

IN THE SUPREME COURT  
STATE OF FLORIDA

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

Appellant,

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

vs.

LANDON COLE SAPP,

Appellee.

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**APPEAL OF DISTRICT COURT'S FINAL ORDER**  
**APPELLANT'S REPLY BRIEF**

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

George T. Reeves  
Fla. Bar No. 0009407  
Davis, Schnitker, Reeves & Browning, P.A.  
Post Office Drawer 652  
Madison, Florida 32341  
(850) 973-4186

ATTORNEYS FOR APPELLANT

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## **REPLY-ARGUMENT**

### I.

FLORIDA'S CONSTITUTIONAL RIGHT TO  
PRIVACY DOES NOT BAR A MATERNAL  
GRANDMOTHER FROM INTERVENING IN A  
PENDING PATERNITY ACTION TO SEEK  
VISITATION

The Grandmother stands on the argument presented in her Initial Brief and offers no reply argument on this issue.

### II.

THIS COURT IS REQUIRED TO CONSTRUE THE  
TERM "THE CHILD'S BEST INTEREST" DUE TO  
THE LACK OF ANY DEFINITION PROVIDED BY  
THE LEGISLATURE AND THE SPECIFIC  
EXCLUSION OF THE TERM FROM THE WORKING  
DEFINITION OF "BEST INTEREST OF THE CHILD"  
IN § 61.13(3), FLA.STAT.

The Father has asserted that the District court was correct and that § 61.13(2)(b)(2)(c), Fla.Stat., should be found unconstitutional just as § 61.13(7), Fla.Stat., was unconstitutional in *Richardson v. Richardson*, 766 So.2d 1036 (Fla.

2000).

In the case at bar, section 61.13(2)(b)(2)(c), like section 61.13(7), purports to give grandparents visitation rights based solely on the best interest of the child.

*Sullivan v. Sapp*, 829 So.2d 951 at 952 (Fla. 1<sup>st</sup> DCA 2002)

However, § 61.13(2)(b)(2)(c), Fla.Stat., did not allow visitation to be decided on the “best interest of the child” standard. Rather the standard used is the “child’s best interest”. § 61.13(2)(b)(2)(c), Fla.Stat. While this may seem like the same standard due to the closeness in phrasing, the standards are different because the legislature chose to give a definition to the term “best interest of the child,” but specifically declined to do so for the term “child’s best interest”.

§ 61.13, Fla.Stat., specifically provides as follows:

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 phrase "shared parental responsibility and primary physical residence" was added to § 61.13(3), Fla.Stat., in 1981. "For the purposes of shared 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 the Legislature has chosen not to provide any guidance to the courts in

the meaning of the term “child’s best interest” as set out in § 61.13(2)(b)(2)(c), Fla.Stat., it falls to the courts, particularly this court, to give this term meaning. Of course this court is bound to give the term a constitutional meaning if possible. *St. Mary’s Hospital v. Phillipe*, 769 So.2d 961 at 972 (Fla. 2000)

Thus, the Father must be incorrect in saying that a narrowing construction is not possible. As there is no legislative construction of the term “child’s best interest,” it must be given a meaning by this court. Therefore, to find § 61.13(2)(b)(2)(c), Fla.Stat., unconstitutional this court give the term “child’s best interest” an unconstitutional meaning when the meaning of the term has been left solely to the court. The court is unable to do this because this court is bound to construe statutory terms constitutionally if possible. As the legislature has not provide a definition for the term, a constitutional construction is not only possible it is required. *St. Mary’s, supra*.

### III.

THE MINOR CHILD DOES HAVE AN  
INDEPENDENT CONSTITUTIONAL RIGHT TO  
MAINTAIN CONTACT WITH PERSON WITH  
WHOM THE CHILD HAS DEVELOPED A PARENT  
LIKE RELATIONSHIP AS RECOGNIZED BY THE  
NEW YORK FAMILY COURT

Since the service of the Initial Brief herein, the Appellant has discovered an opinion of a court which has adopted the reasoning of Justice Stevens's dissent in *Troxel v. Granville*, 530 U.S. 57 (2000) *i.e.* that a minor child has a protected constitutional right to maintain contact with persons with whom he has established parent like bonds. In *Webster v. Ryan*, 189 Misc.2d 86, 729 N.Y.S.2d 315 (N.Y.Fam.Ct.2001), the court relied upon Justice Steven's dissent in *Troxel*, to determine that a minor child had a fundamental constitutional right to maintain contact with his foster mother, over the objections of his natural father, due to the parent-like bonds which the minor child had developed with the foster mother. *Webster*, at 317-318. The court held as follows:

In this case, the Court holds that a child has an independent, constitutionally guaranteed right to maintain contact with a person with whom the child has developed a parent-like relationship.

That right is constitutionally guaranteed because it is a fundamental liberty encompassed within the freedom of association right of the First Amendment of the United States Constitution and Article 1 § 8 and § 9 of the Constitution of the State of New York. This liberty is protected by the Due Process Clause of the Fourteenth Amendment and Article I § 6 of the Constitution of the State of New York. Because the State has provided no statutory basis for a child to assert such right of contact in a court of law, as it has for similar situations involving child contact with parents, grandparents and siblings, Alex Ryan, Jr. has been denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and Article I § 11 of the Constitution of the State of New York. (Footnotes omitted)

*Webster*, at 316.

In reaching the above, the *Webster*, court relied heavily upon Justice Stevens's *Troxel*, dissent as follows:

The two cases that most directly impact the holding in this case are the Supreme Court's grandparents' visitation decision, handed down last year in [\*Troxel v. Granville\*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 \[2000\]](#) and the New York Court of Appeals "*de facto*" parent visitation decision in [\*Alison D. v. Virginia M.\*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 \[1991\]](#).<sup>1</sup>

\* \* \*

Justice Stevens, in dissent ... provides the analytical framework which, when the issue is examined from a point of view that first considers the child's constitutional rights, supports the results in this case. Justice Stevens is the only justice to raise the issue of the child's constitutional rights.

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual whose interests are implicated in every case to which the statute applies--the child. 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, it seems to one 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. ([\*Troxel\*, above, at 86, 88, 120 S.Ct. 2054,](#)

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<sup>1</sup> *Alison D. v. Virginia M.*, *supra*, deals more properly with issues of State Law and thus is not explored further.



citations omitted.)

Stevens goes on to note that there is, in effect, a place at the constitutional table for a child in Alex Ryan, Jr.'s situation.

Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship and so forth. ([Troxel, above, at 85, 120 S.Ct. 2054](#))

Justice Kennedy, also in dissent, lends support to the concept that, under appropriate circumstances, court-ordered visitation between a child and a non parent is constitutionally permissible.

My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case.... Cases are sure to arise ... in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. ([Troxel, above, at 98](#))

*Webster*, at 113-115. (Footnotes omitted)

Therefore the court determined that:

The historical development of family law in America, and the expansion of individual constitutional rights by the Supreme Court of

the United States and the Court of Appeals of the State of New York, give foundation to a holding that a child has a constitutional right to maintain contact with a person with whom the child has developed a parent-like relationship. Accompanying that right, is also a right to the equal protection of the laws. This requires that the child have the due process necessary to claim his right. This claim can be given constitutional protection, while at the same time giving due recognition, respect and protection to a parent's constitutional right to the custody, care and control of his or her child.

*Webster*, at 341.

This court is urged to follow the reasoning of the New York Family Court and determine that the minor child herein has a constitutionally protected right to maintain parent-like bonds with the grandmother and remand this action to the trial court with instructions to appoint a guardian ad litem as requested by the grandmother, to investigate if such bonds exist and if so to assert them through the use of an attorney ad litem or through any other legal means.

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George T. Reeves  
Fla. Bar No. 0009407  
Davis, Schnitker, Reeves & Browning, P.A.  
Post Office Drawer 652  
Madison, Florida 32341  
(850) 973-4186

ATTORNEYS FOR THE APPELLANT

**CERTIFICATE OF SERVICE**

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

HARVEY BAXTER  
Post Office Box 776  
Gainesville, Florida 32602-0776  
Attorney for Appellee

by regular U.S. mail this 3<sup>rd</sup> day of March, 2003.

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George T. Reeves

**CERTIFICATE OF COMPLIANCE**

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

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George T. Reeves