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Opinion No. 10-62

Constitutionality of Amendment to Grandparent Visitation Statute

QUESTION

Is language in Senate Bill 3036/House Bill 2700 (2010) (collectively “SB 3036”) constitutionally valid insofar as it proposes to create a rebuttable threat of harm to a child when one of the child’s parents has died and the surviving parent has terminated the relationship between the child and the parent or parents of the deceased parent?

OPINION

Yes, because, as we have previously opined as to similar legislation, the statute preserves the constitutionally-required initial finding of a substantial threat of harm to the child from the termination of the child’s relationship with a grandparent, merely erecting a rebuttable presumption that the termination of the relationship constitutes such a threat of harm.

ANALYSIS

Your question concerns Tennessee’s grandparent visitation rights statute. As currently constituted, the statute provides standing to grandparents in certain circumstances to petition for visitation with their minor unmarried grandchildren over the objection of a parent. Tenn. Code Ann. § 36-6-306(a). For example, the statute provides standing to grandparents to seek visitation when either the father or the mother of a child is deceased. Tenn. Code Ann. § 36-6-306(a)(1).

In considering the grandparent visitation petition, a court must first determine whether cessation of visitation between a grandparent and grandchild constitutes a substantial threat of harm to the child. Tenn. Code Ann. § 36-6-306(b). The statute lists three situations in which the cessation of the child’s relationship with the grandparent may pose a threat of significant harm to the child. Tenn. Code Ann. § 36-6-306(b)(1) through (3). The court may find a substantial threat of harm to the child if the child’s relationship with the grandparent is so significant that its loss will likely occasion severe emotional harm to the child, if the cessation of the grandparent’s role as primary caregiver to the child could disrupt provision of the child’s daily needs and thus cause physical or emotional harm, or if loss of the child’s significant existing relationship with the grandparent presents the danger of other direct and substantial harm to the child. *Id.* The statute provides that a grandparent shall be deemed to have a significant existing relationship with the child if the child resided with the grandparent for at least six consecutive months, if the

grandparent was a full-time caretaker of the child for at least six consecutive months, or the grandparent visited frequently with the child for at least a year. Tenn. Code Ann. § 36-6-306(b)(2). A grandparent is not required to present expert proof of a significant existing relationship; instead a court must simply consider whether the facts of a particular case would lead a reasonable person to believe that there is such a relationship or that the loss of the relationship would likely cause the child severe emotional harm. Tenn. Code Ann. § 35-6-306(b)(3).

The proposed legislation prompting your question would add a new subsection (b)(4) to the statute to provide, in full:

For the purposes of this section, if the child's parent is deceased and the grandparent seeking visitation is the parent of that deceased parent, there shall be a rebuttable presumption of substantial harm to the child based upon the cessation of the relationship between the child and grandparent.

SB 3036 § 1. We have previously opined in favor of the constitutionality of similar proposed legislation that would have created a rebuttable presumption of substantial harm in four instances, including when the father or mother of an unmarried minor child is deceased. Op. Tenn. Att'y Gen. No. 00-982 (May 2, 2000) (copy attached). We noted that the Tennessee Supreme Court has held that before a grandparent may interfere with a parent's fundamental right to custody and control of his or her child, the grandparent must establish the existence of a substantial threat of harm to the child from a parent's decision to prevent the grandparent from visiting the child. *Id.* (citing *Hawk v. Hawk*, 855 S.W.2d 573, 577, 579-80 (Tenn. 1993), and *Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995)). We observed that the legislation satisfied *Hawk's* precondition of an initial finding of a substantial threat of harm, writing, "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. *Id.*

We are unaware of any subsequently-issued authority that would supersede our 2000 opinion. Accordingly, we do not believe that a court would find SB 3036 unconstitutional should the legislation be enacted.

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