

RECEIVED, 7/29/2013 09:28:36, Thomas D. Hall, Clerk, Supreme Court

IN THE  
SUPREME COURT OF FLORIDA

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CASE NO. SC13-1275

Lower Tribunal Case No. 4D12-3500

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FELIX F. CANINO,

Petitioner

vs.

MICHELE CANINO,

Respondent

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JURISDICTIONAL BRIEF

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## **STATEMENT OF THE CASE AND FACTS**

Petitioner is a Florida resident and the father of the children which are also residing in the State of Florida and are the subject of this appeal regarding timesharing. Petitioner was divorced from Respondent in April 2007 and was following an in-state timesharing schedule prior to the children's relocation out-of-state with the children's mother. Upon return to the State of Florida, the parties resumed the in-state timesharing schedule for a few months, but then without advance notice or reason the Respondent/Mother stated that she was going to follow the out-of-state timesharing schedule even though the children were located within the State of Florida. Petitioner objected to this unilateral change in the timesharing schedule and filed a Motion for Enforcement with the Circuit Court to enforce timesharing pursuant to the in-state timesharing schedule the parties had previously agreed to and had followed prior to the mother's relocation out of state and after the Respondent/Mother's relocation back to the State of Florida. The Circuit Court ordered the parties to follow the out-of-state timesharing schedule even though the children were residing in the State of Florida and the parties had previously followed the in-state timesharing schedule. The Petitioner appealed the Circuit Court's decision and the Fourth District affirmed the Circuit Court's decision to follow the out-of-state timesharing schedule even though the children

were residing within the State of Florida. These decisions were evidenced by the June 26, 2013 Order of the Fourth District Court of Appeal affirming the underlying Order issued by the Honorable Judge Keyser, in Case No. 502006DR0108XXXXNB in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida, thus causing a mistake of law that raises substantial questions of partial invalidation of statutory and constitutional rights, violation of due process and issues of great public importance such as denial of parental and basic rights without due process warranting review by this Court.

### **SUMMARY OF THE ARGUMENT**

The Summary of the Argument is contained in the Table of Contents on of this Brief and is hereby incorporated in its entirety by reference due to the brevity of this Brief in order to avoid duplication and for purposes of judicial economy.

### **JURISDICTIONAL STATEMENT**

This Court is required to review decisions of District Courts of Appeal declaring invalid a state statute or a provision of the State constitution pursuant to Fla. R. App. P. 9.030(a)(1)(A)(ii). Furthermore, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v) discretionary jurisdiction may be sought to review decisions of District Courts of Appeal that pass upon a question of great public importance,

such as denial of parental and other basic rights without due process or affecting the public at large when similarly situated parties are faced with the same issue.

### **ARGUMENT**

**A. THIS COURT HAS MANDATORY JURISDICTION AND SHOULD REVIEW THE DECISIONS OF THE LOWER COURTS PURSUANT TO FLA.R.APP.P. 9.030(a)(1)(A)(ii) AND 9.030 (a)(2)(A)(v) AS THE LOWER COURTS HAVE RULED AGAINST THE VALIDITY OF A STATE STATUTE (FLA. STAT. 61.13 (2)(c)(1)(2013)) AND CONSTITUTIONAL RIGHTS ASSURED BY ARTICLE I, SECTIONS 2, 9 AND 23 OF THE STATE OF FLORIDA CONSTITUTION AND THE UNITED STATES CONSTITUTION.**

It is clear that pursuant to Fla. R. App. P. 9.030(a)(1)(A)(ii) and 9.030(a)(2)(A)(v), respectively, that exercise of mandatory jurisdiction by this Court is appropriate due to the Lower Courts' partial invalidation of Fla. Stat. 61.13(2)(c)(1)(2013) and Article I, Sections 2, 9 and 23 of the State of Florida Constitution and comparable provisions of the United States Constitution by limiting visitations and thereby violating Petitioner's basic rights, due process, privacy and freedom from government intrusion. Both the father and the children have been subjected to violation of parental, familial, civil, legal, moral, human and constitutional rights including, but not limited to, the Lower Court's decisions upholding a substantial reduction in the frequency of timesharing by ordering the parties to follow an out-of-state timesharing schedule when the children are located within the State of



Florida without any explanation or justification and thereby partially invalidating Fla. Stat. 61.13(2)(c)(1)(2013) and Article I, Sections 2, 9 and 23 of the Florida Constitution and comparable provisions of the United States Constitution.

Fla. Stat. 61.13(2)(c)(1)(2013) provides in pertinent part that: “It is the public policy of this state that each minor child has frequent and continuing contact with both parents . . . .” “ The Lower Courts’ rulings partially invalidated this statute because by ordering the parties to follow the out-of-state timesharing schedule, the children have much less frequent contact with the noncustodial parent.

The Courts of this State have consistently ruled that: “Parents have a fundamental and constitutional right to continuous timesharing with their children.” (See *T.M.H. v. D.M.T.*, Case No. 5D09-3559 (Fla. 5<sup>th</sup> DCA 2011), and that “A parent has a constitutionally protected “inherent right to a meaningful relationship with his children . . . .” and that is why “Visitation with a child should never be denied. . . .” See *McAlister v. Shaver*, 633 So. 2d 494 (Fla. 5<sup>th</sup> DCA 1994).

Article I, Sections 2 (“Basic Rights”), 9 (“Due Process”) and 23 (“Right to Privacy”) of the Florida Constitution are comparable to those provisions of the United States Constitution and the following cases support that the Lower Court’s rulings effectively partially invalidate those provisions of the Florida Constitution.

1. The rights of parents to the care, custody and nurture of their children is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and such right is a fundamental right protected by the United States Constitution. See *Doe v. Irwin*, 441 F. Supp 1247 (W. D. of Mich., S. D. 1977).

2. State Judges, as well as federal, have the responsibility to respect and protect persons from violations of federal constitutional rights. See *Goss v. State of Illinois*, 312 F. 2d 257 (7<sup>th</sup> Cir. 1963).

3. The U.S. Supreme Court has specifically stated that: “We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.” See *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978).

4. The right to raise one’s children have been deemed “basic civil rights.” Restriction of full contact between a father and child interferes with family relationships and impedes the father’s right to participate in his children’s rearing and education. See *In the Matter of J.S. and C.*, 324 A. 2d 90 (N. J. 1974).

5. The Parent-child relationship is a constitutionally protected liberty interest and that familial rights have long been considered to be “basic civil rights of man.”

See *Kelson v. City of Springfield*, 767 F. 2d 651 (9th Cir. 1985).

6. The United States Supreme Court in a long line of decisions has recognized that matters involving the parent-child relationship are among those fundamental "liberty" interests protected by the United States Constitution. The noncustodial divorced parent has no way to implement the constitutionally protected right to maintain a parental relationship with his child except through visitation. See *Wise v. Bravo*, 666 F 2d 1328 (10<sup>th</sup> Cir. 1981).

This Court should exercise mandatory jurisdiction because the decisions of the Lower Courts have partially invalidated Fla. Stat. 61.13(2)(c)(1) (2013) and Article I, Sections 2, 9 and 23 of the Florida Constitution and similar provisions of the Constitution of the United States and represent an abuse of discretion and denial of due process. Such exercise of the Court's jurisdiction is necessary in order to protect Petitioner and the general public's frequent visitations with their children.

**B. THIS COURT HAS MANDATORY JURISDICTION AND SHOULD REVIEW THE ACTIONS OF THE LOWER COURTS BECAUSE THEY CONSTITUTE VIOLATIONS OF PARENTAL, CIVIL, LEGAL, MORAL, HUMAN AND CONSTITUTIONAL RIGHTS, INCLUDING, BUT NOT LIMITED TO, IMPOSING PARTIAL TERMINATION OF PARENTAL RIGHTS WITHOUT DUE PROCESS.**

This Court has mandatory jurisdiction because of due process violations and this Court's ability to exercise of its jurisdiction in an expedited manner in matters

involving constitutional rights and children. A parent which is deprived of custody of his or her child, even though temporarily, suffers grievous loss and such loss deserves extensive due process protection. The Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive any person of life, liberty or property without due process of law. See *In the Interest of Cooper*, 621 P. 2d 437 (1980).

The Circuit Court and Fourth District's rulings have effectively upheld a substantial reduction in the frequency of timesharing by ordering the parties to follow the out-of-state timesharing schedule while the children are located within the State of Florida and forced the continued separation of the Father and his minor children without any explanation or legal justification or proper due process.

In reviewing the facts in this matter and the applicable law, it is clear that denial of the appeal deprives not only the Father, but the minor children of civil, legal, moral, human and constitutional rights, and establishes a perilous precedent for all parents, children and families in this State without proper basic rights, due process and freedom from government intrusion interfering with the children's visitations.

In *Mize v. Mize*, 621 So. 2d 417 (Fla. 1993), this Court stressed the importance of frequent visitations as opposed to shorter ones when it stated that: "... the best

interests of children are served by frequent and continuing contact with both parents.”

“Our policy favoring frequent visitation is grounded in widely recognized social and psychological data . . . . investigators point out the importance of frequent father-child visiting patterns. . . .regular visitation by the noncustodial parent is an important predictor of children’s adjustments to their parents’ divorce.”

“ . . . when psychiatrists have testified about optimal visitation arrangements, they have stated that shorter, more frequent visitations [with the noncustodial parent] are preferable to fewer, longer, ones.” R. Gardner, *Psychotherapy with Children of Divorce* 379 (1976) . . . .“In sum, the social science literature is virtually unanimous in stressing the importance to children of regular, frequent contact with both their parents and in recommending that children’s relationships with their noncustodial parents not be lightly disturbed or frustrated.”

“Whenever possible the court must provide for a reasonable and realistic alternative visitation schedule, in keeping with the Legislature’s determination that the best interests of the child are served through shared parenting and maintaining frequent and continuing contact with both parents.”

This Court should exercise mandatory jurisdiction because the Lower Court’s

rulings ordering less frequent visitations have effectively partially terminated Petitioner's parental rights and constitutional rights without proper due process.

**C. THIS COURT HAS DISCRETIONARY JURISDICTION AND SHOULD REVIEW THE DECISIONS OF THE LOWER COURTS BECAUSE THEY ARE CONTRARY TO A PLETHORA OF CONSTITUTIONAL RIGHTS, STATUTES AND CASE LAW THAT SERVE TO PROTECT THE RIGHT TO BE A PARENT, AND IF IT DOES NOT ACCEPT JURISDICTION, THIS COURT WOULD BE PASSING UPON A QUESTION OF GREAT PUBLIC IMPORTANCE.**

The Lower Courts' actions are contrary to a plethora of Constitutional rights, statutes and case law federally and of the several states that serve to protect the right to be a parent and participate in frequent visitations and therefore the issue on appeal is an issue of great public importance for the public at large.

In addition, the issue on appeal is an issue which frequently arises in divorce cases where interstate relocations occur and if passed upon by this Court, hundreds of divorced parents who are similarly situated and have had their families relocate out of the State of Florida and return to the State of Florida will be forced to go to court to seek to obtain rulings to revert to the in-state timesharing schedule.

Accordingly, this Court should exercise its discretionary jurisdiction to ensure that Petitioner and the general public's state and federal parental and constitutional rights are protected as this is an issue of great public importance.

## **CONCLUSION**

This Court has mandatory jurisdiction to review the Lower Courts' decisions because this appeal involves the partial invalidation of Fla. Stat. 61.13(2)(c)(1) (2013) and Article I, Sections 2, 9 and 23 of the Florida Constitution (i.e., a parent's basic right to frequent timesharing with their children, due process and freedom from government intrusion). In the alternative, this Court has discretionary jurisdiction because it involves an issue of great public importance because hundreds of other similarly situated parties will be forced to go to court to resolve this timesharing issue each year unless it is addressed by this Court.

The Lower Courts' rulings have created a new standard with respect to timesharing by ordering the Petitioner to follow an out-of-state timesharing schedule when the Petitioner's children are located within the State of Florida. Such a new standard is based on what Petitioner believes to be a misapplication of Florida law and United States Supreme Court precedent and is unconstitutional. Accordingly, review of this case by the Florida Supreme Court is appropriate and necessary for assurance of the best interests of the health, welfare and safety of the Petitioner's children and assurance of protection of mandated State and Federal constitutional rights and responsibilities of the Father/Petitioner, and a failure to do so would set a perilous precedent for all children and families in this State.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Jurisdictional Brief has been furnished by electronic filing to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 S. Duval St., Tallahassee, FL 32399-1927 (Telephone Number: 850-488-0125) and by email (pleadings@orsleycripps.com) and U.S. Mail on July 29, 2013 to: Steven Cripps, Esq., Counsel for Former Wife, 1803 South Australian Avenue, West Palm Beach, Florida 33409.

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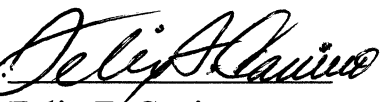
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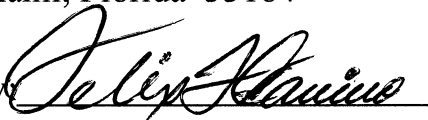


## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this Jurisdictional Brief complies with the font standards (i.e., Times New Roman 14-point font) and other requirements set forth in Florida Rule of Appellate Procedure 9.210.

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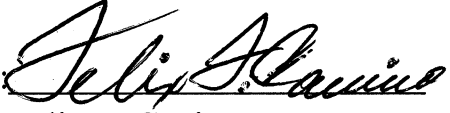
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**CERTIFICATE OF COMPLIANCE  
WITH ADMINISTRATIVE ORDER AOSC04-84  
AS AMENDED BY AOSC 13-7**

I hereby certify that I have complied with Administrative Order AO04-84 as amended by AOSC 13-7 in that a copy of Petitioner's Jurisdictional Brief has been electronically submitted this 29<sup>th</sup> day of July, 2013.

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