



Constitutionality of Pennsylvania's Grandparent Statute under question in *D.P. and B.P. vs. G.J.P and A.P.*

By Dorothy Wolbert

On September 8, 2015, Judge Smail, Court of Common Pleas of Westmoreland County, issued an Order and Opinion in *D.P. and B.P. vs. G.J.P and A.P.*, which may cause the Pennsylvania Supreme Court to review the constitutionality of Pennsylvania's Grandparent Statute, 23 Pa.C.S. 5325, Subsection 2. This statute grants standing for grandparents to seek partial custody where the parents have been separated for at least six months, or have commenced a divorce action.

This case was appealed, and transferred directly to the Pennsylvania Supreme Court, where a decision has yet to be made. The principal question on appeal appears to be whether conferring automatic standing on grandparents to *seek* custody of their grandchildren violates the fundamental rights of otherwise fit parents.

In *D.P. and B.P. vs. G.J.P and A.P.*, paternal grandparents pursued custody of their grandchildren citing they had standing under 23 Pa.C.S. §5325(2). The parents in this case are divorced, but jointly filed a motion to dismiss the grandparents' action for custody. They argued that §5325(2) violates their due process and equal protection rights under the United States Constitution's 14th Amendment. In his Opinion, Judge Smail granted the parents' motion to dismiss and agreed that §5325(2) does violate the parents' due process and equal protection rights when fit parents jointly make the decision to exclude grandparents from their children's lives.

Judge Smail further opined that §5325(2) infringes on parents' fundamental rights as it permits a court to "override the otherwise valid decision of one or *both* separated parents with no required finding of unfitness." Judge Smail distinguished §5325(2) from Subsections (1) and (3) of the statute, which grants standing to grandparents in instances of serious emotional trauma; whereas, Subsection (2) permits grandparents to seek standing simply because of marital status. Judge Smail questions whether "the mere fact of separation" gives the "fair assumption that the child is without proper parental supervision or care" to warrant grandparent intervention.

Judge Smail noted that while predecessor grandparent statutes have been found constitutional, the Pennsylvania Supreme Court has not specifically ruled on the constitutionality of current §5325. He further distinguished the following Pennsylvania cases which have addressed the constitutionality of the predecessor grandparent statutes.

- In *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006), the Pennsylvania Supreme Court held that the

grandparent statute did not violate due process, as it was narrowly tailored to provide standing to grandparents whose child had died.

- In *Schmehl v. Wegelin*, 927 A.2d 183 (Pa. 2007), the Pennsylvania Supreme Court found that the predecessor grandparent statute did not violate a parent's equal protection rights when paternal grandparents sought custody after a mother had denied visitation to them following the divorce. Despite this, Judge Smail points to Justice Cappy's Dissent in that case as persuasive. The Dissent suggested that in upholding the statute on equal protection grounds, courts are finding that divorced or separated parents are *inherently less fit to parent* in comparison to married parents. *Id* at 192-193.

Ultimately, Judge Smail confirms two key distinctions from this case to the past case law: (1) the parents are asserting *both* due process and equal protection rights have been violated, and (2) these parents *agree* that the grandparents should not have standing. Judge Smail finds it "dubious at best" to direct that grandparents may automatically have standing even when parents, who are merely separated or divorced, agree to limit grandparent contact with their children. The Judge acknowledges that §5328 provides factors to determine whether it is in the best interests of the child for the grandparents to have actual custody, but it appears he believes §5325(2) still permits the Court to ignore the parents' wishes.

Finally, Judge Smail cited that other states have considered parents' wishes in granting grandparent visitation. Specifically, California's Code indicates there is a rebuttable presumption that grandparent visitation is not in the best interests of the child when the parents agree there should be no visitation. Cal. Fam. Code §3103(d).

It will be interesting to see how the Pennsylvania Supreme Court handles this case. It can choose to decline consideration of the constitutional issues, remand the case back to Judge Smail to develop a record, and/or make a finding regarding the constitutionality of the statute. Further, it will be interesting to see whether this decision impacts only cases where the parents agree, or whether it will have an impact on cases where only one parent wishes to exclude the grandparents. No matter the result, those of us practicing family law will be keeping a close eye on its outcome, as any change to the statute could have an immense impact on grandparents' rights.

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