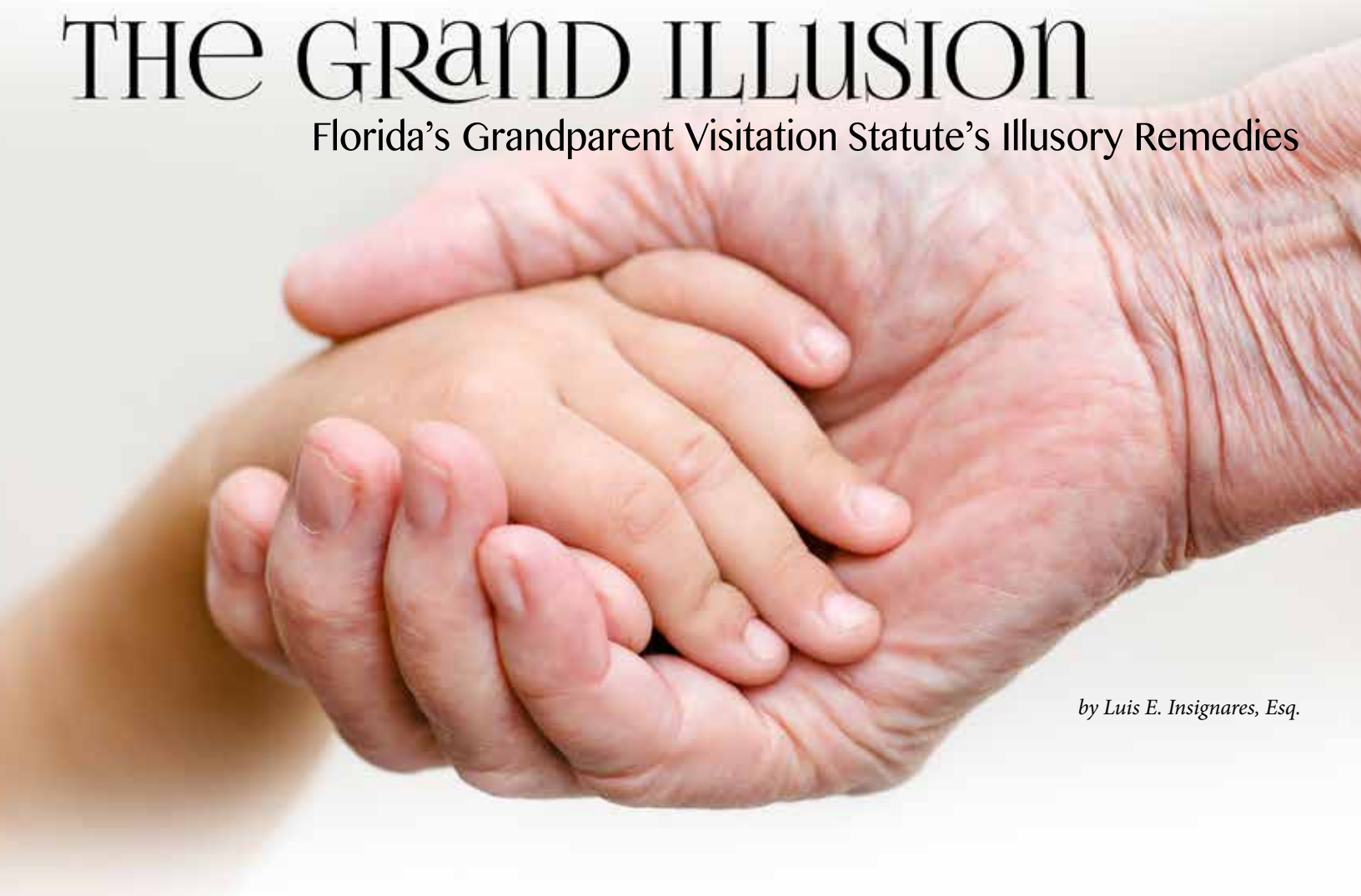
# The Grand Illusion

## Florida's Grandparent Visitation Statute's Illusory Remedies



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Given Florida's traditional status as a retirement destination, it is somewhat ironic that grandparents wishing to visit their grandchildren here essentially have no enforceable legal rights. This is, as our own Second District Court of Appeal ("DCA" hereinafter) has stated, "because of the privacy right's protection enshrined in our state constitution." *Fazzini v. Davis, 98 So.3d 98, 104* (Fla. 2d DCA 2012). But Article I, Section 23 of the Florida Constitution simply declares that "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."

As of the expansion of the statute in 1990, there were four statutory scenarios that might trigger a right of grandparent visitation: when one or both parents of the child was deceased, where the parents were divorced, where a parent had deserted a child, and the new provision, where the grandchild was born out of wedlock. *See*, Fla. Stat. § 752.01(1) (Supp. 1990). The permissive "may" of the original statute was changed so that the statute stated that a court "shall" grant reasonable visitation rights when one of the four factual scenarios had occurred. *Id.* A new subsection was added including a list of factors that the court was required to consider in "determining the best interest of the minor child." *See*, Fla. Stat. § 752.01(2) (Supp. 1990).

Having expanded grandparental rights beyond the original three scenarios where a traditional married couple's family had been broken by death, divorce, or desertion, in 1990, to include families where the parents had never married, and having changed the statute from being discretionary to mandatory (so long as the visitation was in a child's best interests), the proponents of grandparent visitation rights were emboldened to make more sweeping changes. In 1993 the statute was again amended, and this expansion may have been the statute's downfall.

The 1993 amendment expressly extended grandparental rights even to when the minor child's parents were still married and together, whenever "either or both parents have used their parental authority to prohibit a relationship between the minor child and the grandparents." Fla. Stat. § 752.01(1)(e) (1993) (emphasis supplied). Now, whenever virtually any grandparent wanted visitation, and the parent(s) refused, that grandparent could bring his or her claim in court.

Within 3 years, the Florida Supreme Court considered the first of numerous piecemeal challenges to the statute, considering the constitutionality of the various scenarios set

forth in the statute. The first of these cases was *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996) which considered the newest, broadest provision of the statute. The Florida Supreme Court held that the "intact family" provision of the statute finding violated the privacy guarantee of the state constitution, and distinguished other cases where grandparent statutes had been upheld, in states whose constitutions did not have express privacy provisions.

With the constitutional door thus opened, the other provisions of the statute began to fall as well. As it turns out, Florida's other parents have the same constitutional rights as those who are married. Including widows/widowers, *Von Eiff v. Aziori*, 720 So.2d 510 (Fla. 1998), and those with "out-of-wedlock" children. *Saul v. Brunetti*, 753 So.2d 26 (Fla. 2000). Although the supreme court has not expressly ruled on the "divorce" provision, the DCAs have, and it is equally invalid. *See, Lonon v. Ferrell*, 739 So.2d 650 (Fla. 2d DCA 1999); *Belair v. Drew*, 776 So.2d 1105 (Fla. 5th DCA 2001); *Forbes v. Chapin*, 917 So.2d 948 (Fla. 4th DCA 2005); *see also*, *Belair v. Drew*, 770 So.2d 1164, 1167 (Fla.2000); *Richardson v. Richardson*, 766 So.2d 1036 (Fla. 2000) (Chapter 61 provision placing grandparents essentially on equal footing with parents — for purposes of custody rather than visitation — held unconstitutional because that provision did not include a "detrimental harm" component, as had been noted to be absent from the grandparent visitation statute provisions struck down in *Beagle and Von Eiff*).

The only provision effectively left in the statute is the "desertion" provision. Since desertion (or "abandonment") is in itself grounds for termination of parental rights, see, Fla. Stat. § 39.806(1)(b) (2013), if a parent objecting to grandparent visitation has deserted the child with whom the grandparent sought visitation, a grandparent might have a good argument that such a parent has waived, or is estopped to assert, his or her privacy rights. *See, Griss v. Griss*, 526 So.2d 697 (Fla. 3d DCA)(maternal grandfather, who was acquitted on grounds of self-defense of murder of child's mother's husband, could be granted visitation with child, given determination that child's putative father, who was not married to child's mother, left,

abandoned, or otherwise deserted mother and child some three months after child was born; however note that *Griss* predates *Beagle* and thus may no longer be good law), *review dismissed* 531 So.2d 1353 (Fla. 1988). In the more likely scenario of a parental objection coming from a non-deserting parent, the objecting parent, left behind with the child(ren) with whom visitation was sought, would be in an analogous position to the widow or widower left with a child after the death of her or his spouse, and *Von Eiff* would probably apply to bar grandparent visitation. Outside the very narrow confines of desertion/abandonment, grandparent visitation in Florida may require amendment of the Florida Constitution. RG

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