by Ronald H. Kauffman

Unbowed, Unbent, Unbroken: An Update on Grandparent Visitation

The struggle for grandparent visitation rights in Florida is a game of thrones between the three branches of government.[1] The Florida Supreme Court has stricken all previous attempts to legislate grandparent visitation as unconstitutional. Yet, the legislature and the governor keep passing new laws to enforce grandparent visitation rights for Florida voters.

After years of battles between governors, legislators, and judges, Florida grandparent visitation rights have come to resemble Winterfell. Maybe, "summer is coming." In 2012, the governor signed into law a statute indirectly granting grandparent visitation rights for deployed military parents.[2]

In 2015, the legislature repealed unconstitutional language in earlier versions of the grandparent visitation statute and created a new limited grandparent visitation statute.[3] This year, the Florida Supreme Court enforced an out-of-state grandparent visitation order despite the lack of any showing of harm to a child.[4]

This article briefly reviews the history of grandparent visitation rights in Florida and provides an update on those rights through the Florida Supreme Court's recent decision in *Ledoux-Nottingham v. Downs,* 210 So. 3d 1217 (Fla. 2017), earlier this year.[5]

The Gift

In common law, there was never a legal right to nonparent visitation, and Florida has clung to that tradition.[6] A very high percentage of elderly voters reside in Florida.[7] Not surprisingly, Florida politicians have historically tried to provide enforceable visitation rights to grandparents — even over the objections of fit parents.

In 1978, the legislature made two changes to the Florida Statutes that granted enforceable rights to visit their grandchildren. First, F.S. §61.13(2)(b) permitted courts to award grandparents visitation rights of a minor child if it is deemed by the court to be in the child's best interest.[8]

Later, F.S. §61.08 was amended to give courts, which are competent to decide child custody matters, jurisdiction to award the grandparents of a minor child visitation rights upon the death of or desertion by one of the minor child's parents if a court finds it to be in the minor child's best interest.[9]

In 1984, the legislature enacted Ch. 752, "Grandparental Visitation Rights," which included a procedure for granting visitation rights to grandparents in three situations: 1) when one or both parents of the child are deceased; 2) when the marriage of the child's parents has been dissolved; or 3) when a parent of the child has deserted the child.[10]

In 1990, the constitutionality of Ch. 752 was challenged in *Sketo v. Brown*, 559 So. 2d 381 (Fla. 1st DCA 1990). In *Sketo*, a parent argued F.S. §752.01 violated her constitutional right to privacy.[11] The First District upheld the statute, finding that Florida has a sufficiently compelling interest in the welfare of children in a family in which a parent died, and it can provide for the continuation of relations between children and their grandparents so long as it is in the children's best interest.[12] Grandparent visitation had won its first major battle.[13]

Finally, in 1993, the legislature broke all the chains on grandparent visitation rights by adding F.S. §752.01(1)(e). That section allowed courts to award reasonable visitation rights to grandparents when it is in the best interest of the minor child; even if the child is living with both parents who are still married to each other.[14]

The Wall

The Florida Supreme Court built a massive wall blocking Florida grandparent visitation rights in *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996). The facts in *Beagle* are simple. The grandparents, relying on the new F.S. §752.01(1)(e), filed an action for visitation with their granddaughter.

The parents moved to dismiss the petition. At the time of the filing of the petition, the parents were living together with the child as an intact family. The trial court dismissed the grandparents' petition, finding the statute violated the parents' right to privacy, and the grandparents appealed.

The First District, which six years earlier had decided *Sketo*, reversed.[15] In *Sketo*, the panel found the statute constitutional to the extent it provided grandparent visitation rights in the event of a death of a parent, based on a best interest of the child test. In *Beagle*, the First District applied the same best-interest analysis to the new F.S. §752.01(1)(e), and upheld the statute.

The Florida Supreme Court quashed the First District's *Beagle* opinion, and remanded with directions to affirm the trial court. The Florida Supreme Court explained that parenting is protected

by the right to privacy, a fundamental right, and any intrusion upon that right must be justified by a compelling state interest.

In Florida, that compelling state interest was harm to the child: "[W]e hold that the [s]tate may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm."[16]

However, the Florida Supreme Court did not hold that all grandparent visitation was unconstitutional. The *Beagle* panel only answered a narrow question: Did the state show a compelling state interest in imposing grandparental visitation sufficient to overcome the fundamental rights of parents? The *Beagle* court concluded there was no compelling state interest, unless the state is acting to prevent demonstrable harm to a child.[17]

Two years after *Beagle*, F.S. §752.01(1), which provided for grandparent visitation rights, met the same grisly fate as House Stark. In *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998), the high court — relying on the Florida Constitution's explicit right of privacy — ruled that the statute infringed on this fundamental right, and had to survive the highest level of scrutiny.[18]

The Florida Supreme Court held that subsection (1)(e) did not survive the stringent standard of the compelling state interest test because it did not require a showing of "demonstrable harm to the child before the [s]tate's intrusion upon the parent's fundamental rights."[19]

The Florida Supreme Court held that F.S. §61.13(7) was also unconstitutional. F.S. §61.13(7), which authorized custody — as opposed to visitation — for grandparents if a child is "actually residing with a grandparent in a stable relationship."

In *Richardson v. Richardson*, 766 So. 2d 1036 (Fla. 2000), the Florida Supreme Court reaffirmed that in a dispute between a fit parent and a third party, there must be a showing of detrimental harm to the child in order for custody to be denied to the parent. The court found F.S. §61.13(7) unconstitutional on its face because it equated grandparents with natural parents and permitted courts to determine custody between the two using only a best-interest-of-the-child test.[20]

The High Sparrow

In *Troxel v. Granville*, 530 U.S. 57 (2000), the grandparents petitioned to expand their visitation rights with their deceased son's daughters. The children's mother had reduced the grandparents' visitation to one afternoon a month, after years in which the children's father brought them alternating weekends. The trial judge, after waxing nostalgically about his own childhood visits to his grandparents, not surprisingly ordered increased visitation.[21]

The Washington Supreme Court held that the statute unconstitutionally interfered with the fundamental right of parents, finding: "Short of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a compelling state interest overruling a parent's

fundamental rights."[22]

The U.S. Supreme Court, in a plurality decision, affirmed. The Supreme Court reasoned that the 14th Amendment's due process clause protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. The *Troxel* Court then affirmed the presumption that fit parents act in the best interests of their children. The Washington statute was held unconstitutional because the statute "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. In effect, the judge placed."[23]

The majority also adopted a part of Justice Kennedy's dissent, which recognized that merely litigating grandparent visitation is disruptive enough of a parent-child relationship that the constitutional right of a parent is implicated: "If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorneys' fees alone might destroy her hopes and plans for the child's future."[24]

However, *Troxel* never found that the due process clause requires a showing of harm or potential harm to the child as a condition for granting visitation. Instead, the U.S. Supreme Court left those decisions for the states to decide because "much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the due process clause as a per se matter."[25]

Troxel established that a statute, which places the burden of proof on a fit parent to show that grandparent visitation would not be in the best interest of the children, violates the U.S. Constitution.

Florida, however, is governed by its own constitution. The Florida Constitution contains an express right of privacy written into it: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."[26]

The Florida Supreme Court has concluded that the express privacy right in Florida's Constitution is much broader in scope than that of the U.S. Constitution.[27] Accordingly, the Florida Supreme Court has determined that the state may not intrude upon a parent's right to raise his or her children unless the child is threatened with harm.[28]

Oathkeeper

During the 2008 session, the Florida governor signed into law §61.13002. Briefly, the statute prohibits a court from modifying a custody order as it existed at the time a parent was activated to military service, unless there is clear and convincing evidence the modification is in the best interest of the child. The legislature unanimously added §61.13002(2) in 2010.

The amendment to the statute resuscitated grandparent visitation, at least for some, by providing that "if a parent is activated, deployed, or temporarily assigned to military service on orders in excess of 90 days and the parent's ability to comply with time-sharing is materially affected as a result, the parent may designate a person or persons to exercise time-sharing with the child on the parent's behalf."

The amendment authorizes a military parent to designate a child's grandparent the right to exercise time-sharing, unless the civilian parent can show that the visitation is not in the best interest of the child.

Then, in 2015, the Florida Legislature passed §752.011, which provides additional grandparent visitation rights:

> A grandparent of a minor child whose parents are deceased, missing, or in a persistent vegetative state, or whose one parent is deceased, missing, or in a persistent vegetative state and whose other parent has been convicted of a felony or an offense of violence evincing behavior that poses a substantial threat of harm to the minor child's health or welfare, may petition the court for court-ordered visitation with the grandchild under this section.

The legislature, in this latest statute, gave grandparents limited visitation rights. For example, it authorizes a grandparent of a minor child, whose parents are deceased, missing, or in a persistent vegetative state, to petition the court for visitation.

Moreover, a grandparent may also petition for visitation if there are two parents, one of whom is deceased, missing, or in a persistent vegetative state and the other has been convicted of a felony or an offense of violence evincing behavior that poses a substantial risk of harm to the child.

Under the new statute, the petitioning grandparent must show, by clear and convincing evidence, that the parent is unfit, or there has been significant harm to the child. However, if the grandparent meets that burden, the court can grant visitation if it is in the best interest of the child and will not harm the parent-child relationship.

The statue also requires courts to consider the "totality of circumstances," and includes a list of several factors the court must consider to determine the best interest of the child.

The Wars to Come

Despite the recent legislative victories for grandparent visitation rights in Florida, the enforcement of out-of-state grandparent visitation court orders has always been left "beyond the wall" — until very recently.

• M.S. v. D.C., Jr. — In *M.S. v. D.C., Jr.*, 763 So. 2d 1051 (Fla. 4th DCA 1999), the court entered a stipulated custody agreement in a Connecticut dissolution of marriage. The custody agreement adopted in the final judgment gave the father custody of the three minor children. Three years after the divorce, the father shot and killed his girlfriend while the children were present in the home. The father was convicted of murder, and sentenced to 60 years in prison. The mother received sole custody by a stipulated modification order entered in Connecticut.

The stipulated modification order also provided for grandparent visitation. After the order was entered, the mother relocated with the children to Florida and filed a petition for termination of the father's parental rights.

The paternal grandparents filed a separate petition for visitation based on the stipulated modification order. The trial court denied the mother's petition to terminate the father's pa-

rental rights and granted the grandparents visitation rights. The Fourth District Court of Appeal reversed.

On the issue of grandparent visitation rights, the panel in *M.S.*, relying on the Florida Supreme Court's decision in *Von Eiff*, held that the grandparent visitation rights violated the privacy guarantees of the Florida Constitution.

The Fourth District refused to afford full faith and credit to the Connecticut custody decree. Although the *M.S.* panel acknowledged that the Connecticut order was entitled to respect on comity principles, it held that principles of comity do not "prevent the application of an overriding provision of our law, applying a paramount public policy." The court further held that few policies in Florida were "more paramount than enforcement of an exercise of a recognized constitutional right to privacy."[29]

• Fazzini v. Davis — The Second District Court of Appeal faced a similar issue in *Fazzini v. Davis,* 98 So. 3d 98 (Fla. 2d DCA 2012). In *Fazzini*, the minor child's mother died shortly after the child's birth. The father was on active duty in the Navy and placed his child in the custody of his parents in Florida. The maternal grandmother, Pamela Davis, filed suit in Virginia seeking custody or visitation with the child. The father and maternal grandmother entered into a consent judgment providing grandparent visitation.

After the father was discharged from the Navy, he moved to Florida. The father and maternal grandmother disputed the location of visitation, and whether the child should be informed of his mother's death. As a consequence, the father filed a supplemental petition for modification in Florida, and to domesticate the Virginia consent judgment.

The trial court denied modification of the Virginia judgment, but did domesticate the judgment here. The father appealed, arguing the Virginia order was not entitled to full faith and credit, the court applied the incorrect standard for modification.

Unlike the Fourth District in *M.S.*, the Second District affirmed that the Virginia order was entitled to full faith and credit. However, the *Fazzini* court found that Florida public policy subordinates grandparent visitation rights to the superior rights of a parent: "[U]pon the foreign judgment being domesticated, it does not follow that this particular order was not subject to modification after being given full faith and credit."[30] Given that grandparents "have virtually no rights" in our state "because of the privacy right's protection enshrined in our state constitution," Florida's public policy was an exception to the full faith and credit clause.[31]

• *Breaker of Chains* — Ruth LeDoux-Nottingham divorced her husband, the father of their two minor children, in Colorado in 2010. The father died in 2011 in Colorado.[32] Immediately after his funeral, the mother and the children moved to Florida. In the meantime, the paternal grandparents timely initiated proceedings in Colorado for visitation with their grandchildren.

The mother then filed a separate action in Florida to register the Colorado final judgment dissolving her marriage, and, relying on *Fazzini*, asked for a judicial determination that the grandparents have no legal right to time-share with the minor children.

The grandparents filed a motion to dismiss the Florida proceeding because Colorado had already exercised jurisdiction to address visitation and had not yet ruled. The mother filed a motion to stay the Florida case pending resolution of the Colorado proceedings.

On October 11, 2012, the Colorado court rendered its final order determining that it was in the best interest of the children for grandparents to have visitation, and awarded the grandparents three weeks of visitation, in addition to reasonable telephone contact.

On October 24, 2012, the mother amended her Florida petition to both domesticate and modify the Colorado order awarding the grandparents visitation. The mother argued that under Florida law, enforcement of the grandparent visitation order was unconstitutional and against public policy.

The Florida trial judge entered a final judgment registering, domesticating, and enforcing the Colorado order establishing the grandparents' visitation rights, and denied the mother's request for modification. The trial judge, however, specifically reserved jurisdiction on grandparents' motion for enforcement and make-up visitation.

The mother argued on appeal that the Colorado order was unenforceable as a matter of Florida law and public policy because it violates child-rearing autonomy guaranteed to parents under the Florida Constitution.

The Fifth District Court of Appeal affirmed. The panel held that the public policy of one state has no effect on whether a state must give full faith and credit to judgments of another state. This holding was in direct contravention to the *M.S.* court, which held that the full faith and credit clause *did not* provide a sufficient compelling state interest to justify "the application of an overriding provision of law, applying a paramount public policy."

The panel also held under the full faith and credit clause, trial courts are required to give recognition to final judgments of another state, *without discretion*. The Fifth District also certified the conflict with the Fourth District Court of Appeal's decision in *M.S*.

In reviewing the Fifth District's opinion, the Florida Supreme Court first held that the Parental Kidnapping Prevention Act (PKPA) explicitly applies to "any custody determination or visitation determination," including those in which a grandparent claims a right to visitation of a child. Moreover, to the extent that the PKPA conflicts with Florida law, the PKPA — as federal law — controls under the supremacy clause of the U.S. Constitution.

The Florida Supreme Court then noted that the U.S. Supreme Court has repeatedly rejected the holdings of *Fazzini* and *M.S.*, that a state may elevate its own public policy over the policy behind a sister state's judgment, thereby disregarding the full faith and credit clause.

The Florida Supreme Court also held that the Colorado final judgment was one Florida is required to enforce, despite the fact that entry of a similar judgment by a Florida court under the same circumstances would be prohibited by the Florida Constitution.

In affirming the Fifth District, the Florida Supreme Court disapproved the decision of the Fourth District in *M.S.* — to the extent that it applied comity principles to an out-of-state visitation, order rather than the full faith and credit clause.

The Florida Supreme Court also disapproved of the decision of the Second District in *Fazzini*, to the extent that it held that the public policy of Florida provided an exception to the full faith and credit clause.

The Dance of Dragons

It has been said that "when you play the game of thrones you win, or you die. There is no middle ground."[33] If so, *Ledoux-Nottingham* might be the beginning of the endgame. For the first time, the Florida Supreme Court has approved enforcement of a foreign grandparent visitation order, which did not require a showing of harm. *Ledoux-Nottingham* also highlights the fact that timesharing rights are still denied to nearly thousands of Floridians.[34]❑

[1] *Game of Thrones*, HBO broadcast (2011-present) (The title of this article, and all subsections, are titles of episodes from the HBO series.).

[2] *See* Ronald H. Kauffman, *Bleeding Grandparent Visitation Rights*, 86 Fla. B. J. 42 (Sept. 2012) (discussing grandparent visitation rights when consenting parents are deployed in the military).

[3] *See* Fla. Stat. §752.011 (2015) (providing grandparent visitation when parents are deceased or incarcerated).

[4] *Ledoux-Nottingham v. Downs*, 210 So. 3d 1217 (Fla. 2017).

[5] The limited grandparent visitation rights available when children have been adjudicated dependent, and taken from the physical custody of the parents, is beyond the scope of this article.

[6] *See Troxel v. Granville*, 530 U.S. 57, 97 (2000) (quoting *Succession of Reiss*: "[T]he obligation ordinarily to visit grandparents is moral and not legal" (internal citations omitted)).

[7] "The U.S. Census at the end of 2014 estimated that Florida's seniors grew to 18.7 [percent] of Florida's total population." *See* Lynne Holt & David Colburn, *Senior Citizens: Their Place in Florida's Past, Present, and Future* (Feb. 17, 2015).

[8] *See* Fla. Stat. §61.13(2)(b) (1978).

[9] *See* Fla. Stat. §61.08 (1978).

[10] *See* Fla. Stat. §752.01(1) (1984).

[11] *See* Fla. Const. art. I, §23. "Every natural person has the right to be let alone and free from government intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

[12] *See Sketo*, 559 So. 2d at 382 (emphasis added).

[13] *See* Jorge M. Cesteros, *Happiness Is Being a Grandparent? The Evolution of Grandparent Visitation in Florida*, 71 Fla. B. J. 51 (Nov. 1997) (provides an excellent analysis of the then-current state of grandparent visitation rights through the *Beagle* decision, some rulings following *Beagle*, and briefly surveys the development of grandparent rights in other state courts).

[14] *See* Fla. Stat. §752.01(1) (1995).

[15] *See Beagle,* 678 So. 2d at 1273-1274.

[16] *Id.* at 1276-1277.

[17] *Id*.

[18] *See Von Eiff,* 720 So. 2d at 514.

[19] *Id*. (italics original) (internal citations omitted).

[20] *See Richardson,* 766 So. 2d at 1038.

[21] *See Troxel,* 530 U.S. at 72 ("I look back on some personal experiences….We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out.").

[22] *See In re: Smith*, 137 Wash.2d 1, 969 P.2d 21, 30 (1998).

[23] *Id*. at 69-70.

[24] *Id.* at 75 (quoting Kennedy, J., dissent at 80).

[25] *See Id.* at 73.

[26] *See* Fla. Const. art. 1, §23.

[27] *See Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Business Regulation,* 477 So. 2d 544 (Fla. 1985). *Accord Von Eiff*, 720 So. 2d at 514 (finding the state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart).

[28] *See Beagle,* 678 So. 2d at 1273.

[29] *M.S.,* 763 So. 2d at 1055.

[30] *Fazzini*, 98 So. 3d at 104.

[31] *Id*.

[32] *Ledoux-Nottingham v. Downs*, 210 So. 3d 1217 (Fla. 2017).

[33] *Game of Thrones*, HBO broadcast, Season 1, Episode 7 (2011).

[34] *See* U.S. Census Bureau, Frank B. Hobbs, The Elderly Population. The number of elderly is expected to increase as the first members of the Baby Boom reached aged 65 last year. *See* U.S. Census Bureau, *We, The American Elderly*.

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