

Supreme Court of Florida

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1997  
SUPREME COURT

PHILIP VON EIFF, et al.,

Petitioners,

v.

LEONOR AZICRI, et al.,

Respondents.

CASE NO: 91,647  
District Court of Appeal,  
3rd District - No. 96-3273

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**AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION OF FLORIDA, INC.**

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TABLE OF CONTENTS

|   | <u>PAGE</u> |
|---|-------------|
| TABLE OF CONTENTS .....                   | i           |
| TABLE OF AUTHORITIES .....                | ii          |
| STATEMENT OF THE CASE AND THE FACTS ..... | 1           |
| SUMMARY OF THE ARGUMENT .....             | 2           |
| ARGUMENT .....                            | 3           |
| CONCLUSION .....                          | 8           |
| CERTIFICATE OF SERVICE .....              | 9           |

## TABLE OF AUTHORITIES

### STATUTES AND CONSTITUTIONAL PROVISIONS

|   |     |
|---|-----|
| Article I, Section 23, Florida Constitution ..... | 3   |
| Fla. Stat. § 752.015 .....                        | 6   |
| Fla. Stat. § 752.01(1) .....                      | 6   |
| Fla. Stat. §752.01(1)(a) .....                    | 2,5 |
| Fla. Stat. §752.01(1)(e) .....                    | 2   |
| Fla. Stat. §752.01(2)(f) .....                    | 6   |
| Fla. Stat. Chapter 752 .....                      | 5   |

### CASES

|   |               |
|---|---------------|
| <u>Beagle v. Beagle</u> , 678 So.2d 1277 (1996) .....                                     | <i>passim</i> |
| <u>Fla. Bd. of Bar Examiners re: Applicant</u> , 443 So.2d 71 (Fla. 1983) .....           | 3             |
| <u>Foster v. Sharpe</u> , 114 So.2d 373 (Fla. 3rd DCA 1959) .....                         | 4             |
| <u>Franklin v. White Egret Condominium, Inc.</u> , 358 So.2d 1984 (Fla. 4th DCA 1978) ... | 4             |
| <u>In re: Dubreuil</u> , 629 So.2d 819 (Fla. 1993) .....                                  | 3             |
| <u>In re: Guardianship of Browning</u> , 568 So.2d 4 (Fla. 1990) .....                    | 4             |
| <u>In re: T.W.</u> , 551 So.2d 1186 (Fla. 1989) .....                                     | 3,4           |
| <u>In the Interest of D.B. &amp; D.S.</u> , 385 So.2d 83 (Fla. 1980) .....                | 3             |
| <u>In the Interest of E.H.</u> , 609 So.2d 1289 (Fla. 1992) .....                         | 3,4           |
| <u>Meyer v. Nebraska</u> , 405 U.S. 645 (1972) .....                                      | 7             |
| <u>Padgett v. Dept. Of Health &amp; Rehab. Svcs.</u> , 577 So.2d 565 (Fla. 1991) .....    | 3,5,7         |

## TABLE OF AUTHORITIES

### STATUTES AND CONSTITUTIONAL PROVISIONS

|   |     |
|---|-----|
| Article I, Section 23, Florida Constitution ..... | 3   |
| Fla. Stat. § 752.015 .....                        | 6   |
| Fla. Stat. § 752.01(1) .....                      | 6   |
| Fla. Stat. §752.01(1)(a) .....                    | 2,5 |
| Fla. Stat. §752.01(1)(e) .....                    | 2   |
| Fla. Stat. §752.01(2)(f) .....                    | 6   |
| Fla. Stat. Chapter 752 .....                      | 5   |

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|   |               |
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| <u>Beagle v. Beagle</u> , 678 So.2d 1277 (1996) .....                                     | <i>passim</i> |
| <u>Fla. Bd. Of Bar Examiners re: Applicant</u> , 443 So.2d 71 (Fla. 1983) .....           | 3             |
| <u>Foster v. Sharpe</u> , 114 So.2d 373 (Fla. 3rd DCA 1959) .....                         | 4             |
| <u>Franklin v. White Egret Condominium, Inc.</u> , 358 So.2d 1984 (Fla. 4th DCA 1978) ... | 4             |
| <u>In re: Dubreuil</u> , 629 So.2d 819 (Fla. 1993) .....                                  | 3             |
| <u>In re: Guardianship of Browning</u> , 568 So.2d 4 (Fla. 1990) .....                    | 4             |
| <u>In re: T.W.</u> , 551 So.2d 1186 (Fla. 1989) .....                                     | 3,4           |
| <u>In the Interest of D.B. &amp; D.S.</u> , 385 So.2d 83 (Fla. 1980) .....                | 3             |
| <u>In the Interest of E.H.</u> , 609 So.2d 1289 (Fla. 1992) .....                         | 3,4           |
| <u>Meyer v. Nebraska</u> , 405 U.S. 645 (1972) .....                                      | 7             |
| <u>Padgett v. Dept. Of Health &amp; Rehab. Svcs.</u> , 577 So.2d 565 (Fla. 1991) .....    | 3,5,7         |

Santosky v. Kramer, 455 U.S. 745 (1982) ..... 7

State ex rel. Sparks v. Reeves, 97 So.2d 18,20 (Fla. 1957) ..... 3,6

Von Eiff v. Azicri, 699 So.2d 772 (Fla. 3rd DCA 1997) ..... 4,6,7

Winfield v. Div. Of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985) ..... 4

Wisconsin v. Yoder, 406 U.S. 205 (1972) ..... 7

OTHER AUTHORITIES

Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right to  
Raise Their Bundle of Joy, 18 Fla. State U. L. Rev. 533 (1991) ..... 6

STATEMENT OF THE CASE AND THE FACTS

Amicus relies upon and adopts the Statement of the Case and the Facts set forth in the Initial Brief of Petitioners on the merits.

## SUMMARY OF THE ARGUMENT

The Third District's opinion should be reversed under the Florida Constitution. Fla. Stat. §752.01(1)(a) authorizes imposition of subjective notions of the "best interests of the child" on nuclear families with fit parents. Interference by state courts in one of the most sacrosanct zones of privacy -- the nuclear family unit -- should not be countenanced without finding, by clear and convincing evidence, that there exists a substantial threat of significant harm to a child. No such compelling state interest underlies §752.01(1)(a), however noble its purpose.

The goal of fostering good relationships between grandparents and grandchildren is also poorly served by adversarial legal proceedings against the grandchild's parents. A legislative scheme that makes the child an object of intra-family litigation itself creates serious potential for harm to that child. As in Beagle v. Beagle, 678 So.2d 1277 (1996), the Court should squarely hold that the presented subsection of §752.01(1) is unconstitutional. This statute harms Florida's families.

## ARGUMENT

Article I, Section 23, of the Florida Constitution states that "Every natural person has the right to be let alone and free from government intrusion into his private life . . . ." In Florida, this provision is considered "a guarantee of greater protection than is afforded by the federal constitution." Beagle v. Beagle, 678 So.2d at 1275. Accord In re: T.W., 551 So.2d 1186 (Fla. 1989).

Both before and since enactment of Florida's Privacy Amendment, this Court has firmly recognized that parents have a fundamental constitutional right to raise children without interference by the state. See, e.g., Beagle v. Beagle, 678 So.2d at 1277; In re: Dubreuil, 629 So.2d 819, 827 n. 11 (Fla. 1993) ("[P]arenting is not just a statutory responsibility -- it is a constitutional right."); In the Interest of E.H., 609 So.2d 1289, 1290 (Fla. 1992) ("We recognize that a constitutionally protected interest exists in preserving the family unit and in raising one's children."); Padgett v. Dept. Of Health & Rehab. Svcs., 577 So.2d 565, 570 (Fla. 1991) ("[T]his Court and others have recognized a longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism."); Fla. Bd. of Bar Examiners re: Applicant, 443 So.2d 71, 76 (Fla. 1983) (Family matters such as child rearing and education are privacy rights "which are fundamental or implicit in the concept of ordered liberty."); In the Interest of D.B. & D.S., 385 So.2d 83, 90 (Fla. 1980) ("there is a constitutionally protected interest in preserving the family unit and in raising one's children."); State ex rel. Sparks v. Reeves, 97 So.2d 18, 20 (Fla. 1957) ("[A] parent has a natural God-given legal right to enjoy the custody,

fellowship and companionship of his offspring.”) It is difficult to conceive of many contexts in which notions of constitutional privacy resonate more powerfully than in the setting of parenting decisions and families.

Because of the important privacy interests held by parents, this Court in Beagle v. Beagle expressly adopted a stringent test in evaluating whether a state court may impose grandparent visitation over the objections of a parent. 678 So.2d at 1277 (“We find it cannot without first demonstrating a harm to the child.”). The applicable standard of review requires that § 752.01(1)(a) survive a strict level of scrutiny:

The right of privacy is a fundamental right which we believe demands the compelling state interest standard . . . . The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the least intrusive means.

Winfield v. Div. Of Pari-Mutual Wagering, 477 So.2d 544, 547 (Fla. 1985). In holding that ‘this is a highly stringent standard,’ in In re: T.W., 551 So.2d at 1192, this Court noted that it could cite no cases in Florida involving “personal decision making” in which a state law or practice survived a compelling interest test.<sup>1</sup>

§ 752.01(1)(a) serves no compelling state interest. In the context of parental decisionmaking, a “compelling state interest” is one that will prevent harm to a child through circumstance of abuse, abandonment or neglect. See, e.g., In the Interest

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<sup>1</sup> Significantly, in this light, no state in which a grandparent visitation statute has been upheld has an express fundamental right of privacy in its state constitution. Compare Von Eiff v. Azicri, 699 So.2d 772, 774 n. 1 (3rd DCA 1997), and Beagle, 678 So.2d at 1275 (only Alaska, California, Florida, Hawaii and Montana have privacy provisions in their state constitutions).

of E.H., 609 So.2d at 1290; Padgett v. Dept. of Health & Rehab. Svcs., 577 So. 2d at 570. Here, however, precisely as in Beagle, the statute “does not require the State to demonstrate a harm to the child prior to the award of grandparent visitation rights.” Beagle, 678 So.2d at 1276 (emphasis added). Accordingly, under Beagle, *a fortiori*, Section 752.01(1)(a) must fail as facially unconstitutional.

Indeed, substantive concerns *about harm to children* do not appear to play a textual basis for any of the visitation enactments encompassed by §752.01(1). Rather, the title of Chapter 752 (“**GRANDPARENTAL VISITATION RIGHTS**”) plainly suggests the law’s true purpose and function. That purpose, while undeniably commendable, must be subject to constitutional restraint on the state’s power to impose child visitation for grandparents against the wishes of the child’s parent. See Beagle, 678 So.2d at 1272 (“We emphasize that our determination today is not a comment on the desirability of interaction between children and grandchildren.”)

Even were grandparent visitation rights a compelling state interest, the challenged statute is not the least intrusive means of furthering that interest. The statute sanctions lawsuits between a child’s parents and grandparents; fosters public allegations and discovery of “mental health” problems of family members (as well as “any other factors as are necessary” in the view of a trial court) (Fla. Stat. §752.01(2)(f)); and inherently undermines the integrity of parental authority in the family home. Most disturbingly, Section 752.01(1) and its subsections make children the objects of intra-family litigation, in many instances resulting in significant potential for harm to children in Florida. If Fla.Stat. §752.01(1) does serve a compelling state interest, it seems difficult to conceive

of means that are more intrusive to families than the legal action created under that statute.<sup>2</sup>

Judge Green's dissent in Von Eiff v. Azicri, 699 So.2d at 778-787, and the Petitioner's Initial Brief, identify a number of conceptual deficiencies in the Third District majority's opinion in Von Eiff. The ACLU would add several more concerns.

In order to reach its result in this case, the Third District both avoided and distorted the strict scrutiny analysis required by this Court's holding in Beagle. First, the Third District inappropriately leveled the playing field between grandparents and parents. See Von Eiff, 699 So. 2d 774 ("[W]ell-established precedent clearly provides that the rights and concerns of the child must ultimately control.")<sup>3</sup> That construct ignores necessary constitutional restraints. Under Beagle, as this Court clearly explained, "a best interest test without an explicit requirement of harm cannot pass constitutional muster in this specific context." 678 So. 2d 1276. See also Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right to Raise Their Bundle of Joy, 18 Fla. State U. L. Rev. 533, 551 (1991)("[W]hen the dispute is between a parent and non-parent, the court must do more than simply decide in which situation the child will be better off.")<sup>4</sup>

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<sup>2</sup>What the state can and should do, in the event a compelling state interest were to exist, is to provide mediation services, counseling, courses or other non-mandatory (and non-adversarial) services that might facilitate grandparent visitation and build stronger intergenerational family relationships. See, e.g., Fla. Stat. § 752.015.

<sup>3</sup>The only precedent cited by the Third District, however, is a 40 year old decision, State ex rel. Sparks v. Reeves, 97 So.2d 18 (Fla. 1957).

<sup>4</sup>Grandparents also bear more than a mere burden of persuasion in order to interfere with a parent's decisionmaking about family associations. Any proof of specific

The Third District also claimed to identify a "compelling state interest" in the harm that is visited on a child in the event of a parent's death. While no one would deny the tragedy for a child in that circumstance, the Third District's approach dangerously expands the types of "harm" that comprise a compelling state interest warranting interference with a parent's child-rearing responsibilities. Traditionally, the types of abandonment, abuse or neglect courts have considered in advancing a child's best interest against a parent's wishes have required some measure of culpability on the part of the parent. See, e.g., Padgett v. Dept. of Health and Rehab. Svcs., 577 So. 2d at 570 (holding that prior termination of a parent's rights in one child can support severing of the parent's rights in another child); Wisconsin v. Yoder, 406 U.S. 205 (1972)(Amish parents could not be convicted of violating compulsory school attendance laws); Santosky v. Kramer, 455 U.S. at 753; Meyer v. Nebraska, 405 U.S. 645 (1972)(state could not presume unmarried fathers are neglectful parents). In this case, the child's parents are not culpable for the harm relied on by the Third District, and the state lacks a compelling interest warranting intrusion on the rights of, and decisions made by, these parents.

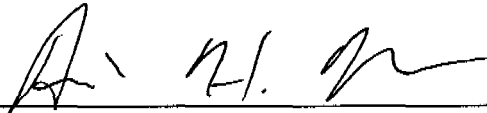
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harm to a child should be proven by clear and convincing evidence before the state may sanction intrusion on parental rights. Cf., Santosky v. Kramer, 455 U.S. 745 (1982).

CONCLUSION

For the foregoing reasons, the Third District's opinion in this case should be reversed.

Respectfully submitted,

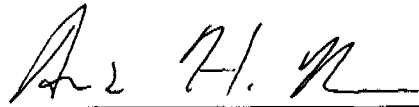


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to File Brief as Amicus Curiae has been furnished by U.S. mail to Brenda B. Shapiro, Esq., Courthouse Tower, 44 W. Flagler Street, Suite 750, Miami, FL 33130 and Jonathan A. Heller, Esq. and Avi J. Litwin, Esq. Of Geiger, Kasdin, Heller, Kuperstein, Charnes & Weil, P.A., 1428 Brickell Ave., 6th Floor, Miami, FL 33131 this December 19, 1997.



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