MY, WHAT BIG TEETH YOU HAVE, GRANDMOTHER!: How the Florida Courts Have Eaten Away Grandparents' Visitation Rights

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I. Introduction

We are all familiar with the story of Little Red Riding Hood. We know that her mother sent her through the woods to her grandmother's house to bring her a basket of goodies. But when Little Red Riding Hood got there, she found that the Big Bad Wolf had already devoured her grandmother whole. Like the Grandmother that was gulped down, this article isn't going to show how grandparents have fought the valiant fight, but how regardless of their fight, their visitation rights to their grandchildren have been narrowed, lessened and basically eaten up.

We currently know that more than five million children are living in households headed by grandparents.[1] Additionally, the U.S. Census 2000 data tell us that 2.4 million grandparents are taking on primary responsibility for their grandchildren's basic needs.[2] Many of these grandparents have assumed this responsibility without the parent of the child being in the home.[3] The 2000 Census was the first time that grandparental care-giving had been included in a decennial census.[4] However, the 2000 Census does not count the total grandparent population. There have been reports from various unsubstantiated sources that the total number of grandparents in the United States in 2001 was approximately 98 million and projections that by 2010 there will be over 117 million grandparents nationwide. Thus,

it would appear that the larger portion of the grandparent population do not reside with their grandchildren and must rely on visits in order to be involved in their grandchildren's lives.

The visitation rights of non-coresident grandparents is the focus of this article. Part II of this article looks at the common law rights of a grandparent juxtaposed against the fundamental right of parents. Part III of this article looks at the grandparents' rights movement and the expansion of their rights, as well as how some states have handled the issue of grandparent visitation rights. And finally, Part IV looks extensively at how Florida courts have removed the grandparent visitation foothold by determining that the grandparent visitation statutes are unconstitutional and violative of a parent's fundamental right to raise a child free from governmental intrusion.

II. Common Law Rights For Grandmother and Grandfather, Fundamental Rights for Mother and Father

Once upon a time, in an era far removed from present day, there lived the traditional family. Mother stayed home with the children and father worked during the day and neither spoke too loudly about the taboo subject of divorce or unwed families. Both maternal and paternal grandparents were involved in the lives of their children and grandchildren because they lived

nearby or within the same home. Grandparents, aunts, uncles, cousins, and the like were referred to as family, not the clinical terminology of "extended family". During this time, parents had the principled duty to keep family ties strong and encourage healthy relationships between grandparents and grandchildren. Thus, grandparents had no legal right to visit grandchildren, only a belief that the parents would obey their moral obligation.

However, even in the face of parental objection, there was little a grandparent could do through common law to compel visitation with a grandchild. Long before a parent's right to raise a child became fundamental, parental autonomy was protected by the parental rights doctrine.[5] This doctrine cosseted the idea that parents, not grandparents, had ultimate authority over the children.[6] The common law rule denying a grandparent standing over parental determination served several purposes. First, it protected parental autonomy.[7] Second, it protected the interests of the child.[8] And last, it prevented the government from getting involved in private matters whereby their judgment would be substituted for the parent's judgment.[9] A child being pulled into the middle of a dispute between her parents and grandparents was not a situation that would promote the well-being of the child. Additionally, having a judge inject himself into family matters was believed to not be

conducive to the promotion of any right of privacy. Someone had to have the final say in any matter concerning what was best for the child, and who better to make that decision than the persons who caused that child to come into being.

But with any rule of law, there are always exceptions. Grandparents could secure forced visitation with their grandchild only if they could show that visitation with the grandchild would be in the grandchild's best interest, that a substantial relationship existed with the grandchild, and the grandparent fit within a general exception or could show that a special circumstance existed.[10] General exceptions generally included situations where there existed a written agreement for visitation, where the grandparent and grandchild resided together for a time, or where the parents of the child were found unfit.[11] While there appears to be no specific definition for what qualified as a special circumstance, it appears that the circumstance would have to be more than the possibility that an existing and meaningful relationship between grandparent and grandchild might have been destroyed.[12] Thus, grandparents could only depend on the moral obligation that parents would allow visitation or on the fleeting chance that the grandparent may obtain a court order for visitation, while parent's rights were being solidly secured by the United States Supreme Court.

In cases having nothing to do with grandparent visitation, the U.S. Supreme Court seals the fate of a grandparent's right of visitation by determining that parents' entitlement to make decisions for their child free from governmental intrusion is a constitutional right. The first case making this determination is *Meyer v. Nebraska*.[13]

In *Meyer*, the parents challenge a statute that requires a child to successfully complete the eighth grade before a foreign language can be taught.[14] The Supreme Court finds the statute is unconstitutional since the fundamental right of a parent to have control over the child's upbringing is violated.[15] To show that this case isn't an anomaly, two years later the U.S. Supreme Court decides *Pierce v. Society of Sisters*, which agrees with the *Meyer* rationale in holding that the statute requiring children to attend public school violates the parent's liberty to direct the upbringing and education of children under their control.[16] The *Pierce* Court states, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[17]

Nonetheless, a parent's right to direct the upbringing of a child is not absolute. It takes the U.S. Supreme Court nearly 20 years to clarify that point. In *Prince v. Massachusetts*, the legal guardians of a 9-year-old girl direct the girl to hand out

religious pamphlets in violation of the state's child labor laws.[18] The guardians argue that they have a fundamental right as parents to control the child. In response, the Supreme Court states that, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . .[a]nd it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."[19] However, the Court upholds the statute since it is meant to protect the child from the harms associated with child labor.[20] As a result of this case, protection from harm to the child becomes the compelling reason for a state to intrude upon the parent's fundamental right of raising their child.

In the 1970's the U.S. Supreme Court again reiterates the right of parents to bring up and control their child. Even though *Wisconsin v. Yoder* deals with First Amendment protections of religion, it places great emphasis on the fundamental parental right to control their child free from governmental intrusion.[21] In this case, Amish parents challenge a state requirement of compulsory education for their children.[22] The U.S. Supreme Court gives great deference to the parents and agrees that compelling attendance violates not only religious rights, but parental rights as well.[23] The Court states, "The

history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[24] Furthermore, in *Parham v. J.R.*,[25] the U.S. Supreme Court holds that a child's procedural due process is not violated when that child is committed to a mental institution at his parent's behest.[26] The Court holds that there is an assumption that parents are acting in the best interest of their child and the Court refuses to allow the same procedural due process as it requires when committing adults.[27] Additionally, the Court states, "[t]hat some parents 'may at times be acting against the interest of their children'. . .creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest."[28]

Through the cases dealing with parental fundamental rights, the U.S. Supreme Court clearly establishes that there is a presumption that parents generally act in the best interest of their child and that parents have control over the upbringing of their child. Furthermore, because the right is fundamental, no law may infringe upon that right unless there is a compelling reason to do so and the means must be narrowly tailored. Compelling reasons for governmental intrusion arise only when

there is found to be a detriment to the child.[29] It is with this arsenal of parental rights that the U.S. Supreme Court finally weighs in on the issue of grandparents' rights.

Long after grandparents united and became successful in pressuring state legislatures into enacting laws forcing parents to allow grandparents to visit their grandchildren, the U.S. Supreme Court decided *Troxel v. Granville*.[30] In this case, the mother, Tommie Granville, limits the visitation of her two daughters to their paternal grandparents, Jenifer and Gary Troxel, after the children's father commits suicide.[31] The paternal grandparents immediately bring suit in order to obtain visitation with the two children under Washington statutes that allow "[a]ny person to petition the court for visitation rights at any time. . . when visitation may serve the best interest of the child"[32] The Washington Superior Court orders visitation with the grandchildren, the Washington Court of Appeals reverses and dismisses the action, and the Washington Supreme Court affirms the Court of Appeals judgment holding that the visitation statutes infringe on a parent's fundamental right to care for their children.[33] The U.S. Supreme Court grants certiorari and affirms the judgment.[34]

The U.S. Supreme Court, through the opinion of Justice O'Connor, begins by tracking parents' fundamental liberty in the care, custody and control of their children from its foundation

in *Meyer v. Nebraska* up through 75 years of case law to ultimately conclude that the Washington statutes unconstitutionally infringes on the well-established fundamental parental rights.[35] The Court terms the offending statute as "breathtakingly broad" since it allows "any person" the right to seek compelled visitation when such visitation serves the child's best interest.[36] Additionally, the Court takes issue with the fact that the statute does not provide any deference to the parent's determination as to what is in his or her child's best interest. Instead, the statute allows for the court's decision of whether such visitation is in the child's best interest to supersede a "fit" parent's decisions.[37] The Court succinctly states:

> [T]he decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination."[38]

The Court ultimately determines that the Washington statute violates Granville's fundamental liberty of the care, custody and control over her children.[39] However, because the Court bases its determination solely on the fact that the statue is overly broad, it gives no direction to state courts in assessing whether there should be any "showing of harm or potential harm to the child as a condition precedent to granting visitation."[40]

Thus, the decision leaves state court grappling with the appropriate standard of review to be used when deciding the constitutionality of their own grandparent visitation statutes.

III. Grandparents Push For Codified Visitation Rights And State Legislatures Respond In Kind.

Through a long string of federal cases, parents' fundamental right to the care, custody and control over their children becomes well grounded in American tradition and is protected by the Fourteenth Amendment of the United States Constitution. However, during this time, Grandparents are left in the lurch without any standing, other than the flimsy common law, to obtain visitation with their grandchildren. What was once an easily identifiable nuclear family started to blur. The structure of the traditional family was rapidly changing after the 1950's into single-parent families, divorced families, step-parent families, adoptive families, and so on. Because of the change in the family structure, the role of the grandparent changed as well. Andrew Cherlin, author of The Modernization of Grandparenthood states the following:

> All of these trends taken together - changes in mortality, fertility, transportation, communication, the work day, retirement, Social Security, and standards of living – have transformed grandparenthood from its pre-World War II state. Many people are living longer to become grandparents and to enjoy a lengthy period of life as grandparents. They can keep in touch more easily with their grandchildren; they have more time to devote to them; they have more money

> to spend on them; and they are less likely to still be raising their own children.[41]

Likewise, Justice O'Connor remarks in *Troxel v. Granville* that, "[t]he nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of [the] changing realities of the American family."[42] Consequently, the need to secure intergenerational contact finally moves out of the shadow of parental rights into the forefront of legislative action. Grandparents ultimately organize forming national organizations for grandparents' rights as early as 1983.[43] A little more than a decade later, grandparents' organizations successfully lobby each and every state to enact some form of grandparent visitation right statute.[44]

Unfortunately the states are disjointed and fragmented in their statutory laws governing the rights of grandparents to visit their grandchildren. There are many different categories of grandparent visitation statutes. Some focus on the best interest of the children, others focus on the marital or parental status of the parents, while still others focus exclusively on the function and significance of a grandparent.[45] In effect, some of the statutes require a strict scrutiny standard of review with a showing of detriment to the child as a compelling interest before forcing grandparent visitation.[46] Other states have allowed visitation based merely on the notion

that it is in the child's best interest to promote contact with the child's grandparents, thereby overruling the parent's judgment.[47] Still other states have decided grandparents' rights to visitation based on the notion that granting such visitation is not overly burdensome.[48] But even while state courts were floundering about in the 1980's and 1990's, the U.S. Supreme Court fails to grant review to any grandparent visitation rights cases in order to offer the states any guidance. As such, states become more permissive and continue the trend of expanding grandparent visitation rights without any kind of homogeny.

Late in the game, the American Bar Association (ABA) steps in to promote uniformity. In 1989, through a project funded by a grant from the Administration on Aging of the U.S. Department of Health and Human Services, the Commission on Legal Problems of the Elderly, the Family Law Section and the National Legal Resource Center for Child Advocacy and Protection collaborated to provide guidelines for grandparent visitation.[49] Their efforts result in a resource manual which offers practical guidance for lawyers, judges and mediators.[50] The resource manual urges that the disagreeing parties enter mediation prior to commencing any action for visitation rights, and that judges should require mediation after a suit has been filed if a satisfactory resolution is achievable.[51] Additionally, the

resource manual suggests that state legislatures delineate the standards for the best interest of the child including such factors as the extent of the relationship between the child and grandparent, the promotion of the psychological development of the child, the tension that may erupt between the child and the parents, the support and stability that visitation may bring on, the possibility that the parents and grandparents may at some point work together, and the child's wishes.[52] Lastly, the resource manual suggests that a guardian ad litem should be appointed for the children that are involved in the visitation disputes.[53]

Unfortunately, the states have not adopted the ABA guidelines wholesale, but instead have either ignored the ABA guidelines completely or incorporated only some of the provisions piecemeal.[54] To date, there is no uniform state act with regard to grandparent visitation statutes. However, even before *Troxel v. Granville* decision in 2001, and continuing thereafter, many state courts have been holding permissive grandparent visitation statutes unconstitutional.[55] If this trend continues, a uniform grandparent visitation act may be all together moot.

IV. Florida's Grandparental Visitation Rights

Florida has always been a haven for retirees, senior citizens, and in general, grandparents. Florida is home to

nearly 20% of all person aged 65 years and older in the United States.[56] Since Florida holds approximately 1/5th of the elder population, it necessarily follows that issues affecting that group of individuals are lobbied in the Florida House and Senate with consistent regularity. The right for grandparents to visit their grandchildren has seen much attention since the late 1970's. However, because the Florida Supreme Court has been very active in curtailing permissive grandparent rights, the grandparent activity seems to have waned for a time.

Grandparent visitation statutes in Florida came into being the same way they arose in other states. Grandparents united and lobbied for secure and codified rights to visit their grandchildren. In 1978, the Florida Statutes incorporate a provision which allows an award of visitation of a minor child to grandparents if deemed to be in the best interest of the child.[57] Additionally, the Florida Statutes incorporate a provision which allowed the court jurisdiction to award grandparent visitation rights upon death or desertion of a minor child's parents if deemed to be in the best interest of the child.[58] Six years later, the legislature thought it appropriate to merge the two grandparent visitation provisions into their own chapter and then expand the visitation rights to allow grandparents to seek an award of visitation when one or both of the child's parents were deceased, where the marriage of the

parents was dissolved, or where a parent has deserted the child.[59]

In 1990, the Florida Legislature again visits the Grandparent Visitation Statute, but this time incorporating the suggestions outlined by the ABA in the resource manual in order to provide guidance to courts handling grandparent visitation disputes.[60] Two provisions were added. The first delineates the criteria for determining the best interest of the child and the second promotes mediation as an alternative dispute resolution.[61] Again, in 1993, the Grandparental Visitation Rights statutes are modified, this time expanding the rights of grandparents to seek court ordered visitation when the parents of a child in an intact family deny such visitation to the grandparent.[62] Thus, in 1993, Florida Statutes §752.01(1) appears as follows:

> The Court shall, upon petition filed by grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:
>
> (a) One or both parents of the child are deceased;
>
> (b) The marriage of the parents of the child has been dissolved;
>
> (c) A parent of the child has deserted the child, or
>
> (d) The minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in s. 742.091.
>
> (e) The minor is living with both natural parents who are still married to each other whether or not there is a broken relationship between either or both parents of the minor child and the grandparents, and either or parents have used their parental authority to prohibit a relationship between the minor child and the grandparents.

Even after a decade and a half of expansion of grandparent visitation rights, the Florida Supreme Court did not finally step in to restrain the grandparent movement until the statutes allowed the state to intrude upon an intact family. Nonetheless, the Florida Supreme Court acted earlier than most states and even the U.S. Supreme Court in finding that the compelled grandparent visitation statutes offended parents' fundamental liberty interest in the care, custody and control of their children.

To understand why the last provision in §752.01(1) finally offended the Florida Supreme Court's sensibilities, we must look to Florida's Constitution. Florida, unlike most states, has an explicit right of privacy set out in its constitution which states, in pertinent part, " . . .every natural person has the right to be let alone and free from governmental intrusion into his private life . . ."[63] Because there is no qualifying term such as "unreasonable" before the words "governmental intrusion", Florida's right of privacy is much more expansive than even the federal constitution's right of privacy. Therefore, a parent's privacy interest in raising their children free from governmental intrusion is paramount and §752.01(1)(e), Florida Statutes (1993), was repugnant to that right.

Beagle v. Beagle, through the opinion by Justice Overton, is the case that strikes the initial blow to the Grandparental Visitation Rights statutes and ultimately starts the increased activity of limiting compelled visitation.[64] The facts of this case deal with married parents of a child who live together in an intact family and who oppose the paternal grandparents visiting the child. The paternal grandparents seek to compel visitation with their granddaughter based on §752.01(1)(e), Florida Statutes(1993).[65] The Court focuses exclusively on "whether it is proper for the government, in the absence of demonstrated harm to the child, to force such [intergenerational] interaction against the express wishes of at least one parent of an intact family."[66] The Court ultimately concludes that §752.01(1)(e) is unconstitutional since it infringes on parents' fundamental right to raise their child free from governmental intrusion without showing the compelling state interest of harm to the child.[67]

In the opinion, the Court meticulously sets out the history of the Grandparental Visitation Rights statute.[68] The Court also looks at how other jurisdictions have handled the issue of grandparent visitation rights and the violations to the federal constitution that arise.[69] The Court further reiterates that Florida is unique in having a more protective privacy right than most other jurisdictions or even the federal constitution.[70]

Thus, the Court declares that the appropriate standard of review when determining whether the state's intrusion into a citizen's private life is constitutional must be subjected to the compelling state interest standard.[71] Consequently, because §752.01(1)(e) uses only a best interest standard when determining whether forced visitation is appropriate instead of determining whether harm to the child exists prior to assessing the child's best interest, the Court finds that the compelling state interest standard has not been met.[72]

Through the opinion, the Court is showing that it is sympathetic to the dilemma facing grandparents who are unable to visit their grandchildren. Twice in the opinion the Court remarks that their holding is not a comment on "the desirability of interaction between grandparents and their grandchildren."[73] However, the Court refuses to base its decision on its own judgment as to whether or not a child should have contact with his or her grandparent or on the sentimentalities of normal grandparent and grandchild relationships. Furthermore, many of the Justices deciding this case are grandparents, but due to the sheer pervasiveness of §752.01(1)(e) into a parent's fundamental privacy right, the Justices are prevented from making any other determination as to the constitutionality of the provision.

Another point of interest in this case is the emphasis on the narrow holding. In the opinion, the Court succinctly

states, "We limit our holding to only those situations in which a child is living with both natural parents. . ."[74] Additionally, the Court seeks to leave all other areas of family law requiring only a best interest standard undisturbed: "We emphasize that our holding in this case is not intended to change the law in other areas of family law where the best interest of the child is utilized to make a judicial determination."[75] By so limiting the holding, the Court carves out a mouse hole which will later have to be boarded up one board at a time through other opinions dealing with grandparent visitation.

Therefore, because the Florida Supreme Court is not a proactive branch of government, it had to wait for a dispute to arise in order to react and correct any additional constitutional infirmities in §752.01(1). This opportunity came two years after the *Beagle* opinion in *Von Eiff v. Azicri*.[76]

The Von Eiff's were married prior to their child being born.[77] But shortly thereafter, the mother died and the father remarried.[78] The natural father and adoptive mother of the child limit and condition visits with the natural maternal grandparents.[79] The maternal grandparents seek an order of unsupervised visitation with their grandchild based on §752.01(1)(a), Florida Statutes (1993).[80] The lower court grants unsupervised visitation to the grandparents holding that such

visitations are in the child's best interest.[81] However, the Florida Supreme Court reverses the holding and instead finds that §752.01(1)(a) suffers from the same infirmity as §752.01(1)(e) (which was held unconstitutional in *Beagle*) since there is no requirement for a showing of harm to the child prior to governmental intrusion.[82]

Similar to the *Beagle* opinion, the *Von Eiff* opinion considers how other jurisdictions have handled the issue of grandparent visitation. Additionally, the *Von Eiff* Court includes in its opinion an excerpt from a Tennessee Supreme Court decision that outlines the federal fundamental right to rear one's own children.[83] Moreover, the opinion reemphasizes Florida's implicit right of privacy and the requirement that the standard of review necessary when a fundamental right is intruded upon is the highest level of scrutiny.[84] The Court also refuses to distinguish from the *Beagle* holding based on the status of the family since there is no "difference between the fundamental rights of privacy of a natural parent in an intact family and the fundamental rights of privacy of a widowed parent."[85]

Accordingly, the Court unambiguously spells out again why the statute's current state of basing an order of visitation only on the best interest standard is an inherent problem. "It permits the State to substitute its own views regarding how a

child should be raised for those of the parent. It involves the judiciary in second-guessing parental decisions."[86] This problem coupled with the failure to show harm to the child before assessing the child's best interests forces the Court to hold §752.01(1)(a) facially unconstitutional.[87]

The *Von Eiff* Court, like the *Beagle* Court, deals with only one provision of §752.01(1). However, three provisions still remain intact and still require only a best interest standard before ordering grandparent visitation. So once again, the Florida Supreme Court has to revisit the Grandparental Visitation Rights statutes and reemphasize the standard necessary in to order intrude upon a parents' decision to limit visitation. This occurs in *Saul v. Brunetti*.[88]

In *Saul*, the mother and father have out-of-wedlock child.[89] The mother and child live with mother's parents and the father lives with his own parents.[90] The mother of the child is killed in a car accident and the father takes the child to live with him and his parents.[91] Soon after, a dispute arises between the father and the maternal grandparents regarding visitation.[92] The maternal grandparents seek a visitation order under §752.01(1)(d), Florida Statutes (1995).[93] Using the same rationale as *Beagle* and *Von Eiff*, the Court holds that §752.01(1)(d) suffers from the same inadequacies as §752.01(1)(a) and §752.01(1)(e) in that there is no requirement

for a showing of harm to the child prior to governmental intrusion.[94] Additionally, the Court further refuses to distinguish from the *Beagle* or *Von Eiff* holding based on the fact that the mother and father in those cases were, at some point, married.[95] "If the father of a child born into a marriage has a right of privacy when the biological mother is deceased,. . ., it follows that the father of an out-of-wedlock child has the same right of privacy."[96]

Again the Florida Supreme Court continues its assault on §752.01(1) of the Florida Statutes but this time to a lesser degree. In *Belair v. Drew*, the Court does not hold the offending provision unconstitutional since the Court deals solely with the issue of whether the district court's denial of certiorari was inappropriate.[97] After a divorce from the child's father, the mother refuses visitation to the paternal grandparents.[98] The grandparents seek visitation under §752.01(1)(b).[99] The trial court awards temporary visitation until further hearing and refuses to rule on constitutionality of statute.[100] The mother petitions for writ of certiorari to Fifth District Court of Appeals which is denied and the Florida Supreme Court accepts jurisdiction.[101]

Since the Court deals only with the denial of the writ of certiorari, they do not expressly hold Section (b) to be unconstitutional.[102] However, the Court states in the opinion

that failure to grant review and forcing visitation based on §752.01(1)(b) directly contravenes the mother's right to privacy and decision-making in rearing her child.[103] And even though the Florida Supreme Court does not hold subsection (b) unconstitutional, Florida's Second and Fifth District Courts of Appeal hold §752.01(1)(b) to be unconstitutional as violating a parent's right to raise children free from governmental intrusion.[104]

The constitutionality of Florida Statutes 752.01(1)(c), which allows visitation when a parent has deserted the child, has not as of yet been the subject of Florida Supreme Court review either directly or indirectly. The Fifth District Court of Appeals opinion in *Clinbell v. Department of Children and Families* holds that subsection (c) is constitutional based on the limited holding professed in the *Beagle* opinion.[105] However, *Von Eiff* had not yet been decided by the Florida Supreme Court when *Clinbell* was decided and *Von Eiff* appears to overrule the Fifth District's rationale.

So now, in 2004, one would think that the Florida Statutes would reflect the massive overhaul to Chapter 752 that the Florida Supreme Court began nearly a decade ago. Quite the contrary. Florida Statutes, §752.01(1) (2003) appears as follows:

> The Court shall, upon petition filed by 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.

Even though the current statute removes the offending provisions held unconstitutional in *Beagle* and *Von Eiff*, it does not reflect the *Saul v. Brunetti* ruling, it still allows a showing of best interest of the child, it still defines what is to be considered when looking at the best interest standard, and still fails to require a showing of harm or detriment to the child as a condition precedent.[106]

Currently however, it appears that the attack on 752.01 has abated for the time being, since midway through the *Beagle* and *Von Eiff* line of cases, the Supreme Court began picking apart other portions of the Florida Statutes that deal with the grandparents' rights. In *Richardson v. Richardson*, the Court deals with the constitutionality of §61.13(7), Florida Statutes (1999).[107]

In this case, the mother and father of the child divorce and the mother is given custody of the child.[108] While the mother finishes her college education, she allows the minor to reside at the paternal grandparents' home.[109] After some time, the

mother takes the child and moves to North Carolina and refuses to return the child to the custody of the grandparents.[110] The grandparents seek an award of custody under § 61.13(7) which declares,

> 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.[111]

The Court holds that the statute is unconstitutional since it gives grandparents an elevated status to seek custody on only a best interest standard without an evaluation of detriment to the child. This violates the parent's fundamental privacy right as articulated in *Beagle* and *Von Eiff*.[112] The Court further asserts that because the statute deals with custody and not only visitation, it is even more intrusive upon the parent's rights.[113]

Like Chapter 752, §61.13(7) still exists in the 2003 Florida Statutes without any change, and regardless of the fact that it was found unconstitutional three years ago. Despite the Florida Legislature's failure to update the statutes that apply to grandparents' rights, the Florida Supreme Court is still chomping at the bits. The most recent case dealing with grandparent visitation that the Florida Supreme Court decided was just handed down in January of this year.

Sullivan v. Sapp continues where Richardson left off in finding that §61.13(2)(b)2.c., Florida Statutes (2001), is unconstitutional since it also violates a parent's fundamental liberty to raise children free from governmental intrusion without a compelling state interest.[114] Sullivan had a child out of wedlock and brings a paternity action against Sapp who is ultimately found to be the child's biological father.[115] Sullivan then requests a rehearing in order to clarify the issue of claiming the child as a dependent for federal tax purposes.[116] Unfortunately, before the hearing is held, Sullivan dies in a car accident and it is assumed that the father acquires custody of the child.[117] The maternal grandmother then motions to intervene in the paternity action in order to seek visitation of the child.[118] Section 61.13(2)(b)2.c., provides that,

> 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. 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.[119]

The Court first holds that the grandmother does not have a right to intervene in the paternity action to obtain visitation rights since the visitation interest is no longer the matter in litigation.[120] And while the Court could have ended its analysis without venturing into the constitutional question, the Court

goes forward to disapprove of *Spence v. Stewart* which holds that § 61.13(2)(b)2.c., does not offend the right to privacy expressed in the Florida Constitution.[121] Accordingly, the Court holds that §61.13(2)(b)2.c., Florida Statutes (2001), is unconstitutional based on the same reasoning as the *Beagle* line of cases and the *Richardson* case since it violates Florida's right of privacy by failing to require a showing of harm to the child prior to compelling and forcing the invasion of grandparent visitation.[122]

Obviously, the Florida Supreme Court will not even entertain the notion of allowing compulsory grandparent visitation unless the petitioners can irrefutably show that there is a detriment to the child that would warrant state intrusion into the private family realm. But even while the Florida Courts have eaten away the Florida Statutes that allow grandparents to obtain visitation when a parent refuses based solely on a best interest standard, the legislation has still not taken its cue to rethink and revamp the grandparental visitation rights statutes.

V. Conclusion

Most would agree that a continuing relationship between a child and his or her grandparents is beneficial. However, in some cases and for some parents, ending that relationship would be what they consider the most beneficial action for their child. Through nearly a century of case law, the parents'

rights are fundamental and must be given deference even if we don't agree with them, and as long as there is no detriment or harm to the child. While some states continue to substitute their judgment for that of the parents, many state courts like Florida have put a direct end to reaching into the family when there is no compelling reason to do so. The U.S. Supreme Court failed to specifically define what standard of review should be used in *Troxel v. Granville*.[123] Nevertheless, Florida had little difficulty in making the determination that strict scrutiny was required when a fundamental liberty was at stake. Florida made this determination five full years before the issue ever made it to the steps of the U.S. Supreme Courthouse.

Obviously the issue is not dead in Florida even though the grandparent rights statutes have been almost completely devoured by the Florida Supreme Court. The legislature is dragging its feet in updating the statutes, but it is finding alternative ways to push the intergenerational bonds. For example, a new provision in the Florida Constitution allows for a tax reduction to property when the value of the property is increased for the purpose of housing grandparents.[124] Perhaps offering carrots to maintain amenable intergenerational relations instead of forcing a particular brand of conduct by the stick will result in a more positive outcome than the debauchery that has occurred over the past decade to the codified grandparent visitation rights.

[1] United States Census – Children's Living Arrangements and Characteristics: March 2003, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, Issued June 2003.

[2] United States Census 2000 – Grandparents Living With Grandchildren: 2000, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, Issued October 2003.

[3] *Id*.

[4] *Id*.

[5] Maegen E. Peek. Grandparent Visitation Statutes: Do Legislatures Know The Way To Carry The Sleigh Through The Wide And Drifting Law? 53 FLA. L. REV. 321, 324 (2001).

[6] *Id*.

[7] *Id*. at 324-325.

[8] *Id*.

[9] *Id*.

[10] *Id*. at 325.

[11] *Id*.

[12] *Id*.

[13] 262 U.S. 390 (1923).

[14] *Id*. at 397.

[15] *Id*. at 401.

[16] 268 U.S. 510, 534 (1925).

[17] *Id*. at 535.

[18] 321 U.S. 158, 159 (1944).

[19] *Id*. at 166.

[20] *Id*. at 175.

[21] 406 U.S. 205 (1972).

[22] *Id*. at 207.

[23] *Id*. at 244.

[24] *Id*. at 232.

[25] 442 U.S. 584 (1979).

[26] *Id*.

[27] *Id*. at 602.

[28] *Id*. at 602-603.

[29] *Prince*, supra note 18, at 166.

[30] 530 U.S. 57, 120 S. Ct. 2054 (2000).

[31] *Id*. at 60.

[32] *Id*. at 61.

[33] *Id*. at 61-62.

[34] *Id*. at 63.

[35] *Id*. at 65-67.

[36] *Id*. at 67.

[37] *Id*.

[38] *Id*. at 70.

[39] *Id*. at 72.

[40] *Id*. at 73.

[41] Andrew J. Cherlin and Frank Furstenberg, Jr., The Modernization of Grandparenthood, in Arlene Skolnick, The Intimate Environment 131 (6th ed. 1989).

[42] *Troxel*, supra note 30, at 64.

[43] Edward M. Burns, Grandparent Visitation Rights: Is it Time for the Pendulum to Fall?, 25 Fam.L.Q. 59, 62.

[44] Peek, *supra* note 3, at 326.

[45] *Id*. at 327-330.

[46] *Id*. at 340.

[47] *Id*.

[48] *Id*. at 342.

[49] John H. Pickering, Grandparent Rights Project, ABA Journal, 75 A.B.A.J. 117, September, 1989.

[50] *Id*.

[51] ABA, Grandparent Visitation Disputes: A Legal Resource Manual 5, 122 (Ellen C. Segal & Naomi Karp eds. 1989)(hereinafter "Resource Manual")

[52] *Id*. at 121-123.

[53] *Id*. at 123.

[54] See, Florida Statutes §752.01 (2004).

[55] See, *Hawk v. Hawk*, 855 S.W. 2d 573 (Tenn. 1993)(finding that absent some harm to the child, there is no compelling justification for interfering with the parent's fundamental right); *Brooks v. Parkerson*, 454 S.E. 2d. 769 (Ga. 1995); (striking down grandparent visitation statute as violative of the parents' rights under the federal constitution); *Beagle v. Beagle*, 678 So.2d. 1271 (Fla. 1996)(holding compelled grandparent visitation on an intact family is unconstitutional); *Herbst vs. Sayre*, 971 P. 2d 395 (Okla. 1998)(holding that the grandparent visitation statute explicitly violated the federal constitutional rights afforded to parents regarding their children); *Wickham v. Byrne*, 199 Ill. 2d 309, 769 N.E. 2d 1 (2002)(holding Grandparent Visitation Act facially unconstitutional); *Roth v. Weston*, 789 A.2d 431 (Conn. 2002)(concluding that the grandparent visitation statute was unconstitutional as applied).

[56] United States Census 2000 – The 65 Years and Older Population: 2000, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, Issued October 2001.

[57] See, Florida Statutes § 61.13(2)(b)(1978); *Beagle*, supra note 46, at 1272.

[58] See, Florida Statutes § 68.08 (1978); *Id*. at 1273.

[59] See, Florida Statutes §752.01 (1984); *Id*.

[60] Resource Manual, supra note 51, at 123.

[61] See, Florida Statutes §752.01(2)(1990); Florida Statutes §752.015 (1990); Beagle, supra note 46, at 1273.

[62] See, Florida Statutes §752.01(e) (1993); *Beagle*, supra note 46, at 1273.

[63] Article I, Section 23, Florida Constitution.

[64] *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

[65] *Id*. at 1273-1274.

[66] *Id*. at 1272.

[67] *Id*.

[68] *Id*. at 1272-1273.

[69] *Id*. at 1274-1275.

[70] *Id*. at 1275-1276.

[71] Id. at 1276.

[72] *Id*. at 1277.

[73] *Id*. at 1272. The Court also states, "[i]t is not our judicial role to comment on the general wisdom of maintaining intergenerational relationships." *Id*. at 1277.

[74] *Id*.

[75] *Id*. at 1277.

[76] 720 So.2d 510 (Fla. 1998).

[77] *Id*. at 511.

[78] *Id*.

[79] *Id*. at 511-512.

[80] *Id*. at 512.

[81] *Id*.

[82] *Id*. at 516-517.

[83] *Id*. at 513. (citing *Hawk v. Hawk*, supra note 46, at 578)

[84] *Id*. at 514.

[85] *Id*. at 515. (citing *Fitts v. Poe*, 699 So.2d 348, 348 (Fla. 5th DCA 1997))

[86] *Id*. at 516.

[87] *Id*. at 517.

[88] 753 So.2d 26 (Fla. 2000).

[89] *Id*. at 27.

[90] *Id*.

[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *Id*. at 29.

[95] *Id*. at 28.

[96] *Id*. (citing *Brunetti v. Saul*, 724 So.2d 142 (Fla. 4th DCA 1998).

[97] 770 So.2d. 1164, 1165 (Fla. 2000).

[98] *Id*. at 1165.

[99] *Id*.

[100] *Id*.

[101] *Id*. at 1166.

[102] *Id*.

[103] *Id*. at 1167.

[104] See, *Lonon v. Ferrel*, 739 So.2d 650 (Fla. 2d DCA 1999); *Belair v. Drew*, 776 So.2d 1105, (Fla. 5th DCA 2001).

[105] 711 So.2d 194 (Fla. 5th DCA 1998).

[106] See, §752.01, Florida Statutes (2003).

[107] 766 So.2d 1036 (Fla. 2000).

[108] *Id*. at 1037.

[109] *Id*.

[110] *Id*.

[111] *Id*. at 1038.

[112] *Id*.

[113] *Id*. at 1040.

[114] 866 So.2d 28 (Fla. 2004).

[115] *Id*. at 30.

[116] *Id*.

[117] *Id*. (specifically footnote 2).

[118] *Id*.

[119] *Id*. at 35.

[120] *Id*. at 33.

[121] *Id*. at 37. (*Spence v. Stewart*, 705 So.2d 996 (Fla. 4th DCA 1998))

[122] *Id*.

[123] 530, U.S. 57, 120 S.Ct. 2054.

[124] Article VII, Section 4, Subsection (e), Florida Constitution.