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May 31, 2007

Opinion No. 07-83

Constitutionality of Proposed Grandparent Visitation Legislation

QUESTION

Is House Bill 1284/Senate Bill 1472 regarding grandparent visitation constitutional?

OPINION

As currently written, certain provisions of the bill are vulnerable to constitutional challenge as more fully explained below.

ANALYSIS

You have requested an opinion regarding the constitutionality of House Bill 1284/Senate Bill 1472 (copy attached), which would amend the current statutes regarding grandparent visitation.[1] As currently written, certain provisions raise constitutional concerns.

House Bill 1284/Senate Bill 1472 would replace the current statutory scheme by which a grandparent may seek visitation with his grandchild when the child's parents prohibit such visitation. If passed, the bill would allow a grandparent to seek an order for grandparent visitation by filing a motion with "a court that has competent jurisdiction over the child" if (1) the child's parents are divorced, legally separated, an annulment has been granted, or if one of these proceedings is pending before a court; (2) one of the child's parents is deceased; (3) the child's parents have never been married or are not residing in the same household; (4) legal custody has been granted to someone other than the parents or the child does not live with the parents; or (5) the grandparent has provided a home for the child for the past year. The bill erects a rebuttable presumption that a parent's decision to deny grandparent visitation does not create a substantial risk of harm to the child. In order to rebut this presumption, a grandparent must prove by a preponderance of the evidence that the parent's decision creates a substantial risk of harm to the child's mental, physical, or emotional health. If the grandparent fails to do so, then the court must dismiss the action. If the grandparent proves that denial of visitation will harm the child, then the court proceeds to determine whether it

[1]This opinion is limited to the question of the bill's constitutionality and does not address any other inconsistencies in the legislation.

is in the best interest of the child to order grandparent visitation. If two fit parents submit an affidavit stating that they oppose grandparent visitation, the court is required to dismiss the action unless one of the parents is a stepparent who has adopted the child. The legislation also provides, *inter alia,* that the court may refer a case to mediation; that a grandparent can file such a petition only once every two years; and that adoption of the child, except for stepparent adoptions, terminates a grandparent's right to file an action for visitation.

The constitutionality of nonparental visitation statutes has been addressed by both the United States and Tennessee Supreme Courts. *See Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Hawk v. Hawk,* 855 S.W.2d 573 (Tenn. 1993). In *Troxel v. Granville,* the United States Supreme Court considered a Washington state statute which allowed anyone to petition for visitation with a child at any time. *Troxel,* 530 U.S. at 60. In striking down the statute as unconstitutional, the Supreme Court noted that the statute in question gave no deference to the parent's decision but allowed a court to grant visitation based solely upon a determination that visitation was in the best interest of the child. *Troxel,* 530 U.S. at 67. While the Court stopped short of considering whether a showing of potential harm to the child was required in all nonparental visitation cases, it determined that the "breathtakingly broad" Washington statute was an unconstitutional infringement on a parent's fundamental right to raise her child. *Troxel,* 530 U.S. at 67, 73.

Several years before *Troxel,* the Tennessee Supreme Court struck down a grandparent visitation statute as unconstitutional because it allowed a court to order visitation solely upon a finding that visitation would be in the best interest of the child. *Hawk v. Hawk,* 855 S.W.2d 573 (Tenn. 1993). In a decision based on the right to privacy under the Tennessee Constitution, the court held that, absent a threat of substantial harm to the child, the state lacked a compelling justification to interfere with the fundamental right of a parent to raise the child as he or she sees fit. *Hawk,* 855 S.W.2d at 579. Accordingly, the Tennessee Supreme Court set a more stringent prerequisite than the United States Supreme Court by requiring that a grandparent demonstrate a threat of harm to the child before a court may order visitation against the wishes of a parent.

Given these precedents, we believe that the general provision of this bill establishing a rebuttable presumption that the parent's decision regarding visitation between the grandparent and grandchild will not harm the child sufficiently protects a parent's fundamental constitutional right to raise his children. However, there are several specific provisions which raise constitutional concerns.

First, one of the prerequisites that must exist for a grandparent to file an action for visitation is that the child's parents have never been married or are not residing in the same household. Both the United States and Tennessee Supreme Courts have addressed standards which differ based on a parent's marital status and concluded that such differing standards are unconstitutional. *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Nale v. Robertson,* 871 S.W.2d 674 (Tenn. 1994). In *Nale v. Robertson,* the Tennessee Supreme Court considered the case of a father of a child born out of wedlock who fought the adoption of his child after the child's mother surrendered her to an adoption agency. *Nale,* 871 S.W.2d at 676. After reviewing United States

Supreme Court precedent, the court concluded that parents of children born out of wedlock have a fundamental liberty interest in the care and custody of their children and, therefore, struck down a statute allowing the termination of an unwed father's parental rights based on a lower standard than that applied to termination of a mother's or married father's rights. *Nale,* 871 S.W.2d at 680. The court specifically linked its reasoning to the *Hawk* grandparent visitation case:

> The [petitioner's] position that this Court in *Hawk* limited the protection of parental rights to "an intact, nuclear family with fit parents" is untenable. . . . This Court joins the Court of Appeals, which, in this case, stated:
>
> "No reason occurs to this Court why a fit parent should be denied the privilege of parenthood merely because of birth out of wedlock. As previously stated, the denial of privilege of parenthood is based upon termination for unfitness."

Nale, 871 S.W.2d at 680. Because parents who have never been married are entitled to the same constitutional protections of their parental rights, we believe that a provision allowing grandparents to petition for visitation based solely on the fact that the parents have never been married is vulnerable to constitutional attack.

Second, the bill permits a grandparent to overcome, by a preponderance of the evidence, the presumption that a parent's decision to deny visitation to the grandparent will not harm the child. In custody disputes between parents and grandparents, Tennessee courts have held that the threat of harm to the child must be proven by the higher standard of clear and convincing evidence. *Toms v. Toms,* 98 S.W.3d 140 (Tenn. 2003); *Hall v. Bookout,* 87 S.W.3d 80 (Tenn. Ct. App. 2002). For example, in *Hall v. Bookout,* the Tennessee Court of Appeals considered a petition for custody filed by grandparents whose granddaughter had lived with them for more than a year after her mother's death. *Hall,* 87 S.W.3d at 82. The court held:

> In a custody dispute between a biological parent and non-biological parent, due to the constitutional protection afforded biological parents, the non-biological parent has the burden of establishing by clear and convincing evidence that the child will be exposed to substantial harm if placed in the custody of the biological parent.

Hall, 87 S.W.3d at 86. The Tennessee Supreme Court approved of this standard in *dicta* in a case in which grandparents intervened in the parents' divorce case to request custody of the children. *Toms v. Toms,* 98 S.W.3d at 145 n.5. While this bill governs visitation and not custody disputes, many of the same constitutional concerns regarding a parent's right to make decisions regarding his

or her children are at issue. Therefore, we believe it is likely that a court would find the preponderance of the evidence standard unconstitutional.[2]

Finally, the bill contains two provisions relating to stepparent adoptions. The first exempts cases of stepparent adoptions from the section of the bill providing that an action must be dismissed if the child's two parents sign an affidavit stating that they both oppose an order for grandparenting time. The second provides that the adoption of a child by a stepparent does not terminate the right of a grandparent to commence an action for visitation with the child. The Tennessee Supreme Court has previously held in a grandparent visitation case involving a stepparent adoption that adoptive parents are entitled to the same constitutional protections as natural parents. *Simmons v. Simmons*, 900 S.W.2d 862, 864 (Tenn. 1995). However, as we subsequently opined:

> The right of adoption in Tennessee is purely a statutory right. Therefore, the relationship created by adoption is determined by statute. Tennessee statutes have long been construed to give adoptive parents the same custody and control of the child as possessed of natural parents. This was the basis for the holding in *Simmons* that adoptive parents are entitled to the same constitutional protection of parenting decisions as natural parents. Assuming that the legislature clearly expresses its intent to create an exception to the provisions in Tenn. Code Ann. § 36-1-121 giving stepparent or relative adoptive parents the same custody and control of the child as natural or other adoptive parents, it is our opinion that the holding in *Simmons* would no longer be applicable.

Op. Tenn. Att'y Gen. No. 97-084 (May 27, 1997) (citations omitted). While the issue is not free from doubt, we believe that if the bill clearly reflects the legislature's intention to create an exception to Tenn. Code Ann. § 36-1-121, this aspect of the bill would be constitutionally defensible. As currently written, both applicable subsections of the bill explicitly mention adoptions under title 36, chapter 1, part 1 of the Tennessee code and provide that the respective subsection of this proposed legislation does not apply to cases of stepparent adoption. We believe this adequately expresses the legislature's intention to create an exception to Tenn. Code Ann. § 36-1-121. Therefore, we believe these subsections are constitutionally defensible.

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[2]It appears that this possibility has already been considered as the bill includes a provision raising the standard to clear and convincing evidence if the lower standard is ruled unconstitutional.

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