

P E N N S Y L V A N I A LAW WEEKLY

GRANDPARENTHOOD - A GIANT STEP FORWARD

Just in time for National Grandparents Day, which occurs the first Sunday after Labor Day, the Supreme Court of Pennsylvania gave grandparents a priceless gift - their grandchildren. At issue was the constitutionality of a Pennsylvania statute governing the provision of partial custody or visitation to grandparents in the event of the death of a child who is the grandchildren's parent. The Pennsylvania Supreme Court upheld that statute as constitutional and now a grandparent in that situation (or great-grandparent) may seek visitation and/or partial custody with a grandchild. At issue before the Court in *Hiller v. Fausey*, 2006 Pa. LEXIS 1543 (2006) was the following statute: §5311. When parent deceased:

“If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the Court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The Court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.” 23 Pa. C.S. §5311.

The child, Kaelen Fausey, lost his mother to cancer when he was eight years old. Prior to his mother's death, Kaelen had had frequent interaction with his grandmother, Cheryl Hiller who had been a daily presence in his life for at least the last two years of Kaelen's mother's illness. After the death of Kaelen's mother, Father, Shane Fausey, abruptly and without cause denied Grandmother contact with the child. The trial court evidence indicated that in the year after the mother's death, Cheryl Hiller (“Grandmother”) saw the child on only three occasions. Grandmother filed for partial custody pursuant to 23 Pa. C.S. §5311.

The trial court awarded Grandmother partial custody of the child - one weekend per month and one week during the summer. Father appealed to the Superior Court of Pennsylvania, which upheld the trial court. Father then petitioned the Supreme Court of Pennsylvania which granted review in order to determine whether 23 Pa. C.S. §5311 violated the Due Process Clause of the United States Constitution and whether the statute constituted an impermissible infringement upon a parent's fundamental rights with regard to his child.

The United States Supreme Court was confronted with a similar situation in the matter of *Troxel v. Granville*, 530 U.S. 57 (2000) which was a plurality decision with Justice O'Connor writing for the Court. Before that Court was a Washington state statute which provided that “any person” could petition the Court for visitation rights “at any time” and stated further that a Court must grant that petition if it is in the child's best interest. Washington Rev. Code §26.110.160(3). That statute provided:

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“Any person may petition the Court for visitation rights at any time including, but not limited to, custody proceedings. The Court may order visitation rights for any person when visitation may serve the best interests of the child whether or not there has been any change of circumstances.” *Washington Rev. Code* §26.110.160(3).

The *Troxel* Court in 2000 and the *Hiller* Court in 2006 were obliged to consider a body of law which provided that the right to raise a child as a parent sees fit and to care for and control that child is a fundamental liberty interest long ago recognized by the Supreme Court of the United States. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Parham v. J.R.*, 442 U.S. 584 (1969); and *Santosky v. Kramer*, 455 U.S. 745 (1982). These cases all held that parents have a fundamental liberty interest concerning the care, custody, and management of their children, guaranteed by the Fourteenth Amendment of the United States Constitution. How then did the Pennsylvania Supreme Court hold that a grandparent has an interest in securing partial custody of a grandchild, in the situation where that grandchild’s parent is deceased? The following provides the Pennsylvania Supreme Court’s analysis.

In *Troxel, supra*, the plurality of the Supreme Court found that the language of the Washington statute was so “breathtakingly broad”, permitting “any person” to petition the Court for visitation rights at “any time” and that the Court may grant those visitation rights whenever the visitation serves the best interest of the child. *Troxel, supra*, at 67. The *Troxel* Court was able to skirt many issues because the language of the statute was so overbroad that the statute was unable to pass constitutional muster for that reason alone. Therefore, the Washington Statute was held unconstitutional. Many have since then incorrectly assumed that *Troxel* stood for the proposition that grandparents cannot assert rights as against parents which interpretation is incorrect.

The law which had developed over the years by the United States Supreme Court held that when one is examining a fundamental right, a “strict scrutiny” analysis rather than a “rational basis” analysis is required. In short, it is not enough that legislation have some rational basis for the purpose stated when a fundamental right is involved. The Supreme Court of Pennsylvania in *Hiller* stated:

“Thus, given the fundamental nature of the right, we conclude that we must apply a strict scrutiny analysis to any infringement by the state of the fundamental right of parents to direct the care, custody, and control of their children. Accordingly, as this Court has previously defined the appropriate test to apply when utilizing strict scrutiny review, we must determine if the infringement is supported by a

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compelling state interest and if the infringement is narrowly tailored to effectuate that interest.” *Hiller* at 28.

The Court defined the compelling state interest as Pennsylvania’s interest in protecting the health and emotional welfare of children. *Id.* at 31. The Pennsylvania Court then went on to determine whether 23 Pa. C.S. §5311 was narrowly tailored to serve that interest. The Court defined the issue before it as follows:

“We must therefore determine whether Section 5311 is narrowly tailored to protect the fundamental rights of fit parents while providing for appropriate state intervention to protect the welfare of children through court-ordered grandparent visitation or partial custody.” *Id.* at 32.

There is a body of law in Pennsylvania dealing with the rights of third parties as against natural parents. The Superior Court in *In re Hernandez*, 376 A.2d 648, (Pa Super) (1977), stated, “Even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents’ side.” The Supreme Court in *Rowles v. Rowles*, 668 A.2d 126, 128 (Pa 1995), failed to reach consensus on the weight that should be afforded to a parent’s rights in custody disputes with third parties. However, in *B.A. v. E.E.*, a presumption in favor of the parents was affirmed. *B.A. v. E.E.*, 559 Pa. 545, 741 A.2d 1227 (1999), thereby continuing the rationale of *In re Hernandez*, *supra*.

Having established that there is a *prima facie* presumption for the fitness of the natural parent, the Pennsylvania Court found that §5311 was indeed narrowly tailored to apply to only those grandparents (or great-grandparents) whose child had died and who had enjoyed a relationship with the grandchild prior to the death of the grandparent’s child. The Court also found that the rationale behind the stated public policy was that grandparents, in the recent past, have assumed increased roles in their grandchildren’s lives and our cumulative experience demonstrates the many potential benefits of strong inter-generational ties. *Hiller, supra*, at 33, citing *Troxel*, 530 U.S., at 64.

The Pennsylvania high court also determined that the statute was narrowly tailored because any Court which ordered partial custody and/or visitation to a grandparent was compelled to look at the strength of the grandparent- grandchild relationship prior to the time that a petition had even been filed. The Pennsylvania Court therefore concluded that the statute continued to afford “special weight” to the decisions of the fit parent but nevertheless found that a narrow application of the statute also concluded that the child would benefit from spending time with the grandparent with whom he had a long and close relationship.

Justice Cappy filed a dissent in which he stated that if in fact the raising of a child is a fundamental right protected by the United States Due Process Clause, and the Pennsylvania Constitution, then he would require a grandparent to show by clear and convincing evidence that absent an Order granting the grandparent custody and/or visitation, the child was being or would be harmed. *Hiller v. Fausey, supra* at 84 (Cappy, P.J., dissenting).

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Grandparenthood is very special. Celebrities have recently elevated that relationship to The New York Times Bestseller List. The books, I Already Know I Love You by Billy Crystal and Elizabeth Sayles as well as If I Knew It Was Going to be This Much Fun, I Would Have Become a Grandparent First, by Willard Scott and Friends, are recent examples extoling the virtues of those very special bonds that bind alternating generations.

The Pennsylvania Supreme Court has succeeded in recognizing the unique status of the grandparent-grandchild relationship while still preserving the fundamental rights of parents regarding the raising of their children

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