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Opinion No. 06-067

Constitutionality of House Bill 2763 and Senate Bill 2763

QUESTION

Are House Bill 2763 and Senate Bill 2763 constitutional in light of *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993)?

OPINION

No. Insofar as House Bill 2763 and Senate Bill 2763 confer upon grandparents guardianship rights that exist simultaneously with a parent's parental rights, the bills unconstitutionally infringe upon parents' constitutional privacy interest in caring for their children without unwarranted state intervention.

ANALYSIS

House Bill 2763 and Senate Bill 2763[1] would amend Tenn. Code Ann., Title 36, Chapter 1, which governs adoption, by adding a provision that:

> all living blood grandparents of any degree shall be given the same rights afforded to legal guardians of children pursuant to this chapter with respect to termination of guardianship rights and adoption of such children.

Title 36 defines the term "guardian" as follows:

> 'Guardian(s)' or 'co-guardian' means a person or persons or an entity, other than the parent of a child, appointed by a court or defined by law specifically as 'guardian' or 'co-guardian' or 'conservator' to provide supervision, protection for and care for the

[1]House Bill 2763 and Senate Bill 2763 are identical and will be referred to as "HB 2763" or "the bill."

> person or property, or both, of a child or adult.

Tenn. Code Ann. § 36-1-102(24)(A).

HB 2673 would also amend Tenn. Code Ann. § 36-1-117, which sets out who must be made parties to adoption and termination of parental and guardianship rights proceedings. The bill would require that the rights of a "living blood grandparent of any degree" be terminated "by a court to authorize the court to order the adoption of the child or adult by other persons."

You have specifically asked about the constitutionality of HB 2763 in light of the Supreme Court of Tennessee's decision in *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993). In *Hawk*, a married couple became estranged from the husband's parents. *Id.* at 575-76. Consequently, the couple decided that their children would no longer have contact with their grandparents. *Id.* at 576. Pursuant to Tenn. Code Ann. § 36-1-301 (1985) and over the parent's objections, the trial court ordered visitation between the grandparents and grandchildren, finding that visitation was in the best interest of the minor children. *Id.* at 575-77.

On appeal, the Supreme Court reversed the judgments of not only the trial court but also the Court of Appeals granting visitation. *Id.* at 582. The Court recognized that the Tennessee State Constitution protects parents' right to privacy "to care for their children without unwarranted state intervention." *Id.* at 579. The Court held:

> 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. When applied to married parents who have maintained continuous custody of their children and have acted as fit parents, we conclude that court interference pursuant to T.C.A. § 36-6-301 constitutes an unconstitutional invasion of privacy rights under the Tennessee Constitution.

Id. The Court held Tenn. Code Ann. § 36-6-301 unconstitutional to the extent that it permitted the state to interfere with the child-rearing decisions of parents whose parental rights were still intact.

HB 2763 would grant guardianship rights to "living blood grandparents of any degree." It is unclear when those rights would attach. However, *Hawk* is only relevant when the state extends to grandparents rights that interfere with an intact set of parental rights. Therefore, we assume that you read the statute to confer upon grandparents guardianship rights that exist simultaneously with the parents' parental rights and without regard to the parents' fitness. These state-granted guardianship rights to provide supervision, protection, and care for a child would interfere with the privacy interest of parents in their child-rearing decisions. Absent some showing of a threat of harm to the child, for which the bill does not clearly provide, the state lacks a sufficient compelling

justification for granting rights to grandparents that would interfere with parents' fundamental rights. Thus, in light of *Hawk*, HB 2763 unconstitutionally invades the constitutionally-protected privacy rights of parents as set out in the decision.

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