IN THE SUPREME COURT
STATE OF FLORIDA

ELIZABETH SULLIVAN, individually,
and as the personal representative
of the Estate of FRANCIS 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.: 2000-409CA

APPEAL OF DISTRICT COURT'S FINAL ORDER
APPELLANT'S INITIAL BRIEF

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

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INTRODUCTORY NOTES

The Appellant, ELIZABETH SULLIVAN, individual, and as the personal representative of the Estate of FRANCIS ADRIENNE SULLIVAN, deceased, will be referred to in this Brief as the "Grandmother" or Appellant.

The Appellee, LANDON COLE SAPP, will be referred to in this Brief as the "Father" or Appellee.

The Record herein is contained in one volume with the pages numbered 1

through 157 inclusive. Citations to the Record shall be designated as (R, ___) with the appropriate page number being inserted in the blank. As there is only one volume, all citations to the record are to Volume I.

STATEMENT OF THE CASE AND FACTS

PROCEDURAL POSTURE OF THE CASE

This action was filed on September 21, 2000, by FRANCIS ADRIENNE SULLIVAN, deceased, (the "Mother") against LANDON COLE SAPP, (the "Father") to establish the paternity of the Mother's minor child. (R, 1-4) The parties eventually settled this action and stipulated to the entry of a final judgment which provided that the Father was the natural father of the minor child and setting reasonable visitation for the Father. (R, 41-45) After the entry of the final judgment of paternity the Mother timely served on March 20, 2001, her Motion for Rehearing which requested that the court amend its final judgment because the judgement as written was not in compliance with her agreement at the time of settlement and the requirements of § 61.30(11)(a)(8), Fla.Stat., dealing with which parent may claim the minor child for Federal Income Tax purposes. (R, 38-40)

On July 25, 2001, prior to any ruling on the Mother's Motion for Rehearing, the Mother was tragically and unexpectedly killed in an automobile accident. (R, 57-58) On August 2, 2001, ELIZABETH SULLIVAN, the maternal grandmother of the minor child (the "Grandmother"), filed her Motion to Intervene and for the Award of Reasonable Visitation to Grandparent, seeking to intervene in the existing action and be awarded grandparent visitation pursuant to § 61.13(2)(b)(2)(c), Fla.Stat. (R, 57-58)

In response the Father filed his Motion to Dismiss and Motion for the Award of Attorney's Fees in which he requested the court to dismiss the Grandmother's Motion to Intervene and for the Award of Reasonable Visitation to Grandparent, and attorney's fees. (R, 70-74) Thereafter the Grandmother was appointed as the personal

representative of the Estate of the Mother and moved the court to substitute her as personal representative for the Mother in this action. (R, 75-78)

On October 2, 2001, the trial court held a hearing in this action (R, 96-118) considering the Father's Motion to Dismiss. (R, 99) The court did not rule at that time. (R, 111-114) Subsequently, the trial court entered its non-final Order Granting Motion to Dismiss Motion to Intervene, which dismissed the Grandmother's Motion to Intervene. (R, 79-81) Thereafter the Grandmother filed a Motion for Rehearing on Order Granting Motion to Intervene an for the Award of Reasonable Visitation to Grandparent. (R, 82-84) The Grandmother also filed a Motion for the Appointment of a Guardian Ad Litem. (R, 85-86)

The court held a final hearing on November 27, 2001, ruling at that time on all pending maters at that time. (R, 119-157) The trial court rendered its final judgment on January 24, 2002, which finally dismissed the Grandmother's Motion to Intervene and for the Award of Grandparent Visitation, and denied her Motion for the Appointment of a Guardian Ad Litem, and thereby denied her all relief. (R, 87-88) The Notice of Appeal was timely filed with the clerk of the lower tribunal on January 31, 2002, and appeal ensued to the District Court of Appeal, First District. (R, 89-95)

On October 30, 2002, the District Court of Appeal, First District, issued its opinion which is reported at 829 So.2d 951 (Fla. 1st DCA 2002). In its opinion the District Court upheld the Final Judgment of the trial court, specifically finding that § 61.13(2)(b)(2)(c), Fla.Stat., is facially unconstitutional. The Grandmother timely filed her notice of appeal on November 18, 2002, with the lower tribunal and invoked the appeal jurisdiction of this court pursuant to Fla.R.App.P. 9.030(a)(1)(A)(ii) and Art.

V, § 3(b)(1), Fla.Const.

FACTS OF THE CASE

The Motion to Intervene and Motion for the Appointment of a Guardian Ad Litem were dismissed by the court without the taking of any testimony or evidence by the court. The facts as alleged by the Grandmother in her Motion to Intervene and for the Award of Reasonable Grandparent Visitation are as follows:

1. The court entered its Final Judgment of Paternity in this matter on March 14, 2001.
2. After the entry of the court's order the Petitioner moved for rehearing on certain issues contained therein. The motion for rehearing has never been resolved and this action remains pending.
3. On or about July 25, 2001, the Petitioner was killed in an automobile accident in Madison County, Florida.
4. The Intervenor is the natural mother of the Petitioner and therefore the maternal grandmother of the Petitioner's child who was the subject of these proceedings.
5. The Intervenor is in need of the court to award her visitation rights as provided under Florida law, for visitation with the Petitioner's child.
6. The award of visitation for the maternal grandparent in this instance is in the child's best interest.
7. The court has jurisdiction and is authorized to award such rights in this

pending action pursuant to § 61.13(2)(b)2c, Fla.Stat.

(R, 57-58)

These facts were further expanded by the Grandmother in her Motion for the Appointment of a Guardian Ad Litem, as follows:

1. Pursuant to Fla.Fam.L.R.P. 12.210 and Fla.R.Civ.P. 1.210, and §§ 61.401- 405, Fla.Stat, the court may allow the interest of the minor child to be represented by a next friend or alternatively appoint a guardian ad litem to represent such interest.
2. The interest ELIZABETH SULLIVAN wishes to assert on behalf of the minor child is the minor child's interest in the maintenance of its relationship with its maternal grandparents which is protected by the 14th Amendment of the United States Constitution and Art. I, §§ 2, 4, 9, and 23, Fla.Const., and other applicable provisions of law. For this proposition ELIZABETH SULLIVAN cites Justice Stevens' dissent in the case *Troxel v. Granville,* 530 U.S. 57 (2000). In his dissent, Justice Stevens opines that: (quotation omitted)
3. Should the court decide that ELIZABETH SULLIVAN were not an appropriate person to be the minor child's next friend or guardian ad litem, then alternatively ELIZABETH SULLIVAN requests the court to appoint a guardian ad litem of its choosing.
4. This motion is intended to be separate and not dependant upon the court's granting ELIZABETH SULLIVAN's motion to intervene.

The Appellant is of course not limited to these facts because in reviewing the

grant of a motion to dismiss with prejudice, the appellate court may sustain the dismissal on the facts pled yet reverse the prejudicial nature of the ruling if it appears possible to amend the pleading to state a sufficient cause.

> Upon review of Foxx's allegations of a federal civil rights violation, which we find unnecessary to detail in this opinion, we agree with the County that they were insufficient to state a cause of action. However, we are inclined to agree with Foxx that he should have been given an opportunity to amend his complaint. Dismissal of a complaint with prejudice is a severe sanction which should only be granted when the pleader has failed to state a cause of action and it conclusively appears that there is no possible way to amend the complaint in order to state a cause of action. (Emphasis supplied)

Madison County v. Foxx, 636 So.2d 39 at 51 (Fla. 1st DCA 1994)

SUMMARY OF ARGUMENT

As the trial court dismissed the Grandmother's Motion to Intervene without taking any testimony or other evidence, this appeal is an appeal of an final judgment granting a motion to dismiss.

The trial court's determination on a motion to dismiss is reviewed de novo. *See Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So.2d 582 (Fla. 2000). A district court's determination that a statute is unconstitutional is also reviewed de novo. *City of Miami v. McGrath,* 824 So.2d 143 at 146 (Fla. 2002). Further, even after being determined unconstitutional by a district court, a Florida statute comes before this court "clothed with a presumption of constitutionality," *McGrath, supra,* at 146.

I.

Contrary to the decision of the First District Court of Appeals, Florida's constitutional right to privacy, embodied in Art. I, § 23, Fla.Const., does not render § 61.13(2)(b)(2)(c), Fla.Stat., facially unconstitutional. This court should follow the line of decisions of the Fourth District Court of Appeals as set out in *Spence v. Stewart,* 705 So.2d 996 (Fla. 4th DCA 1998) and *Smith v. Koolidge,* 780 So.2d 1025 (Fla. 4th DCA 2001). In these cases the Fourth District Court found that the right to privacy embodied in Art. I, § 23, Fla.Const., does not bar a grandparent from intervening in a pending paternity or dissolution action to request an award of reasonable visitation pursuant to § 61.13(2)(b)(2)(c), Fla.Stat. The Fourth District Court found that unlike the situation where a grandparent files an original action pursuant to Ch. 752, Fla.Stat., the constitutional right to privacy is not invoked in an intervention, because the parents have waived such right by bringing their dispute

before the court to have it resolved.

Under this line of cases the Motion to Intervene of the Grandmother should not have been dismissed. The Final Judgment of the trial court should be reversed with instructions to have a hearing on the merits and consider the petition of the Grandmother for reasonable visitation.

II.

The court should follow the reasoning of the Missouri Supreme Court in *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. banc 2002) and narrowly construe § 61.13(2)(b(2)(c), Fla.Stat., so as to avoid the unconstitutionality of the statute. Unlike *Richardson v. Richardson,* 766 So.2d 1036 (Fla. 2000), a saving construction is possible in this case because the legislature expressly placed the grandparents in a lesser position than the parents. Further, as the legislature has expressly limited its statutory definition of the term "best interest of the child" to the purposes of "shared parental responsibility and primary residence" the proper definition of "best interest of the child" for the purposes of grandparent visitation must be determined by this court. Of course this court must construe statutes in a way which is constitutional if possible.

III.

Regardless of the right of the Grandmother to request the court to award her reasonable visitation, the minor child has the right to preserve his previous familial relations under the State and Federal Constitutions and specifically as set out in Justice

Stevens' dissent in the case *Troxel v. Granville*, 530 U.S. 57 (2000). The Grandmother requested that the court appoint her as next friend or guardian ad-litem to assert those rights on behalf of the minor child, or in the alternative appoint a guardian ad-litem of the court's choice to assert those rights. The trial court refused to do either and the rights of the child will not be considered by the trial court. The trial court should be reversed with instructions to appoint a guardian ad-litem and weigh the rights of the child in preserving his previous familial rights with his maternal relatives.

ARGUMENT

STANDARD OF REVIEW

"[D]ismissal of a complaint with prejudice is a severe sanction which should be granted only when the pleader has failed to state a cause of action, and it conclusively appears that there is no possible way to amend the complaint to state a cause of action." *Meyers v. City of Jacksonville,* 754 So.2d 198 at 202 (Fla. 1st DCA 2000); "For the purposes of a motion to dismiss ... allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff." *Ralph v. City of Daytona Beach,* 471 So.2d 1 at 2 (Fla.1983) "A trial court's ruling on a motion to dismiss based on a question of law is subject to de novo review." *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So.2d 582 at 583 (Fla. 2000)

A district court's determination that a statute is unconstitutional is also reviewed de novo. *City of Miami v. McGrath,* 824 So.2d 143 at 146 (Fla. 2002). Further, even after being determined unconstitutional by a district court, a Florida statute comes before this court "clothed with a presumption of constitutionality," *McGrath, supra,* at 146; *Dep't of Legal Affairs v. Sanford-Orlando Kennels,* 434 So.2d 879 (Fla. 1983)

I.

FLORIDA'S CONSTITUTIONAL RIGHT TO PRIVACY DOES NOT BAR A MATERNAL GRANDMOTHER FROM INTERVENING IN A PENDING PATERNITY ACTION AND SEEKING GRANDPARENT VISITATION PURSUANT TO § 61.13(2)(B)(2)(C), FLA.STAT.

In this action the Grandmother sought to intervene in existing paternity proceedings to request that she be given visitation with her minor grandchild.(R, 57-58) At the time of the Motion to Intervene, paternity proceedings were still pending. (R, 57-58) The Grandmother sought to intervene under the authority of § 61.13(2)(b)(2)(c), Fla.Stat., which provides that grandparents may intervene in existing paternity and custody proceedings to seek visitation. (R, 57-58)

The trial court dismissed the Grandmother's Motion to Intervene and the First

District Court affirmed, holding that § 61.13(2)(b)(2)(c), Fla.Stat., was facially unconstitutional under Florida's right to privacy as embodied in Art. I, § 23, Fla.Const. *Sullivan v. Sapp*, 829 So.2d 951 at 952 (Fla. 1st DCA 2002)

In reaching its conclusion, the First District Court cited as authority this court's prior rulings in *Beagle v. Beagle*, 678 So.2d 1217 (Fla. 1996); *Von Eiff v. Azieri*, 720 So.2d 510 (Fla. 1998); *Saul v. Brunetti*, 753 So.2d 26 (Fla. 2000); and *Richardson v. Richardson*, 766 So.2d 1036 (Fla. 2000). *Sapp*, at 952. These cases will each be addressed in turn.

In *Beagle v. Beagle*, 678 So.2d 1217 (Fla. 1996), the court found that § 752.01(1)(e), Fla.Stat., was facially unconstitutional under Florida's right to privacy because it gave the court authority to award child visitation to grandparents where the family was intact and both parents simply chose not to allow contact between the child and the grandparents. *Beagle*, at 1272-1273. *Beagle*, however specifically limited its holding to the circumstances of that case.

> We limit our holding to only those situations in which a child is living with both natural parents, at least one natural parent objects to grandparental visitation, and no relevant matters are pending in the court system. See 752.01(1)(e), Fla. Stat. (1995). In such cases, we find that a judge cannot impose grandparental visitation upon an intact family. (Emphasis supplied)

Beagle, at 1272.

Beagle, provides no authority for a court to hold a statute unconstitutional which allows grandparents to intervene in existing paternity proceedings to request visitation. Especially as in the instant case where the Father would have no parental rights except for the paternity proceedings. (R, 41-45)

In *Von Effie v. Azieri*, 720 So.2d 510 (Fla. 1998), the court ruled that § 752.01(1)(a), Fla.Stat., was facially unconstitutional because it allowed grandparents to seek and be awarded visitation where one of the parents was deceased. The court found that the Statute violated Florida's right to privacy and was therefore impermissible. *Von Eiff,* at 514.

Unlike the instant case, the grandparents were not attempting to intervene in an existing proceedings. Therefore this case also does not squarely determine the issue at hand.

Also cited as authority by the First District Court was this court's opinion in the case of *Richardson v. Richardson*, 766 So.2d 1036 (Fla. 2000). In *Richardson*, this court declared that a grandparent could not seek custody of grandchildren under the provisions of § 61.13(7), Fla.Stat., because it is unconstitutional. The statute in *Richardson*, provided as follows:

> In any case where the child is actually residing with a grandparent in a stable relationship, whether the court has awarded custody to the grandparent or not, the court may recognize the grandparents as having

> the same standing as parents for evaluating what custody arrangements are in the best interest of the child. (Emphasis supplied)

§ 61.13(7), Fla.Stat.

§ 61.13(2)(b)(2)(c), Fla.Stat., the statute at issue in the instant action, is not similar to the statute at issue in *Richardson*, for two reasons. First, the *Richardson*, statute was a custody statute and allowed a grandparent seek custody in the same manner as the parent of the child. The instant statute does not deal with custody but rather simple visitation, and thus would be much less intrusive into the rights of the parent. Second, the instant statute explicitly provides protections to the parents and does not place the grandparents in an equal position with the parents. § 61.13(2)(b)(2)(c), Fla.Stat. reads as follows:

> 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. This section does not require that grandparents be made parties or given notice of dissolution pleadings or proceedings, nor do grandparents have legal standing as "contestants" as defined in s. 61.1306. A court may not order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation by the grandparents.

§ 61.13(2)(b)(2)(c), Fla.Stat.

The statute in the instant case specifically declares that the grandparents are in a position inferior to the parents by providing that:

1. The grandparents are not required to be made parties or given notice of

dissolution pleadings or proceedings.

2. The grandparents do not have legal standing as "contestants" as defined in § 61.1306, Fla.Stat.[1]

3. A court may not order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation by the grandparents.

Saul v. Brunetti, 753 So.2d 26 (Fla. 2000) most closely resembles the situation at hand. In *Saul,* the parents had an out-of-wedlock child. The mother sued the father for paternity, and the action was resolved although we are not told if this was by judgment or settlement. *Saul v. Brunetti*, 724 So.2d 142 at 143 (Fla. 4th DCA 1998) Approximately two years after the child was born, the mother was killed in a car accident. The maternal grandparents then sued the father for grandparent visitation pursuant to § 752.01(1)(d), Fla.Stat. § 752.01, Fla.Stat., provides as follows:

> (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) The marriage of the parents of the child has been dissolved;
> (b) A parent of the child has deserted the child; or
> (c) 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.

§ 752.01, Fla.Stat. (Previous versions of § 752.01(1), Fla.Stat., listed the present subdivision (c) as (d))

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[1]This provision may have less significance since the repeal of § 61.1306, Fla.Stat., in 2002, but at least evidences an intent to subordinate the interests of the grandparent to those of the parents.

The court found that the grandparents could not maintain an action under § 752.01, Fla.Stat., as this statute violated the parent's constitutional right to privacy. *Saul,* at 29.

The Father asserts that *Saul,* is analogous to the instant case and thus the holding should be construed to apply to the Grandmother's request to intervene to seek grandparent visitation rights.

However, in *Saul,* the Grandparent sought to bring a new action for Grandparent visitation pursuant to Ch. 752, Fla.Stat. In the instant case, the Grandmother sought to intervene in an existing action and such intervention was expressly pursuant to § 61.13(2)(b)(2)(c), Fla.Stat. (R, 58) Interventions by grandparents in pending paternity actions pursuant to § 61.13(2)(b)(2)(c), Fla.Stat., have been specifically upheld by the Fourth District Court of Appeals in the case of *Spence v. Stewart,* 705 So.2d 996 (Fla. 4th DCA 1998). This court explicitly recognized this distinction in *Saul,* by 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 subsection 61.13(2)(b)2.c, Florida Statutes (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, Footnote 3 at 29.

The Grandmother argued to the First District Court below and reasserts here that the court should follow the reasoning of the Fourth District Court and interpret § 61.13(2)(b)(2)(c), Fla.Stat., in conformance with the case of *Spence v. Stewart,* 705 So.2d 996 (Fla. 4th DCA 1998). In *Spence,* a paternal grandmother sought intervene in an existing paternity proceeding. The trial court denied the motion to intervene. The Fourth District Court reversed and held that the intervention of the grandmother pursuant to § 61.13(2)(b)(2)(c), Fla.Stat., would not violate the parents privacy rights under the Florida Constitution. The court held that § 61.13(2)(b)(2)(c), Fla.Stat., unlike § 752.01, Fla.Stat., was not unconstitutional and could be used as authority for the intervention of a grandparent in an existing paternity action.

> Familial privacy is grounded on the right of parents to raise their children without interference. *See In re* Guardianship of D.A. McW., 429 So.2d 699, 702 (Fla. 4th DCA 1983), *approved*, 460 So.2d 368 (Fla.1984). Where, however, the parents are not in agreement as to the best interest of their child and have taken that disagreement to a court to resolve, such as in dissolution or paternity cases, the court determines what is in the child's best interest. One parent does not have the absolute right to make child rearing decisions over the objection of the other parent unless a court has determined that the best interest of the child demands that sole responsibility for the child rests with that parent. That being the case, there is no right of privacy to protect the decisions of one parent as to child rearing decisions absent agreement by the other parent. With respect to grandparent visitation, the legislature has provided that grandparents may receive visitation privileges if that is in the best interest of the child. *See* § 61.13(2)(b)(2)(c). 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 grandparental visitation is in the best interest of the child is not violative of the right to privacy. (Emphasis supplied)

Spence, at 998

Further, the Fourth District Court has recently upheld its opinion in *Spence,* in the case of *Smith v. Koolidge,* 780 So.2d 1025 (Fla. 4th DCA 2001) In *Smith,* the Fourth District court considered its opinion in *Spence,* in light of the Supreme Court's opinion in *Saul,* and did not recede from the holding of *Spence,* that intervention pursuant to § 61.13(2)(b)(2)(c), Fla.Stat., was still viable for grandparents seeking visitation.

> Smith sought grandparent visitation pursuant to section 752.01(1)(d), Florida Statutes (1999), [FN1] stating that her grandchild had been born out of wedlock. A paternity action between the child's parents was pending at the time. When the parents reached an agreement and reconciled, a final judgment on paternity was rendered, and the trial court dismissed Smith's petition.
>
> Saul rendered section 752.01(1)(d) unconstitutional. 753 So.2d at 29. Smith asserts, however, that Spence v. Stewart, 705 So.2d 996 (Fla. 4th DCA 1998), allows section 752.01(1)(d) to be constitutionally applied here. We disagree.
>
> Spence recognized grandparents' statutory right to seek visitation in dissolution and paternity proceedings. 705 So.2d at 998. This court clarified in Brunetti v. Saul, 724 So.2d 142 (Fla. 4th DCA 1998), *aff'd*, Saul v. Brunetti, 753 So.2d 26 (Fla.2000), that Spence is grounded on section 61.13. [FN2] We recognized, however, that where there is no proceeding under chapter 61 and the grandparents'

> only source of recourse is section 752.01(1)(d), a grandparent has no right to seek visitation. Brunetti, 724 So.2d at 142-43. *See also* L.B. v. C.A., 738 So.2d 425 (Fla. 4th DCA 1999)(affirming dismissal of petition for visitation where grandparents relied only on section 752.01(1)(d)). In the instant case, the paternity action was no longer pending; thus, Smith had only section 752.01(1)(d) on which to rely. (Emphasis supplied)

Smith, at 1025

The Appellee has not offered any contrary interpretation of the cases of *Spence v. Stewart,* 705 So.2d 996 (Fla. 4th DCA 1998) and *Smith v. Koolidge*, 780 So.2d 1025 (Fla. 4th DCA 2001), thus there seems to be no dispute that the Fourth District Court of Appeals has determined that Florida's constitutional right to privacy does not barr interventions by grandparents in pending paternity actions pursuant to § 61.13(2)(b)(2)(c), Fla.Stat., to seek visitation.

The Father however cited below as opposing authority, the concurrence of Judge Kline in the case of *Brunnetti v. Saul,* 724 So.2d 142 (Fla. 4th DCA 1999), *majority opinion approved,* 753 So.2d 26 (Fla. 2000), and the case of *Lonon v. Ferrell,* 739 So.2d 650 (Fla. 2d DCA 1999) which specifically cites Judge Kline's concurrence. According to the Father, these opinions assert that *Spence*, improperly requires a litigant to "give up" the privacy protections embodied in Art. I § 23, Fla.Const., in order to exercise of the right of access to courts set out in Art. I, § 21, Fla.Const.

This is characterization misconstrues the holding of *Spence*. *Spence* did not hold that a party must waive a right, but rather that the exercise of one right (access to courts) necessarily and unavoidably excludes the exercise of the other (right to be free from government intrusion).

Florida's Constitutional right to privacy provides as follows:

> Every natural person has the right to be let alone and free from governmental intrusion into his 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. (Emphasis supplied)

Article I, § 23, Fla.Const.

For intervention to be possible under § 61.13(2)(b)(2)(c), Fla.Stat., at least one of the parents must have voluntarily requested that the government, through its courts, determine the parties' rights and compel the other parent to act accordingly. In this case that was done through a paternity proceeding filed by the Mother and originally disputed by the Father.

It is not possible for the government to intrude where it has been invited. To put it another way, the government may not both intrude into the parents' private lives with their children to determine disputed issues and leave the parents "free from governmental intrusion". The one necessarily excludes the other.

It seems that the real argument of Judge Kline and the Father is that the

parents should be able to partially invoke their rights to privacy under Art. I, § 23, Fla.Const., by controlling the extent of government intrusion once requested. This type of partial invocation of rights is certainly not allowed in other areas of constitutional law. For example, a criminal Defendant who offers testimony in his own defense, cannot partially invoke his rights under the Fifth Amendment of the U. S. Const., against self incrimination to avoid cross examination.

> A defendant who takes the stand waives the privilege against compelled self-incrimination.

State v. Hickson, 630 So.2d 172 at 176 (Fla. 1994)

Certainly the Defendant would like to "partially" waive his privilege by giving testimony and then use the Fifth Amendment to shield himself from cross examination. However, in this context the Defendant must waive his constitutional protections in order to fully utilize the processes of the court.

Similarly a criminal Defendant may not plead that he is not guilty by reason of insanity without waiving his rights against self incrimination.

> There is no constitutional right to plead this defense, [Insanity] and, if the statutes and case law permit a defendant the privilege of raising it, he must waive certain constitutional rights with respect to it, including the privilege against self-incrimination. The defendant's right at trial to offer evidence on the issue of his sanity at the time of the alleged crime is conditioned upon his cooperation during a psychiatric examination on behalf of the prosecution or court. (Emphasis added)

Parkin v. State, 238 So.2d 817 at 822 (Fla. 1970)

Again the Defendant would most assuredly wish to "partially" waive his rights against self incrimination by offering evidence on the subject of his insanity and then use the Fifth Amendment to bar the State from inquiring into his mental health. However, in order to defend himself in the court proceeding he must waive some of his constitutionally protected rights to invoke others.

The question raised by this action must be framed properly. The question is not whether it is fair or a good idea to require the waiver of the one right in exchange for the other. Rather the question is whether the right to privacy embodied in Art. I, § 23, Fla.Const., precludes the Florida Legislature from passing a statute which allows grandparents to intervene in existing paternity proceedings to seek some manner of visitation. As there has been a voluntary "abandonment", *Spence,* at 998, of the right in these proceedings, the determination of the Florida Legislature to allow intervention should be given deference and § 61.13(2)(b)(2)(c), Fla.Stat., should be upheld in this context.

The finding of a waiver of the privacy rights embodied in Art, I, § 23, Fla.Const., is in conformance with the state's greater interest in family law proceedings. In fact, in *Barron v. Florida Freedom Newspapers,* 531 So.2d 113 (Fla. 1988), the Supreme Court found that a divorce proceeding should not be

closed to the public in part because:

> Dissolution proceedings are regulated by statute and are unique because the state is considered an interested third party to protect the public welfare. *See, e.g., Perez v. Perez,* 164 So.2d 561 (Fla. 3d DCA 1964); *Harman v. Harman,* 128 So.2d 164 (Fla. 3d DCA 1961). (Emphasis supplied)

Barron, 531 So.2d 113 at 119

Certainly the interest of the state in a paternity proceeding like the instant case, would be no less than the interest of the state in a divorce proceeding as set out in *Barron, supra*. The interest of the state "to protect the public welfare" would require the state, through its courts, to be able to consider the request of the grandparents for reasonable visitation with a minor child.

Therefore this court is urged to follow the reasoning of the Fourth District Court in *Spence v. Stewart,* 705 So.2d 996 (Fla. 4th DCA 1998) and *Smith v. Koolidge,* 780 So.2d 1025 (Fla. 4th DCA 2001) and rule that § 61.13(2)(b)(2)(c), Fla.Stat., is constitutional and that the Grandmother herein may intervene in the existing paternity action and petition for reasonable grandparent visitation.

II.

THE CURRENT STATUTORY SAFEGUARDS AND POSSIBLY A NARROWING CONSTRUCTION BY THE COURT WOULD RENDER § 61.13(2)(B)(2)(C), FLA.STAT., CONSTITUTIONAL

The Grandmother urges this court to construe the statute at issue in this case

to be constitutional following the same reasoning as the Supreme Court of Missouri in the case of *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. banc 2002)[2] In *Blakely*, the court determined that Missouri's grandparent visitation statute did not violate the U.S. Constitution's protections of parental rights, as set out by the U.S. Supreme Court in *Troxel v. Granville*, 530 U.S. 57, (2000), because it provided adequate protections for the parents. The Missouri law provides in pertinent part as follows:

> 1. The court may grant reasonable visitation rights to the grandparents of the child and issue any necessary orders to enforce the decree. The court may grant grandparents visitation when:
> ....
> (3) A grandparent is unreasonably denied visitation with the child for a period exceeding ninety days;
> ....
> 2. The court shall determine if the visitation by the grandparent would be in the child's best interest or if it would endanger the child's physical health or impair the child's emotional development. Visitation may only be ordered ***540** when the court finds such visitation to be in the best interests of the child. The court may order reasonable conditions or restrictions on grandparent visitation.... (Emphasis supplied)
> Sec. 452.402.1(3).

Blakely, at 539-540.

The Missouri court reaffirmed its earlier finding in *Herndon v. Tuhey*, 857

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[2] *Blakely,* was not presented to the District Court because it was not discovered by the Appellant in time to be argued below. *Blakely,* was first decided on June 25, 2002. The Reply Brief below was served on June 7, 2002.

S.W.2d 203 (Mo. 1993), that the statute was proper because it was narrowly tailored to protect the interests of the child and the parent.

> *Herndon* held that the statute contemplates only "*occasional, temporary visitation,* which may only be allowed if a trial court finds visitation to be in the best interest of the child and does not endanger the child's physical or emotional development." 857 S.W.2d at 209 (emphasis added). Similarly, *Herndon* ruled that the statute permitted only a "*minimal intrusion* on the family relationship and ... [was] ... *narrowly tailored* to adequately protect the interests of parents and children." *Id.* at 210 (emphasis added). It emphasized that "if the statute allowed a great amount of visitation we would be more likely to find an undue burden on the family and hold that these subsections are unconstitutional." *Id.* at 210-11.
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> We here reaffirm the narrow interpretation of Missouri's statute adopted in *Herndon* and other Missouri cases following it, [FN4] and hold that, as so interpreted, it comports with the standards set out in *Troxel.*

Blakely, at 543-544.

Further, the court held that the statutory scheme of not ordering visitation until a grandparent had been unreasonably denied visitation for a period in excess of 90 days made the statute at issue constitutional.

> In addition, unlike Washington, Missouri's legislature has balanced the interests involved and provided that to be entitled to visitation, grandparents must meet the threshold requirement of demonstrating that parents have "unreasonably denied" visitation for a period exceeding 90 days. Sec. 452.402.1(3). The fact that no visitation can be ordered unless the parents have entirely denied visitation for a period of 90 days provides the second important distinction between the two statutes. This Court has previously noted that the 90-day

> period of "unreasonable denial of visitation that must elapse before a court may enter an order under section 452.402 indicates the legislature contemplated an allowance of minimal visitation subject to reasonable restrictions and conditions as a court might find appropriate." *Herndon*, 857 S.W.2d at 210. Thus, unlike in *Troxel*, a grandparent does not have automatic standing to seek visitation:
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> > [T]he initial ninety day denial of visitation requirement makes [section] 452.402.1(3) constitutional because it guarantees that a court will not intrude upon the family for less than an egregious denial of visitation. The statute sets ninety days as the limit of permissible visitation denial after which point a court may intervene. It is therefore a type of "jurisdictional" waiting period, after ninety days without visitation an aggrieved party may gain access to the courts.
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> *Ray v. Hannon*, 14 S.W.3d 270, 273-74 (Mo.App. W.D.2000).

Blakely, at 544-545.

Like the Missouri statute in *Blakely*, § 61.13(2)(b)(2)(c), Fla.Stat., does not give the grandparent the same standing as the parent to seek visitation. Specifically, as stated before § 61.13(2)(b)(2)(c), Fla.Stat., provides that:

1. The grandparents are not required to be made parties or given notice of dissolution pleadings or proceedings.

2. The grandparents do not have legal standing as "contestants" as defined in § 61.1306, Fla.Stat.

3. A court may not order that a child be kept within the state or jurisdiction of the court solely for the purpose of permitting visitation by the grandparents.

Further the decisions of the parent in this regard cannot be reviewed by the court

unless they are made “without proper cause”:

> When a custodial parent refuses to honor a noncustodial parent's or grandparent's visitation rights without proper cause, the court shall... (Emphasis supplied)

§ 61.13(4)(c), Fla.Stat.

This provision can provide protection similar to the protection afforded by the Missouri statutes use of “unreasonably denied”. *Blakely*, at 544-545

Further the fact that § 61.13(2)(b)(2)(c), Fla.Stat., requires that the visitation be awarded when in the “child’s best interest” does not necessarily place the grandparent in the same position as the parent. The legislature has specifically set out statutory factors for determination of the best interest of the child for purposes other than grandparent visitation:

> For purposes of shared parental responsibility and primary residence, the best interests of the child shall include an evaluation of all factors affecting the welfare and interests of the child, including, but not limited to:... (Emphasis supplied)

§ 61.13(3), Fla.Stat.

As the legislature chose not to include grandparent visitation in § 61.13(3), Fla.Stat., the legislature has shown it does not intend for this definition to be applied to grandparent visitation.

> "Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of

> another." *Moonlit Waters Apartments Inc. v. Cauley*, 666 So.2d 898, 900 (Fla.1996). By failing to permit self-insured motorist policy exclusions in the list of authorized exclusions, the Legislature has further indicated its intent in section 627.727 not to permit self-insured motorist policy exclusions.

Young v. Progressive, 753 So.2d 80 at 85 (Fla. 2000).

Further § 61.13, Fla.Stat., provided for grandparent visitation beginning in 1978. "The court may award grandparents visitation rights of a minor child [sic] if it is deemed by the court to be in the child's best interest" § 61.13(2)(b), Fla.Stat. (Supp. 1977) The use of the phrase "shared parental responsibility and primary physical residence" were added in 1981. "For the purposes of share parental responsibility and primary physical residence..." § 61.13(3), Fla.Stat. (Supp. 1981)

The Legislature must be presumed to have known that there was a grandparent visitation statute in existence at the time it chose to use the phrase "For the purposes of share parental responsibility and primary physical residence" and intended for this section not to apply.

> There is a general presumption that later statutes are passed with knowledge of prior existing laws, and a construction is favored which gives each one a field of operation...

Oldham v. Rooks, 361 So.2d 140 at 143 (Fla. 1978)

As it must be presumed that the legislature did not intend to define the term "child's best interest" for the purposes of grandparent visitation, it falls to this

court to construe this term. Of course this court is bound to construe statutes in ways which render them constitutional if possible.

> It is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional. *See* *Van Bibber v. Hartford Accident & Indem. Ins. Co.*, 439 So.2d 880, 883 (Fla.1983). In fact, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent."

St. Mary's Hospital v. Phillipe, 769 So.2d 961 at 972 (Fla. 2000)

Therefore the Grandmother encourages this court construe the term "child's best interest" in such a manner as will render it constitutional under the Florida and Federal Constitutions. The Grandmother respectfully suggests that the following construction of the term "child's best interest" might render it constitutional:

1. The decision of the parent to allow or not allow visitation will be presumed to be in the child's best interest unless overcome by clear and convincing evidence.

2. In order to overcome the presumption that the parent's decision is in the child's best interest the court must consider the following:

    A. Whether there existed previously a strong emotional tie between the child and the grandparent which the minor child has an interest in preserving.[3]

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[3] This provision follows the line of reasoning that the child has a constitutional right to preserve its familial relationships with its grandparents against arbitrary action by the parent, as expressed in Section III of this brief.

B. Whether the parents have unreasonably denied visitation for a lengthy period of time.
C. The moral fitness of the grandparent.
D. The past conduct of the grandparent with respect to the child.

3. Should the court award grandparent visitation against the wishes of the parent the child's best interest are served by a minimal intrusion including the following:

A. The visitation shall be limited and/or supervised by the parent.
B. The Grandparent shall be responsible for all costs of visitation with the child, and such visitation shall not disrupt the home or education of the child.
C. The parent shall be given the initial opportunity to set the visitation and shall be given such discretion unless shown to be unreasonably denying visitation.
D. Visitation of no more than once per 60 days.

The Grandmother does not feel that it is necessary for the court to use the "harm to the child" standard set out in *Richardson*, *supra,* is necessary because of the waiver of privacy rights as set out in *Spence*, *supra,* and the rights of the child to maintain previously established grandparent relationship as set out in Section III of the brief.

II.

THE MINOR CHILD HAS A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST, IN PRESERVING FAMILIAL BONDS WITH HIS

Regardless of whether the Grandmother has the right to request grandparent visitation under § 61.13(2)(b)(2)(c), Fla.Stat., or any other provision of law, the minor child has a constitutionally protected liberty interest in preserving his familial bonds with his maternal family pursuant to the 14th Amendment of the United States Constitution and Art. I, §§ 2, 4, 9, and 23, Fla.Const.

The undersigned can find no case where this court has determined whether the child may assert his interest in maintaining familial bonds. However, as authority the Grandmother cites Justice Stevens' dissent in the case *Troxel v. Granville*, 530 U.S. 57 (2000). In his dissent, Justice Stevens opines that:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U.S., at 130, 109 S.Ct. 2333 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. [FN8] At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. See *ante*, at 2059-2060 (opinion of O'CONNOR, J.) (describing States' recognition of "an independent third-party interest in a child"). The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child. [FN9] (Emphasis supplied)

Troxel, at 88-89

Justice Stevens goes on to show examples of the constitutional rights possessed by children in Footnote 4 to his dissent.

> This Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties. See Parham v. J. R., 442 U.S. 584, 600, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (liberty interest in avoiding involuntary confinement); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state- defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506-507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (First Amendment right to political speech); In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (due process rights in criminal proceedings).

Troxel, at footnote 4, page 88

The Grandmother recognized that the minor child has a constitutionally protected interest in preserving his familial bonds with his mother's family. The Grandmother further recognized that since the minor child was born September 20, 1999, (R, 41) he was too young to appreciate his rights in this matter. Thus, the Grandmother requested the trial court to appoint a guardian ad-litem to assert this interest on behalf of the minor child pursuant to Fla.Fam.L.R.P. 12.210, Fla.R.Civ.P. 1.210, and §§ 61.401- 405, Fla.Stat, (R, 85-86, 108-109,) The trial court refused to even appoint a guardian or even consider the possibility that the

right of the child to preserve his familial bonds may need to be protected. (R, 87-88) Thus denying the minor child any way to assert his constitutionally protected rights.

This courts of this state have affirmed the use of such a procedure in the case of *Attorney Ad Litem for D.K. v. Parents of D.K.,* 780 So.2d 301 (Fla. 4th DCA 2001) In *D.K.,* a court appointed psychologist requested the mental health records of the minor child D.K. The parents agreed to the production but the court appointed an attorney ad litem to assert the psychotherapist privilege set out in § 90.503, Fla.Stat. *D.K.,* at 303-305.[4]

It should be noted that the court in *D.K.,* quashed the order of the trial court and held that the parents did not have the ability to determine access to the child's mental health records without the consent of the child.

> Thus, we conclude both from the plain meaning of our own statute, as well as the weight of authority from other jurisdictions, that a child has a privilege in the confidentiality of her communications with her

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[4]The court in *D.K.,* specifically approved the use of an attorney ad litem rather than a guardian ad litem. D.K., Footnote 1 at 304. The grandmother asserts that had she been appointed guardian ad litem she would most likely have requested the appointment of an attorney ad litem. Regardless the Grandmother should be given the opportunity to amend her motion to request an attorney ad litem if necessary. "Dismissal of a complaint with prejudice is a severe sanction which should only be granted when the pleader has failed to state a cause of action and it conclusively appears that there is no possible way to amend the complaint in order to state a cause of action." (Emphasis supplied) *Foxx, supra,* at 51.

> psychotherapist. Where the parents are involved in litigation themselves over the best interests of the child, the parents may not either assert or waive the privilege on their child's behalf. This is particularly true in the instant case where the child, who is over seventeen years old, has the ability to obtain her own treatment under the statute and has sufficient mental capacity to assert the privilege herself, as she has done here.

D.K., at 307-308

The trial court should be reversed and this action remanded for the appointment of a guardian ad litem or attorney ad litem, and a hearing on the merits to determine if the minor child has a constitutionally protected interest in preserving his familial bonds with his maternal family.

CONCLUSION

The opinion of the District Court and the Final Judgment of the trial court should be reversed with instructions for the trial court to allow the Grandmother to intervene and request visitation or in the alternative appoint a guardian ad litem or attorney ad litem for the minor child and hold a hearing on the merits to consider whether reasonable visitation should be ordered between the minor child and his

maternal grandmother.

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CERTIFICATE OF SERVICE

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

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by regular U.S. mail this 17th day of January, 2003.

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CERTIFICATE OF COMPLIANCE

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

George T. Reeves