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MAY 18 1995

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IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

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50,771

Boyd Campbell and Beverly Campbell,
 Plaintiffs and Appellants,
 v.
 Janet C. Campbell,
 Defendant and Appellee.

OPINION
(For Publication)

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16p.

Case No. 930790-CA

1016859
(16pp.)

F I L E D
(May 18, 1995)

First District, Cache County
The Honorable Gordon J. Low

REPORT

Attorneys: L. Brent Hoggan, Logan, for Appellant
Dianne R. Balmain, Logan, for Appellee

Before Judges Orme, Garff,¹ and Wilkins.

ORME, Presiding Judge:

Boyd and Beverly Campbell appeal the trial court's order awarding them only limited rights of visitation with their grandchildren. Upholding the constitutionality of Utah's grandparent visitation statute, we vacate the order and remand.

FACTS

Appellants Boyd and Beverly Campbell were the parents of Kelly Campbell. Kelly Campbell was the husband of appellee Janet Campbell until his death on August 1, 1991. At the time of Kelly's death, Kelly and Janet had four children, and Janet was pregnant with a fifth child.

After Kelly's death, Boyd and Beverly sought to maintain a relationship with their five grandchildren. Janet claims she encouraged her children's relationships with their grandparents,

1. Senior Judge Regnal W. Garff, acting pursuant to appointment under Rule 3-108(4), Utah Code of Judicial Administration.

Because counsel for both sides believed that presentation of evidence through testimony would further exacerbate the already acrimonious relationship between the parties, and in an effort to preserve the possibility of future reconciliation between them, counsel proffered their evidence and argued their clients' positions to the court. At this hearing, Boyd and Beverly requested more extensive visitation rights.²

2. Specifically, Boyd and Beverly requested the following visitation schedule:

1. One (1) twenty-seven (27) hour period every other week, preferably from 6:00 p.m. Friday night to 9:00 p.m. on Saturday night. If the children have church, school or recreational activities or music lessons during this time, Campbells will see that the children involved attend all such activities.
2. One (1) evening on the day before or after each child's birthday from 4:00 p.m. to 8:30 p.m. during the school year and until 9:00 p.m. when school is not in session.
3. Father's Day from 9:00 a.m. until 6:00 p.m.
4. Three (3) days during the Christmas holidays.
5. One (1) day during the Thanksgiving holiday from 9:00 a.m. until 9:00 p.m.
6. One (1) week during the summer.
7. The time and duration of Campbells' family reunions.
8. Once per month from 4:00 p.m. until 8:00 p.m. with one child of Campbells' choice for purposes of a one-on-one relationship with that child.

In addition to the foregoing, Campbells would like the older children to work at odd jobs provided by Boyd Campbell during the summer for the purpose of assisting Janet in teaching the children a strong work ethic and as a way of providing money to the children earned through their own effort, for school, recreation and savings purposes.

The Campbells also ask that they be given at least one (1) week's notice of the dates each child will receive church ordinances such as baptisms and priesthood ordinations and of the children's participation in school, church and sporting

(continued...)

Boyd and Beverly appeal the trial court's visitation order, challenging the adequacy of the findings and claiming the court's analysis and resulting order were skewed by the trial court's view that section 30-5-2 is unconstitutional. Janet disputes Boyd's and Beverly's claims and further contends that she should be awarded attorney fees incurred in responding to this appeal, which she characterizes as frivolous.⁵

ADEQUACY OF THE FINDINGS

Rule 52(a), Utah Rules of Civil Procedure, requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Woodward v. Fazzio, 823 P.2d 474, 477 (Utah App. 1991) (quoting Utah R. Civ. P. 52(a)). To successfully challenge the findings, the appellant must ordinarily demonstrate they are clearly erroneous. Id. To make such a showing, appellant is required to marshal all the evidence supporting the findings and then demonstrate that the findings are not supported by legally sufficient evidence. See id.

In the instant case, appellants do not marshal all the evidence in an effort to demonstrate that the court's findings--and its ensuing conclusion--are erroneous. Instead, appellants contend that the court's findings are insufficiently detailed--i.e., facially inadequate--to allow for meaningful review. We agree. As noted in Woodward, appellants need not engage in a futile marshalling exercise if they can demonstrate the findings, as framed by the court, are legally insufficient. Id. at 477-78. As explained in the following analysis, whatever may be said as to the "reasonableness" of the visitation ordered by the court, the more immediate problem in this case is that the findings are not sufficiently detailed to disclose the evidentiary basis for the court's decision and thereby allow for meaningful review. See id.

4. (...continued)

Defendant/Mother is also invited to attend.

6. Once per month from 4:00 p.m. until 8:00 p.m. with one child of the Plaintiffs' choice for purposes of the development of a one-on-one relationship with that child.

5. Our resolution of this appeal conclusively dispels any suggestion that the appeal is frivolous.

"appropriate and reasonable." Its order was fashioned accordingly.

The court's first finding, that some visitation would be in the children's best interest, is conclusory. The court should have entered detailed findings to support its conclusion. Moreover, Janet had previously stipulated that some visitation was in her children's best interest. Thus, the only question before the court was what constituted reasonable visitation. A solitary finding that some visitation is in the best interest of the children, a proposition not in dispute, neither advances the trial court's analysis nor allows for meaningful review of the reasonableness of a particular schedule of visitation.

Likewise, a finding that the present dispute between the parties has harmed the children by exposing them to the stress that inevitably accompanies litigation between family members, does not provide any insight as to why this particular schedule of visitation is in the children's best interest. Stated from a slightly different perspective, if the stress is due only to the litigation, what bearing does it have on how much visitation to permit, since, from all that appears, the stress will end when the litigation does? Apparently, spending time with their grandparents was not, in and of itself, a source of stress for the children. See infra note 8.

Finally, it is factually accurate that Janet agreed to a particular visitation schedule, but such agreement does not necessarily make that schedule of visitation reasonable. If court-ordered grandparent visitation were to be entirely dictated by the preferences of the parent, the statute would be rendered meaningless. It would be futile for a grandparent to sue for visitation rights if those rights would be ultimately limited to what a grandparent would receive as a matter of grace from the parent.

Certainly, an important factor in deciding whether to award visitation and in determining the amount of visitation is the extent to which such visitation will disrupt the children's relationship with their parent. Applying this factor to the instant case, it is possible that the visitation requested by

7. In Goolsbee v. Heft, 549 S.W.2d 34 (Tex. App. 1977), the court came to the same conclusion when it expressly determined that the trial court's power to grant visitation was not subject to the will of the parent, because otherwise the statute providing grandparents visitation rights, if visitation is in the best interest of the grandchildren, would have been without practical effect. Id. at 35.

It is clear that the court's findings, and its ultimate conclusion, reflect the trial court's view that section 30-5-2 unconstitutionally restricts a parent's right to raise his or her children without interference by the State.¹⁰ If the court's concerns were not well-founded, then the court's findings were, at least in part, the product of a misapprehension of the law, which is itself an adequate basis to remand for reconsideration. Hoffman v. Life Ins. Co., 669 P.2d 410, 420-21 (Utah 1983). Because the constitutionality of section 30-5-2 will almost certainly arise again on remand, we turn our attention to that issue. See Utah R. App. P. 30(a); Randle v. Allen, 862 P.2d 1329, 1334 (Utah 1993); Reeves v. Gentile, 813 P.2d 111, 119 (Utah 1991).

We begin our analysis by reiterating "the well-settled proposition that all statutes are presumed to be constitutional." Blue Cross & Blue Shield v. State, 779 P.2d 634, 637 (Utah 1989). See Horton v. Utah State Retirement Bd., 842 P.2d 928, 934 (Utah App. 1992). Moreover, we will not hold a statute to be unconstitutional unless it clearly contravenes a constitutional provision. Baker v. Matheson, 607 P.2d 233, 237 n.2 (Utah 1979).

9. (...continued)

when the nuclear family has been dissolved." Hawk v. Hawk, 855 S.W.2d 573, 580 n.10 (Tenn. 1993).

10. The court's analysis and the order of visitation based thereon are apparently influenced by its all-but-exclusive focus on the importance of maintaining the parent-child relationship. The court stated that it was

not sure the courts have discretion to [award grandparent visitation,] despite the language of the statute. Even if they do, I question whether that results in a healthy relationship, because I think it absolutely does compromise and encroach upon and is in some ways detrimental to the relationship of authority, control and custody provided by the natural situation and those provided by statute of the natural parent.

The court opined that the State will not infringe upon a parent's right to raise his or her children unless "the parent is found to be absolutely unfit and the parent's influence on the children, or lack thereof, expose[s] the children to danger, unreasonably so." Because it was not suggested, nor would the evidence have supported the claim, that Janet was an unfit parent, the court refused to infringe upon her parental authority and limited its order of visitation to those parts of the visitation schedule to which she had previously agreed.

____, ____, 112 S. Ct. 2791, 2807 (1992) (plurality opinion) (recognizing "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"); In re Castillo, 632 P.2d 855, 856-57 (Utah 1981) (reaffirming parents' fundamental interest in maintaining relationships with their children).

However, the constitutionally protected right of family autonomy is not unfettered. There are many circumstances related to child health and well-being in which state intervention is constitutional. See Ginsberg v. New York, 390 U.S. 629, 639, 88 S. Ct. 1274, 1280 (1968). In Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438 (1944), the Court recognized that a "state has a wide range of power for limiting parental freedom" and thus "may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."¹³ Id. at 166-67, 64 S. Ct. at 442.

While parents have a constitutional right to make decisions affecting the family, the degree of the infringement by the state is a significant consideration in determining whether courts will strike a statute down as unconstitutional. In Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673 (1978), the Court considered the constitutionality of a Wisconsin statute prohibiting marriage by any resident with a child support obligation without a prior judicial determination that child support has been paid and that the minors "'covered by the support order are not then and are not likely thereafter to become public charges.'" Id. at 375, 98 S. Ct. at 675 (quoting Wis. Stat. § 245.10(1) (1973)).

12. (...continued)
the sanctity of the family"); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442 (1944) (recognizing the existence of a "private realm of family life which the state cannot enter").

13. Over the years, there has been increased legislation designed to promote the safety, education, and physical and emotional welfare of children, even if at the expense of parental autonomy. For example, children may be excluded from school unless properly inoculated against disease, Utah Code Ann. § 53A-11-301 to -306 (1994); see State ex rel. Cox v. Board of Educ., 21 Utah 401, 412-13, 60 P. 1013, 1015-16 (1900); parents cannot abuse or neglect their children, Utah Code Ann. § 76-5-109 (Supp. 1994); restrictions are placed on the employment of children, Utah Code Ann. §§ 34-23-101 to -402 (Supp. 1994); and children must be restrained when riding in a motor vehicle. Utah Code Ann. § 41-6-148.20 (1993).

encroachment upon personal liberty," Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

Id. at 461-62, 103 S. Ct. at 2509-10 (O'Connor, J., dissenting) (some citations omitted). See also Planned Parenthood v. Casey, ___ U.S. ___, ___, 112 S. Ct. 2791, 2820 (1992) (plurality opinion) (applying undue burden test to determine constitutionality of state infringement on women's right to terminate pregnancy); Webster v. Reproductive Health Servs., 492 U.S. 490, 509, 109 S. Ct. 3040, 3052 (1989) (holding state's refusal to fund abortions does not unduly burden women's right to have abortions).

With the foregoing principles in mind, we hold that the visitation rights authorized for grandparents under section 30-5-2 do not substantially infringe upon the parent's fundamental rights or the autonomy of the nuclear family.¹⁴ Section 30-5-2 is narrowly tailored to require "reasonable" periods of temporary visitation only if the court finds visitation to be "in the best interest of the children." While grandparents are members of the extended family whom society recognizes as playing an important role in the lives of their grandchildren,¹⁵ which recognition has been given added meaning in this State by the Legislature's policy judgment underlying section 30-5-2, the statute does not presume that grandparent visitation is necessarily in the

14. Under section 30-5-2, grandparents are not the only parties permitted to petition the court for rights of visitation. "[O]ther immediate family members" may also petition the court for visitation rights.

15. See Moore v. City of East Cleveland, 431 U.S. 494, 504-05, 97 S. Ct. 1932, 1938-39 (1977). Historically, grandparents had no legal right of visitation. Laurence C. Nolan, Honor Thy Father and Thy Mother: But Court-Ordered Grandparent Visitation in the Intact Family?, 8 B.Y.U. J. Pub. L. 51, 57 (1993). See King v. King, 828 S.W.2d 630, 632 (Ky.), cert. denied, ___ U.S. ___, 113 S. Ct. 378 (1992). However, the promulgation of section 30-5-2 indicates that our Legislature now considers the grandparent-grandchild relationship important enough to warrant grandparent visitation rights in appropriate cases. See Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978). Moreover, in recent years, "the grandparent-grandchild relationship has received increasing attention from both state legislatures and courts." Ward v. Ward, 537 A.2d 1063, 1067 (Del. Fam. Ct. 1987). As of 1993, every state had "enacted grandparent visitation statutes, allowing grandparents to petition the court for visitation under certain circumstances." Nolan, supra, at 52.

demographics of domestic relations, the rise in the divorce rate, and the increasing numbers of children born to single parents are but a few of the factors contributing to the destabilization of the traditional nuclear family. Given such circumstances, it is not unreasonable for our Legislature to attempt to strengthen intergenerational ties as an alternative or supplementary source of family support for children. Therefore, we conclude that, because grandparent visitation as provided by section 30-5-2 is rationally related to promoting the State's legitimate interest in fostering relationships between grandparents and their grandchildren, the statute is constitutional.¹⁸ And because grandparent visitation, as provided by section 30-5-2, does not unduly burden a parent's autonomous right to raise his or her children, we do not apply strict scrutiny to determine the statute's constitutionality. Instead, we hold the statute to be constitutional because it is rationally related to furthering a legitimate state interest.

CONCLUSION

Because the trial court believed section 30-5-2 was unconstitutional, the court entered its findings and fashioned its order in an analytically flawed way, being overly solicitous of the parent-child relationship. We hold that the trial court erred, as a matter of law, by failing to apply the best-interests-of-the-children standard mandated by section 30-5-2.

18. We note that the vast majority of courts that have addressed the constitutionality of grandparent visitation statutes authorizing visitation if in the best interest of the child, have upheld those statutes as constitutional. See Sketo v. Brown, 559 So.2d 381, 382 (Fla. App. 1990); Bailey v. Menzie, 542 N.E.2d 1015, 1020 (Ind. App. 1989); Spradling v. Harris, 778 P.2d 365, 368 (Kan. App. 1989); King v. King, 828 S.W.2d 630, 631-32 (Ky.), cert. denied, ___ U.S. ___, 113 S. Ct. 378 (1992); Herndon v. Tuhey, 857 S.W.2d 203, 208 (Mo. 1993) (en banc); Roberts v. Ward, 493 A.2d 478, 481 (N.H. 1985); People ex rel. Sibley v. Sheppard, 429 N.E.2d 1049, 1052 (N.Y. 1981); Deweese v. Crawford, 520 S.W.2d 522, 526 (Tex. App. 1975). While the Tennessee Supreme Court has held that Tennessee's grandparent visitation statute is unconstitutional under the Tennessee Constitution, the court did not decide whether the statute is unconstitutional under the United States Constitution. See Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993). To date, only Georgia has declared a statute permitting court-ordered grandparent visitation, if in the best interest of the child, to be unconstitutional under the United State Constitution. See Brook v. Parkerson, 454 S.E.2d 769, 773-74 (Ga. 1995).