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Opinion No. 09-78

Constitutionality of Tenn. Code Ann. § 36-6-101(a)(2)(A)(i)

QUESTIONS

1. Does Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) violate the fundamental right of parents to raise their children by not requiring a substantial threat of harm to the children as a predicate to the state's allocation of custody between the parents involved in a suit for annulment, divorce, or separate maintenance?

2. If Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) is unconstitutional, would the enactment of House Bill 0002 (2009) ("HB0002") remedy the deficiency?

3. Does HB0002 as proposed remove judicial discretion by mandating that parenting time be shared equally between parents?

OPINIONS

1. No, a suit for annulment, divorce, or separate maintenance itself serves as the implicit harm to children sufficient to justify state intervention in child custody determinations.

2. The answer to the preceding question makes a response to this question unnecessary.

3. No, HB0002 (2009) neither removes judicial discretion nor mandates equally shared parenting time.

ANALYSIS

As the answers to your questions involve constitutional analysis and comparison of Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) with HB0002,¹ it will be useful to set out both the statute and the bill. The statute guides courts in allocating child custody between parents suing for divorce, annulment, or separate maintenance. It provides as follows:

¹ We have previously opined that HB0002 is constitutional as currently drafted. Op. Tenn. Att'y Gen. No. 09-66 (April 24, 2009).

Except as provided in this subdivision (a)(2)(A), neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child. Unless the court finds by clear and convincing evidence to the contrary, there is a presumption that joint custody is in the best interest of a minor child where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate, the court may direct that an investigation be conducted. The burden of proof necessary to modify an order of joint custody at a subsequent proceeding shall be by a preponderance of the evidence.

Tenn. Code Ann. § 36-6-101(a)(2)(A)(i). The bill aims to delete and replace the current statute with the following language:

SECTION 1. This act shall be known, and may be cited, as the “Equal and Fair Parenting Act”.

SECTION 2. Tennessee Code Annotated, Section 36-6-101(a)(2)(A)(i), is amended by deleting the current language in its entirety and by substituting instead the following: (i) Except as provided in this subdivision (a)(2)(A), the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child. Unless the court finds by a preponderance of evidence to the contrary, or where the parents have agreed to a different custody arrangement, at a hearing for the purpose of determining the custody of the minor child, there shall be a rebuttable presumption that equally shared parenting is in the best interest of the child. For the purpose of assisting the court in making a determination whether an award of equitably-shared parenting is inappropriate, the court may direct that an investigation be conducted. The burden of proof necessary to modify an order of shared parenting at a subsequent proceeding shall be by a preponderance of the evidence.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.

HB0002.

Neither the statute nor the bill explicitly requires a showing of substantial threat of harm before the court orders a custody arrangement in a suit for annulment, divorce or separate maintenance. However, Tennessee courts have decided that no such showing is required before a court allocates custody in such a suit.

In *Hawk v. Hawk*, the Tennessee Supreme Court held that “an initial showing of harm to the child is necessary” before the state may intervene in parents’ rights to control the custody of their children. However, the court added, “In a divorce case, for instance, the harm from the

discontinuity of the parents' relationship compels the court to determine custody 'as the welfare and interest of the child or children demand.'" 855 S.W.2d 573, 580 (Tenn. 1993) (quoting Tenn. Code Ann. § 36-6-101(a)(1) (1993)).

In *Lee v. Lee*, the Court of Appeals applied *Hawk* to decide a constitutional challenge that mirrored almost precisely the issue raised in your first question. 66 S.W.3d 837 (Tenn. Ct. App. 2001). In *Lee*, a father challenged the constitutionality of Tenn. Code Ann. § 36-6-101(a)(1), the section immediately preceding the statute analyzed in this opinion. Section 36-6-101(a)(1), which has not been amended since *Lee*, provides continuing authority to courts in suits for annulment, divorce, or separate maintenance to award child custody to either or both parents or some other suitable person. The provisions analyzed in this opinion guide a court's discretion in exercising its authority under Tenn. Code Ann. § 36-6-101(a)(1) to allocate custody between parents. Like those provisions, Section 36-6-101(a)(1) does not explicitly require a showing of substantial harm to the child, and it was on this basis that the father in *Lee* challenged the section's constitutionality. 66 S.W.3d at 846. Relying on *Hawk*, the *Lee* court decisively rejected the challenge, writing, "Because the harm to the child is implicit in a divorce proceeding, parents involved in such a proceeding automatically submit the issue of custody of a minor child to the court." *Id.* at 847. While *Hawk* and *Lee* were divorce cases, their reasoning applies equally to suits for annulment and separate maintenance as all three actions involve the actual or anticipated dissolution of the marital relationship.

Like Section 36-6-101(a)(1), the provisions analyzed in this opinion involve a court's custody determination in a suit for annulment, divorce, or separate maintenance. The institution of such a suit automatically provides the court constitutional authority to determine child custody. *Lee*, 66 S.W.3d at 847. Accordingly, statutes or bills like Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) or HB0002 that guide a court's custody determination after parents institute a suit for annulment, divorce, or separate maintenance need not require a separate showing of substantial harm to the child in order to pass constitutional muster.

Finally, you ask whether HB0002 removes judicial discretion by mandating that parenting time be shared equally between the parents. It does not. On the contrary, HB0002, like Tenn. Code Ann. § 36-6-101(a)(2)(A)(i), explicitly provides a court "the widest discretion to order a custody arrangement that is in the best interest of the child." Similarly, neither provision mandates that parenting time be shared equally between parents. Instead, HB0002, like Tenn. Code Ann. § 36-6-101(a)(2)(A)(i), sets out presumptions and burdens of proof to guide a court in exercising its discretion to order equally shared parenting or some other child custody arrangement.

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