S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0485

May 2, 2000

Opinion No. 00-082

Constitutionality of Amendments to HB 2297/ SB 2475 concerning Grandparent Visitation

---

QUESTION

1. Whether HB 2297/SB 2475, as amended by Amendment No. 1, meets state constitutional requirements, in view of *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995); and *Ellison v. Ellison*, 994 S.W.2d 623 (Tenn. Ct. App. 1999) and whether it meets federal constitutional requirements such as those raised in *Troxel v. Granville*, U.S. Sup. Ct. No. 99-138?

2. Whether a second, enclosed proposed amendment, which would substitute for above Amendment No. 1, would be constitutional in light of the same referenced cases?

OPINION

1. HB 2297/SB 2475, as amended by Amendment No. 1, meets constitutional requirements.

2. The second proposed amendment is constitutionally suspect.

ANALYSIS

This request concerns proposed legislation which amends Tenn. Code Ann. §§ 36-6-306 and 36-6-307.

Amendment No. 1 to HB 2297/SB 2475

Amendment No. 1 to HB 2297/SB 2475 states that a petition for grandparent visitation raises a rebuttable presumption of a danger of substantial harm, necessitating a hearing if such grandparent visitation is opposed by the custodial parent or parents if:

(1) The father or mother of an unmarried minor child is deceased;
(2) The child's father and mother are divorced or legally separated;
(3) The child's father or mother has been missing for not less than six (6) months; or
(4) The court of another state has ordered grandparent visitation.

The legislation requires a court of competent jurisdiction to first determine the presence of a danger of substantial harm to the child. Such a finding may be based upon cessation of the relationship between an unmarried minor child and the child's grandparent if the court determines, according to certain specified criteria, that the child had a significant existing relationship with the grandparent or the grandparent functioned as primary caregiver and the child may be harmed by the loss of the relationship.

It is well established that parents have a fundamental liberty interest under the United States Constitution in the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Under the Tennessee Constitution, parents have a fundamental right of privacy with respect to the raising of their children. See *Bond v. McKenzie*, 896 S.W.2d 546, 547-48 (Tenn.1995); *Hawk v. Hawk*, 855 S.W.2d 573, 579, 582 (Tenn. 1993). But these rights are not absolute. *Santosky v. Kraemer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). If a statute infringes on a fundamental right or creates an inherently suspect classification, the statute is subject to strict judicial scrutiny which requires the state to establish a compelling interest in its enactment. *See, State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). The Tennessee Court of Appeals has recognized that the state has a compelling interest in the well being of children. *State of Tennessee Department of Human Services v. Ogle*, 617 S.W.2d 652 (Tenn. Ct. App. 1980).

As we have previously opined, in *Hawk v. Hawk*, the Tennessee Supreme Court held that an initial showing of danger of substantial harm to a child is necessary before the state may intervene to determine the "best interests of a child" when an intact, nuclear family with fit, married parents is involved. *Hawk v. Hawk*, 855 S.W.2d 573, 577, 579-580 (Tenn. 1993); Op. Tenn. Atty Gen. 99-006 (January 25, 1999). This holding was reaffirmed by the Court in a decision setting aside an order of grandparent visitation where the father's parental rights had been terminated and the child was adopted by the stepfather and there was no evidence that the child was in substantial danger of harm. *Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995). But the Tennessee Supreme Court has never addressed whether there is a "compelling state interest" in interfering with parental rights if the family unit is no longer intact. Thus, whether a finding of substantial danger of harm to a child is required by the Tennessee Constitution before a grandparent may petition for visitation with his or her grandchild when the nuclear family is no longer intact remains an open question.

Amendment No. 1 to HB 2297/SB 2475 requires a court of competent jurisdiction to first determine the presence of a danger of substantial harm to the child. The legislation establishes a

rebuttable presumption of substantial harm in four instances, three of which involve a situation where the family unit is no longer intact. The legislation recognizes that if the grandparents have had a sufficient existing relationship with a child, a loss of that relationship would be a severe emotional and psychological blow to the child. Under the legislation, the loss of such relationship would create a rebuttable presumption of substantial danger to the welfare of the child. Assuming that this presumption is not rebutted at the hearing, it is our opinion that the state would have a compelling interest to justify interference with the parent's right by ordering grandparent visitation.

After an initial finding of danger of substantial harm to the child, the legislation then requires the court to determine whether grandparent visitation would be in the best interests of the child. The court must consider all pertinent matters, including, but not limited to:

(1) the length and quality of the prior relationship between the child and the grandparent and the role performed by the grandparent;
(2) the existing emotional ties of the child to the grandparent;
(3) the preference of the child if the child is determined to be of sufficient maturity to express a preference;
(4) the effect of hostility between the grandparent and the parent of the child manifested before the child, and the willingness of the grandparent, except in case of abuse, to encourage a close relationship between the child and the parent(s) or guardian(s) of the child;
(5) the good faith of the grandparent in filing the petition;
(6) if the parents are divorced or separated, the time-sharing arrangement that exists between the parents with respect to the child; and
(7) if one (1) parent is deceased or missing, the fact that the grandparents requesting visitation are the parents of the deceased or missing person.

We believe that Amendment No. 1 to HB 2297/SB 2475 provides adequate due process protection for a parent’s liberty interest in his child. The legislation requires a court of competent jurisdiction to first determine the presence of a danger of substantial harm to the child and merely establishes a rebuttable presumption with respect to the issue of substantial harm to the child in four instances, three of which involve a situation where the family unit is no longer intact. Moreover, the legislation provides sufficient guidelines for a court to determine whether visitation is proper. The determination of the best interest of a child is generally a factual issue which must be decided on a case by case basis. We believe these requirements are consistent with the *Hawk* decision. We also believe that the legislation is consistent with the *Simmons* decision because it specifically recognizes that if a relative or stepparent adopts a child, the provisions of the statute apply thus providing adoptive parents the same constitutional protection as natural parents.

Proposed Amendment 2 to HB 2297/SB 2475

Subsection (a) of Proposed Amendment 2 to HB 2297/SB 2475 states that if grandparents have had a significant existing relationship with a child, a loss of that relationship -- unless the child's parents are fit and married and the child has been raised in an intact, nuclear family -- would be such a severe emotional and psychological blow to the child that it creates a rebuttable presumption of substantial harm or danger to the welfare of the child.[1] We believe this provision is constitutionally suspect because it treats a single parent different than married parents. The Tennessee Supreme Court has held that a parent's fundamental liberty interest in raising his or her children is the same whether the child was born out of wedlock or inside the bounds of marriage. *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994); see also *Rust v. Rust*, 864 S.W.2d 52, 56 (Tenn. App. 1993) (holding that a custody award to one parent creates "single-parent family" entitled to same constitutional protection against unwarranted state interference as an "intact, two-parent family").[2] Moreover, unmarried parents living with their children have been accorded recognition as family units by the United States Supreme Court. See *Michael v. Gerald D.*, 491 U.S. 110, 123 n. 3, 109 S.Ct. 2333, 2342 n. 3, 105 L.Ed.2d 91, 106 n. 3 (1989).

Subsection (b) of the legislation states:

> "Substantial harm or danger" includes, but is not limited to a cessation of or severe disruption, limitation, or diminution in the relationship between an unmarried minor child and his or her grandparent, unless the child's parents are fit and married and have maintained primary custody of the child in an intact, nuclear family. This "substantial harm or danger" is a rebuttable presumption sufficient to satisfy the "initial showing of harm" required by *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

Subsection (b) suffers from the same defect as subsection (a) because it treats a single parent different than married parents. But we believe subsection (b) is constitutionally suspect for another reason. As stated above, if a statute infringes on a fundamental right or creates an inherently suspect classification, the statute is subject to strict judicial scrutiny which requires the

---

[1] We note that "significant existing relationship" is not defined in the legislation nor does the legislation offer any factors a court might consider in determining whether the grandparents have had a significant existing relationship with a child. Thus, whether such a relationship exists would be left to the court's discretion.

[2] While the Tennessee Supreme Court has not addressed the issue of a single parent in the context of a grandparent visitation case, we note that North Carolina has concluded that a single parent living with his or her child is an "intact family" under North Carolina's grandparent visitation statute. *Fisher v. Gaydon*, 124 N.C.App. 442, 445, 477 S.E.2d 251, 253 (N.C. App. 1996), disc. review denied, 345 N.C. 640, 483 S.E.2d 706 (1997); *Montgomery v. Montgomery*, 524 S.E.2d 360 (N.C. App. 2000).

state to establish a compelling interest in its enactment. *See, State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). In *Hawk v. Hawk,* the Tennessee Supreme Court held that an initial showing of danger of substantial harm to a child is necessary before the state may intervene to determine the "best interests of a child" when an intact, nuclear family with fit, married parents is involved. *Hawk v. Hawk*, 855 S.W.2d 573, 577, 579-580 (Tenn. 1993); Op. Tenn. Atty Gen. 99-006 (January 25, 1999). We believe that a court would conclude that a cessation of or severe disruption, limitation, or diminution in the relationship between an unmarried minor child and his or her grandparent is not a "compelling interest" sufficient to interfere with parents' fundamental right of privacy with respect to the raising of their children.

Subsection (c) states that if:

> (1) Either the father or mother of an unmarried minor child is deceased;
> (2) The child's father and mother are divorced or legally separated;
> (3) The child's father or mother has been missing for not less than six (6) months; or
> (4) The court of another state has ordered grandparent visitation
>
> then, the legislature finds such a child has already suffered substantial harm that threatens his or her welfare sufficient under *Hawk v. Hawk* to outweigh any constitutional rights of the child's parents to refuse grandparent visitation when such visitation is found to be in the child's best interests based on the factors in Section 36-6-307.

This subsection creates an irrebuttable presumption of substantial harm to the child in four situations. We believe a court would conclude that this provision violates a parent's due process rights because irrebuttable presumptions have been held violative of the Due Process Clause of the Fourteenth Amendment. *Vlandis v. Kline,* 412 U.S. 441, 453, 93 S.Ct. 2230, 2237, 37 L.Ed.2d 63 (1973); *Universal Restoration, Inc. v. U.S.,* 798 F.2d 1400, 1406 (Fed. Cir. 1986).

Subsection (d) contains a reference to ". . . never-married persons defined in subsection (c)(2)." We note that there is no reference to "never-married persons" in subsection (c)(2). Moreover, subsection (d) contains language which is superfluous. The last sentence of subsection (d) states, "For such grandparents [of grandchildren in situations covered by subsections (c)(1) through (4)], no further showing of substantial harm shall be necessary or required to make their prima facie case." As stated above, subsection (c) already creates an irrebutable presumption of substantial harm. Thus, stating that "no further showing of substantial harm shall be necessary or required" is superfluous.

Subsection (e)(2) is also constitutionally suspect. It states:

> If a relative or a stepparent is adopting or has adopted a child, a grandparent who is the mother or father of the absent biological parent may petition a court of competent jurisdiction for reasonable visitation rights to the child during its

> minority if a sufficient existing relationship exists between the grandparent and the child upon a finding that such visitation rights are in the best interests of the minor child based on the factors in § 36-6-307.

Because this provision infringes on the parents' fundamental right of privacy with respect to the raising of their child, it is subject to strict judicial scrutiny which requires the state to establish a compelling interest in its enactment. *See, State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). In *Hawk v. Hawk*, the Tennessee Supreme Court held that an initial showing of danger of substantial harm to a child is necessary before the state may intervene to determine the "best interests of a child" when an intact, nuclear family with fit, married parents is involved. *Hawk v. Hawk*, 855 S.W.2d 573, 577, 579-580 (Tenn. 1993); Op. Tenn. Atty Gen. 99-006 (January 25, 1999). We believe that a court would conclude that proof of a "sufficient existing relationship" would neither establish a "danger of substantial harm" under *Hawk* nor would it be a "compelling interest" sufficient to interfere with parents' fundamental right of privacy with respect to the raising of their children.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

MICHELLE HOHNKE JOSS
Assistant Attorney General

Requested by:

Honorable Mark Maddox
State Representative
76th Legislative District
26 Legislative Plaza
Nashville, TN 37243-0176