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Grandparents' Rights in Child Custody Getting More Difficult to Pursue

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Cases involving grandparents seeking any form of physical custody of their grandchildren can be tough, especially in situations where both parents are in league against allowing children to have a relationship with their grandparents. If both parents do not want a grandparent in their children's lives and are otherwise fit parents, courts in Pennsylvania have previously recognized the parents' right to decide the role, if any, that grandparents may play, as in *Herron v. Seizak*, 321 Pa.Super. 466, 468 A.2d 803 (Pa. Super. 1983), and in *Helsel v. Puricelli*, 2007 Pa.Super. 144, 927 A.2d 252 (Pa. Super. 2007). While there are avenues in the current child custody statute, 23 Pa.C.S. Sections 5324 and 5325, setting forth grandparents' ability to obtain either primary or partial physical custody of their grandchildren, the current law, amended in November 2010, added a new requirement to the previous statute, 23 Pa.C.S. Sections 5311 through 5314, and otherwise re-organized the previous sections detailing grandparents' rights and made it somewhat

more difficult to petition and possibly to obtain custody of grandchildren.

In the previous version of the custody statute, among the reasons that grandparents were generally permitted to petition for some form of physical custody were: if a parent was deceased; when the parents were in divorce proceedings; parents separated for longer than six months (not in divorce); or when a child had resided with a grandparent for 12 months or more and was removed from the grandparents' home by the parents, as in *Hiller v. Fausey*, 588 Pa. 342, 904 A.2d 875 (2006) (grandparent had standing when the parent of child was deceased); and *Schmehl v. Wegelin*, 592 Pa. 581, 927 A.2d 183 (2007) (grandparent had standing when parents of child divorced). Now, in addition to the other facts that grandparents must demonstrate in seeking custody, the current statute adds a strict deadline to when grandparents must file with the court in situations where the children have resided with the grandparents for 12 months or more and then were removed by the parents. As such, in just the last five years grandparents have seen at least one opportunity



to demonstrate standing to file for custody of grandchildren diminish by an act of the legislature by virtue of the new deadline requirement. This is not news. However, and as will be seen, grandparents needing to obtain custody of their grandchildren were just thrown a major curve ball.

The Pennsylvania Supreme Court recently decided the case, *D.P. and B.P., his wife v. G.J.P. and A.P.*, 2016 Pa. LEXIS 2003; 2016, where

the court affirmed parts of a common pleas court decision on constitutional grounds eliminating an avenue that grandparents had that enabled them to petition the court for partial physical custody of their grandchildren. In that case, the Superior Court generally reaffirmed the parents' "fundamental liberty interest in raising their children as they see fit" (quoting the common pleas decision that relied on the U.S. Supreme Court opinion in *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). The court distinguished the facts present in D.P. from previous decisions by stressing that D.P. involved married parents who were separated for more than six months, but had not filed for divorce. In D.P. the grandparents filed for partial physical custody of their grandchildren pursuant to 23 Pa.C.S. Section 5325(2), which confers standing on grandparents to file for partial physical custody of grandchildren based upon either situation of: parents being involved in a current divorce (or divorced) or parents who have simply been separated for six months. The court analyzed the current statute and applied a strict scrutiny standard as the statute implicated the fundamental right of otherwise fit parents to raise their children without the involvement of third parties (grandparents).

Citing the state's "parens patriae power" the Supreme Court identified the commonwealth's "compelling interest in safeguarding children from various kinds of physical and emotional harm and promoting their wellbeing." Then, arguing that the court was without any empirical data to suggest that a six-month separation has the same adverse impact upon children as do parents actually in divorce proceedings (or divorced), confined its decision to that part

of the statute having to do with six month separation and found that section of 23 Pa.C.S. Section 5325(2) unconstitutional.

Like the legislative amendments to Pennsylvania's custody statute of 2010, B.P. represents a further elimination of the opportunities for grandparents to successfully obtain partial physical custody of their grandchildren. The problem with the B.P. decision lies in its selective carving up of the statute even within the very section at issue. While recognizing that the fact of conferring standing upon third party grandparents to invade the recognized right to parent one's children because parties were separated for more than six months is a violation of parents fundamental rights and the purpose of the statute was not narrowly tailored to achieve the commonwealth's interest, the Supreme Court stopped short of finding the same violation and logic applied to parents in divorce, as the common pleas court had done. Also, unlike the common pleas' decision, the court confined its analysis of the operative section of the statute to a fundamental rights analysis and chose not to find the equally apparent violation of the equal protection clause of the 14th Amendment. This allowed the court to continue to distinguish between parents who are merely separated and not first married and divorcing. As a result, the statutory scheme now existing in the wake of B.P. essentially acts to discriminate against grandparents whose children chose not to marry.

Such was the subject of the short but pointed concurring and dissenting opinions filed by Justices Max Baer and David Wecht with the former arguing that the mere fact of a parents' divorce is not enough to relieve a grandparent from the necessity to

demonstrate that the children are being harmed in order to satisfy the compelling state interest. Wecht, who like the common pleas court, also relies on the equal protection clause and states with no uncertainty that the majority's decision discriminates between married and divorced parents and "consigns roughly half the population to second-class status ... to stigmatize these citizens and their children."

With unwed parents becoming an increasing norm in American society, it can easily be said that the law as written and as modified by B.P. doesn't reflect the realities that the statute will likely continue to encounter and may even be discriminatory. Grandparents do, of course, have other statutory opportunities to demonstrate standing and successfully petition for both primary and partial physical custody under the current statute, but as mentioned, in the last revision of the law those requirements were made more difficult. B.P. continues the trend of eroding grandparents' rights. •

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