), Fla. Stat., to avoid the unconstitutionality of the statute by creating (or adopting) the suggestion of the grandmother as to a statutory scheme for grandparent visitation without the court supplanting the legislative function of Florida House of Representation and Florida Senate.

III

There is no recognized child's right to preserving his familial bonds with his grandparents. The appointment of a next friend or guardian ad-litem for the child without a showing of a substantial harm to the child to warrant court intervention is nothing more than a subterfuge to interfere with the father's right to privacy.

ARGUMENT

STANDARD OF REVIEW

As to Issues I & II

The standard for review of the Motion to Dismiss to Intervene is the *de novo* standard of review. *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582 (Fla. 2000).

A district court of appeals's determination that a statute is unconstitutional is also reviewed *de novo*. *City of Miami v. McGrath*, 824 So.2d 143 (Fla. 2002)

As to Issue III

As to the Motion for the Appointment of a Guardian ad-litem the statute relied on by the Appellant, sec. 61.401, Fla. Stat. would suggest the standard of review would be the discretion of the court.

> "In an action for dissolution of marriage, modification, parental responsibility, custody or visitation, if the court finds it is in the best interest of the child, the court may appoint a guardian ad litem to act as next friend of the child, investigator or evaluator, not as attorney or advocate. sec. 61.401, Fla Stat."

I

FLORIDA'S CONSTITUTIONAL RIGHT TO PRIVACY BARS A GRANDPARENT FROM INTERVENING IN A PATERNITY ACTION AND SEEKING GRANDPARENT VISITATION

The trial court properly acknowledged the father's right to privacy found in the Florida Constitution. Art. I, sec. 23, Fla. Const. and barred the grandmother's request to intervene to seek grandparent visitation rights. There is no allegation in the pleadings of any alleged harm to the child which may take away the father's right to privacy and his ability and right to parent his child without state interference.

The First District Court of Appeals affirmed the trial court and further held that § 61.13(2)(b)(2)(c), Fla. Stat., is facially unconstitutional under Florida's right to privacy. *Sullivan v. Sapp,* 892 So.2d 951 (Fla. 2002).

Properly relying on this court's ruling in *Richardson v. Richardson,* 766 So.2d 1036 (Fla. 2000), the District Court found in the instant case, the statute purports to give grandparents visitation rights based solely on the best interest of the child and thus concluded "that the statute is facially unconstitutional in that it intrudes on the father's fundamental privacy right to raise his child free from

governmental interference." *Sullivan* at 952.

The grandmother urges that the Court interpret § 61.13(2)(b)(2)(c) Fla. Stat. in conformance with *Spence v. Stewart*, 705 So.2d 996 (Fla. 4th DCA 1998) and find the statute does not violate the Father's privacy rights under the Florida Constitution, arguing he abandoned his right of privacy by participating in the paternity action before the trial court.

This court did not address the viability of *Spence* in its ruling in *Saul v. Burnette*, 753 So.2d 26 (Fla. 2000), in footnote 3, stating:

> The Fourth District's opinion distinguished *Spence v. Stewart*, 705 So. 2d 996 (Fla. 4th DCA 1998), and *Moore v. Trevino*, 612 So. 2d 604 (Fla. 4th DCA 1992), which interpreted the applicability of § 61.13(2)(b)(2)(c), Fla. Stat. (1995), based on the fact that there was no pending paternity action in this case. We decline to address the applicability of that statute, which was neither pled nor relied on by appellants in the trial court. We further decline to address the viability of the decisions addressing that subsection.

Saul at 29.

The fact pattern of the instant case is strikingly similar to the fact pattern in *Saul v. Burnetti*, 753 So.2d 26 (Fla. 2000). In *Saul*, maternal grandparents brought an action under § 752.01, Fla. Stat. In the instant action, the grandmother attempts to pursue her claim by intervening in the paternity action brought by her deceased daughter under § 61.13(2)(b)(2)(c), Fla. Stat. She suggests that *Spence* permits

intervention and overrides the father's privacy rights by highlighting the Fourth District's comment, that:

> Because the parents have already abandoned their right of familial privacy by bringing their dispute before the court, the court's further consideration of whether grandparent visitation is in the best interest of the child is not violative of the right to privacy.

Spence, at 998.

However, Judge Kline in his concurring opinion in *Brunetti v. Saul*, 724 So.2d 142 (Fla. 4th DCA 1999) questioned the underlying premises of *Spence*, stating:

> Florida's Right to Privacy, Article I, section 23 of the Florida Constitution, was worded so as to make it "as strong as possible." *Winfield v. Division of Pari-Mutual Wagering, Department of Bus. Reg*., 477 So.2d 544, 548 (Fla. 1985). I am troubled by the finding of a waiver of that right by people exercising their constitutional right of access to the courts. Art. I, sec 21, Fla. Const. The right of access to the courts is construed "liberally in order to guarantee broad accessibility to the courts for resolving disputes" and applies to dissolution cases. *Psychiatric Associates v. Siegle*, 610 So.2d 419 (Fla. 1992).
>
> There is something essentially unfair, in my opinion, in holding that an unwed mother who is economically compelled to bring a paternity action gives up her constitutional right of privacy against forced grandparent visitation, while an unwed mother who does not go into court retains that right.
>
> I recognize that the Florida Supreme Court cautioned that its holding in *Beagle* [*Beagle v. Beagle*, 678 So.2d 1271 (Fla.

> 1996)]was "not intended to change the law in other areas of family law where the best interest of the child is utilized to make judicial determination." *Id.* at 1277. At the same time it recognized that the State may not intrude upon a parent's fundamental right to raise their children except in cases where the child is threatened with harm." *Id*. at 1276.

Similarly should a father, forced into court, give up his right to privacy? I suggest not, and nor did the Second District Court in *Lonon v. Ferrell*, 739 So.2d 299 (2nd DCA 1999):

> We disagree with *Spence* and instead agree with the First District's conclusion in *S.G. v. C.S.G.*, 726 So.2d 806, 811 (Fla. 1st DCA 1999), that the "intact family" language in *Beagle* has no validity after *Von Eiff*. [*VonEiff v. Azieri*, 720 So.2d 510 (Fla. 1998)] Thus, the Constitutional protections announced in *Beagle* apply in dissolution actions. *Id*. In so holding, the *S.G*. court rejected the reasoning *Spence* that the constitutional privacy right did not apply when parents had abandoned the right by bringing their dispute before the court. We agree with *S.G.*, a divorced natural parent, such as Mrs. Ferrell, should have no lesser privacy rights than a married or widowed natural parent.
>
> and
>
> ..... we need not reach Judge Klein's concurrence to analogize the *Brunetti* reasoning. We do note, however, that we share his concerns about the rationale in *Spence v. Stewart*, 705 So.2d 996 (Fla. 4th DCA 1998), because it seems to be based on the notion that parents can waive their constitutional right of privacy by exercising their constitutional right of access to courts. *See also S.G. v. C.S.G., 726 So2d at 811*.

Lonon at 652.

The First District has joined with the Second District Court of Appeals:

> "....we share Judge Klein's concerns about the rationale in *Spence*, because it seems based on the premises that the exercise of a parent's constitutional right of access to the courts under article I, section 21, Florida Constitution, creates and implied waiver or abandonment of the Constitutional familial right to privacy under article I, section 23, Florida Constitution. *Brunetti*

S.G. at 811.

II

THE STATUTE, FOUND UNCONSTITUTIONAL BY THE DISTRICT COURT, IS NOT AMENDABLE TO NARROWING CONSTRUCTION

The grandmother suggests that the Missouri Supreme Court ruling in *Blakely v. Blakely* 83 S.W.3d 537 (Mo. banc 2002) provides a method to narrowly construe § 61.13(2)(b)(2)(c), Fla. Stat. to render it constitutional. *Blakely* addresses a statutory scheme under Missouri law that provides a multi step process to permit grandparent visitation. The Missouri Court in analyzing its statute determined it could be narrowly tailored to avoid being found unconstitutional in light of *Troxel v. Granville* 530 U.S. 57 (2000).

In contrast to the Missouri Statute, § 61.13(2)(b)(2)(c), Fla. Stat. provides in part:

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

By invoking the best interests standard without requiring proof of a substantial threat of significant and demonstrable harm to the child is not favored by this Court:

> Accordingly, we held that a trial court may not intrude upon the parent-child relationship by awarding visitation rights to a grandparent without evidence of a demonstrable harm to the child. Id.; see also *Beagle*, 678 So. 2d at 1276.

Richardson at 1039.

The grandmother is asking this Court to do in this case what it would not do in *Richardson*:

> We are also wary of actually judicially amending the statute by adding language that the Legislature so clearly did not intend to use. If this Court were to construe the statute narrowly by inserting a harm to the child element, we would in effect be rewriting the statute and changing it in a manner not intended by the Legislature. As we have previously explained, courts should refrain from reading elements into a statute that plainly lacks such additional elements.

Richardson at 1042.

III

THERE IS NOT A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST AVAILABLE TO A MINOR CHILD WHO IS RESIDING WITH A NATURAL PARENT TO PRESERVING FAMILIAL BONDS WITH THE CHILD'S MATERNAL GRANDPARENTS TO WARRANT THE APPOINTMENT OF A GUARDIAN AD LITEM

The novel right suggested by the grandmother, that a child has a recognized protected liberty interest in preserving his familial bond with his maternal family, is illusory and without legal basis.

The grandmother relies on Justice Steven's dissent in *Troxel v. Granville*, 530 U.S. 55 (2000). It is important to remember that the central theme of *Troxel*'s plurality decision is a reaffirmation of a parent's constitutional right to make decisions concerning the rearing of one's own child without intervention of the State.

The trial court properly exercised its sound discretion in denying the motion to for appointment of a guardian ad litem.

CONCLUSION

The Opinion of the First District Court of Appeals and the Final Judgment of the trial court entered on January 22, 2002, should be affirmed.

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to:

George T. Reeves, Esquire
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Attorney for Appellant

by regular U.S. Mail this 6th day of February, 2003.

_____
Harvey E. Baxter

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla.R.App.P 9.210(a)(2)

_____
Harvey E. Baxter