Florida State University Law Review

Volume 18 | Issue 2 | Article 11

Winter 1991

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Michael J. Minerva, Jr.

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GRANDPARENT VISITATION: THE PARENTAL PRIVACY RIGHT TO RAISE THEIR "BUNDLE OF JOY"

MICHAEL J. MINERVA, JR.

THE concept of a “bundle of sticks” is a familiar teaching tool in first-year property courses. The phrase refers to the quantum of ownership in a piece of property. The more sticks in a person’s bundle, the more rights of control that person has over the property. A person with fee simple ownership has more sticks than a lessee, for example.

Parents do not own their children in the same way that people own property, but parents do have many legally cognizable rights vis-a-vis their children. Courts at all levels have cited the first1 and fourteenth2 amendments to the United States Constitution, article I, section 23, of the Florida Constitution,3 and even natural law4 as sources of the right of a parent to raise a child free from governmental interference.

Viewing parental rights as a bundle of sticks, any governmental usurping of parental prerogatives removes some of the sticks from the parents’ bundle. Until recently, the state did not take any sticks away from a fit parent. If one natural parent died, the whole bundle passed to the surviving parent much like property held in tenancy by the entireties. If the parents divorced, the state might be called upon to divide the bundle, much like an action for partition, but again the overall number of sticks remained the same.

The introduction of court-ordered grandparent visitation against the wishes of the natural parent has fundamentally altered this scheme. Under current Florida law, when one natural parent dies or abandons a child, the state takes away some of the sticks and gives them to the child’s natural grandparents. Further, when the natural parents divorce, both surrender some of the sticks to the child’s natural grandparents. Thus, the grandparents receive sticks they never had before the death or abandonment, or during their children’s marriage. In fact, as against the natural parents, these grandparents held no rights in their grandchildren at all. Previously, only parental misconduct, such as child abuse, worked a forfeiture of any of the sticks.

4. State ex rel. Sparks v. Reeves, 97 So. 2d 18, 20 (Fla. 1957).
Now, on the basis of divorce from or death or abandonment by the other parent, the state will transfer sticks away from an utterly blameless parent.

This Article examines the mechanism by which Florida courts take some of the sticks of control away from single parents. The emphasis is on the constitutional ramifications of governmental interference with parental prerogatives in the absence of a showing that the parent has harmed or will harm the child. Whether courts analyze these cases under common law rights of parents or under constitutional rights of privacy, Florida’s grandparent visitation law can achieve equitable results only if courts require the grandparent-petitioner to prove that, on the facts of each particular case, visitation serves a compelling state interest.

I. Florida’s Grandparent Visitation Statute

A. The Statute and Its History

Before 1978, Florida law afforded grandparents no avenue through which to seek the visitation of their grandchildren. That year, the Florida legislature amended Florida Statute section 61.13 to allow a court to award visitation as part of a dissolution of marriage proceeding. However, the grandparents were not given legal standing to appear or intervene and were not required to be made parties. Grandparents could also receive visitation privileges upon the death of or desertion by one of the child’s parents. Grandparents seeking visitation during a divorce proceeding or during an intact marriage of the child’s natural parents generally lost on issues of standing.

5. Excluded from the scope of this article are issues concerning: (1) the intricacies of the effect of step-parent adoption on grandparent visitation; (2) the effect of any rights the children might assert in these cases; and (3) any potential equal protection argument arising from the fact that only natural parents who are not still married can be defendants.

6. FLA. STAT. §§ 752.01, .02, .07 (Supp. 1990).

7. See Sheehy v. Sheehy, 325 So. 2d 12 (Fla. 2d DCA 1975) (an order is unjustified and unenforceable if it grants visitation rights to a non-parent of a child whose custody has been awarded to a fit parent); see also Tamargo v. Tamargo, 348 So. 2d 1163 (Fla. 2d DCA 1977), superceded by statute as stated in Wishart v. Bates, 531 So. 2d 955 (Fla. 1988), cert. denied, 109 S. Ct. 1633 (1989); Rodriguez v. Rodriguez, 295 So. 2d 328 (Fla. 3d DCA 1974), superceded by statute as stated in Wishart, 531 So. 2d 955.


9. Id.


11. Id. at 183-84 (citing Shuler v. Shuler, 371 So. 2d 588 (Fla. 1st DCA 1979)(grandparents had no standing to petition for visitation, even during the course of divorce proceeding)); see also Osteryoung v. Leibowitz, 371 So. 2d 1068 (Fla. 3d DCA 1979)(no independent grant of standing to grandparents for visitation absent dissolution proceeding).
the statute did not otherwise confer standing to grandparents, they could be awarded visitation only during a proceeding initiated by one of the parties to the dissolution action, and if the trial judge granted an award *sua sponte*.12

In 1984 grandparents gained the right to seek visitation on their own in certain situations. A court could grant visitation only upon petition by the grandparent and after the death of one parent, abandonment by a parent, or upon dissolution of the parents' marriage.13 The law also required the grandparent/petitioner to provide the parents with notice of the action and a copy of the petition; and provided that a step-parent adoption would not, by operation of law, destroy rights awarded to a grandparent under the chapter.14

**B. The 1990 Amendments**

In 1990 the legislature sought to overhaul chapter 752.15 The 1990 amendments made a number of changes, probably the least important of which was to make an award of visitation mandatory upon a finding that it was in the best interests of the child.16 Because the earlier statute provided that a judge "may . . . award reasonable rights of visitation" upon a finding of the child's best interests,17 theoretically,

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12. Note, *supra* note 10, at 185-86. This note discusses Putnal v. Putnal, 392 So. 2d 613 (Fla. 5th DCA 1981), in which the trial court ordered grandparent visitation pursuant to a modification proceeding initiated by the father. Because one of the contestants, rather than the grandparents, initiated the action, the case presented no standing problems.

13. The operative section of FLA. STAT. § 752.01 (1983 & Supp. 1984) provides:
   (i) The court may, 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) One or both parents of the child are deceased;
      (b) The marriage of the parents of the child has been dissolved; or
      (c) A parent of the child has deserted the child.

14. FLA. STAT. § 752.07 (Supp. 1984). The statute further provides that "the court may determine that termination of such visitation rights is in the best interest of the child and rule accordingly, after affording the grandparent an opportunity to be heard." *Id.* In Beard v. Hamilton, 512 So. 2d 1088 (Fla. 2d DCA 1987), the Second District Court of Appeal held that the grandparent's visitation petition could be heard as long as it was pending before the adoption proceeding. A pre-existing order granting visitation was not required to gain such rights. The court cited § 752.07, which preserves visitation rights when there is a subsequent adoption by the step-parent. *Id.* at 1091. In addition, the court reasoned that there was a potentially short period of time between a qualifying event such as death, dissolution, or abandonment and a step-parent adoption, which contrasted with the potentially long judicial process involved to secure visitation rights. Thus, it appears that the grandparent need only file a petition, rather than having to secure visitation rights, before a step-parent adoption. See, e.g., Note, *supra* note 10, at 193.

15. Ch. 90-273, §§ 6-8, 1990 FLA. LAWS 1721 (codified at FLA. STAT. §§ 752.01, .015, .07).

16. See FLA. STAT. § 752.01 (Supp. 1990).

a judge could refuse to award visitation even if he or she determined that visitation would be in the child's best interests. Common sense suggests, and case law supports, that no judge would choose such a course of action. Thus, the "mandatory" amendment seems to do no more than conform the statute to existing practice.

The situations under which a grandparent may seek a visitation award were increased by the 1990 Florida Legislature. Under the old law, a grandparent could petition for visitation only upon the death or abandonment of a parent or the dissolution of the parents' marriage. Under the 1990 amendments, a grandparent may also petition if "[t]he minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in s. 742.091."19

A second major change made in 1990 came in the form of a new mechanism for resolving grandparent visitation disputes. The new section 752.015 states a new public policy that favors internal resolution of family disputes, as well as favoring mediation where such internal channels fail. It instructs courts to refer newly filed petitions to mediation services in accordance with rules promulgated by the Florida Supreme Court.20

Additionally, the statute now leaves the door open for grandparents who could have been, but were not, granted visitation before a step-parent adopted the child. Previously, a grandparent had to file a petition for visitation before a step-parent adoption. The new law seems to require only that the grandparent could have filed a petition before the adoption in order to seek visitation.21 This new provision recognizes that the time period between the qualifying event and the step-parent adoption can be short, and even a diligent grandparent might not have had an opportunity to file this petition.

Finally, the Legislature cured one glaring defect by creating criteria which courts must consider in grandparent visitation cases. These criteria are as follows:

(a) The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents;
(b) The length and quality of the prior relationship between the child and the grandparent or grandparents;

18. FLA. STAT. § 752.01 (1) (1989).
21. See id.
22. These events include death, dissolution of marriage, abandonment, or a child born out of wedlock. Id.
(c) The preference of the child if the child is determined to be of sufficient maturity to express a preference;
(d) The mental and physical health of the child;
(e) The mental and physical health of the grandparent or grandparents;
(f) Such other factors as are necessary in the particular circumstances.\(^23\)

Criterion (a) reflects legislative recognition of the importance of preserving the authority of the parent. As one commentator has observed, grandparent visitation suits can create an authority crisis—the child becomes confused because parental authority has been usurped.\(^24\)

Through subsections (d) and (e), the Legislature has instructed courts not to award visitation, or at least to limit the award of visitation, when the mental or physical health of either the child or the grandparent would be adversely affected. It is unlikely that the Legislature intended for each case to involve thorough inquiries into the mental and physical well-being of the child and the grandparent. Most of the issues under these two subsections will probably involve the effect of conditions on visitation brought about by the age or health of the grandparent.

The length and quality of the relationship between the child and the grandparent is the most significant criterion.\(^25\) In situations where the two have a close relationship which the parent attempts to sever, the state's interest in intervening and protecting the child is the strongest. When there exists no relationship for the state to preserve, an award of visitation not only contravenes parental authority, but does so with little justification.

C. Court Interpretations of the "Best Interest Test" Under Chapter 752

Few challenges to the merits of an award of grandparent visitation have reached the appellate level. To the extent the opinions provide enough facts to allow meaningful analysis, these cases reveal a logical trend: courts are more likely to award visitation where the child and grandparent lived together, or otherwise had a close relationship. In


\(^{24}\) Note, Visitation Rights of a Grandparent Over the Objections of a Parent: The Best Interests of the Child, 15 J. Fam. L. 51, 60 (citing J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 37-38 (1973) [hereinafter Goldstein]).

\(^{25}\) See discussion infra text accompanying notes 27-45.
one case where the grandparent had essentially no relationship with
the child, the appellate court reversed a visitation award. This pat-
ttern reflects the overriding importance of the existence of strong and
meaningful relationship as a necessary precursor to any award of visi-
tation.

In the case of In re Guardianship of D.A. McW., the grand-
mother, in conjunction with the natural mother, raised the child since
birth and the child had resided in the grandmother's home since
birth. The mother died in an automobile accident when the child was
two years old and both the father, who had never married the mother,
and the maternal grandparents sought custody. Because of the mater-
nal grandmother's prior relationship with the child, the trial court
awarded her custody. The Fourth District Court of Appeal reversed,
citing the overriding strength of natural parental rights. The Fourth
District suggested that, on the facts of this particular case, the grand-
mother should be granted "liberal visitation privileges," because
"[a]n abrupt and complete severance of the child's relationship with
his grandmother would obviously be detrimental to the welfare of the
child."

For similar reasons, the Third District Court of Appeal in Griss v.
Griss ordered the trial judge to expand the unduly severe limitations
placed on visitation. In Griss, the grandfather seeking visitation had
shot and killed the child's stepfather in an incident later dismissed by
a jury as an act of self-defense. The child and his mother had lived
with the grandfather at various times over a period of several years
before the shooting. Because the court failed to elaborate on the de-
tails of the visitation order or any evidence which indicated that visita-
tion was in the child's best interest, a factual analysis of this case is
nearly impossible.

In Sketo v. Brown, the First District Court of Appeal reversed and
remanded an extensive visitation award which approached the level of
a joint custody arrangement. Before the death of their father, the two
children had lived with both parents on the west coast from birth until
ages three years and fourteen months, respectively. During that time,
the grandparents had only "minimal contacts" with the children "and

27. 429 So. 2d 699 (Fla. 4th DCA 1983), aff'd, 460 So. 2d 368 (Fla. 1984).
28. Id. at 702.
29. Id. at 704.
30. Id.
31. 526 So. 2d 697 (Fla. 3d DCA 1988).
32. Id. at 698.
33. 559 So. 2d 381 (Fla. 1st DCA 1990).
[had] visited them only on rare occasions." 34 When the father died, the mother and two children moved to Tallahassee, where the grandmother lived, and she visited with the children "on a few occasions." 35 According to the court, the relationship between the mother and grandmother "progressively deteriorated, and [the grandmother] was allowed only limited visitation with the children." 36

After a hearing, the trial court ordered weekly visitation, including two hours on alternating Wednesdays and a consecutive 24 hour period on alternating weekends, full (ten hour) days on the children's birthdays and certain holidays, and one week in the summer. 37 The order also allowed the grandmother to travel with the children out of town against the mother's wishes. The appellate court reversed the trial court, holding that it was not "in the children's best interest that the grandmother have the extensive visitation rights granted . . . in the . . . order."

Given its discussion of the limited contact between the grandmother and the children, the court likely relied on this factor in holding that the trial judge abused his discretion.

Finally, the opinion in Beard v. Hamilton 39 did not even mention the length or quality of the relationship between the grandparents and the children. Such discussion would have been mere surplusage, however, because the Second District Court of Appeal did not apply the "best interest" test. Instead, the court cited the fact that the parents sought to avoid visitation as a factor in its decision to award visitation. 40 If the best interests of the child were the true touchstone, courts would never use parental motives as a basis for their decisions.

The Beard court also misplaced the burden of proof. The court found in favor of the grandparents in part because "there [was] no compelling reason not to have grandparent's visitation in [this] . . . case" and because it was "obvious that the grandparents love[d] the child of their deceased daughter." 41 Contrary to this analysis, the statute did not require the parent to advance a compelling reason to defeat visitation. Instead, the statute placed the burden on the grandparent to prove that visitation was in the best interests of the child. 42 However, the court in Beard presumed that visitation was in

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34. *Id.* at 382-83.
35. *Id.* at 383.
36. *Id.*
37. *Id.*
38. *Id.*
39. 512 So. 2d 1088 (Fla. 2d DCA 1987).
40. *Id.* at 1091.
41. *Id.*
the best interests of the child and required the parents to prove otherwise.

Essentially, the *Beard* court created a presumption in favor of granting visitation. Following this analysis, courts could award visitation merely because a grandparent aggressively pursued visitation, expressed love for the child, and the parent could not unearth a compelling reason to deny visitation.

The new “prior relationship” criterion reduces the possibility that courts will rule along the lines of *Beard*. Because of the new statutory criteria, a court cannot perfunctorily award visitation without considering the quality of the existing relationship. Requiring the trial court to examine this specific factor precludes an award of visitation justified only by the general belief that “[s]urely a child’s welfare is promoted in most cases by having grandparents, rather than by not having them.” Had the Legislature so intended, it would not have demanded an inquiry into the prior relationship as it expressly directs in Section 752.01(2)(b), Florida Statutes.

The 1990 Legislature’s rejection of Senate Bill 450, which would have placed the burden of disproving best interest on the parent, also argues against the *Beard* court’s assertion. Even if the state does conclude that a child is better off by visiting with grandparents than by not, it does not follow ineluctably that the state can substitute its judgment for the parents absent proof that the parent’s choice will harm the child. The state might also conclude that children who participate in extra-curricular athletics develop socially better than children who do not, but the state’s authority to force such participation over the objections of the parent is dubious at best.

II. THE RIGHT TO PRIVACY

The concept of a right to privacy, the notion that there are certain realms of personal liberty where governmental regulation must be strongly justified, originated in the fourteenth amendment to the United States Constitution. The United States Supreme Court has construed the due process clause of the fourteenth amendment as protecting those personal interests which are “implicit in the concept of

43. *FLA. STAT.* § 752.01 (2) (b) (Supp. 1990).
44. *Ramey v. Thomas*, 483 So. 2d 747, 748 (Fla. 5th DCA 1986).
45. *See infra* text accompanying notes 150-155, for a discussion of the major provisions of this bill, which was introduced by Senator Karen Thurman (Dem., Orlando).
46. “For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all.” *Bean, Grandparent Visitation: Can the Parent Refuse?*, 24 J. Fam. L. 393, 441 (1985-86).
ordered liberty."""47 One of the first rights to be recognized as fundamental was ""the liberty of parents and guardians to direct the upbringing and education of children under their control."""48

The Supreme Court announced this right in Pierce v. Society of Sisters49 and based it on substantive due process principles which federal courts now recognize as the privacy right. As the Court explained years later, ""'[a]lthough '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the fourteenth amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.'""50

Although the guarantee of a right to privacy in the United States Constitution has been attacked by an increasingly conservative Supreme Court,51 Florida's state constitution seems to keep intact the persuasive authority of federal cases which have recognized a strong right of privacy.52 Specifically, article I, section 23, of Florida's constitution provides that ""'[e]very natural person has the right to be . . . free from governmental intrusion into his private life. . . .'""53

Because Florida voters adopted this amendment in 1980, well after the United States Supreme Court decisions in Griswold v. Connecticut54 and Roe v. Wade,55 the Florida Supreme Court has concluded that the amendment encompasses, at a minimum, all privacy rights protected by the United States Constitution under 1980 case law.56 As a result, post-1980 federal cases cannot erode the floor of privacy established in Florida by article I, section 23, even though Webster v. Reproductive Health Services57 signaled a retreat from the United States Supreme Court's previously vigorous protection of privacy rights. To illustrate the vitality of Florida's constitutional right of privacy, the Florida Supreme Court in In re T.W.58 stated:

49. 268 U.S. 510.
53. Id.
54. 381 U.S. 479 (1965).
56. In re T.W., 551 So. 2d 1186 (Fla. 1989).
58. 551 So. 2d 1186.
Article I, Section 23, [of the Florida Constitution] was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.59

Thus, federal cases that recognize a strong constitutional protection of privacy merely serve to complement post-1980 Florida cases by defining the minimal level of protection allowable in Florida.

Florida and federal courts have recognized a privacy "interest in avoiding public disclosure of personal matters,"60 and a "decision-making or autonomy zone of privacy interests of the individual."61 The latter includes "matters concerning . . . family relationships and child rearing."62

The right of privacy, however, does not apply in all situations where the state regulates or limits personal choice. "[B]efore the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist."63 Although no court, either Florida or federal, has directly addressed the issue of whether a natural parent has a reasonable expectation that he or she can raise a child without the state transferring the child into the temporary custody of a grandparent,64 cases decided at all levels indicate that such an expectation is reasonable.65

Even if the parent can carry the burden of proving that such an expectation is reasonable, the privacy right is not absolute and "will yield to compelling governmental interests."66 Because of the fundamental nature of the right of privacy, Florida applies the compelling state interest test, which "shifts the burden of proof to the state to

59. Id. at 1191-92 (quoting Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985)).
60. Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71, 76 (Fla. 1983) (citations omitted).
61. See Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980) (constitutional right exists in the decision of a competent, adult, terminally ill patient to refuse or discontinue extraordinary medical treatment as it falls within the zone of protected personal autonomy).
62. Applicant, 443 So. 2d at 76.
63. Winfield, 477 So. 2d at 547.
64. Sketo v. Brown, 559 So. 2d 381, 382 (Fla. 1st DCA 1990).
65. See cases cited supra note 69 and text accompanying notes 69-111.
justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. 67

III. THE RIGHT OF PRIVACY IN THE CONTEXT OF GRANDPARENT VISITATION

According to the Florida Supreme Court in *In re T.W.* 68 and *Winfeld v. Division of Pari-Mutuel Wagering*, 69 the Florida Constitution encompasses all of the privacy rights recognized in federal cases—and more. Two theories logically flow from this broad right of privacy which a parent could assert to retain control over grandparent visitation privileges. First, a parent has the right to raise a child free from governmental interference as long as the parent is fit and the child is not in danger of substantial harm. 70 Second, the parent has the right to define the family as he or she pleases, and not according to the state’s conception of what constitutes a “proper” family. Both of these theories will be thoroughly examined in the following two sections.

A. The Right to Raise a Child Free from Governmental Interference

The United States Supreme Court has recognized for most of this century that the fourteenth amendment protects the right of a parent to raise children without governmental interference. 71 For example, in *Pierce v. Society of Sisters*, 72 the Court struck down an Oregon statute requiring all school-age children to attend public schools. The Court stated that “[t]he 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.” 73 The *Pierce* Court relied on *Meyer v. Nebraska*, 74 decided two years earlier, which recognized “the right of the individual to . . . establish

67. *Id.*
68. 551 So. 2d 1186 (Fla. 1989).
69. 477 So. 2d 544.
70. Bean, *supra* note 46, at 449, concluded that “[s]o long as the alleged harm resulting from the refusal of grandparent visitation is not discernible from a thorough examination of the child’s mental, physical, emotional and moral health,” a court should refuse to order visitation.
72. 268 U.S. 510.
73. *Id.* at 535.
74. 262 U.S. 390.
a home and bring up children . . . as essential to the orderly pursuit of happiness by free men."

In later decisions such as *Griswold v. Connecticut* and *Roe v. Wade,* the Court cast the right in terms of privacy. These were the two most prominent in a line of cases concerning the right to decide whether one should become a parent. Although neither *Pierce* nor *Meyer* mentioned any right of privacy, *Griswold* and its progeny cited those cases as precedent for the Court's protection of certain personal decisions. As one commentator noted, "*Meyer* and *Pierce* survived the Court's retrenchment of due process principles, and the Court has subsequently relied upon them to recognize, under the due process clause, the parental right to raise children free from state interference." Privacy rights in Florida have followed a similar path. In early cases, such as *State ex rel. Sparks v. Reeves,* courts protected the right of a parent to raise a child without interference. In *Sparks,* the Florida Supreme Court asserted "that a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring. This is a rule older than the common law itself." Since *Sparks,* Florida courts have jealously guarded "the right of a parent, under natural law, to establish a home and bring up children. . . ." The enactment of article I, section 23, cemented this right in constitutional form.

Even since 1980, courts have on occasion upheld strong parental rights without indicating a textual source. For example, in *Department of Health and Rehabilitative Services v. Straight, Inc.,* the First District Court of Appeal discussed:

> the long recognized right and duty of parents to train and educate their minor children and to exercise such control and use such disciplinary measures as will enable them to discharge their parental duty. Parental authority in rearing children is not absolute and may

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75. *Id.* at 399 (citations omitted).
76. 381 U.S. 479 (1965).
77. 410 U.S. 113 (1973).
80. 97 So. 2d 18 (Fla. 1957).
81. *Id.* at 20 (citation omitted).
82. *In re Guardianship of D.A. McW.*, 429 So. 2d 699, 704 n.4 (Fla. 4th DCA 1983) (citation omitted).
83. 497 So. 2d 692 (Fla. 1st DCA 1986).
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be limited by the state if that authority is exercised in an unreasonable manner or is otherwise abused.84

Although the First District did not mention the state constitution's guarantee of privacy, the court did cite Lassiter v. Department of Social Services,85 a federal privacy case, as support for the strength of parental rights. The district court in Straight upheld the right of a parent to place a minor child in a drug treatment program against the minor child's wishes and without a court order. According to the court, the statute authorizing a parent or other interested party to petition the circuit court for involuntary placement of a child in such a program "does not in any way restrict the right of the parent to place a minor child in a treatment program regardless of the minor's consent if the minor is either a drug abuser or drug dependent."86

To date, In re T. W.87 is the most notable Florida case recognizing a person's right to make child-rearing decisions without state interference. Even though T. W. was a pregnant minor, the state constitution's right to privacy protected her decision not to bear a child. As a result, the state high court struck down the law that would have required a pregnant minor to get permission from her parents before obtaining an abortion.88

The court in T. W. took notice of the "wide authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child."89 As a result, article I, section 23, prohibits the state from forcing an unwed minor to seek parental permission before terminating her pregnancy or consenting to medical treatment for her child, and "this could include authority in certain circumstances to order life support discontinued for a minor child."90

Given the broad rights that the state recognizes in minor parents, it seems an unassailable proposition that a parent who has neither abused, neglected, or abandoned a child must then have a reasonable expectation that the state will not interfere with his or her decision to limit a grandparent's access to the child.

Courts have relied on the existence of other intrusions as factors reducing a person's reasonable expectation of privacy in a given situa-

84. Id. at 693 (emphasis added).
86. Straight, 497 So. 2d at 693.
87. 551 So. 2d 1186 (Fla. 1989).
88. This holding seems to comport with the level of privacy recognized in federal cases up to 1980, which was noted by Chief Justice Ehrlich in his concurrence, as well as Justice Overton and Justice Grimes in their concurring opinions. Id. at 1197, 1201, 1202.
89. Id. at 1195 (emphasis added).
90. Id. (citing In re Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984)).
The absence of such intrusions into parental decisions argues strongly in favor of the reasonableness of the expectation of privacy. Most significantly, in no other situation will the state order a child to leave a natural parent, absent abuse or neglect, unless such removal is in favor of the other natural parent who asserts an equally strong right.

**B. The Right to Define a Family Without Governmental Interference**

Another facet of the right to privacy which a parent in this context may assert is the right not to associate with the grandparent. As with the child-rearing right, the parent asserting this right must demonstrate the existence of a reasonable expectation of privacy in the choice to define the family as he or she pleases.

In *Roberts v. United States Jaycees*, the Court explained that in addition to the associational right expressly protected by the first amendment, the Due Process Clause of the fourteenth amendment contains an implied right of association in close personal and family relationships. "[The] choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State." Further, "[p]rotecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." Finally, the Court stated, "[t]he personal affiliations that exemplify these considerations . . . are those that attend the creation and suste-

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91. In drug testing cases, for example, courts have looked to see if a person has already agreed to certain other privacy invasions. If so, then a test for drugs seems to constitute only a minimally greater intrusion. See, e.g., Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299 (1989) (consent to medical examinations in collective bargaining agreement impliedly authorized routine drug testing); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing urine of Customs Service employees who were seeking promotions into drug interdiction area was constitutional).

92. The state does not even force a child to attend school. The Florida Home Education Act allows a parent to educate a child in the home. See Fla. Stat. § 228.041 (1989). Although this statute has yet to be addressed in a constitutional context in Florida, the United States Supreme Court's decision in Wisconsin v. Yoder, 406 U.S. 205 (1972), seems applicable. In *Yoder*, the Court struck down a compulsory education law as violative of the first and fourteenth amendment rights of the Amish. *Yoder*, however, seems to rest more on free exercise principles than on any general right to raise children without government interference.


94. "Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Loving v. Virginia*, 388 U.S. 1, 12 (1967).


96. *Id.* at 619 (citations omitted).
nance of a family [including] . . . the raising and education of children . . . and cohabitation with one's relatives."

The United States Supreme Court also addressed the issue of associational privacy rights in Moore v. City of East Cleveland.98 In Moore, a city zoning ordinance allowed only single family dwellings, and defined the word "family" in such a narrow manner that it was a crime for the plaintiff to live with her two sons and their two children. The Court held that "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."99 The opinion stressed the right to decide what unit constitutes a family, and admonished the government not to interfere with that decision.100

A parent fending off a grandparent visitation action might assert that the right of associational privacy, recognized in Moore101 and Loving v. Virginia,102 includes the right not to associate with a certain person. However, neither Moore nor Loving, in which the Supreme Court struck down a law prohibiting interracial marriage, directly support such a proposition. The right protected in Moore and Loving is the right to define one's family unit as he or she pleases, without state interference. An award of grandparent visitation essentially requires a parent to make the grandparent a part of the family, regardless of the parent's wishes.103 Although the grandparent can define his or her family to include the grandchild, this right exists only as against

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97.  Id. at 619-20 (citations omitted).
99.  Id. at 506.
100.  Id. Not all persons who claim a right to associate with one another can fall under the protection of the right to privacy. For example, in Belle Terre v. Boraas, 416 U.S. 1 (1974), a Long Island city had enacted a zoning ordinance similar to the one struck down in Moore, 431 U.S. 494. However, there was one crucial difference. The East Cleveland ordinance was much more restrictive than the Belle Terre ordinance.

In Moore, the ordinance narrowly defined "family" as those persons related to the head of the household, essentially limiting it to the nuclear family group. 431 U.S. at 495 n.2. (quoting full text of the ordinance). Conversely, the Belle Terre ordinance broadly defined "family" as persons related by blood, adoption or marriage. 416 U.S. at 1. It was not broad enough, however, to encompass the six unrelated college students who lost their suit against the Belle Terre ordinance. The Court properly dismissed the privacy theory without elaboration.

Similarly, in Roberts v. United States Jaycees, 468 U.S. 609 (1984), the Court denied associational privacy protection to the United Jaycees organization, who were equally undeserving of rights recognized only in the area of close personal and family relationships. Mere casual or large organizational relationships do not seem to qualify for greater privacy under this limited associational right.

101.  431 U.S. 494.
103.  "[I]t is clear that determining with whom the child should not associate is necessary to direct the development of the child." Bean, supra note 46, at 432.
state interference, and must yield to the stronger right of the parent.104

C. The "Integrity of the Body" Issue

There are several key distinctions between the decision to terminate a pregnancy and the decision to deny grandparent visitation. Unlike the abortion decision, which the state constitution clearly protects,105 the decision to limit visitation does not involve a governmental intrusion upon the integrity of the body. Also, unlike the abortion decision, the visitation decision does not involve the choice of whether a person will have a child, a right that the Florida Constitution clearly protects as well.106

A parent involved in grandparent visitation litigation does not assert a right that affects the integrity of the body. Instead, the parent asserts the right to raise a child and the right to define his or her family without governmental interference. Because these rights do not affect the integrity of the body, one could argue that they are not as fundamental as the rights asserted in the abortion cases. Although cases such as Pierce v. Society of Sisters107 and Meyer v. Nebraska108 did not involve the integrity of the body, those cases implicated constitutional rights other than the right of privacy.

The statute in Pierce made it illegal for a parent to send a child to parochial school, and the Supreme Court ruled this proscription violated basic free exercise of religion notions.109 Likewise, the statute in Meyer forbade the teaching of the German language, which undermined traditional free speech principles.110 The fact that the statute providing a mechanism for ordering grandparent visitation neither affects the integrity of the body nor implicates an independent constitutional touchstone as did the statutes at issue in Pierce and Meyer indicates that the expectation of privacy involved here is not as great as in those cases.111

104. This issue will be more fully discussed infra text accompanying notes 112-36, in the context of the state's interest.

105. In re T.W., 551 So. 2d 1186 (Fla. 1989). The Florida Supreme Court unanimously declared that a woman's right to terminate a pregnancy during the first trimester was a fundamental right protected by article I, section 23, of Florida's Constitution. Id. at 1192-93.

106. Id.; see also In re Guardianship of Barry, 445 So. 2d 365 (Fla. 2d DCA 1984).


108. 262 U.S. 390 (1923).


110. Meyer, 262 U.S. 390. Interestingly, in neither case did the Court expound upon, or even hint at the importance of, the separate constitutional considerations of the free speech and free exercise clauses.

111. In neither Pierce nor Meyer did the Court explicitly engage in the burden-shifting analysis which the Florida Supreme Court demanded in Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985).
The test for determining whether the privacy right attaches, however, is not how “strong” or “fundamental” one right is in relation to another. The courts have instead looked to whether the constitutional right asserted involves an area where the person has a reasonable expectation of privacy."112 According to the Florida Supreme Court, once the constitutional right attaches through a reasonable expectation of privacy, the state must justify all intrusions with a compelling state interest."113 Because a parent has the reasonable expectation that the state will not override the choice to limit a grandparent’s access to the grandchild, the burden shifts to the party seeking the intrusion to justify that intrusion."114

IV. The State’s Interest in Ordering Grandparent Visitation

As the Florida Supreme Court has explained, an intrusion into an area where a person has a reasonable expectation of privacy must be justified by the state."115 The state bears the burden of proving that the intrusion serves a compelling state interest."116 Because the state must justify its interference by proving the existence of a compelling need, Florida’s constitution will allow such an interference only when abstention would cause the child significant harm. This conclusion comports with principles restraining state interference in abuse and neglect cases, where the court will not abrogate parental rights absent clear evidence of harm to the child."117

As written, Section 752.01(2), Florida Statutes, requires courts to base any grandparent visitation decision on the “best interests of the child,” a familiar but amorphous standard in family law. Florida Statute chapter 61, regarding dissolution of marriage, defines that phrase in the context of custody battles between parents,"118 but most of the defining criteria have no relevance in the grandparent visitation context. The 1990 amendments will provide courts with greater guidance and should steer the courts towards equating the “best interests of the child” with a compelling state interest as required by the consti-

112. The “reasonable expectation of privacy” test originated in the landmark case of Katz v. United States, 389 U.S. 347, 351 (1967) (Harlan, J., concurring), and has continued to be the touchstone of privacy analysis.
113. In re T.W., 551 So. 2d 1186 (Fla. 1989); Winfield, 477 So. 2d 544.
114. Winfield, 477 at 547.
115. Id.
116. Id.
117. See infra text accompanying notes 145-51.
118. See, e.g., Shuler v. Shuler, 371 So. 2d 588 (Fla. 1st DCA 1979); see also Osteryoung v. Leibowitz, 371 So. 2d 1068 (Fla. 3d DCA 1979).
tution. Such an approach would avert arbitrary and capricious intrusions on parental privacy.

In the grandparent visitation context, the state (or the grandparent who is a party to the suit) could assert a variety of state interests that court-ordered visitation would serve. As the state did in T. W., it could claim that visitation serves to protect an immature minor and to preserve the family unit.119 Although the Florida Supreme Court rejected these arguments in T. W.,120 each state interest must be considered with respect to the specific intrusion.

Arguably, the state in T. W. sought to protect the pregnant minor from the burden of making the weighty decision of whether to have an abortion. In the context of a grandparent visitation action, the state seeks to protect the minor, but here the alleged harm stems from not having a relationship with a grandparent due to parental interference.121 This interference may be for cruel or vengeful reasons, or simply due to a sincere distrust of or dislike for the grandparent. In Enslein v. Gere,122 for example, the parent admitted that visitation was in the child's best interests, but alleged that the grandparent had petitioned the court despite the parent's willingness to allow visitation. The dispute, he claimed, was over "the parameters of such."123 One commentator has observed that "[b]ecause of the relatively comfortable lifestyle of Florida grandparents, courts should be wary of situations in which grandparents want to control their children's lives."124 The same could be said for vengeful grandparents who file petitions in retaliation against their children-in-laws.125

Although the Florida constitution requires a compelling justification for intrusions into areas in which a person has a reasonable expectation of privacy,126 the First District Court of Appeal in Sketo v. Brown concluded that "[t]he state has a sufficiently compelling interest in the welfare of children that it can provide for the continuation

119. T. W., 551 So. 2d at 1195.
120. Id.
121. See Griss, 526 So. 2d 697, 700 (Fla. 3d DCA 1988) (quoting Fla. H.R., tape recording of proceedings (April 23, 1984) (floor debate on H.B. 487) (tape available from the clerk of the Florida House of Representatives)) ("[T]his bill . . . really is a children's visitation rights bill. And I don't think we feel its fair to let spiteful parents in a particular case prevent their children from seeing their grandparents."). (Representative's name omitted in Griss quotation).
122. 497 So. 2d 705 (Fla. 4th DCA 1986).
123. Id.
125. The parent in Enslein, 497 So. 2d 705, alleged that the "real purpose of the action was to burden him financially." Id.
126. In re T. W., 551 So. 2d 1186, 1195 (Fla. 1989).
of relations between children and their grandparents under reasonable terms and conditions so long as that is in the children's interest.\textsuperscript{27}

The mere conclusion that the state has a compelling interest in the welfare of its children does not justify any intrusion into parental privacy. Under this analysis, the state can award grandparent visitation if it believes that a child will be better off with, rather than without, such visitation.\textsuperscript{28} As the Florida Supreme Court has indicated, when the dispute is between a parent and a non-parent, the court must do more than simply decide in which situation the child will be better off.\textsuperscript{29} Rather, the state must take into consideration the rights of the parent and can usurp parental authority only when to do so serves a compelling interest.\textsuperscript{30}

Consequently, the \textit{Sketo} court's analysis merely pays lip service to the compelling state interest test. It disregards the superiority of parental rights and treats the dispute as one between persons of equal rights with respect to the children. According to the \textit{Sketo} court, any regulation asserting the welfare of children as its touchstone need only be reasonable, rather than serving a compelling state interest. If this assertion were sufficient to carry the state's burden, the Florida Supreme Court would not have struck down the parental consent law in \textit{T. W.},\textsuperscript{31} in which the state attempted to justify its law by asserting a compelling interest in the protection of immature minors.

In contrast to the First District's \textit{Sketo} opinion, the Fourth District's analysis in \textit{In re Guardianship of D.A. McW.}\textsuperscript{32} reflects a precise understanding of the issues involved. First, despite the close relationship between the child and the grandparent, the parent's natural rights require that he or she be given custody, absent evidence that to do so would be affirmatively harmful to the child.\textsuperscript{33} This reflects a proper consideration of not only the best interests of the child, but also the rights of the parent.\textsuperscript{34} Second, despite the strength of a parent's rights, if the evidence demonstrated a danger of substantial harm to the child from not seeing the grandparent, then the state would

\begin{itemize}
\item \textsuperscript{127} 559 So. 2d 381, 382 (Fla. 1st DCA 1990).
\item \textsuperscript{128} Ramey v. Thomas, 483 So. 2d 747 (Fla. 5th DCA 1986).
\item \textsuperscript{129} \textit{In re Guardianship of D.A. McW.}, 460 So. 2d 368, 370 (Fla. 1984).
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} 551 So. 2d 1186.
\item \textsuperscript{132} 429 So. 2d 699.
\item \textsuperscript{133} \textit{Id.} at 703-04.
\item \textsuperscript{134} See also Behn v. Timmons, 345 So. 2d 388 (Fla. 1st DCA 1977), in which the First District Court reversed a trial court's order awarding custody to the maternal grandmother rather than to the father. In support of its decision, the appellate court cited the discussion in State \textit{ex rel.} Sparks v. Reeves, 97 So. 2d 18 (Fla. 1957), on the natural rights of parents to rear their children. 345 So. 2d at 389.
\end{itemize}
have enough of a compelling interest to override the parent’s preroga-
tive. 135

On review of D.A. McW., the state supreme court praised the Fourth District for its “thorough opinion,” and because it “correctly articulated the test to be applied in a custody dispute between two natural parents and distinguished it from the test applicable to a cus-
tody dispute between a natural parent and a third party.” 136 According to the supreme court, granting the grandparent custody “would permit improper governmental interference with the rights of natural parents who are found fit to have custody of and raise their chil-
dren.” 137 Although not citing the state constitution, the court echoed the “governmental interference” language of article I, section 23. 138

V. OTHER CHILD CUSTODY AND CONTROL ISSUES

In termination of parental rights and other similar cases, the courts have demonstrated great deference to the wishes of natural parents. Like many pre-Griswold United States Supreme Court decisions, opinions in Florida cases have not cited the right to privacy as the source of these parental rights. Instead, the courts have looked to funda-
mental, natural law principles. The characterization is not impor-
tant because the analysis under each approach has been virtually identical. An examination of these cases demonstrates that even apart from cases decided under article I, section 23, Florida has long re-
quired a standard similar to the compelling interest test before abro-
gating parental rights over children. 139

In Behn v. Timmons, 140 the First District Court of Appeal reversed a grant of custody to the maternal grandparent upon appeal by the natural father. Citing, inter alia, Sparks, the court stated that in the absence of a finding of unfitness on the part of the father, he must be awarded custody. “[E]xcept in cases of clear, convincing and compel-
ling reasons to the contrary, a child’s welfare is presumed to be best served by care and custody by the natural parent.” 141 The court reached its conclusion despite evidence that from May to October of every year, the paternal grandparents would care for the children seven days a week while the father worked cutting and baling hay.

135. 429 So. 2d 703-04.
136. In re Guardianship of D.A. McW., 460 So. 2d 368, 369 (Fla. 1984).
137. Id. at 370.
138. Id.
139. See, e.g., State ex rel. Sparks v. Reeves, 97 So. 2d 18 (Fla. 1957); see also Behn v. Timmons, 345 So. 2d 388 (Fla. 1st DCA 1977).
140. 345 So. 2d 388.
141. Id. at 389.
The paternal grandparents were aged 60 and 85, respectively, and were "not in the best of health." The maternal grandparents, conversely, were twenty years younger than their counterparts and lived in a "larger . . . more attractive and cleaner" home.

In dissent, Judge Ervin apparently did not place any particular significance on the fact that one party was a natural parent. The analysis in the dissent is merely a comparison of the households and lifestyles of the parties, much like in a custody battle between parents. The correct approach, approved by the supreme court in \textit{D.A. McW.}, is that where two parents battle over custody, their rights cancel out, and the court should only be guided by the best interests of the child. In contrast, however, where a non-parent contests a parent, "the rights of the parent as well as the welfare of the child must be considered."

In cases involving a potential termination of parental rights, Florida courts have required clear and convincing evidence that termination is in the child's best interests, such as in cases of abuse or neglect. In the case of \textit{In re W.D.N.}, for example, although the court recognized that "the right to the integrity of the family is among the most fundamental rights," the trial court's finding of child abuse justified an adjudication of dependency, which terminated parental rights. The child abuse involved in \textit{W.D.N.} was severe. The trial court found that the parent had broken the ribs of a four-month old child, inflicted at least ten bone fractures on a six-month-old child, received past adjudications of dependency, and had no capacity to learn proper parenting skills. According to an expert witness, there was "a high risk of additional child abuse if the children returned home."

Although \textit{W.D.N.} does not purport to represent the minimum findings necessary to terminate parental rights, it is an example of the kind of evidence necessary to override those strong rights. In \textit{Jones v. A.W.}, the Second District Court of Appeal reversed an adjudication

142. \textit{Id.} at 390 (Ervin, J., dissenting).
143. \textit{Id.}
144. 460 So. 2d 368, 369-70 (Fla. 1984).
145. \textit{Id.}
146. \textit{In re Ca\~nn}, 294 So. 2d 318 (Fla.), cert. denied, 419 U.S. 866 (1974); \textit{Jones v. A.W.}, 519 So. 2d 1141 (Fla. 2d DCA 1988); \textit{In re W.D.N.}, 443 So. 2d 493 (Fla. 2d DCA 1984); Potvin v. Keller, 299 So. 2d 149 (Fla. 3d DCA 1974), \textit{aff'd}, 313 So. 2d 703 (Fla. 1975).
147. 443 So. 2d 493.
148. \textit{Id.} at 495 (citation omitted).
149. \textit{Id.} at 494-95.
150. \textit{Id.} at 495.
151. 519 So. 2d 1141 (Fla. 2d DCA 1988).
of dependency, despite a finding that the parents, who were ultimately divorced, "have permitted the children to live in an environment which caus[ed] the children’s physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired."152 The mother retained custody, it appeared, because of the father's pattern of sexual abuse against the children, and despite her role in the past problems.

The foregoing cases indicate that Florida's protection of parental rights has the same origins as the right to privacy, even though the decisions do not always cite this constitutional provision. Unlike the above cases, the grandparent visitation situation does not involve the loss of custody by a parent. Rather, an award of grandparent visitation would deprive the parent of control only temporarily, and remove only some decisions from the scope of parental authority. Such infringement might be characterized as only a de minimis interference with parental rights. However, if construed as an intrusion of any substance, the courts should apply the compelling state interest test to visitation cases as well as to custody cases.

VI. THE FUTURE OF GRANDPARENT VISITATION

A number of issues remain on the horizon for grandparent visitation in Florida. First, neither the legislature nor the appellate courts have yet addressed the situation where a parent seeks to defeat visitation because of hostility between the parent and the grandparent. Second, the new situation in which a grandparent can petition for visitation of children born out of wedlock differs so dramatically from the other three situations where a parent dies or abandons a child or the parent's marriage is dissolved as to require wholly different justifications for intrusion by the state. Third, a number of proposals surface each year during the session, which may foretell future amendments.

A. Hostility Between the Parties as a Basis for Denying Visitation

One scenario not specifically addressed by either the 1990 amendments or previous law arises when the parent makes disparaging comments about the grandparent in an attempt to defeat visitation. A parent might be so bitter about the situation that they refuse to encourage a good relationship between the child and the grandparent, while avoiding affirmatively sabotaging it. The first criterion in Sec-

152. *Id.* at 1141-42 (quoting from order of trial court).
tion 752.01(2)(a), Florida Statutes, takes into account the possibility that the grandparent will respond in a similar fashion, and it seems to indicate that this will weigh against visitation. It is possible, therefore, that the legislature's omission of a similar provision for parental conduct indicates its desire not to so limit a parent's actions.

This issue has split both courts and commentators, and the 1990 amendments make the picture no clearer in Florida. On one side, a number of prominent child psychology experts argue that placing children in hostile situations is not in their best interests, and therefore, visitation should be denied when this factor is present. Some courts, however, have refused to allow parents to "manipulate" the litigation by fostering hatred towards the grandparent, then using that hostility as basis for arguing against visitation.

This dilemma exposes the inherent flaw in grandparent visitation statutes. Up until the time a grandparent seeks judicial intervention, a parent is free to "manipulate" the statute by creating an atmosphere hostile to the grandparent. Even at that point, the ability of a court to order the parent to act differently has yet to be established, and it might be too late anyway. A court should not seek to punish the parent by placing the child in a potentially traumatic situation.

If the "best interests of the child" standard truly guides the courts, then two possible solutions present themselves where one or both parties foster resentment toward the other party. First, the court can refuse to award visitation, thereby immunizing the child from any harm created by the conflict. Or secondly, the court can enjoin the parties from engaging in the harmful conduct.

Granting or denying visitation is fully within the power of the courts, so there is little controversy over the first possible solution. The court's power to order the parties to foster good relations between the child and the other party is less than certain. The court does have the authority to make such an order in a divorce case, at least according to one Florida court. In Schutz v. Schutz, the Third District Court determined that the first amendment does not prevent it from ordering a divorced mother to foster in her children a loving relationship towards their non-custodial father.

Schutz turned on the state's justification for limiting the exercise of the first amendment right of free speech, rather than on privacy con-

153. See Note, supra note 24, at 60 (citing Goldstein, supra note 24).
154. See Beard v. Hamilton, 512 So. 2d 1088 (Fla. 2d DCA 1987).
155. Note, supra note 24, at 61.
156. Schutz v. Schutz, 522 So. 2d 874 (Fla. 3d DCA 1988).
157. Id. at 875.
cerns, but the result should be no different under a privacy analysis. Because both natural parents assert an equally strong privacy right, those rights cancel out and the court is free to do simply what it thinks is best for the child.\textsuperscript{158} The parent cannot complain of state interference with privacy rights, because the state is acting on behalf of a person with an equally strong right.\textsuperscript{159}

In the grandparent visitation context, however, the rights of the two parties are not equal. The parent has much stronger rights; in fact, as against the parent, the grandparent has no constitutional rights.\textsuperscript{160} The legislature has chosen to deal with a grandparent who is not willing to foster a loving relationship with the parent, but, even with full knowledge of the Schutz\textsuperscript{161} case, has remained silent on similar actions by a parent. Ordering the parent to foster good relations with the grandparent implicates the parent’s privacy right of child rearing, and the strength of this right might call for a different result than was reached in Schutz.

\textbf{B. Visitation With A Child Born Out of Wedlock}

Before 1990, a grandparent could petition for visitation only after the death of a parent, abandonment of the child, or the divorce of the parents. In each of these situations, the state could have recognized that the child would be experiencing a potentially traumatic event and tried to minimize the upheaval by preserving contact with a grandparent who could serve a stabilizing function.

A grandparent can now petition for visitation with a child born out of wedlock. In this situation, the child has undergone no single traumatic event that visitation could alleviate.\textsuperscript{162} This intrusion on parental privacy rights cannot be uniformly justified on the basis of preserving

\begin{itemize}
  \item \textsuperscript{158} \textit{See In re Guardianship of D.A. McW.}, 460 So. 2d at 370 (Fla. 1984).
  \item \textsuperscript{159} \textit{See generally supra} text accompanying notes 112-35. The strong language employed by the Schutz court in chastising the custodial parent, as well as the importance the court placed on the welfare of the child, indicates that the court believed it also had the power to restrain the parent from making disparaging comments about a non-custodial grandparent. 522 So. 2d 874.
  \item \textsuperscript{160} Although Moore v. East Cleveland, 431 U.S. 494 (1977), established that the grandparent has the right to define his or her family without state interference, the Florida constitution does not prevent invasions of privacy by private persons. Like the federal constitution, \textit{state action} is necessary to trigger any privacy protection. In this situation, a parent seeks to prevent state (forced visitation) interference, and a grandparent seeks to prevent private (parental) interference. As a result, a grandparent would have no right of privacy vis-a-vis a parent.
  \item \textsuperscript{161} 522 So.2d 874 (Fla. 3d DCA 1988).
  \item \textsuperscript{162} Under pre-1990 law, section 752.01 (1) (a), Florida Statutes, would have provided an avenue for visitation based on the status of the parents at the time of birth only in the unusual event that a father had died or that the parents had divorced between the conception and birth of a child. Nothing in the text of the statute indicates that the timing of the death or divorce would have any effect on the right to petition.
\end{itemize}
GRANDPARENT VISITATION

stability in the child's life. The children of never-married parents can lead perfectly stable lives, notwithstanding the absence of a "traditional" family setting.

In the "child born out of wedlock" cases, the grandparent must prove that the benefits of having a child exposed to the non-custodial parents side of the family constitute a compelling interest which outweighs the parent's right of privacy. The difficulty of proof in such a case is readily apparent.

C. The Legislative Horizon

The 1990 Legislature rejected a number of bills, the operative provisions of which might resurface in subsequent sessions. A discussion of Senate Bill 450 (1990), sponsored by Senator Karen Thurman, and which contains some radical proposals, illuminates the possible future of chapter 752.

Section 1 of Senate Bill 450 proposed reversing the current burden of proof by requiring the parent to demonstrate that court-ordered visitation would not serve the child's best interests. Currently the grandparent has the burden to prove visitation would be in the child's best interests. The proposed amendment, however, would require a parent to justify why there should not be a governmental intrusion into the realm of personal privacy. This runs counter to the constitutional requirement that the state must justify any intrusion into personal privacy. Consequently, this provision probably would not withstand constitutional scrutiny.

As a practical matter, a reversal of the burden of proof would encourage parents to bring before the court as much damaging information about the grandparent as possible in an effort to defeat visitation, aggravating an already unpleasant conflict. As pointed out by one commentator, the average single parent in Florida has less available funds than a grandparent in this state. Requiring the parent, as a defendant, to rebut the presumption in favor of grandparent visitation would place an undue financial burden on already underfinanced parents.

163. Dem., Orlando.
164. See supra text accompanying notes 112-35.
165. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976); In re T.W., 551 So. 2d 1186 (Fla. 1989).
166. See Bean, supra note 46, at 442-45.
167. Note, supra note 10, at 207-08.
168. Courts could help cure this problem by awarding attorney's fees to parents who must defend grandparent visitation actions. See generally Enslein v. Gere, 497 So. 2d 705 (Fla. 4th DCA 1986).
Section 3 of 1990 Senate Bill 450 proposed creating an inimical device apparently designed to force parents into financial submission. The section called for mediation of these disputes, at the grandparent-petitioner's request, with costs to be borne by the grandparent-petitioner. The bill then provides that if, after the parent receives the written request to mediate, "the parent fails to mediate in good faith, he shall be responsible for the costs and attorney's fees of a grandparent who is awarded greater visitation rights, in any subsequent legal action to establish grandparent visitation rights, than had been allowed by the parent." 169

Therefore, once the parties reach mediation, only the parent has an incentive to settle for it is the parent who must bear the risk of paying costs and fees. This leaves the grandparent free to seek the most expensive legal counsel. Because the grandparent will have, on the average, a greater income than the parent, 170 the party least able to pay may be forced to bear the greatest cost. Thus, Senate Bill 450 would have forced the parent to allow greater visitation or face the risk of extreme legal expenses. It is not clear how imposing such a financial burden on the child's household merely for the sake of grandparent visitation would serve the best interests of the child.

VII. CONCLUSION

The state and federal constitutions preserve the long-recognized parental right to raise a child free from governmental interference. A parent does not have the unqualified right to keep the entire bundle of sticks that represent control of the rearing of a child. Just as it has in all other circumstances, however, the state should take sticks from the parental bundle only where the failure to do so will affirmatively harm the child. The Legislature has taken great strides towards this end by enacting criteria which will help prevent arbitrary and capricious intrusions into the realm of parental rights. The courts must take the next step, and apply these criteria in accordance with the compelling state interest test under which the state must justify its intrusion into the parent's and child's life.

169. Fla. SB 450, § 3 (1990) (proposed Fla. Stat. § 762.004 (2)).
170. Note, supra note 10, at 207 (In 1980, the average income for heads of households in their "grandparent years" exceeded those in their child-rearing years by $4,000.00).