[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

OPINION

MR. JUSTICE BAER **DECIDED: August 22, 2006**

This Court granted allocatur in this matter to determine the constitutionality of a trial court's application of the Pennsylvania's statute governing the provision of partial custody or visitation to grandparents upon the death of their child who is also the grandchild's parent, 23 Pa.C.S. § 5311.[1] The Superior Court held that the trial court's application was constitutional. We affirm.

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[1] § 5311. When parent deceased

> 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.

(continued…)

Shane Fausey (Father) has challenged the grant of partial custody of his son, Kaelen Fausey (Child), then age eight, to Cheryl Hiller, Child's maternal grandmother (Grandmother). Child lived with his mother (Mother) and Father from his birth in 1994 until his mother died in May 2002 after battling cancer for several years. Prior to Mother's death, Child had frequent contact with Grandmother, especially during the last two years of his mother's illness, when they saw each other on an almost daily basis. Grandmother often transported Child to and from school and cared for him when Mother attended doctors' appointments or was too ill to provide care. Further, Grandmother took on the task of preparing Child for Mother's death. The trial court found credible the testimony that Child and Grandmother enjoyed spending time together, showed a great deal of affection toward one another, and shared a very close relationship.

After Mother's death, however, Father abruptly denied Grandmother contact with Child, despite Grandmother's repeated attempts to call Father and request time with Child. Between Mother's death in May 2002 and April 2003, Grandmother saw Child on only three occasions when Child was visiting other maternal relatives.[2]

Eventually exasperated with the situation, Grandmother filed for partial custody pursuant to Section 5311. The court granted her temporary partial custody in April 2003 following a non-record custody conference, after which Father filed for modification. After extensive pre-trial activities, the court held a two-day hearing in July 2003. At its

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(…continued)

23 Pa.C.S. § 5311.

[2] Father apparently allowed Child's relationship to continue with his maternal great-grandfather (Great-grandfather) with whom Child also had a very strong relationship.

conclusion, the trial court granted Grandmother partial custody one weekend per month and one week each summer.[3]

In its thorough opinion in support of its decision, the trial court explained its application of Section 5311. In compliance with the United States Supreme Court's decision in Troxel v. Granville, 530 U.S. 57 (2000), discussed in detail *infra*, the trial court applied the presumption that a fit parent acts in the child's best interests. Further, the court noted that a grandparent seeking to compel partial custody carries the burden of proof.

With these premises established, the trial court examined the facts of the case. As specifically required by Section 5311, the court first considered the contact between Child and Grandmother prior to Grandmother's petition. First, the court noted that Child's parents had permitted significant contact with Grandmother prior to Mother's death, and that a strong and affectionate relationship had formed between Child and Grandmother.

Next, in accordance with Troxel, the court considered the likelihood and amount of contact that Father would provide to Grandmother absent a court order. As previously discussed, Grandmother had seen Child only three times between May 2002 and April 2003. Moreover, according to the trial court, Father's position on acceptable partial custody or visitation changed dramatically during the course of the proceedings.[4] After one custody

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[3] In its temporary custody order, the trial court had given Grandmother time on Christmas Day. In its final order, it omitted this provision, noting that Christmas is best spent with a parent.

[4] Although the parties and the courts below have occasionally used the terms interchangeably, we note that Pennsylvania law distinguishes "partial custody" from "visitation." See 23 Pa.C.S. § 5302. A party granted "visitation" may visit a child but may not remove the child from the parent's control. Id. Conversely, a grant of "partial custody," as in the case at bar, allows the individual to "take possession and control of the child" and can involve potentially extensive periods of time. Id. The United States Supreme Court in Troxel and many of the courts of our sister states have utilized the term "visitation" to encompass both visitation and partial custody as defined in Pennsylvania. Therefore, when discussing the Troxel decision and those of our sister courts, we will use the term "visitation" generically.

conference, Father agreed to limited periods of partial custody without overnight stays. One month later he changed his mind and asserted that Grandmother should not be provided any court-ordered visitation. Father changed his position yet again at trial, where he stated that he would permit partial custody one day per month without overnight stays. Parenthetically, the court also found Father's various accusations regarding his concern's for Child's safety in Grandmother's care lacking in credibility and devoid of evidentiary support: "Given the fact that none of these concerns have any merit, the court must conclude that either [Father] is grasping at straws and inventing reasons to keep [Child] away from his grandmother, or he actually believes the allegations, which shows he is under serious delusions concerning [Grandmother] and his judgment regarding her is polluted."[5] Tr. Ct. Slip Op. at 5. Accordingly, with ample factual support, the trial court concluded that, absent a court order, Father would not provide Grandmother the opportunity to see Child.

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[5] The court supported its conclusion further, noting Father's similar treatment of Great-grandfather. The court noted:

> [Father's] own testimony demonstrated that he allows his personal feelings to cloud over his judgment regarding [Child's] contact with his family. For instance, all parties agreed that [Child] and [Great-grandfather] have an extremely close relationship, and in fact [Father] ensured the two remained in frequent contact after [Mother's] death. However, [Father] became perturbed at [Great-grandfather] throughout the custody proceedings, and testified that he no longer trusted him. Upon being questioned by the court, it was clear that [Father's] mistrust of [Great-grandfather] involved only the personal relationship between the two men, and had nothing to do with the relationship between [Child] and [Great-grandfather]. However, [Father] clearly was allowing his anger toward [Great-grandfather] to interfere with [Child's] relationship with [Great-grandfather.]

Tr. Ct. Slip Op. at 4-5.

The court then turned to the statute's requirement that the court find that visitation or partial custody with Grandmother would be in the child's best interests, even when applying the presumption that a parent's decision limiting contact is in the child's best interests. The court found that Father's proposed arrangement of one day per month "is not enough time to maintain the bond [Child] has established with his grandmother and her side of the family, especially given his extensive contact in the past." Tr. Ct. Slip Op. at 6. Specifically, the court noted that Grandmother is warm and loving and has developed a "longstanding, very close relationship" with Child, and that Child enjoyed spending time with her, engaging in many activities with her, and visiting with his many maternal relatives during the family gatherings that occur during the court-ordered periods of partial custody. Tr. Ct. Slip Op. at 6. Significantly, the court observed that "when [Child] is with [Grandmother], he seeks and receives emotional support regarding the death of his mother." Tr. Ct. Slip Op. at 6. This finding is particularly resonant because "[Father] himself expressed concerns regarding [Child's] ability to express his emotions regarding his mother's death." Tr. Ct. Slip Op. at 6. Thus, the court concluded, "contact with his mother's side of the family is highly beneficial emotionally for [Child] in helping him deal with the loss of his mother." Tr. Ct. Slip Op. at 6

As dictated by the statute, the trial court next considered whether the court-ordered partial custody would interfere with Father's relationship with Child. Father argued that it would interfere because of the animosity between Grandmother and him, which, he noted, had led to the legal proceedings. The trial court, however, aptly commented:

> If the mere existence of animosity and dislike between parent and grandparent were enough to prevent grandparent custody, surely there would be very few court ordered periods of grandparent custody. For after all, if the parties were able to get along together, they would not be in court to begin with.

Tr. Ct. Slip Op. at 7. Instead, the court distinguished this case from those where grandparent partial custody would have either distressed the child or adversely impacted

the parent's ability to parent him. Moreover, the court found credible Grandmother's assertion that she would not express negative feelings about Father to Child, or create a situation that would negatively impact Child. The court also expressed confidence that Father would not let his animosity toward Grandmother cause harm to Child, as the court found it clear that Father was a capable father who loved his son. Additionally, the court noted that there had been no incidents of problems in the visits thus far.

The court therefore found that Grandmother had met her burden of demonstrating that partial custody would be in Child's best interests and would not interfere with the parent-child relationship, and thereby, had rebutted the presumption that Father's decision limiting or eliminating Grandmother's contact with Child was in Child's best interests. Tr. Ct. Slip. Op. at 8. The court thus granted partial custody to Grandmother one weekend per month and one week per summer.[6]

Father timely appealed to the Superior Court, asserting that the application of the statute violated his substantive due process rights under the Fourteenth Amendment to the United States Constitution.[7] In a published opinion, a panel of the Superior Court[8] acknowledged that the United States Supreme Court recently held, "it cannot be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

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[6] The court also addressed and found unavailing Father's constitutional challenges to Section 5311. These issues will be discussed in detail *infra*.

[7] Father also asserted a facial challenge to the statue under the Equal Protection Clause, asserting that the statute treated children of single parents differently than children of married parents without a sufficient government interest. Father has not raised that challenge before this Court, and we will not address it.

[8] Judge Lally-Green concurred in the result of the majority opinion written by the late Judge Cavanaugh and joined by Judge Gantman.

Fausey v. Hiller, 851 A.2d 193, 195 (Pa. Super. 2004) (quoting Troxel, 530 U.S. at 67). Given the fundamental right of parents, the Superior Court utilized a strict scrutiny analysis and considered whether the imposition on a parent's fundamental rights was necessary to promote a compelling state interest and was narrowly tailored to effectuate that interest. Id.[9]

The Superior Court began its analysis by comparing Pennsylvania's statute to the Washington State statute which the United States Supreme Court found unconstitutional as applied in Troxel. Fausey, 851 A.2d at 196. The court found Pennsylvania's statute and its application in this case "readily distinguishable" from the situation in Troxel.[10] Moreover, the court held that the trial court complied with Pennsylvania precedent by placing the burden of proof on the petitioning grandparent due to the deference given to the decisions of fit parents.[11] Finally, the Superior Court concluded that the trial court properly applied the statute with the necessary presumption that Father's decisions were in the best interests of the Child and that the record supported the trial court's conclusions that Grandmother overcame the presumption by demonstrating that partial custody was in Child's best interests and that it would not interfere with Father's relationship with Child.

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[9] As will be discussed more fully *infra*, the United States Supreme Court specifically refused to define the "precise scope of the parental due process right in the visitation context" or to set a standard of scrutiny to be applied. Troxel, 530 U.S. at 73. Justice Thomas, however, asserted that strict scrutiny should be applied to any infringement of a parent's fundamental right. Id. at 80 (Thomas, J., concurring).

[10] The court also concluded that the statute did not violate the Equal Protection Clause.

[11] See Charles v. Stehlik, 744 A.2d 1255, 1258 (Pa. 2000) (holding that, in custody disputes between a biological parent and a third party, the "evidentiary scale is tipped and tipped hard to the biological parent's side); B.A. v. E.E., 741 A.2d 1227, 1229 n.1 (Pa. 1999); Ellerbe v. Hooks, 416 A.2d 512, 513-14 (Pa. 1980).

The Superior Court therefore affirmed the trial court's decision, finding the application of Section 5311 constitutional.

From this published decision, Father petitioned for this Court's review, which we granted to consider whether Section 5311 violates the Due Process Clause of the United States Constitution as an infringement upon a parent's fundamental rights. This issue of first impression for our Court was specifically left to the individual states in the United States Supreme Court's decision in Troxel, 530 U.S. at 73 ("We do not, and need not, define today the precise scope of the parental due process right in the visitation context"). Before discussing the parties' arguments which hinge on divergent readings of the United States Supreme Court's decisions in Troxel, we must first discuss what the divided High Court held, what it implied, and what it left open for determination by the individual states.

The facts involved in Troxel are similar to those in the case before this Court. Each case involves a child's tragic loss of a parent and the later decision of the surviving parent to restrict contact between the child and a grandparent on the deceased parent's side, where the grandparent and the child had a significant relationship prior to the death of the parent. In the opinion announcing the judgment of the Court, in Troxel, Justice O'Connor, joined in full by Chief Justice Rehnquist and Justices Ginsburg and Breyer, initially noted that all fifty states have enacted statutes granting grandparents (and others) the ability to seek visitation or custody in part in "recognition of the changing realities of the American family." Troxel, 530 U.S. at 64; see also, id. at 74 n.1. The statutes are designed to "ensure the welfare of the children therein by protecting the relationships those children form with such third parties." Id. at 64.

The plurality acknowledged, however, that protection of these relationships comes at a cost to the parent-child relationship. In addressing the mother's argument that the Washington statute violated her due process rights under the Fourteenth Amendment, the plurality observed that "[t]he liberty interest at issue in this case -- the interest of parents in

the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized" by the United States Supreme Court. Id. at 65 (citing and discussing, *inter alia,* Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Parham v. J.R., 422 U.S. 584, 602 (1979); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-5 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923)). "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel, 530 U.S. at 67.

The plurality noted that the Washington statute at issue in Troxel was "breathtakingly broad" in that it stated that "any person" may petition for visitation at "any time." Id. Further, the plurality faulted the statute for allowing a trial court to overturn a fit parent's decision merely based on the trial court's determination of what was in the best interests of a child, in apparent tension, if not actual conflict with, the United States Supreme Court's confirmation in Parham of the presumption that fit parents act in the best interests of the child. Id. at 68-70 (citing statutes that protect a parent's fundamental right by providing a parental presumption). Thus, the plurality found that the trial court failed to give "special weight" to the mother's determination of the children's best interests. Id. at 69. The opinion also noted that the mother did not cut off but merely limited visitation. Id. at 71 (noting that some states' statutes require that a parent have actually denied all visitation). The plurality specifically criticized the trial court's "slender findings," presumption in favor of grandparent visitation, and "failure to accord significant weight to [the mother's] already having offered meaningful visitation to the [grandparents]." Id. The plurality then concluded, "the visitation order in this case was an unconstitutional infringement on [mother's] fundamental right to make decisions concerning the care, custody and control of her two daughters." Id. at 72. "[T]he Due Process Clause does not permit 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." Id. at 72-73.

While the Troxel plurality found the trial court's application of the statute unconstitutional, it did not find the statute facially unconstitutional.[12] Instead, and directly relevant to the case *sub judice*, the plurality refused to "consider the primary constitutional question passed on by the Washington Supreme Court -- whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." Id. at 73. The plurality opined,

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.

Id. (citation omitted).

Justice Souter concurred in the judgment of the plurality in that he also would have affirmed the judgment of the Washington Supreme Court; however, unlike the plurality he would have held the statute facially unconstitutional, finding that the statute swept too broadly by allowing "any person" to seek custody at "any time," requiring merely a showing that visitation was in the best interests of the child. Id. at 76 (Souter, J., concurring). Like

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[12] The appeal to the United States Supreme Court was from a decision of the Washington State Supreme Court. Id. at 63. The Washington Supreme Court declared its statute facially unconstitutional primarily due to two problems. Id. First, it concluded that the statute's lack of a threshold showing of harm or potential harm to the child from the denial of visitation prevented the state's interference with the rights of parents. Id. Second, the state court held the statute unconstitutional because it swept too broadly and thus violated parents' rights by allowing courts to grant visitation to "any person" at "any time" based solely on a best interests analysis. Id.

the plurality, Justice Souter did not rely upon the Washington State court's requirement that grandparents demonstrate harm to the child resulting from the lack of visitation prior to a constitutional grant of visitation.

Also concurring in the judgment, Justice Thomas noted the other justices' refusal to designate a standard of scrutiny to be applied to infringements on the fundamental right at issue. He asserted that strict scrutiny should be applied because the right involved was fundamental, but observed that the Washington statute in question would not even survive rational basis scrutiny for want of a legitimate government interest in "second guess[ing] a fit parent's decision regarding visitation with third parties." Id. at 80 (Thomas, J., concurring).

In contrast, Justice Stevens dissented from the plurality's conclusion that the statute was unconstitutional as applied, and further concluded that the statute was facially constitutional in that the statute had a "plainly legitimate sweep." Id. at 85 (Stevens, J., dissenting). While the plurality and Justice Souter refused to base their conclusions on the statute's lack of a requirement of harm resulting from the lack of visitation, Justice Stevens forcefully rejected the assertion: "we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting even arbitrary parental decisions from any challenge absent a threshold finding of harm." Id. at 86 (Stevens, J., dissenting). Instead, he asserted that limits on the fundamental right of parents resulted from the balancing of parental rights against the state's "long-recognized interests as *parens patriae*." Id. at 88 (Stevens, J., dissenting).[13]

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[13] Additionally, Justice Stevens espoused a potential constitutional right yet to be elucidated by the Court regarding a child's "complementary interest in preserving relationships that serve her welfare and protection." Id. at 88 (Stevens, J., dissenting). "At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it (continued…)

Finally, Justice Kennedy dissented.[14] While acknowledging the existence of a parent's constitutional right, he asserted that the case should be reversed due to the error he found in the Washington Supreme Court's conclusion that parental rights could not be infringed without proof of something more than that visitation would be in the child's best interests. Additionally, like Justice Stevens, he concluded that a showing of harm to the child should not be required prior to a grant of visitation to a third party. Id. at 92 (Kennedy, J., dissenting). Noting that many children today have significant relationships with non-parents, he opined that the parental right should be viewed differently depending on whether the case involves a claim of visitation with a complete stranger or visitation with a *de facto* parent. Although Justice Kennedy concluded that the best interests standard may provide sufficient protection of the parental right, he noted that the disruptive effect of litigation involved in custody battles could require a higher standard:

> Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship.

Id. at 101 (Kennedy, J., dissenting).

The foregoing analysis demonstrates that all the Justices, with the exception of Justice Scalia, recognized the existence of a constitutionally protected right of parents to make decisions concerning the care, custody, and control of their children, which includes determining which third parties may visit with their children and to what extent. Further, a majority agrees that fit parents are entitled to a presumption that they act in the best

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comes to parental rights, children are so much chattel." Id., at 88-89 (Stevens, J., dissenting).

[14] Justice Scalia also dissented based on his conclusion that the parental right was an unenumerated right. Id. at 91-92 (Scalia, J., dissenting).

interests of their children. However, while Justices Stevens and Kennedy explicitly concluded that the Constitution did not require a third party requesting visitation to demonstrate that the child would be harmed by the lack of visitation, the plurality refused to speak to the issue. Although Justice Thomas would apply a strict scrutiny standard of review to infringements of a parent's fundamental right, the rest of the Court was notably silent on this issue. Instead, the court left the decision, at least for the present, to the states in their case-by-case application of individual statutes.

Justice O'Connor's plurality opinion, however, provides some guidance on what constitutes impermissible application and thus presumably highlights issues which should raise red flags in assessing the constitutionality of a particular statute's application. As noted above, the plurality held that the Washington statute was "breathtakingly broad" in that it allowed "any person" at "any time" to petition for custody. The justices also noted that the statute failed to account for the presumption that parents act in the best interests of their children, and that the trial court in Troxel had, in fact, impermissibly presumed that visitation should be granted. Finally, the plurality opinion criticized the "slender findings" supporting the trial court's overturning of the fit parent's exercise of parental discretion.

Against this backdrop, Father requests that we reverse the Superior Court and hold that it erred in concluding that Section 5311 was constitutional as applied. He attempts to diminish the importance of the differences between the statute in Troxel and the significantly narrower Section 5311 and, instead, focuses on the factual similarity between the case at bar and the factual scenario in Troxel. He claims that the trial court below failed to afford his decision "special weight," and instead substituted its view of what was in the best interests of Child, which the plurality in Troxel found unconstitutional. He maintains that the preponderance of the evidence standard of proof utilized by the court below should only apply between parties with equal rights to the child, such as two fit parents, and should not apply to a dispute between parents and third parties. Instead, he claims that

grandparents, who cannot claim a fundamental right to visitation or partial custody, should be required to demonstrate compelling circumstances such as unfitness of the parent or significant harm to the child resulting from denial of visitation or partial custody before the courts may interfere with the parents' fundamental right to the care, custody, and control their own children. Additionally, he asserts that, like the mother in Troxel, he was willing to allow Grandmother some contact with Child.[15] He urges this Court to follow our sister states that have found statutes providing for visitation or partial custody either facially unconstitutional or unconstitutional as applied.

Conversely, Grandmother asserts that this case is "a paradigm of a trial court's proper application of Section 5311," in which the court "weighed all the factors necessary to render a decision that both promoted the best interests of the child and protected the substantive due process rights of the parent." Grandmother's Brief at 12. Grandmother contends that Section 5311, unlike the "breathtakingly broad" statute in Troxel, strikes a perfect balance between protecting the fundamental rights of a parent and the state's interest in protecting the best interests and welfare of a child who has lost a parent and is at risk of losing his relationship with his grandparent. Grandmother observes that the Troxel plurality opinion contrasted the excessively broad Washington statute with more narrow statutes like Pennsylvania's.[16] Further, she notes that Pennsylvania courts have applied a weighted best interests analysis to grandparent custody cases.

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[15] As noted above, Father's assertions regarding whether he would permit contact with Grandmother absent a court order were not found credible by the trial court.

[16] In particular, Grandmother points to the Court's recognition of Minnesota's statute, Minn. Stat. § 257.022(2)(a)(2)(1998), which requires that visitation be in the best interests of the child and not interfere with the parent-child relationship and considers the amount of personal contact prior to the petition for visitation, and Nebraska's statute, Neb.Rev.Stat. § 43-1802(2)(1998), which requires clear and convincing evidence of a significant beneficial relationship, as well as a determination that visitation is in the child's best interests, and will not interfere with the parent-child relationship.
(continued…)

Grandmother next distinguishes the Troxel plurality's criticism of the trial court's failure to accord special weight to the parent's decision and the court's "slender findings" of fact based in part on the trial judge's experiences with his own grandparents. In contrast, she notes the trial court *sub judice* presumed that Father would act in Child's best interests and made detailed findings of fact regarding whether it was in Child's best interests to order partial custody. Grandmother also observes that the trial court imposed the burden of proof on Grandmother, in contrast to the trial court in Troxel. Further, the trial court in this case carefully considered the likelihood that Father would provide Child with opportunities to continue his relationship with Grandmother and the effect that court-ordered custody would have on the parent-child relationship. Additionally relying on Troxel and the decisions of some of our sister states, discussed *infra*, Grandmother rejects Father's suggestion that the Constitution requires her to demonstrate parental unfitness or harm to the child resulting from the denial of partial custody.

With these arguments in mind, we turn to the constitutionality of Section 5311 as applied in this case.[17] As set forth in Troxel, the right to make decisions concerning the care, custody, and control of one's children is one of the oldest fundamental rights protected by the Due Process Clause. Troxel, 530 U.S. at 67. While the United States Supreme Court declined in Troxel to articulate a standard of review regarding infringements of this fundamental right, this Court traditionally has applied a strict scrutiny analysis to

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[17] Our scope of review of custody orders is very broad. See Albright v. Commonwealth, ex rel. Fetters, 421 A.2d 157, 158-59 (Pa. 1980). However, we will not use that scope of review to nullify the factfinding functions of the trial court, and we will not reverse a trial court's custody order where the trial court has not abused its discretion. Charles, 744 A.2d at 1257. Moreover, our review of questions of law is plenary. See R.M. v. Baxter, 777 A.2d 446, 449 (Pa. 2001).

asserted violations of fundamental rights protected by the Due Process Clause. See Khan v. State Bd. of Auctioneer Examiners, 842 A.2d 936, 947 (Pa. 2004); Nixon v. Commonwealth, 839 A.2d 277, 281 (Pa. 2003). While the decisions of our sister states are not binding on this Court, we further note that numerous state courts that have addressed the constitutionality of grandparent visitation statutes have also applied a strict scrutiny analysis.[18] Thus, given the fundamental nature of the right, we conclude that we must apply a strict scrutiny analysis to any infringement by the state of the fundamental right of parents to direct the care, custody, and control of their children. Accordingly, as this Court has previously defined the appropriate test to apply when utilizing strict scrutiny review, we must determine if the infringement is supported by a compelling state interest and if the infringement is narrowly tailored to effectuate that interest. See Khan, 842 A.2d at 947; Nixon v. Commonwealth, 839 A.2d at 281; see also Reno v. Flores, 507 U.S. 292, 301-02 (1993) (commenting that Supreme Court cases have interpreted the "Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest" (emphasis in original)).

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[18] Our sister states have applied strict scrutiny in the following cases when reviewing statutes, and applications thereof, relating to grandparents' or third parties' petitions for visitation: R.S.C. v. J.B.C., 812 So.2d 361 (Ala. Civ. App. 2001); Linder v. Linder, 72 S.W.3d. 841 (Ark. 2002); Roth v. Weston, 789 A.2d 431 (Conn. 2002); Richardson v. Richardson, 766 So.2d 1036 (Fl. 2000); Lulay v. Lulay, 739 N.E.2d 521 (Ill. 2000); Santi v. Santi, 633 N.W.2d 312 (Iowa 2001); Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002), *cert. denied*, 537 U.S. 1189 (2003); Rideout v. Riendeau, 761 A.2d 291 (Me. 2000); Hoff v. Berg, 595 N.W.2d 285 (N.D.1999); Moriarty v. Bradt, 827 A.2d 203 (N.J. 2003), *cert. denied*, 124 S.Ct. 1408 (2004); Harrold v. Collier, Nos. 2004-1492, 2004-1647, 2005 WL 2483241, at *6 (Ohio Oct. 10, 2005); Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993); In re Pensom, 126 S.W.3d 251 (Tex. Ct. App. 2003); In re C.A.M.A., 109 P.3d 405 (Wash. 2005); M.B.B. v. E.R.W., 100 P.3d 415 (Wyo. 2004).

The compelling state interest at issue in this case is the state's longstanding interest in protecting the health and emotional welfare of children. Numerous times, this Court, like the United States Supreme Court, has approved of the state's exercise of its *parens patria*e interest and allowed infringements on parental rights where the welfare of children is at stake. See In re Adoption of J.J., 515 A.2d 883, 893 (Pa.1986) (balancing state's *parens patriae* interest in protecting the welfare of a child against the parent's rights and determining that the clear and convincing evidence standard, rather than reasonable doubt, is appropriate in cases involving the termination of parental rights). For example, we have permitted the termination of parental rights and declarations of dependency. See, e.g., In re C.A.E., 532 A.2d 802 (Pa. 1987) (reinstating trial court's order terminating parental rights). Moreover, we have permitted grants of custody to non-biological parents over the objections of biological parents. See, e.g., Charles, 744 A.2d 1255 (affirming grant of primary custody to stepfather over objection of biological father); Ellerbe, 416 A.2d 512 (affirming award of primary custody to grandmother over objection of biological father).

Having recognized the existence of a compelling interest, we must determine whether the statute applied in this case is narrowly tailored to serve that interest. We first observe that Pennsylvania's statute and its application in this case are clearly distinguishable from the unconstitutional application of the statute in Troxel. 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.[19] This limitation, it should be noted, furthers our General Assembly's express public policy to assure the "continuing contact of the child or children with grandparents when the parent is deceased, divorced or

[19] While we acknowledge that the statute applies to both grandparents and great-grandparents whose child (or grandchild) has died and left a grandchild (or great-grandchild), we refer only to grandparents for ease of discussion.

separated." 23 Pa.C.S. § 5301. Moreover, the rationale behind the stated public policy is clear: in the recent past, grandparents have assumed increased roles in their grandchildren's lives and our cumulative experience demonstrates the many potential benefits of strong inter-generational ties. Troxel, 530 U.S. at 64.

While acknowledging the general benefits of these relationships, we cannot conclude that such 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.[20] 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. We must therefore determine whether Section 5311is narrowly tailored to protect the fundamental rights of fit parents while providing for appropriate state intervention to protect the welfare of children through court-ordered grandparent visitation or partial custody.

In apparent response to the need to balance the state's interest and parents' rights, Section 5311 requires courts to ensure that the visitation or partial custody will not interfere with the parent-child relationship and to determine that visitation or partial custody serves the child's best interests. Finally, the Pennsylvania statute requires courts to consider the amount of contact between a grandparent and a grandchild before the petition was filed, thus allowing an assessment of the strength of the pre-petition relationship and the willingness of the parent to provide access to the child without court order.

In addition to the language of the statute, our precedent requires our courts to do what the United States Supreme Court faulted the Washington trial court for failing to do --

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[20] This consideration is especially resonant given the strain that custody litigation places on the children as well as parents and grandparents, as noted by Justice Kennedy in Troxel, 530 U.S. at 101 (Kennedy, J., dissenting).

to provide a presumption in favor of the decision of a fit parent. This Court previously has struggled with the appropriate deference to afford parents in custody matters. In Ellerbe, decided before the enactment of Section 5311, we determined the appropriate standard to apply when faced with a custody (not visitation or partial custody) contest between a parent and a non-parent. Initially, we noted that, in custody disputes between parents, the burden of proof is shared equally between the parties and the focus is on the best-interests of the child. Ellerbe, 416 A.2d 512. On the other extreme, we noted that the Juvenile Act, 42 Pa.C.S. § 6301, *et seq.*, dictated that, in a contest between parents and the state, the state bears the burden of showing that the child is delinquent or dependent before the state may wrest custody from a parent. Id. Between these poles lie custody disputes involving parents and third parties, such as grandparents. In Ellerbe, we acknowledged that in such cases the Court lacked legislative guidance regarding how to consider custody requests of third parties. Id. Thus, we adopted the standard developed by the Superior Court:

> When the judge is hearing a dispute between the parents, or a parent, and a third party, . . . [t]he question still is, what is in the child's best interest? However, the parties do not start out even; the parents have a "prima facie right to custody," which will be forfeited only if "convincing reasons" appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents' side. What the judge must do, therefore, is first, hear all evidence relevant to the child's best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side.

Id. at 514 (quoting and adopting the test set forth in In re Hernandez, 376 A.2d 648, 654 (Pa. Super. 1977)).

Fifteen years later, in Rowles v. Rowles, 668 A.2d 126, 128 (Pa. 1995), we again considered the weight that should be afforded parents' preferences in custody disputes with third parties. In that case, a plurality of this Court recommended that the *prima facie*

requirement of Ellerbe be dropped and replaced with the recommendation set forth in then Justice Flaherty's concurring opinion in Ellerbe:

> By clearly eliminating the presumption *per se,* and mandating that custody be determined by a preponderance of evidence, *weighing parenthood as a strong factor for consideration,* custody proceedings would be disentangled from the burden of applying a presumption that merely beclouds the ultimate concern in these cases: the determination of what affiliation will best serve the child's interests, including physical, emotional, intellectual, moral, and spiritual well-being.

Rowles, 668 A.2d at 128 (emphasis in original). Three justices joined the award of custody to the parent in Rowles, but voiced a strong opposition to dispensing with the presumption in favor of the parents and adopting the lower standard of merely considering parenthood as a "strong factor." Id. (Montemuro, J., concurring, joined by Zappala and Cappy, JJ.).

A few years later, in B.A. v. E.E., we reaffirmed the presumption in favor of parents set forth in Ellerbe:

> Because the Rowles opinion did not command a majority of the court, the presumption that parents have a right to the custody of their children as against third parties remains in effect. Whether the parents' interest in their children is referred to as a presumption or as a factor to be weighed, however, the main idea is that parents are to receive special consideration: as the court put it in *Ellerbe,* special weight and deference should be accorded the parent-child relationship.

B.A. v. E.E., 741 A.2d at 1229 n.1; see also Charles, 744 A.2d at 1258. Thus, while the Court has considered other alternatives, we maintain a presumption in favor of parents that meaningfully tips the balance in the parent's favor.

As previously mentioned, Father argues that, in addition to the requirements of Section 5311, grandparents must demonstrate that a child will suffer harm as a result of the denial of visitation or partial custody. The United States Supreme Court in Troxel refused to determine "whether the Due Process Clause requires all nonparent visitation statutes to include a showing of harm or potential harm as a condition precedent to granting visitation."

Troxel, 530 U.S. at 73. Moreover, while some of our sister states have required a finding of harm prior to a grant of visitation or partial custody either under the Due Process Clause or their own constitutions,[21] a number of courts have either declined to require third parties to demonstrate harm or have found that grandparents may satisfy a requirement of harm merely by showing that the child will be harmed by the termination of a beneficial

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[21] The following courts have required a finding of harm before permitting a grant of custody or visitation to a third party: Evans v. McTaggart, 88 P.3d 1078 (Alaska 2004) (requiring clear and convincing evidence of parental unfitness or that the welfare of the child requires third party visitation); Linder v. Linder, 72 S.W.3d. 841, 858 (Ark. 2002) (requiring a showing of "some other special factor such as harm to the child or custodial unfitness that justifies state interference"); Roth v. Weston, 789 A.2d 431 (Conn. 2002) (requiring a showing of real and emotional harm to the child and a parent-like relationship with child); Brooks v. Parkenson, 454 S.E.2d 769 (Ga. 1995) (finding statute unconstitutional and requiring a showing of harm prior to a grant of visitation); Von Eiff v. Azicri, 720 So.2d 510 (Fl. 1998) (holding that state may not intrude on fundamental right of parents except where the child is threatened with harm); Wickham v. Byrne, 769 N.E.2d 1 (Ill. 2002) (permitting interference with parental rights only in limited instances to protect the health, safety, and welfare of the child); In re Howard, 661 N.W.2d 183 (Iowa 2003) (declaring statute involving grandparent visitation after parental divorce facially unconstitutional due to statute's failure to require both a showing of parental unfitness and harm to the child beyond mere loss of a beneficial relationship to the grandparents); Blixt v. Blixt, 774 N.E.2d 1052, 1059 (Mass. 2002), *cert. denied*, 537 U.S. 1189 (2003) (requiring a showing of harm to the child which would satisfy the requirement that there be a "compelling and legitimate State interest in mitigating potential harm to children in non-intact families, an area in which the State has been traditionally and actively involved."); Moriarty v. Bradt, 827 A.2d 203 (N.J. 2003), *cert. denied*, 124 S.Ct. 1408 (2004) (requiring preponderance of evidence that lack of visitation will cause harm to the health and welfare of the child); Neal v. Lee, 14 P.3d 547 (Okla. 2000) (requiring showing of harm to child before state may interfere with parental decision); Camburn v. Smith, 586 S.E.2d 565 (S.C. 2003) (requiring a showing either of parental unfitness or compelling circumstances such as significant harm to child in the absence of visitation not merely that child would benefit from visitation); Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (requiring substantial danger of harm); In re Pensom, 126 S.W.3d 251 (Tex. Ct. App. 2003) (requiring showing of parental unfitness or significant impairment to child's physical health or emotional well-being resulting from lack of visitation).

relationship with his or her grandparents.[22] Additionally, our statute does not require a specific finding of harm, and our precedent militates against requiring grandparents to demonstrate harm as a condition precedent to a grant of visitation. Specifically, this Court has permitted non-biological parents to maintain or obtain primary custody of children over the objections of biological parents so long as there are other circumstances which "clearly indicate the appropriateness of a custody award to the non-parent."[23] See Ellerbe, 416 A.2d 512; see also Rowles, 668 A.2d at 128 (noting that in Ellerbe "all seven justices, agreed on several principles: 'the parent-child relationship should be considered to be of importance in determining which custody arrangement is in the child's best interest,'

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[22] The following courts either have not required a finding of harm or have found harm merely in the denial of visitation with the third party: Jackson v. Tangreen, 18 P.3d 100 (Ariz. Ct. App. 2000), *cert denied*, 534 U.S. 953 (2001) (finding statute facially constitutional in that statute required consideration of parties motivation, historical relationships and amount of visitation requested); Vibbert v. Vibbert, 144 S.W.3d 292 (Ky. Ct. App. 2004) (showing of harm unnecessary); Galjour v. Harris, 795 So.2d 350 (La. App. 1 Cir.) *writ denied,* 793 So.2d 1229 (La.), *cert. denied*, 534 U.S. 1020 (2001) (upholding constitutionality of statute where parent is deceased, interdicted, or incarcerated without any further qualifications); Rideout v. Riendeau, 761 A.2d 291 (Me. 2000) (upholding the constitutionality of the statute, noting the potential traumatic effect of cessation of the grandparent relationship on the child); Moriarty v. Bradt, 827 A.2d 203 (N.J. 2003); *cert. denied*, 124 S.Ct. 1408 (2004) (requiring preponderance of evidence that lack of visitation will cause harm to the health and welfare of the child, but stating that harm may be demonstrated by death of parent or dissolution of family); Harrold v. Collier, Nos. 2004-1492, 2004-1647, 2005 WL 2483241, at *6 (Ohio Oct. 10, 2005) (holding grant of grandparent visitation warranted where grandparents had raised child for several years following the death of child's mother); In re Marriage of O'Donnell Lamont, 91 P.3d 721 (Or. 2004) (refusing to require showing of unfitness or harm prior to grant of custody to third party); Brandon L. v. Moats, 551 S.E.2d 674 (W.Va. 2001) (finding due process concerns satisfied by statutory requirements that courts consider the best interests of the child and the effect of visitation on the parent-child relationship).

[23] We acknowledge that third parties seeking visitation and custody must meet a stringent test for standing. See T.B. v. R.L.M.,786 A.2d 913, 916 (Pa. 2001) (noting that standing may be established either by invoking specific statutory authorization or by demonstrating that the petitioning party stands *in loco parentis* to the child).

'special weight' and 'deference' should be accorded the parent-child relationship, and the relationship should not be disturbed 'without some showing of harm' or unless circumstances 'clearly indicate the appropriateness of awarding custody to a non-parent'" (internal citations omitted)). Moreover, we conclude that requiring grandparents to demonstrate that the denial of visitation would result in harm in every Section 5311 case would set the bar too high, vitiating the purpose of the statute and the policy expressed in Section 5301, which is to assure the continued contact between grandchildren and grandparents when a parent is deceased, divorced, or separated. Instead, we conclude that the stringent requirements of Section 5311, as applied in this case, combined with the presumption that parents act in a child's best interest, sufficiently protect the fundamental right of parents without requiring any additional demonstration of unfitness or specific requirement of harm or potential harm.[24]

The trial court in the case *sub judice* applied the necessary presumption and gave "special weight" to the decision of Father. Nevertheless, the court found that Grandmother had met this burden given the court's conclusion that the child benefited from spending time with Grandmother, with whom he had a longstanding and close relationship and from

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[24] Unlike Mr. Chief Justice Cappy, we decline to demand a specific finding of harm by the trial court prior to a grant of partial custody in the case at bar. Moreover, we observe that consideration of harm resulting from the denial of grandparent visitation or partial custody is to some extent implicit in the statute because the statute is triggered only when a child has suffered the loss of a parent, and visitation or partial custody is allowable only when the court concludes that the grandparent relationship is in the best interests of the grieving child. It is beyond cavil that the child's loss of an additional beneficial relationship will result in some degree of harm. Nevertheless, we recognize that a demonstration of significant harm could certainly strengthen a grandparent's argument that visitation or partial custody is in the best interests of the child and acknowledge that the justification supporting a grant of visitation or partial custody should be correspondingly more convincing as the extent of the custody granted increases, because greater periods of custody present greater infringement on a parent's constitutional right to the direct the care, custody, and control of the child.

whom he received emotional support in the aftermath of the loss of his mother. We, therefore, find that the trial court satisfied the requirements of Section 5311 and that its application survives our strict scrutiny. Accordingly, the order of the Superior Court is affirmed.

Messrs. Justice Castille, Saylor and Eakin join the opinion.

Former Justice Nigro did not participate in the decision of this case.

Madame Justice Newman files a concurring opinion.

Mr. Chief Justice Cappy files a dissenting opinion.