[J-53-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

CHERYL HILLER,	:	No. 197 MAP 2004
Appellee	:	Appeal from the Order of the Superior Court entered on May 25, 2004 at No. 1428 MDA 2003, affirming the Order of the
v.	:	Court of Common Pleas of Lycoming County entered on August 1, 2003 at No. 03-20, 361.
SHANE FAUSEY,	:	
	:	851 A.2d 193 (Pa. Super. 2004)
Appellant	:	
	:	ARGUED: May 16, 2005

CONCURRING OPINION

MADAME JUSTICE NEWMAN **DECIDED: August 22, 2006**

I join the well-reasoned Opinion of the Majority in this matter but write separately to indicate the strength of my conviction that even greater forward movement in this area of children's rights is required. Security, continuity, and stability in an ongoing custodial relationship, whether maintained with a biologic or adoptive parent and/or with a grandparent is vital to the successful personality development of a child. The law finally needs to recognize that the child, as the focus in various types of proceedings, has the same inalienable rights to the pursuit of life, liberty, and happiness as an adult. Therefore, I write to emphasize that it is time to regard the best interests of the child as

a fundamental and momentous right. Further, I am convinced that this Court needs to provide some guidance toward ascertaining a child's fundamental best interests.

Children are our most precious resource, and it is essential that they have a chance to be brought up in an environment where they are nurtured and given the chance to grow into law-abiding, productive members of the community. Children are vulnerable, impressionable, and in need of guidance and support. This is particularly true when a child experiences the loss of a parent. That support may spring from the child's relationship with a parent, a grandparent, a teacher, or a stranger, but will nearly always be provided by a parent or a grandparent. Situations like the instant matter in which a grandparent cares for a child during the parent's illness and is instrumental in preparing the child for the death of his or her parent are all too common. It is the emotional health of a child concomitant with the emotional bonds formed during childhood that determine whether the child ultimately becomes a productive member of the community.

Development of Parental Rights

Historically, parents have maintained complete discretion over what caretakers to trust, what associations to encourage, and what role models to endorse. Pursuant to the early common law, children were the chattels of their parents, who could do as they wished with the child. Barbara Bennett Woodhouse, "'Who Owns the Child?': Meyer and Pierce and the Child as Property," 33 Wm. & Mary L. Rev. 995, 1037 (Summer 1992) (hereinafter "Child as Property") (children were treated "as assets of estates in which fathers had a vested right . . . . Their services, earnings, and the like became the property of their paternal masters in exchange for life and maintenance.") (internal quotation marks omitted); Hernandez v. Thomas, 39 So. 641, 642 (Fla. 1905) (holding mother's deathbed designation of the grandmother as a guardian for her children

ineffective because only the father has the right of testamentary disposition and father had consigned the children to an orphanage); Eustice v. Plymouth Coal Co., 13 A. 975 (Pa. 1888) (ordering thirteen-year-old boy's wages paid directly to his parent). Early cases emphasized the right of the parent, superior to all others, to the care and custody of the child. See, e.g., Norris v. Pilmore, 1 Yeates 405 (Pa. 1794) (suit by mother and master against clergyman for marrying minor child without her permission and against apprenticeship agreement); Pease v. Burt, 3 Day 485 (Conn. 1806) (noting that a parent has the right to control person of the child); In re Deming, 10 Johns. 483 (N.Y. 1813) (holding that a man sentenced to life and subsequently pardoned resumes right to custody and control of his children); Inhabitants of Dedham v. Inhabitants of Natick, 16 Mass. 135, 1819 WL 1485, *4 (1819) (concluding that widow assumes the role as head of her family with all parental rights and children "cannot, by law, be separated from her"). This right could be dissolved only by abandonment, surrender, or unfitness. See Stansbury v. Bertron, 7 Watts & Serg. 362 (Pa. 1844); Mortiz v. Garnhart, 7 Watts 302 (Pa. 1838); see also In re Salter, 76 P. 51, 52 (Cal. 1904) (holding that court has no discretion to appoint grandmother as guardian of a child if father is not incompetent); Harper v. Tipple, 184 P. 1005, 1006 (Ariz. 1919) (determining that child who lived over three years with the grandparents must be transferred to the custody of the father, absent a clear showing of incompetency).

This centralization of authority was a necessary function of state reliance on parents to raise their children to be functionally responsible citizens and to keep them from being a drain on state and municipal coffers. The belief was that, in order to carry out these duties effectively, parents required the authority to act in the interest of their children without state interference. Further, the law presumed that the parent is able to display the maturity, wisdom, judgment, and experience that the child lacks. This

doctrine of parental preference survives in a somewhat modified form in the presumption that a biologic parent will act in his or her child's best interests. Troxel v. Granville, 530 U.S. 57 (2000) (plurality opinion). "Procedure by presumption [, however] is always cheaper and easier than individualized determination." Stanley v. Illinois, 405 U.S. 645, 656-57 (1972). "But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child . . . [and] [i]t therefore cannot stand." Id.

Although federal and state statutes do not identify parental rights, they do receive constitutional protection through the due process clause of the Fourteenth Amendment. See Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Although often expressed as a liberty interest, childrearing autonomy is rooted in the right to privacy. Meyer involved a Nebraska statute that prohibited the teaching of any foreign language to a child prior to the eighth grade. The Court held the statute unconstitutional stating that "[w]ithout doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children. . . . [I]t is the natural duty of the parent to give his children education suitable to their situation in life." Id. at 399-400. The Commonwealth relied on the reasoning of Meyer in Commonwealth v. Bey, 70 A.2d 693 (Pa. Super. 1950).

In Pierce, the Court addressed a state statute that prohibited children from attending non-public schools. Again, the Court determined that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce, 268 U.S. at 534-35. In In re William L., 383 A.2d 1228, 1232 n.4 (Pa. 1978), this Court observed that a statute "prescribing any particular mode of child rearing would likely be unconstitutional." Later, in West

Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), the Court reaffirmed these principles in concluding that a statute requiring children to recite the Pledge of Allegiance over parental objection violated the parents' rights. These became the foundation cases for the federal theory of "family." However, as the Supreme Judicial Court of Maine articulated in Rideout v. Riendeau:

> The constitutional liberty interest in family integrity is not, however, absolute, nor forever free from state interference. The Due Process Clause is not an impenetrable wall behind which parents may shield their children; rather, it provides heightened protection against state intervention in parents' fundamental right to make decisions concerning the care, custody, and control of their children.

Rideout v. Riendeau, 761 A.2d 291, 299 (Me. 2000) (internal citations omitted). But the state maintains an interest in the welfare of its children and may limit parental autonomy "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). Accord Ex parte Crouse, 4 Whart. 9, 1839 WL 3700 *2 (Pa. 1839) (observing that when parents are incapable of fulfilling parental duties and responsibilities, the biologic parents can "be superseded by parens patriae").

Development of Children's Rights

Although the common law assumed that parents had the duty and the authority to control the upbringing of their children, the state retained the power and the duty to protect those unable to protect themselves. See, e.g., Stanley v. Illinois, 405 U.S. 645 (1972). The government even occasionally superseded the rights of parents when in the government's best interest. See, e.g., Commonwealth v. Barker, 5 Binn. 423 (Pa. 1813) (Congress can enlist minors without the consent of their parents). This doctrinal power originated from the authority of the king and is, of course, termed parens patriae. Parens patriae enabled the state to intervene when parents were unable or unwilling to provide adequate emotional and physical care for their children. See Prince v.

Massachusetts, 321 U.S. 158 (1944). This Court recognized the doctrine of parens patriae as early as 1839 in Crouse, where the child's mother had committed the child to a workhouse because she felt the child was unmanageable. The father sought custody and a determination that the legislation permitting the Commonwealth to keep the child was unconstitutional. This Court propounded the parens patriae doctrine as the rationale by which the Commonwealth could accomplish child behavioral "reformation, by training [children] to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates." Crouse, 4 Whart. 9, 1839 WL 3700 at *2. The seeds of the "best interests of the child" dogma were sown.

Traditionally, courts abhorred interference with parental decision-making, reasoning that such interference may undermine parental authority and hinder parents from fulfilling the legal and moral duties imposed by society. The child's best interests generally served as a tiebreaker in custody disputes between parents; nevertheless, they gave way in disputes between a parent and a third party. Nonetheless, sporadically, common law courts, such as that in Crouse, recognized exceptions to the blanket rule against interfering with parental autonomy. Thus, although not explicitly recognized as inalienable rights in some early cases, the rights of the child to have his or her best interests considered trumped the right of the parents to the companionship and control of their children. See, e.g., Crouse, supra; Commonwealth v. Addicks, 5 Binn. 520 (Pa. 1815) (using best interests of the child over parental rights to decide child custody issues); see also In re Waldron, 13 Johns. 418 (N.Y. 1816) (finding that it is in best interest of the child to remain with grandfather rather than be placed in the care of father); Legate v. Legate, 28 S.W. 281, 282 (Tex. 1894) (holding that "[t]he right of the parent or the state to surround the child with proper influences is of a

governmental nature, while the right of the child to be surrounded by such influences as will best promote its physical, mental, and moral development is an inherent right, of which, when once acquired, it cannot be lawfully deprived.").

Gradually the concept of children as property became obsolete and judicial attitudes and approaches changed. See, e.g., Chapsky v. Wood, 26 Kan. 650, 1881 WL 1006, *1 (1881) ("[A] child is not in any sense like a horse or any other chattel, subject matter for absolute and irrevocable gift or contract."); "Child as Property," supra; Katharine T. Bartlett, "Re-expressing Parenthood," 98 Yale L.J. 293 (Dec. 1988). Although the remnants of the autonomy and supremacy of the parent to make life-determining decisions for a child remained, some courts adopted the position that parents are the trustees of the child's best interests. Even more significant was the recognition of specific children's rights, some of which reached constitutional magnitude.

Development of Grandparents Rights

At early common law, grandparents lacked any substantive rights with regard to custody of their grandchildren. Even though, biologically, generations emerge telescopically, one out of the other, life expectancies of eighteenth and nineteenth century grandparents often prevented them from becoming active participants in the lives of their grandchildren. The "superior rights" of parents protected parental autonomy and the nuclear family, and negated the interests of grandparents and third parties.

Many commentators believe that the erosion of the nuclear family beginning in the 1960s spawned grandparent visitation statutes in all fifty states, thus challenging strict parental autonomy. See, e.g., Jennifer Kovalcik "Troxel v. Granville: In the Battle Between Grandparent Visitation Statutes and Parental Rights, 'The Best Interest of the

Child' Standard Needs Reform," 40 Brandeis L.J. 803 (Spring 2002); Ellen Marrus, "Over the Hills and Through the Woods to Grandparents' House We Go: or Do We, Post-Troxel?", 43 Ariz. L. Rev. 751 (Winter 2001). Conversely, grandparent visitation and custody, although statutorily derived, has not risen to a level that enables inclusion within the purview of the Fourteenth Amendment's bundle of "liberty" rights.

As ably discussed by the Majority, the United States Supreme Court invalidated the Washington statute on an "as applied" basis because of its breadth and the failure of the Washington legislature to require due consideration for the rights of a fit parent to determine how his or her child will be raised and with whom that child will associate. The Pennsylvania grandparent custody and visitation statute does not suffer from these infirmities. The General Assembly has narrowly tailored Section 5311[1] to limit grandparent standing to only those grandparents who have experienced the death of their own child and seek to maintain contact with the children of that deceased child. Further, the trial court is directed to consider the parent-child relationship, the best interests of the child, and the extent of the child-grandparent relationship before granting visitation or partial custody.

Grandparents, as important transmitters of family values, as representatives of family legacy, as mediators between parents and children, or as rescuers of families in

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[1] Section 5311, 23 Pa.C.S. § 5311, states:

> 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.

difficulty, are important resources for society in neutralizing the damaging effects of divorce, death, or drug addition. This statutory expansion of grandparent rights seems to invite conflict as to when the state government, acting through a trial judge, may influence the resolution of an internal family dispute, rather than recognize the realities of modern society. In this vein, one commentator complained, "If we collectively allow grandparent visitation to be forced upon an unwilling family for no better reason than that some robed stranger thought it best, we have embarked upon a slow decent into judicial supervision of family life which has neither legal limits nor a logical end." Joan C. Bohl, "The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases," 49 Okla. L. Rev. 29, 80 (Spring 1996). However, with appropriate guidance and limited statutory authority, a trial court can weigh the facts in an individual case and provide a reasoned, intelligent, and fair disposition that does not descend to the level of "judicial supervision of family life."

On those occasions where courts granted grandparent visitation, the court usually focused on the facts of each case and awarded visitation or partial custody if the grandparents had a close relationship with the child and there was a disruption in the nuclear family. I believe that, in the twenty-first century, the state's interest in protecting a child's relationship with a third party, particularly a grandparent with whom the child has formed an attachment and benefited from a nurturing and caring association, has heightened because, in some instances, there is no intact or stable family to otherwise protect the child.

Interestingly, in Meyer, Pierce, Barnette, and Yoder, the challenge to parental rights came from the state, which tried to curtail parental child-rearing decisions in some manner. Grandparent visitation and partial custody cases, however, do not set the state against parental authority but instead mediate between a parent and the interested

grandparent. Because of the limited reach of the Pennsylvania statute, this conflict is restricted to a parent and one grandparent or a parent and one set of grandparents.

Best Interests as a Fundamental Right

"A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens . . . ." Prince, 321 U.S. at 168. Accordingly, "[i]t is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." New York v. Ferber, 458 U.S. 747, 756-57 (1982) (internal quotation marks omitted). Hardly a more compelling State interest exists than to keep children safe from the kinds of physical or emotional trauma that may scar a child's health and physical, mental, spiritual, and moral development well into adulthood.

Much attention has been given to the fundamental right of parents to the care, custody, and control of their minor children. The primary justification for this parental preference principle, one that resounds within numerous decisions, is based on the constitutional considerations articulated in Meyer, Pierce, Barnette, and Yoder. A parent's superior right to custody of the child is an acknowledgment that parents and children have a recognized unique and legal interest in, and a constitutionally protected right to, each other's companionship. The parent has a right to raise the child, yet the child has a corresponding right to be raised by his or her parent. See generally Stanley v. Illinois, 405 U.S. 645 (1972). Thus, the rights of the parent and the child are ordinarily compatible for it is generally believed that it is in a child's best interest to be reared by its parent. Further, the liberty interests of parents protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution are also protected by the Constitution extant in this Commonwealth. However, it is not only parents who have a right to familial integrity and constitutional protection.

Article I, Section 1 of our Pennsylvania Constitution states that: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." The term "men" as used in this Article is generic for all natural persons. Minors are natural persons in the eyes of the law and, therefore, possess a constitutional right to liberty and the pursuit of happiness. Because fundamental rights do not mature and come into being magically when one attains the state-defined age of majority, minors, along with adults, are protected by our Constitution and possess constitutional rights. See, e.g., In Interest of Stephens, 461 A.2d 1223 (Pa. 1983) (determining that minors possess the constitutional right against placement in double jeopardy); Commonwealth ex rel. Tabb v. Superintendent of Youth Study Ctr., 183 A.2d 317 (Pa. 1962) (freedom from self-incrimination). Further, we have repeatedly held that this Article provides greater protection than that provided by the United States Constitution. See, e.g., Commonwealth v. Nixon, 761 A.2d 1151, 1156 (Pa. 2000); Theodore v. Delaware Valley Sch. Dist., 836 A.2d 76, 88 (Pa. 2003).

In In re William L., 383 A.2d 1228 (Pa. 1978), a termination of parental rights case, we established that while the state generally may not enter into the private realm of family life and because parental rights must be accorded significant protection, the state as parens patriae has an affirmative duty to protect minor children. Thus, the restraint on state interference in family matters does not reach so far as to compel the courts to protect parental rights at the expense of ignoring the rights and needs of children. Id. at 1236.

Having decided that the statute was facially constitutional, the William L. Court took great care in applying the statute to the facts. It rejected the appellant's

assumption that the purpose of the termination statute was to punish an ineffective or negligent parent and that therefore a finding of parental fault was constitutionally necessary before termination. Rather, the Court pointed out, inquiry should center upon the welfare of the child rather than the fault of the parent. The state's responsibility to protect its weaker members authorizes interference with parental autonomy and decision-making in appropriate circumstances. Justice Roberts in William L. set forth the moral and practical importance of this authority:

> These cases do not, however, support the proposition that the state can never interfere in the parent-child relationship. Indeed, in Stanley v. Illinois, supra, the United States Supreme Court recognized that the state had not only a right, but a duty to protect minor children. [Stanley v. Illinois,] 405 U.S. at 649, 92 S.Ct. at 1212. See also Prince v. Massachusetts, supra (upholding anti-child labor statute against challenge that it unreasonably infringed upon parent's and child's free exercise of religion and parent's right to educate child in her beliefs). Constitutional restraint on state interference in family matters does not compel the courts to protect parental rights at the expense of ignoring the rights and needs of children. In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the United States Supreme Court rejected the argument that the state's interest in protecting parental authority justified giving parents a veto power over a minor's decision to have an abortion where the minor and the non[-]consenting parent are so fundamentally in conflict and the very existence of the pregnancy has already fractured the family structure.

Id. at 1235 (internal quotation marks omitted).

The fundamental rights of children to have their best interests considered prevails over the fundamental rights of parents to the care, custody, and control of their children in custody determinations between fit parents, in dependency and delinquency proceedings, and in proceedings to terminate parental rights. Although not explicitly stated in these past decades, I believe that Pennsylvania, for some considerable time, has treated the best interests of the child as a fundamental right.

It is on this basis that I advocate that we finally legitimize the right of the child to have his or her best interests considered as a fundamental right. This interest is expressed in a variety of statutes and proceedings, ranging from the complete severance of parental rights on a judge's finding of parental unfitness, to the limitation of parental choices in the areas, for example, of education, health care, and safety. Thus, I believe that the instant matter involves a situation that burdens two fundamental rights -- the right of a fit father to make parenting decisions for the child and the right of the child to have its best interests considered. Many cases, with their emphasis on the importance of family and personal associations, provide support for the view that a child has a due process right to maintain relationships with individuals other than his or her parents. Interestingly, Great Britain has come to terms with the fundamental rights of children. In Lawrence v. Penbrokeshire County Council, 2006 WL 1288355, at 38 EWHC 1029 (Queen's Bench Div.) (May 11, 2006), the House of Lords held that where "rights of parents and a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail."

Before turning to a balancing of these rights, I will briefly consider the form of relief that the grandmother seeks.

Custody v. Visitation

Generally, the right of visitation is derived from the right of custody. There are essentially three types of custody arrangements - full custody, partial custody, and visitation. "The distinguishing elements of these arrangements are '[t]he length of existing visits, the frequency with which they occur, whose home the visits take place in, and who is in effective control of the [child] during the visit.'" Commonwealth ex rel. Zaffarano v. Genaro, 455 A.2d 1180, 1182 (Pa. 1983) (quoting Note, "Visitation Rights

of a Grandparent Over the Objection of a Parent: The Best Interests of the Child," 15 J. Fam. L. 51, 67 (1976-77)). Full custody denotes the care, control, and maintenance of a child including all physical and legal aspects of custody, and the child resides with the person to whom custody was awarded. Black's Law Dictionary 390 (7th ed. 1999).

Visitation normally represents a period of access by a non-custodial individual. It differs from full custody in that the child does not dwell with the non-custodial individual, and, although this individual can be responsible for the care and safety of the child, he or she may not make important decisions for the child. Black's Law Dictionary 1566 (7th ed. 1999). Full custody confers rights and authority upon the one in whom it is placed as opposed to the privilege of visiting. However, in Pennsylvania, visitation and partial custody have meanings somewhat peculiar to the Commonwealth. Here, visitation is limited to the opportunity to see the child wherever he or she might be, only in the presence of the custodial individual, and does not include the right to remove the child from that environment, even briefly. Partial custody is visitation with a child out of the presence of the custodial individual. Zaffarano, 455 A.2d at 1182 (citing Scott v. Scott, 368 A.2d 288, 290 (Pa. Super. 1976)). It is because of this distinction, that the General Assembly amended the statute to permit grandparents to seek either visitation or partial custody or both.

Standard of Review

Where fundamental rights are in conflict, we must apply a standard of judicial scrutiny that is properly sensitive to the individual interests on both sides. While I generally agree with the Majority that strict scrutiny must be applied to any infringement of a fundamental right, I would find that in matters such as that before us, the standard of review requires both strict scrutiny and a balancing of fundamental rights. Thus, in determining whether to grant visitation, trial judges must weigh the three competing

interests of: the child, the parent, and the state. The interacting interests of the child, the parent, and the grandparents are shaped by societal perceptions of the definition of family. When considered together, the weight given and the value assigned to each of these interests form and define the appropriate standard to be applied.

In balancing the competing interests, I believe that the child is the paramount focus. The child has an interest in being cared for by an adult who will provide protection, companionship, and upbringing. Although the court may seek to determine the child's own views, the child's interest is often unavoidably defined by the views of the adult-spokesperson with whom the child currently resides.

The child's 'best interest' is also not controlled by whether the parent or the non-parent would make a 'better' parent, or by whether the parent or the non-parent would afford the child a 'better' background or superior creature comforts. Nor is the child's best interest controlled alone by comparing the depth of love and affection for the child by those who vie for his or her companionship. Instead, in ascertaining the child's best interest, the court must be guided by principles that reflect a considered social judgment. In this Commonwealth, those principles are subsumed within an extensive statutory scheme.

The parental interest is the next concern to be weighed by the trial judge. The parents' interest in the custody and companionship of the child has already achieved heightened legal significance and has been elevated to a fundamental right. The parental interest is a strong factor, but I believe that it still must accommodate the right of the child, as an individual, to have his or her best interests considered. Although third-party interests, the so-called external factors, may then be considered by the court only after resolving those interests that are fundamental. Often, non-parents, especially grandparents, form an emotional bond with the child. They may seek to perpetuate a

continuing relationship with that child through visitation. Although they may sometimes enjoy a protected interest in the companionship of the child when standing in loco parentis, I agree that, within the legal landscape, the interests of the grandparents are entitled to little weight in comparison to the stronger interests of the parents and the children. Their greatest consideration only enters into a determination of the child's best interests.

Finally, the court must weigh the interest of the state in protecting the emotional and physical health of its minor citizens and ensuring their proper development. The broader form of the state, that is society, has concern relative to the form and function of the family unit. Society's interest in the family stems from the family's unique ability to teach children to care for one another, to develop a sense of community, and to gain the knowledge that is essential for productive citizenship.

Each of these interests promotes a particular result. When considered together, I believe that the result of a contest between competing interests should be clear. Furthermore, I conclude that the interests, themselves, will determine the appropriate balance to strike. In the context of grandparent visitation, the parental interest predominates over the interest of the grandparents, and the consideration of the child's best interest is entitled to fundamental weight.

Fundamental Rights Analysis

The Pennsylvania statute is of neutral application. There is no presumption contained within the statutory text that the best interest of the child will be promoted by any particular custodial disposition. The statute confers standing and sets the standard, and then the court balances the relative rights of the parties.

Our grandparent visitation statute is meant to protect children's well-being by providing for visitation when it is in their best interests. It also seeks to preserve the

right of access of grandparents to their grandchildren under certain specific circumstances. In the declaration of policy preliminary to the grandparent custody and visitation statute, the:

> General Assembly declares that it is the public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights and responsibilities of child rearing by both parents and continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated.

23 Pa.C.S. § 5301 (emphasis added). The specific statutory section states:

> 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 competing constitutional rights of parent and child must be evaluated in light of the government's position within these areas of conflicting interests. Further, the Commonwealth has a legitimate concern in aiding in the parental discharge of the primary and fundamental duties and responsibilities of the family with regard to child welfare and safety. The state has a definite and discrete interest in the safety and welfare of children and exercises this responsibility in a number of different ways. Also, this Court requires that, when competing fundamental constitutional interests are presented, or multiple constitutional concepts face conflict, we must search for harmony to provide each a field of operation.

We have previously given voice to the benefits of the intergenerational relationship between grandparents and grandchildren.

> [Children] . . . have the natural right to know their grandparents and . . . benefit greatly from that relationship. Grandparents give love unconditionally-without entanglement with authority or discipline, and often without pressures of other burdensome responsibilities. Children derive a greater sense of [worth] from grandparental attention and better see their place in the continuum of family history. Wisdom is imparted that can be attained nowhere else. The benefits derived by a [child] from the society of his or her grandparents have frequently been touched upon by psychologists and psychiatrists . . . . They are substantial benefits and should not be lightly regarded by our judicial system.

Bishop v. Piller, 637 A.2d 976, 978-79 (Pa. 1994) (internal footnote omitted). As ably recognized by one of our sister states:

> Moreover, the importance of the grandparent-grandchild relationship in the lives of children has been confirmed. See [Chrystal C. Ramirez Barranti, The Grandparent/Grandchild Relationship: Family Resource in an Era of Voluntary Bonds, 34 Family Relations 343,] 346-47 [(1985)] (describing studies by Baranowski, Kornhaber and Woodward, and Mead in support of that contention).
>
> > The emotional attachments between grandparents and grandchildren have been described as unique in that the relationship is exempt from the psycho-emotional intensity and responsibility that exists in parent/child relationships. The love, nurturance, and acceptance which grandchildren have found in the grandparent/grandchild relationship confers a natural form of social immunity on children that they cannot get from any other person or institution.
>
> Commentators have suggested that, in the absence of a grandparent/grandchild relationship, children experience a deprivation of nurturance, support, and emotional security. Indeed, Kornhaber and Woodward posited that the complete emotional well-being of children requires that they have a direct, and not merely derived, link with their grandparents. Mead advanced the notion that when an individual does not have intergenerational family relationships there is a resulting lack of cultural and historical sense of self.

Moriarty v. Bradt, 827 A.2d 203, 210-11 (N.J. 2003) (internal citations and quotation marks omitted) .

Indeed, the decisional law makes it clear that such a benefit is not limited to the

parent-child nuclear family. For example, in Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Supreme Court invalidated an ordinance limiting occupancy in a dwelling to certain members of a family unit as it applied to a grandmother living in her home with her two grandsons, who were cousins and not siblings. In his plurality opinion, Justice Powell argued that the Yoder, Meyer, and Pierce line of cases applied to extended family relationships, even though those decisions had not involved such associations. Extolling the virtues of the extended family, Justice Powell stated:

> [M]illions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even . . .a decline in extended family households . . . [has] not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home . . . . Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Id. at 504-05.

In Commonwealth ex rel. Spriggs v. Carson, 368 A.2d 635, 640 (Pa. 1977), where we overruled the "tender years" presumption that custody should be awarded to mothers rather than fathers, we stated: "Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of 'presumptions'. Instead, we believe that [our] courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case then before the Court." I believe that the same reasoning should apply where the custody dispute is between parents and third parties.

The General Assembly has directed the focus of the grandparent custody and visitation statute to the fundamental right of the best interests of the child. The courts of the Commonwealth have routinely focused on the best interests of the child in custody

and visitation cases, while still recognizing the fundamental right of parents to raise the child. See Bishop; Ellerbe v. Hooks, 416 A.2d 512 (Pa. 1980); Zaffarano; Miller v. Miller, 478 A.2d 451 (Pa. Super. 1984); etc. Pursuant to the Pennsylvania Constitution, the child has a fundamental right to have his or her best interests considered. In balancing the fundamental rights of parents and children, there is no single overriding factor; rather, courts should consider every fact relevant to the physical, emotional, intellectual, moral, and spiritual well-being of a child. Parenthood, though not paramount, will always be a factor of significant weight.

Child's Best Interests

Courts should consider all relevant factors and specific circumstances of the actual parties involved. Therefore, in determining a child's best interests, the trial judge may consider such factors as: (1) the amount of disruption extensive visitation would cause in the child's life; (2) the suitability of the grandparents' home with respect to the amount of supervision received by the child; (3) the emotional ties between the child and the grandparents; (4) the moral fitness of the grandparents; (5) the distance between the child's home and the grandparents' home; (6) the potential for the grandparents to undermine the parent's general disciplining of the child as a result of visitation; (7) whether the grandparents are employed and the responsibilities associated with such employment; (8) the amount of hostility that exists between the parent and the grandparents; and (9) the willingness of the grandparents to accept the fundamental concept that the rearing of the child is the parent's responsibility and is not to be interfered with by the grandparents.

In addition, the trial court should determine whether the child's emotional health will benefit from re-establishment of the grandparent-child relationship. Was the grandparent, as in this case, an important resource for the child in coping with the death

of the parent? Other factors could include: (1) whether the child's performance in school suffered following the death of the parent; (2) whether the child has interests outside of school and home that would be advanced or supported by grandparent participation; (3) the closeness of the child to other members of the deceased parent's family and the opportunity to maintain that relationship without the presence of the grandparent in the child's life; and (4) the child's wishes.

Requirement of Harm

Experience has taught us the lesson that the parental relationship is not an infallible guarantee that a parent will provide the care and concern essential to a child's proper development. In such cases, the General Assembly has established guidelines and procedures that permit state-enforced custody only when a child is found delinquent or dependent as defined by law, or in cases of abuse, deprivation, or neglect. Thus, the extreme solution of termination of parental rights rests on a demonstration of unfitness of a parent or upon harm to the child.

At the other end of the custody spectrum is the clash between the child's parents and the inevitable dissolution of the family that attends a custody dispute between husband and wife. These disputes have long been guided by the controlling direction to award custody consistent with the best interests of the child.

The middle ground, where a third party seeks partial custody and where there is no state-enforced custody, does not demand the stringent harm-to-the-child standard for resolution. I believe that it requires the delicate balancing of fundamental rights.

Troxel specifically declined to address the so-called "harm" standard, and it also failed to articulate an "inadequate care" requirement. Rather, the due process right that the Supreme Court affirmed in Troxel is important but limited: a court may not override a parent's decision about the care or custody of a child simply because the court

determines that the decision is not in the child's best interest, as the trial court did in Troxel regarding a grandparent's interest in visitation. Instead, the court must presume that a fit parent's decision is in the best interest of the child, and the court may reach a decision contrary to the wishes of the parent only if there is evidence sufficient to overcome that presumption. Troxel goes no further. I am inclined to believe that the Troxel plurality would have used stronger language if it thought that parental discretion may only be outweighed upon a showing of harm to the child.

Troxel does require the state to give "some special weight" to the interest of a parent in decisions regarding a child. Troxel v. Granville, 530 U.S. 57, 73 (2000) (plurality opinion). However, the Pennsylvania statute as the Majority applies it here, responds to that mandate and appropriately protects the father's due process rights. Father received the deference to his due process rights that Troxel requires.

Therefore, I cannot adopt the assertion of the Dissent that some showing of harm to the child must be shown before the courts can implement the Act. That contention ignores the state's legitimate interest in the welfare of the child.

Conclusion

Legal proceedings immutably alter children's lives; when this occurs, their interests must be paramount for they cannot protect themselves. We strictly construe the application of parental rights statutes because of the tension between the fundamental liberty of familial association and the compelling state interest in protecting the welfare of children. I am convinced that this compelling state interest is grounded on the fundamental right of the child to have his or her best interests considered. It is also based on the state's parens patriae responsibility, which tips the balance of the fundamental rights of parent and child in favor of the fundamental right of the child.

Those competing interests are no less compelling when the conflict involves an interest asserted by a grandparent.

Our decision here must perforce be guided by our duty to promote sound public policy and preservation of rights. In the current state of our society, we should interpret the laws of our Commonwealth in such a way that adheres to the mandates of our legislature and promotes the best interests of children in stable families, immediate or extended, that can provide nurturing and supportive homes. Our legislature has spoken on the rights of grandparents to visitation and partial custody of their grandchildren under limited conditions. Our duty is to implement the law accordingly.

Because grandparent visitation is temporary and occasional, the resulting intrusion upon parental authority is minimal. By all accounts, the father in this case has a very close relationship with his son and I cannot see that this child's spending a reasonable amount of time with his grandmother will adversely affect his relationship with his father. Grandparent visitation is a social policy issue more appropriately left to the General Assembly, which has the ability to hold public hearings and debates, to examine the issue, and to draft appropriate legislation addressing the rights and balancing the interests of the various parties involved. That is precisely what the Legislature did in enacting the grandparent custody and visitation statute.