[J-142-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JEAN SCHMEHL AND DAVID SCHMEHL,	:	No. 87 MAP 2005
	:	
Appellants	:	
	:	Appeal from the Order of the Court of
	:	Common Pleas of Berks County, entered
v.	:	on July 14, 2005 at Dkt. No. 05-5526.
	:	
	:	
ANN WEGELIN AND PERRY SCHMEHL,	:	
	:	
Appellees	:	SUBMITTED: November 29, 2005

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: June 12, 2007**

I join Justice Baldwin's dissenting opinion to the extent that it concludes that the state has no compelling interest to classify parents by marital status under 23 Pa.C.S. §3512. Because this is a facial constitutional challenge, I do not join any analysis which delves into the underlying facts of this case but, rather, consider the statute on its face to determine if it creates a permissible classification that survives constitutional scrutiny. I write separately because I believe the majority fails to establish the state's compelling interest in classifying parents according to marital status within the framework of equal protection.

The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. Commonwealth v. Albert, 758

A.2d 1149, 1151 (Pa. 2000). The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. Id. There are different levels of classifications and standards by which classifications are weighed, with the highest level of scrutiny reserved for classifications that burden a suspect class or a fundamental right. Id. at 1152. If the classification impinges a fundamental right protected by the Constitution, then it is subject to strict scrutiny. Id. (citing Smith v. City of Philadelphia, 516 A.2d 306, 311 (Pa. 1986)). A statute containing a classification of this kind will not be entitled to the usual presumption of validity, as the majority asserts. See Danson v. Casey, 399 A.2d 360, 372 (Pa. 1979). Rather, the Commonwealth must establish that its interference with a fundamental right is compelled by some legitimate state interest, and that the interference is narrowly tailored to be the least drastic means of accomplishing that objective. Danson, 399 A.2d at 372. Strict scrutiny requires that the classification be *necessary* to effectuate the state's compelling interest. Commonwealth v. Bell, 516 A.2d 1172, 1178 (Pa. 1986) (emphasis added).

The majority does recognize that parents have the right to make decisions concerning the care, custody and control of their children, and that this is a fundamental right protected by the Due Process Clause. It also properly asserts the state's legitimate interest in the welfare of children. However, the focus of the inquiry under equal protection is the legitimacy of the classification created by the statute. The majority correctly states the law in this area on one hand, but then asserts that the equal protection inquiry is "essentially identical" to an inquiry of substantive due process. See Majority Opinion p. 7 *supra*. In fact, the caselaw cited by the majority does not refer to the inquiries as "essentially identical" but rather as "substantially similar" and while it is true that due process and equal protection involve a substantially similar inquiry in that the concepts are

very much alike, the analyses do differ in what I believe to be a critical aspect. Both consider whether the government action is necessary to promote a compelling state interest and is narrowly tailored to effectuate that interest, but substantive due process applies this test to the legislation, whereas under equal protection we apply that test to the classification created by the legislation. Compare Khan, 842 A.2d at 947 with Commonwealth v. Bell, 516 A.2d at 1178. In other words, strict scrutiny under due process tests the government's interest to determine if the statute represents an acceptable infringement, whereas equal protection, the concept at issue here, considers whether the government's interest is sufficient to support a particular classification. I may seem to quibble over the precise language that the majority chooses to use, however, I believe that there is a real risk that the two inquiries will be conflated. This is problematic because distinct analyses may lead to divergent results. This concern is borne out by a careful reading of Blixt v. Blixt, 774 N.E. 1052 (Mass. 2002), a case cited by the majority to support it's contention that the governmental interest here is compelling. In Blixt, the Supreme Judicial Court of Massachusetts considered a facial challenge to a grandparent visitation statute similar to our own on both due process and equal protection grounds. Id. at 1056. Under due process, the court found that the statute satisfied strict scrutiny because "our construction narrowly tailors it to further the compelling [s]tate interest in protecting the welfare of a child who has experienced a disruption in the family unit from harm." Id. at 660. But, although the court recognized the standard of evaluating the classification within the statute when it turned to the equal protection analysis, it did not engage in any analysis as to how the classification itself served the compelling interest. Id. at 1064-65. Instead, the Blixt court merely repeated its due process analysis. Id. The fact that the two concepts are so substantially similar makes it easy to conflate the two distinct tests. Therefore, in the interests of protecting our constitution and our caselaw, I think it is important that we highlight the small, but important way in which the tests are dissimilar.

As stated above, to come to the conclusion that Section 3512 is constitutional after an equal protection challenge, the majority must show that creating a classification that holds out different groups of parents for disparate treatment according to their marital status is necessary to protect the welfare and safety of children. At this point, I am not persuaded that the majority opinion answers this question. The majority does correctly state the law with respect to a strict scrutiny analysis under equal protection, but then it cites to three cases which are inapt; two from other jurisdictions. In Seagrave v. Price, 79 S.W.3d 339 (Ark. 2002), the Supreme Court of Arkansas considers a grandparent visitation statute under rational basis. The majority makes note of this, but does not elaborate on why it is relevant that another state's high court decided that such a statute could survive a far lower and more deferential level of scrutiny than we consider in this case. The same is true of Curtis v. Kline, 666 A.2d 265 (Pa. 1995) (Montemuro dissenting), which discusses the impact of divorce on children in the context of rational basis review. The only case which appears to be on point is Blixt, which as I detail above, includes an equal protection inquiry which collapses into a due process resolution.

Having listed these cases, the majority simply concludes that "Section 5312 is directly and *narrowly tailored* to such breakdown" without proffering any independent analysis as to how classifying parents by marital status is necessary to protect the compelling interest of the state. Under an equal protection analysis, it is incumbent upon this Court to first find the classification to be necessary to a compelling state interest. The majority does not meet this burden.

I assert that it is not necessary to group parents into categories based on their marital status in order to protect the best interests of children because the fact of divorce or separation alone is not a proxy for determining which parents might cause their children harm. In other words, classifying parents by marital status does not necessarily divide the children at risk from their parent's decisions from the children who are not at risk. This

classification suggests that divorced or separated parents are inherently less fit to parent, as compared to parents who have married, or to parents who have never married, but who conjugate.[1] No matter what strife might actually ensue within the family unit, the decisions of fit married or cohabiting parents as to custody and care of their children will enjoy special status under Section 3512, but not the parenting decisions of the divorced or separated. This distinction between parents based on marital or quasi-marital status is arbitrary. Marital status alone can never serve as an indication of parental fitness. Without making any distinction as to marital status, we have held that there is a presumption that parents will act in a child's best interest. Hiller v. Fausey, 904 A.2d 875, 890 (Pa. 2006). The classification in Section 3512 would seem to directly contradict this presumption and suggest that divorced or separated parents are necessarily in need of heightened state supervision when they make their parenting decisions.

Furthermore, this case is distinguishable from this Court's decision in Hiller, 904 A.2d at 875. There, this Court considered an as applied challenge to a different section of the Domestic Relations Code which allows grandparents to petition for custody when one parent is deceased. 23 Pa.C.S. §5311. That statute classified parents into two groups. One group where both parents were alive, and the other, where one parent had died. This Court found that these two groups of parents were not similarly situated and that the classification was necessary to the compelling state interest of the welfare of children. This Court found that where one parent is deceased, the child might be at risk of loosing his or

[1] In Bishop v. Pillar, 637 A.2d 976 (Pa. 1994) (Opinion Announcing the Judgment of the Court), a plurality of this Court affirmed the Superior Court's construction of Section 3512 to include separated, but never-married parents within the category of "separated" parents subject to the additional state oversight provided by Section 3512. It seems reasonable to conclude then that never-married but cohabiting parents who have not separated remain outside the ambit of Section 3512 alongside married parents due to the fact that their living arrangements create a quasi-marital relationship.

her connection to the grandparents from the deceased parent's side of the family. In that case, the classification did serve as a proxy for determining what children stood at risk of that particular type of harm and survived strict scrutiny, as applied to those particular facts, because the classification itself was necessary to effectuate a compelling government interest.

But unlike the situation in Hiller, separating the married or cohabiting from the divorced or separated is not a substitute for determining which parents might cause their children harm. Section 3512, which creates a classification that distinguishes between married or cohabiting and divorced or separated parents, does not necessarily serve the state's compelling interest in the welfare of children and, therefore, I believe that it cannot withstand strict scrutiny.

Accordingly, I would affirm the order of the Court of Common Pleas.