[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

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: August 22, 2006**

In my view, the trial court unconstitutionally applied Pennsylvania's grandparent partial custody and visitation statute, 23 Pa.C.S. §5311, in this matter. I, therefore, respectfully dissent.

I begin by noting three principles espoused by the Majority with which I agree. First, under the Due Process Clause, parents do enjoy the constitutionally protected fundamental right to make decisions concerning the care, custody, and control of their children. See Majority Opinion at 15. Second, because the trial court infringed upon Appellant Shane Fausey's ("Father") fundamental right to make decisions concerning the custody of his son Kaelen, the trial count's actions taken pursuant to 23 Pa.C.S. §5311 must survive strict scrutiny. Cf. id. at 16. Third and lastly, in order for the trial court's actions taken pursuant to Section 5311 to survive strict scrutiny, its actions must promote a compelling state

interest and be narrowly tailored to effectuate that interest. See id. Unlike the Majority, these principles lead me to conclude that the trial court unconstitutionally applied Section 5311 in this matter.

The state undoubtedly has a compelling interest in protecting the health and emotional welfare of children. That said, unless a court finds that a fit parent's decisions regarding a child's contact with a grandparent is causing or will cause harm to the child, the state's interest in protecting the child's welfare is not implicated.

Here, the trial court did not determine that Father's decisions regarding Kaelen's contact with Ms. Hiller were harming or would harm Kaelen's welfare, and thus, the state's compelling interest in protecting Kaelen's welfare was not implicated. Rather, the court found Father to be a fit parent but nevertheless concluded that Ms. Hiller presented sufficient evidence to rebut the presumption that Father's decisions regarding Kaelen's contact with Ms. Hiller are in Kaelen's best interest and, based on this finding, granted Ms. Hiller partial custody.[1] By acting in this manner, the court supplanted Father's constitutionally protected decision to limit or preclude contact between Kaelen and Ms. Hiller. In place of Father's constitutionally protected decisions, the court injected its and Ms. Hiller's ideas of Kaelen's best interests. The state simply has no compelling interest to interfere with a fit parent's fundamental right to make decisions regarding a child's contact with a grandparent simply because the grandparent or anyone else, including a state court, thinks that a different decision is better or more desirable for the child. See Troxel v. Granville, 530 U.S. 57, 72-73 (2000) (plurality) ("[T]he Due Process Clause does not permit

[1] I note that the trial court did not state what evidentiary standard of proof it applied in determining that Ms. Hiller sufficiently rebutted this presumption. Other than mentioning that the trial court gave "special weight" to Father's decision regarding Kaelen's contact with Ms. Hiller, the Majority does not address this apparent error. Moreover, in my view, the Majority does not fully explain what "special weight" is in this context or how a court is to give "special weight" to a parent's decisions.

a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."). Because the state had no compelling interest in interfering with Father's decisions regarding Kaelen's contact with Ms. Hiller, the trial court's application of 23 Pa.C.S. §5311 does not survive strict scrutiny.[2]

In my view, due process requires that a court must make a threshold finding that a fit parent's decisions concerning his or her child's contact with a grandparent are causing or will cause the child harm before the court can infringe upon these constitutionally protected decisions. I would place the burden of proving such harm on the grandparent. Given the fundamental nature of the constitutional right involved in these types of cases and the presumption that a fit parent acts in the best interest of his or her child, see Troxel, 530 U.S. at 68, I would require a grandparent to demonstrate, by clear and convincing evidence, that absent an order granting the grandparent custody and/or visitation, the child is being or will be harmed. See Santosky v. Kramer, 455 U.S. 745, 754-57 (1982) (discussing standards of proof, and stating, among other things, that the clear and convincing evidence standard is appropriate "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money'"). If a grandparent is able to meet this standard of proof, then the trial court must craft an order that is narrowly tailored to protect the welfare of the child. Only then is a

[2] Because I believe that no compelling state interest is implicated in this matter, I need not express my thoughts as to whether the trial court order is narrowly tailored. I, however, respectfully note my disagreement with the Majority's scrutiny under the narrowly tailored prong of its analysis. Most importantly, this is an "as applied" constitutional challenge and not a "facial" constitutional challenge. Therefore, the proper focus of our scrutiny should be on whether the Commonwealth's action taken pursuant to 23 Pa.C.S. §5311 - i.e., the trial court order - is narrowly tailored to promote the state's compelling interest. Our focus should not be on whether Section 5311 is, itself, narrowly tailored. See, e.g., Majority Opinion at 18.

court's infringement upon a fit parent's right to make decisions regarding his or her child's contact with a grandparent constitutional.[3]

Lastly, I wish to express that I am not insensitive to Ms. Hiller's wish to foster her relationship with Kaelen. Under the circumstances presented in this matter, however, the Constitution of the United States protects Father's decisions concerning Kaelen's contact with her. In this vein, I find the following thoughts shared by Justice O'Connor in her plurality opinion in Troxel to be pertinent:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance.

Troxel, 530 U.S. at 70.

For these reasons, I would reverse the order of the Superior Court.

[3] I find it important to note that, in my view, this construct promotes the best interest of the child. On the one hand, if a grandparent is unable to demonstrate harm in cases such as this, the court may not interfere with the parent's decisions. What is left is a fit parent who is presumed to act in the child's best interests. On the other hand, if a grandparent adequately demonstrates harm, then the court is left with the task of drafting an order which is narrowly tailored to protect the welfare of the child. Such an order, by its very nature, promotes the best interest of the child.