

STATE OF TENNESSEE
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February 17, 2004

Opinion No. 04-028

Pending legislation to amend Tenn. Code Ann. § 36-6-306, the Grandparent Visitation Act

QUESTIONS

1. Does SB 2316, as amended, violate Article I, § 8 of the Tennessee Constitution as an unconstitutional invasion of parental privacy rights?
2. Is the phrase “severe emotional harm” in SB 2316 the correct phrase to use in this bill?

OPINIONS

1. SB 2316 does not violate Article I, § 8 of the Tennessee Constitution.
2. While the exact wording of the statute is a matter properly left to the legislature, the phrase “severe emotional harm” may be read to erect a more stringent standard than that indicated necessary by prior case law analyzing the constitutionality of the Grandparent Visitation Act.

ANALYSIS

1. You have requested an opinion regarding the constitutionality of pending legislation that would amend the Grandparent Visitation Act, currently codified at Tenn. Code Ann. § 36-6-306. While the constitutionality of various versions of Tennessee’s Grandparent Visitation Act has been addressed on several occasions, the most useful analysis of the issue is found in the Tennessee Supreme Court’s opinion in *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993). In *Hawk*, after analyzing both state and federal case law, the court stated:

We hold that Article I, Section 8 of the Tennessee Constitution protects the privacy interest of these parents in their child-rearing decisions, so long as their decisions do not substantially endanger the

welfare of their children. Absent some harm to the child, we find that the state lacks a sufficiently compelling justification for interfering with this fundamental right.

Hawk, 855 S.W.2d at 582. Thus, in order for a statute granting visitation rights to grandparents to be constitutional, it must require that a court make a finding of harm to the child before addressing whether visitation would be in the child’s best interest.

Currently pending is legislation that would require a court to hold a hearing if the grandparent and grandchild had a significant existing relationship for at least a year, that relationship was severed by the parent of the child for reasons other than abuse or a presence of a danger of substantial harm to the child, and the severance of the relationship would likely occasion “severe emotional harm” to the child. Clearly, “severe emotional harm” would fall within the harm contemplated by the *Hawk* decision that must be present before a court can award grandparent visitation. Thus, the legislation is constitutional.

2. You further inquire whether the phrase “severe emotional harm” is the correct phrase to use in the legislation. While the wording of a statute is a matter properly left to the legislature, the phrase “severe emotional harm” seems to set a higher standard than would be necessary under the Tennessee Supreme Court’s decision in *Hawk*. In *Hawk* the court uses the terms “substantial harm” and “significant harm.” *Hawk*, 855 S.W.2d at 577, 581. The word “severe” in its ordinary sense would connote a harm greater than “substantial” or “significant.” While “severe emotional harm” would certainly fall within the concept of substantial harm, it may set a higher standard than necessary to pass constitutional muster.

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Page 3

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