[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
	:	on July 14, 2005 at Dkt. No. 05-5526.
v.	:	
	:	
	:	
ANN WEGELIN AND PERRY SCHMEHL,	:	
	:	
Appellees	:	SUBMITTED: November 29, 2005

DISSENTING OPINION

MADAME JUSTICE BALDWIN **DECIDED: June 12, 2007**

The Majority concludes that the trial court failed to accord proper weight to the interest of the State in the underlying action and that Section 5312[1] of the Domestic Relations Code regarding grandparent custody and visitation survives a constitutional

[1] Section 5312 provides:

> In all proceedings for dissolution, subsequent to the commencement of the proceeding and continuing thereafter or when parents have been separated for six months or more, the court may, upon application of the parent or grandparent of a party, grant reasonable partial custody or visitation rights, or both, to the unmarried child if it finds that visitation rights or partial custody, 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 party and the child prior to the application.

23 Pa.C.S. § 5312.

challenge on equal protection grounds. I respectfully dissent. Section 5312 of title 23 violates the Equal Protection provisions of the Fourteenth Amendment to the U.S. Constitution and Article I, §§ 1 & 26 of the Pennsylvania Constitution. Therefore, I would affirm the decision of the Court of Common Pleas of Berks County.

In Commonwealth v. Albert, 563 Pa. 133, 139, 758 A.2d 1149, 1152 (2000) (internal citations omitted) we set forth the following with respect to 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. However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs. 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. In other words, a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation. Judicial review must determine whether any classification is founded on a real and genuine distinction rather than an artificial one. A classification, though discriminatory, is not arbitrary or in violation of the equal protection clause if any state of facts reasonably can be conceived to sustain that classification.

In the instant case, section 5312 discriminates between married parents and divorced parents, permitting a heightened level of state intervention with respect to parents who are divorced. The majority relies on our recent decision in Hiller v. Fausey, 588 Pa. 342, 904 A.2d 875 (2006) in support of its conclusion that the classification created by section 5312 passes constitutional muster. In Hiller, this Court was called upon to determine whether Section 5311 of the Domestic Relations Code could survive a due process challenge where the parent of the child's deceased mother sought visitation rights and partial custody. Section 5311 was determined to interfere with the fundamental right of a parent to control the upbringing of his or her child, and consequently, we recognized that

a strict scrutiny analysis must be applied. The appropriate test therefore required a determination that the constitutional infringement was supported by a compelling state interest and that the infringement was narrowly tailored to effectuate that interest. We concluded in Hiller that the state possessed a compelling interest in the health and welfare of children, and that section 5311 narrowly limits those who can seek visitation or partial custody not merely to grandparents, but specifically to grandparents whose child has died. Hiller, 904 A.2d at 885-90. We further reasoned that section 5311 protected the father's right to raise his son as he saw fit by, among other things, providing a presumption in favor of the father's decisions and requiring that visitation rights not interfere with the parent-child relationship. Id.

Relying on Hiller, the majority in the instant case finds that the State has a compelling interest in distinguishing between married and divorced parents because of the disruption of the intact family by divorce. I respectfully disagree. Hiller's result required both the procedural protections afforded by Section 5311 and its application to a situation when a parent has died.[2] As we explained in Hiller:

> We cannot conclude that . . . a benefit always accrues in cases where grandparents force their way into grandchildren's lives through the courts, contrary to the decision of a fit parent. In contrast, however, we refuse to close our minds to the possibility that in some instances a court may overturn even the decision of a fit parent to exclude a grandparent from a grandchild's life, especially where the grandparent's child is deceased and the grandparent relationship is longstanding and significant to the grandchild.

[2] We found section 5311 clearly distinguishable from the statute at issue in Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000). The statute in Troxel gave standing to any person at any time. However, section 5311 is limited to grandparents whose child has died.

Id. at 886-87. Thus, the analysis in Hiller does not necessarily apply beyond the exceedingly narrow circumstance where a parent has died and the grandparent had a significant relationship with the child.

The instant appeal involves an examination of a different subsection of the grandparent custody and visitation statute in the context of a different set of facts. Specifically, unlike Hiller, we are dealing with a divorced family with living parents who have different opinions as to the children's visitation with their grandparents. I believe this alters the landscape considerably, for I cannot accept that divorce alone diminishes the fundamental interest of parents who are making caretaking decisions. In particular, I do not believe that the statute can survive the scrutiny involved in comparing two otherwise fit parents who happen to be divorced to two similarly situated parents who are not divorced. In the instant case, the section 5312 classification of parents as married or divorced does not provide a real and genuine distinction upon which to permit state interference with the fundamental right of parents to direct the upbringing of their children. If Father lived with Mother, the present controversy would not be before this Court. While divorce, by necessity, permits the State to intervene to resolve immediate and direct disputes that arise between parents over custody and visitation, divorce is not the sine qua non of a compelling state interest when non-parents seek to challenge parental decision-making.

The majority has failed to identify a compelling reason to discriminate between married and divorced parents. Although the state has a longstanding interest in protecting the health and emotional welfare of children, that interest is not implicated merely as a result of divorce proceedings. While divorce opens the door for courts to resolve disputes between parents, it does not make parents unfit to make decisions that are in the best interests of their children. Divorce proceedings alone do not threaten the health, safety, morals or welfare of children to constitute a compelling reason for state interference. I believe that permitting the state to inject itself into a dispute between two fit parents

involving grandparent visitation violates the grounding premise of Hiller and Troxel, that fit parents are accorded a presumption in favor of their decisions regarding their children. The heightened protection of this valued fundamental interest, recognized in both Hiller and Troxel, should not be altered by the marital status of otherwise fit parents, and the Commonwealth should be held to no lesser standard for intervention. In Hiller we found Section 5311 narrowly tailored to serve the state's compelling interest in children's health and welfare when one parent is deceased. We did not find that the desire of the State to foster close relationships between grandparents and grandchildren alone was sufficient to justify court-ordered visitation and custody over the objection of a fit parent.

While the Commonwealth has a compelling interest in protecting the well-being of its children, particularly in matters of health and safety, this legitimate and compelling interest does not extend to all things that might be beneficial to children nor confer upon the Commonwealth the power to intrude upon the decisions of a fit parent. The Commonwealth may intervene when preventing injury, abuse, trauma, exploitation, severe deprivation, or other comparable forms of significant harm. The United State Supreme Court has indicated that in certain limited arenas, such as compulsory education and compulsory vaccination, the State may contravene the decisions of a fit parent. Meyer v. Nebraska, 262 U.S. 390, 402, 43 S.Ct. 625, 627 (1923) (commenting that "the power of the state to compel attendance at some school . . . is not questioned"); Jacobson v. Commonwealth of Mass., 197 U.S. 11, 25 S.Ct. 358 (1905) (upholding state compulsory vaccination); accord In re Walker, 179 Pa. 24, 36 A. 148 (1897); Rhoades v. Sch. Dist. of Abington Twp., 226 A.2d 53, 60, 424 Pa. 202, 212 (1967). Further, some states have found it necessary to oppose the decisions of a parent involving medical treatment for life-threatening situations. See, e.g., Matter of McCauley, 409 Mass. 134, 565 N.E.2d 411 (1991); Walker v. Superior Court, 47 Cal.3d 112, 763 P.2d 852 (1988); People in Interest of D.L.E., 645 P.2d 271 (Colo. 1982). However, the State does not gain a compelling interest

in supervising the upbringing of a child when both parents are living, albeit divorced. "[M]ere improvement in quality of life is not a compelling state interest and is insufficient to justify invasion of constitutional rights. So long as a family satisfies certain minimum standards with respect to the care of its children, the state has no interest in attempting to 'make things better.'" King v. King, 828 S.W.2d 630, 634 (Ky. 1992) (Lambert, J. dissenting).

Section 5312, at issue in the instant case, requires consideration of the best interests of the child, the impact on the parent/child relationship, and an established relationship between grandparent and grandchild. 23 Pa.C.S. § 5312. Healthy relationships with grandparents unquestionably benefit children. However, the fact that such relationships are desirable does not permit the State to force them upon children contrary to the wishes of a fit custodial parent merely because that parent happens to be divorced. The Majority Opinion is jurisprudentially irreconcilable with both Troxel and Hiller. The Majority finds that the statute survives strict scrutiny because (1) the government has a compelling interest in children's well-being and preventing the "heightened risk of harm" caused by the dissolution of a marriage; and (2) the statute is narrowly tailored to further that interest, requiring, inter alia, that the court consider the best interest of the child and not interfere with the parent-child relationship. (Majority Opinion, slip op. at 9-10). I fail to see how grandparent visitation is narrowly tailored to further the compelling interest of protecting the children of divorced parents from the perceived detriment caused by the dissolution of the core family unit. Court-ordered grandparent visitation does not significantly further the Commonwealth's interest in helping the children affected by divorce here because, unlike in Hiller, the paternal grandparents can visit their grandchildren during their child's custody time. See Hiller, 904 A.2d at 887 ("Unlike the statute in Troxel, which extended standing to any person at any time, Section 5311 narrowly limits those who can seek visitation or partial custody not merely to grandparents, but specifically to

grandparents whose child has died.")[3] Moreover, there is no allegation that children of divorced or separated parents are so traumatized by divorce or separation that they require the special and exceptional intervention of the Commonwealth. Even if divorce traumatizes children enough for the Commonwealth to acquire a compelling interest to intrude on the family, something more than court-ordered time with grandparents is required to further significantly the Commonwealth's purpose of safeguarding children's welfare.

Section 5312 permits a trial court to interfere too easily in parental decision-making. Hiller involved the death of a parent who could no longer ensure that her child was exposed to her family and heritage. That element, which was essential to overcoming the fundamental right of a parent to decide with whom the child associates, is missing here.

Conclusion

Troxel made it clear that when a forum has been created for a court to consider grandparent visitation, the judge must presume that a fit parent acts in the best interests of his or her children. "So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Troxel, 530 U.S. at 68-69, 120 S.Ct. at 2061. This presumption is not simply applicable to joint decisions of fit married parents but applies to the decisions of all fit parents. See Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972) (holding that the state may not interfere with an unwed father's custody rights absent proof of unfitness). It is parental fitness, not mere marital status that gives rise to the

[3] Even Troxel emphasized the fact that the grandparents still had access to the children. See Troxel, 530 U.S. at 71, 120 S.Ct. at 2063 ("Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely.").

presumption. Divorce does not diminish the fundamental interest of a parent in parenting and does not make a father or mother less capable.

The Commonwealth has the power, cloaked in the doctrine of parens patriae, to determine in divorce proceedings how, in the best interests of the child, custody should be allocated. However, once this determination is made, Troxel indicates that decisions by a fit custodial parent must be accorded the presumption that those decisions are in the best interests of the child. With both parents living, and no showing of parental unfitness or harm to the child, Grandparents have failed to demonstrate that divorce alone overcomes that presumption.

Mr. Justice Castille joins this dissenting opinion.