5/7/18 - Pet. for Rev. Denied 27 MDM 2018; Appeal Quashed 395 MDA 2018

J.K. and T.Z.,		: IN THE COURT OF COMMON PLEAS
	Plaintiffs	: DAUPHIN COUNTY, PENNSYLVANIA
		:
v.		: NO. 2013 CV 9678 CU
		:
A.M.U. and G.U.,		:
	Intervenors	: CIVIL ACTION - CUSTODY

May 3, 2018

MEMORANDUM OPINION

Plaintiffs J.K. and T.Z. ("Parents") have appealed from an order I issued February 2, 2018, denying their request that I vacate an order I issued August 24, 2016, granting the Intervenor-Grandparents standing to seek partial physical custody of their two grandchildren. J.K. is the children's biological father. J.K. and T.Z. recently married and T.Z. has legally adopted both children. The parental rights of the children's biological mother, C.K., were terminated in January 2017. Intervenor-Grandmother A.M.U. is C.K.'s mother and Intervenor-Grandfather G.U. is married to A.M.U. though he is not biologically related to the children ("Grandparents").

This is the second request in this action that my August 24, 2016 order granting grandparent standing be vacated. The first request was raised by Father J.K. prior to the termination of C.K.'s parental rights and before the children were adopted by T.Z. In the earlier motion, J.K. argued that Grandparents were precluded from seeking custody of the children under a newly-issued Supreme Court decision, which held a portion of Pennsylvania's grandparent standing law unconstitutional. D.P. v. G.J.P., 146 A.3d 204 (Pa. 2016). I denied this first request to vacate the order granting grandparent standing, which decision was affirmed on procedural grounds by the Superior Court (discussed below).

This opinion is issued in support of my order of February 2, 2018, denying the second request that I vacate my August 24, 2016 order conferring grandparent standing.

Background

J.K. and C.K. were married in December 2010 and separated in October 2013. They had two children, one born in 2011 and the other in 2012. J.K. commenced a custody and divorce action under this docket against C.K. in 2013. An original custody order was issued in December

2013 granting the biological parents J.K. and C.K. shared legal custody, J.K. primary physical custody and C.K. visitation supervised by her mother A.M.U. The order was modified January 6, 2015, granting J.K. sole legal custody and primary physical custody, and granting C.K. supervised visitation. The order was again modified by agreement March 30, 2015 granting J.K. sole legal and primary physical custody, and specifying the terms of C.K.'s supervised visitation. J.K. and C.K. were divorced by decree entered June 5, 2015.

On July 28, 2016, Grandparents A.M.U. and G.U. filed a Petition to Intervene seeking partial physical custody. They raised two grounds for standing under the Child Custody Act; that the biological parents J.K. and C.K. had been separated for six months or more and that J.K. and C.K. had commenced (and completed) divorce proceedings. 23 Pa.C.S.A. § 5325(2).[1] After J.K.

[1] Section 5325 confers standing upon grandparents to seek partial or supervised physical custody, as follows:

> **§ 5325. Standing for partial physical custody and supervised physical custody**
>
> In addition to situations set forth in section 5324 (relating to standing for any form of physical custody or legal custody), grandparents and great-grandparents may file an action under this chapter for partial physical custody or supervised physical custody in the following situations:
>
> (1) where the parent of the child is deceased, a parent or grandparent of the deceased parent may file an action under this section; [or]
>
> **(2) where the parents of the child have been separated for a period of at least six months or have commenced and continued a proceeding to dissolve their marriage**; or
>
> (3) when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home.

23 Pa.C.S.A. § 5325 (emphasis added).

New Legislation unanimously passed in the Pennsylvania House and Senate within the last few weeks (SB 844), and presented to the Governor for signature May 1, 2018, will replace the current language under Section 5325(2) with a new ground for grandparent (and great-grandparent) standing, as follows:

> **§ 5325. Standing for partial physical custody and supervised physical custody.**
>
> In addition to situations set forth in section 5324 (relating to standing for any form of physical custody or legal custody), grandparents and great-grandparents may file an action under this chapter for partial physical custody or supervised physical custody in the following situations:

answered the Petition, I issued an order August 24, 2016, granting intervention since the Grandparents' right to standing under both parts of Section 5325(2) was clear from the face of the record. The merits of the custody request were referred to a conciliation conference. On October 17, 2016, at the conference, Father J.K. presented a motion to dismiss the Grandparents' Petition to Intervene arguing that the grounds they asserted for standing under Section 5325(2) were no longer valid under D.P. v. G.J.P., which had just been issued a month earlier.

Grandparents countered that D.P. only found as unconstitutional one of the two grounds they claimed for standing (i.e. parental separation of at least six months). The Court in D.P. had declined to reach the issue of whether the other standing provision (commencement by the parents of divorce proceedings) was constitutional. I issued an opinion and order December 5, 2016, agreeing with Grandparents that standing based upon the commencement of divorce proceedings was still a valid ground for grandparent standing under the Child Custody Act while also recognizing that there was a compelling case to be made that the provision might be deemed unconstitutional by our appellate courts in the future. See, J.K. v. C.K. v. A.M.U. and G.U., 126 Dauph. Co. Rptr. 64 (Dec. 5, 2016). (See Court Attachment A)

Father sought to certify the matter for interlocutory appeal to the Superior Court, which request I granted. While Father's appeal was pending, C.K.'s parental rights were terminated January 4, 2017 in a Cumberland County proceeding. On February 14, 2017, the Cumberland

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* * *

(2) where the relationship with the child began either with the consent of a parent of the child or under a court order and where the parents of the child:

(i) have commenced a proceeding for custody; and

(ii) do not agree as to whether the grandparents or great grandparents should have custody under this section; or * * *

SB 844, PN 1531 (emphasis added).
http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2017&sessInd=0&billBody=S&billTyp=B&billNbr=0844&pn=1531 (SB 844 Text); and
http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2017&sind=0&body=S&type=B&bn=844 (legislative history).

County Court issued a decree allowing T.Z. to adopt the children. I later granted Father's requests to amend the caption in this action by removing C.K. and adding T.Z. as a Plaintiff.

On September 27, 2017, the Superior Court issued an order affirming my decision on procedural grounds. The Superior Court found that Father waived raising his challenge to the constitutionally of Section 5325(2) (second clause) by failing to provide notice to the Attorney General. J.K. v. C.K. v. A.M.U. and G.U., No. 441 MDA 2017 (Sept. 27, 2017).

On October 30, 2017, Parents J.K. and T.Z. filed a new motion seeking to dismiss the Grandparents' Petition to Intervene (filed July 28, 2016). They provided notice to the Attorney General of their challenge to the constitutionality of Section 5325(2) (second clause). In their motion they sought that I vacate my August 24, 2016 order granting the Grandparents standing. Following oral argument, I issued my February 2, 2018 order denying the renewed motion to dismiss the Grandparents from this action for lack of standing.

Legal Discussion

Parents J.K. and T.Z. raised the same legal challenge J.K. alone had raised in his original motion; that the second clause in Section 5325(2) of the Child Custody Act, which confers standing to grandparents to seek custody where the parents commenced a divorce action, is unconstitutional. I agreed to consider the matter again because, while Parents raised the same legal issue I previously rejected, T.Z. had not been a party to the first action and the family structure had been significantly altered whereby T.Z. had married J.K. and adopted the children, creating an intact family.[2] Following oral argument on the issue, I issued my February 2, 2018 order, declining to vacate the 2016 order granting grandparent standing. I also declined to amend my order for the purpose of having the order certified for an interlocutory appeal. The Parents have since filed an appeal to the Superior Court from my February 2, 2018 order.

[2] Parents are not arguing that the termination of the parental rights of the children's biological mother C.K. and the adoption of the children by T.Z. bar the Grandparents from seeking standing or otherwise retroactively revoke standing already conferred upon them. As noted in the Superior Court's memorandum dismissing Father's appeal, "[t]he termination of [C.K.'s] parental rights does not serve to bar Grandparents' standing." J.K. v. C.K. v. A.M.U. and G.U., No. 441 MDA 2017 at p. 4, fn. 7 (Pa. Super. 2017) (citing Rigler v. Treen, 660 A.2d 111 (Pa. Super. 1995)). As noted by the esteemed Judge Phyllis Beck in Rigler, a provision in the Child Custody Act (Section 5326 (formerly Section 5314)) explicitly reserves the rights of grandparents to seek custody where a stepparent adopts a child. 23 Pa.C.S.A. § 5326. Rigler at 113-14.

In addressing the standing issue in my earlier Opinion, I reasoned as follows:

> Under D.P., parental separation is no longer a valid ground upon which maternal grandparents may be conferred standing to seek custody. Father argues that the reasoning set forth in D.P. applies equally to the standing provision in the second part of the Section 5325(2) and requires that this court find it unconstitutional as well. In D.P., two judges issued a concurrence and dissent stating that they would have stricken the second part of the Section 5325(2) standing provision as unconstitutional. Id. at 219-221. On this point, the majority responded that "any such judgment should be left for a future controversy in which the issue is squarely presented, the Court has the benefit of focused adversarial briefing, and the Attorney General is apprised that the constitutional validity of the second half of Section 5325(2) has been called into question and is given an opportunity to defend it." Id. at 217.
>
> While this court agrees that there is a strong case to made for finding that the second part of the Section 5325(2) is unconstitutional under the reasoning set forth in D.P., this court's reading of the majority opinion reveals that such a finding is not clear and that there exist some potentially significant distinguishing factors upon which our Supreme Court might find the second part of Section 5325(2) constitutional. Notably, a distinction recognized by the majority in D.P. between grandparent standing based upon separation versus that based upon commencement (and continuation) of divorce proceedings, is that in the former situation, prior court decisions acknowledged the existence of empirical studies reflecting objective evidence of harm caused to children of divorce. Id. at 611-612. On the other hand, the court noted that "we cannot assume that any empirical studies relating to the effects of divorce carry over to mere separation." Id. at 212. Thus, a strict scrutiny analysis would very likely acknowledge a more compelling state interest in protecting children involved in divorce proceedings as opposed to children of "mere separation," potentially resulting in a finding that grandparent standing conferred by virtue of divorce proceedings might pass constitutional muster.
>
> In addition, the D.P. majority elaborated upon the distinction between separation and divorce proceedings and the increased level of government involvement engendered by the latter. In situations of separation, parents "do not always initiate divorce proceedings or otherwise request court involvement in their family affairs" and "thus children are often shielded from having to participate in court proceedings and are, likewise, free from having to assimilate the knowledge that the government is now involved in their family life," again noting a lack of empirical data "tending to suggest that separation has the same adverse effects upon children as divorce." Id. at 215 (citation omitted). "These factors [among others] render any court-mandated association with such third parties more intrusive to the parents' constitutional prerogatives than in a context where the parents have already invoked the court's oversight as to matters of custody and/or marital dissolution." Id. (citation omitted). Because government involvement and oversight is more significant where divorce proceedings are commenced than when the parties merely separate, the governmental

> interest is greater and the constitutional analysis would again potentially acknowledge this heightened state interest in protecting children of divorce proceedings as opposed to children of separation.
>
> Finally, the court in D.P. found of some significance that the parents in D.P. were unified in their decision to exclude the grandparents from their grandchildren's lives. The court recognized that separated parents who are able to jointly decide such important issues do not "disturb the ordinary presumption, credited by the United States Supreme Court, that fit parents act in their children's best interests." Id. at 207 (citation omitted); *see also*, Id. at 214 ("where there is no reason to believe presumptively fit parents are not acting in their children's best interests, the government's interest in allowing a third party to supplant their decisions is diminished"). On the other hand, parents who disagree as to whether grandparents should have custodial rights certainly can be considered as disturbing the presumption that they act in their children's best interests. Id. at 212 (noting that the "breakdown in unified parental decision-making [is] more severe" in such cases). Again, the state interest in helping prevent potential harm to children caused by a severing the grandparent relationship may be significantly heightened in cases such as that presented here, as compared to those situations where parents reach unified decisions. The potentially greater state interest in protecting such children provides another basis upon which the standing provision at issue might withstand a constitutional challenge.
>
> D.P. thus acknowledges [three] significant differences between grandparent standing based upon parental separation of at least six months and standing based upon the commencement (and continuation) of divorce proceedings by parents. As outlined above, these include the existence of empirical evidence of harm to children of divorce whereas such evidence does not yet exist as to children of separation. Furthermore, in cases of divorce, the parties have requested court involvement and oversight into their lives whereas they make no such requests upon separation. In addition, D.P. recognizes that in the case of separated or divorced parents, the state interest in protecting children by promoting the grandparent relationship may be greater in cases where the parents are unable to make a unified decision as to the nature and extent of the grandparent-grandchild relationship. All of these factors distinguish and weaken the application of D.P. to this case.
>
> Accordingly, because the law is not clear that the grandparent standing provision under the second part of 23 Pa.C.S.A. § 5325(2) is unconstitutional, I [deny Father's motion seeking that I vacate my August 24, 2016 order granting standing to Grandparents].

J.K. v. C.K. v. A.M.U. and G.U., 126 Dauph. Co. Rptr. 64 (Dec. 5, 2016) (see Court Attachment A, pp. 5-7).

Parents stress that their current challenge to grandparent standing is more compelling than when Father alone raised the issue. Specifically, they note that they are currently an intact family

unit who are unified in their decision to exclude the Grandparents from exercising any custody over their children. While it is true that on this particular issue the Parents' position is stronger than it was when Father alone challenged the Grandparents' standing, the other considerations raised by the D.P. court in distinguishing grandparent standing based upon commencement of divorce proceedings and parental separation are still valid. These include evidence that children of divorce suffer greater harm than do children of separation and that in cases where divorce proceedings have been commenced, the parties explicitly request court involvement and oversight into their lives whereas they make no such requests upon the court for mere separation.

Accordingly, I issued my order February 2, 2018, denying Parents' motion seeking that I vacate my August 24, 2016 Order granting the Grandparents standing and allowing them to intervene in this custody action.

May 3, 2018
Date

Jeannine Turgeon, Judge

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JEFFREY KAPP, Plaintiff	:	IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA
v.	:	
CHRISTINE KAPP, Defendant	:	NO. 2013 CV 9678 CU
v.	:	
ANN MARIE UPDEGRAFF and GLEN UPDEGRAFF, Intervenors	:	CIVIL ACTION - CUSTODY

OPINION

Before the Court is plaintiff father's Motion to Dismiss Intervenors' Petition in this custody action. Father seeks that this court reverse an August 24, 2016 Order granting the Petition and conferring standing upon the maternal grandparent-intervenors, in order to allow them to seek partial physical custody over their grandchildren. Father claims the Pennsylvania Supreme Court's recent decision in D.P. v. G.J.P., 146 A.3d 204 (Pa. Sept. 9, 2016), requires that I find grandparents lack standing to pursue custody. For the reasons set forth below, I deny father's Motion to Dismiss.

Background

Plaintiff father and defendant mother were married in December 2010 and separated in October 2013. They are the parents of two children, one born in 2011 and the other in 2012. Father commenced a custody and divorce action under this docket in November 2013. A divorce decree was later entered June 5, 2015. An original custody order was issued in December 2013 and granted the parties shared legal custody, father primary physical custody and mother supervised visitation, later supervised by her mother, one of the intervenors herein. Following a hearing, the order was modified January 6, 2015, granting father sole legal custody and primary physical custody, and granting mother visitation of increasing terms if the visitations proved successful. Father sought reconsideration of the order and following a conference with the parents, I issued an agreed order March 30, 2015 granting father sole legal and primary physical custody, and specifying that mother's supervised visitation was to take place at the Harrisburg YWCA.

On July 28, 2016, maternal grandparents filed a Petition to Intervene in order to seek custody and/or visitation. They claimed two bases for standing under the Child Custody Act; that the parents had been separated for six months or more and that the parents were divorced. 23 Pa.C.S.A. § 5325(2). After father answered the Petition,[3] I granted intervention by maternal grandparents since their right to standing under both parts of Section 5325(2) was clear from the face of the record. The parties agreed, following a September 15, 2016 conference, that grandparents could visit the children one Sunday in September and thereafter determine future visitation depending upon the success of that visit. Both mother and grandparents later filed petitions in September seeking to prevent father from moving to Florida. Mother also sought to modify the March 30, 2015 custody order. I later issued an order permitting father to move to Florida and directing that mother's request to modify the custody terms be resolved through normal Dauphin County custody conciliation procedure.

On the date of the conciliation conference, October 17, 2016, father filed his Motion to Dismiss Intervenor's Petition arguing that grandparents' bases for standing under Section 5325(2) were no longer valid under the D.P. decision.[4] Conciliation was postponed pending resolution of father's Motion to Dismiss. In their Answer, grandparents argue that D.P. only found as unconstitutional one of the two grounds they claimed for standing and that the other is still valid.

[3] Father raised a number of grounds opposing the intervention including that grandparents were unfit and it was not in the best interests of the children that grandparents be granted custodial time. Father noted that he had initiated an action in Cumberland County seeking to terminate mother's parental rights (Case No. 36-Adopt-2016) and that assuming her rights were terminated, his new wife intended to adopt both children. A hearing on the termination of parental rights is scheduled for January 4, 2017 in Cumberland County.

[4] Father again asserted in his Petition that the order granting the grandparents standing should be reversed because they were unfit. Clearly, that is not a valid ground to divest the grandparents of standing but an issue to be determined upon inquiry into the children's best interests (assuming grandparents maintain standing to participate in this custody action). See D.P. v. G.J.P. at 213 (Pa. 2016) (Section 5325 "gives parents the ability to bifurcate the proceedings by seeking dismissal for lack of standing, thereby requiring that any such preliminary questions be resolved before the complaint's merits are reached").

Legal Discussion

Section 5325 confers standing upon grandparents to seek partial or supervised physical custody, as follows:

> § 5325. Standing for partial physical custody and supervised physical custody
>
> In addition to situations set forth in section 5324 (relating to standing for any form of physical custody or legal custody), grandparents and great-grandparents may file an action under this chapter for partial physical custody or supervised physical custody in the following situations:
>
> (1) where the parent of the child is deceased, a parent or grandparent of the deceased parent may file an action under this section; [or]
>
> **(2) where the parents of the child have been separated for a period of at least six months or have commenced and continued a proceeding to dissolve their marriage**; or
>
> (3) when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home.

23 Pa.C.S.A. § 5325 (emphasis added).

As noted above, maternal grandparents asserted valid standing grounds under both parts of Section 5325(2). However, on September 9, 2016, just a few weeks after I granted grandparents the right to intervene, our Supreme Court issued its decision in D.P. In that case, grandparents filed a custody action against the separated parents seeking custody of their grandchildren after the parents mutually agreed to exclude them from the children's lives. The parents challenged the constitutionality of the separated parents standing provision in part one of Section 5325(2) on due process and equal protection grounds. The trial court agreed and held the provision unconstitutional. On appeal, our Supreme Court defined the issue as "whether the parents' fundamental rights are violated by the conferral of standing based solely on a parental separation lasting at least six months." D.P. v. G.J.P., 146 A.3d 204, 205 (Pa. 2016). It set forth the constitutional analysis as follows:

> As reflected in our cases and in *Troxel [v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000) (plurality)]*, Grandparent visitation and custody statutes authorize state action and, as such, they are subject to constitutional limitations. *Accord, e.g., In re Herbst*, 971 P.2d 395, 398–99 (Okla.1998) (explaining that, "mandating the introduction of a third party, even a grandparent, into a family unit is state action limiting the parents' liberty"). There is no dispute that Section 5325 burdens the right of parents to make decisions concerning the care, custody, and control of their children; that such right is a fundamental one, *see Troxel*, 530 U.S. at 65–66, 120 S.Ct. at 2060–61 (discussing cases); *Hiller [v. Fausey*, 588 Pa. 342, 358, 904 A.2d 875, 885 (2006)], and that, as such, it is protected by the Fourteenth Amendment's due-process and equal-protection guarantees. *See* U.S. Const. amend. XIV, § 1 (forbidding states from depriving "any person of life, liberty, or property, without due process of law," or from denying to any person within their jurisdiction "the equal protection of the laws"). In light of these factors there is also no disagreement that, to survive a due process or equal protection challenge, Section 5325 must satisfy the constitutional standard known as strict scrutiny.
>
> The basic features of strict scrutiny, relating to whether the governmental action is narrowly tailored to a compelling state interest, *see Hiller*, 588 Pa. at 359, 904 A.2d at 885–86, are well established. As expressed in *Schmehl [v. Wegelin*, 592 Pa. 581, 927 A.2d 183 (2007)], the inquiries per the Due Process and Equal Protection Clauses are distinct but overlapping: pursuant to the former, the government's infringement on fundamental rights must be necessary to advance a compelling state interest, whereas under the latter it is the classification inherent in the statute which must be necessary to achieve that interest. *See Schmehl*, 592 Pa. at 589, 927 A.2d at 187.
>
> Broadly speaking, the state, acting pursuant to its *parens patriae* power, has a compelling interest in safeguarding children from various kinds of physical and emotional harm and promoting their wellbeing. *See Hiller*, 588 Pa. at 359, 904 A.2d at 886 ("The compelling state interest at issue in this case is the state's longstanding interest in protecting the health and emotional welfare of children."). That aim has been invoked to accomplish certain objectives where appropriate, such as involuntarily terminating a parent's rights and providing a child with a permanent home. *See In re Adoption of J.J.*, 511 Pa. at 608, 515 A.2d at 893; *see also* 23 Pa.C.S. § 2511(a)(2), (9) (permitting involuntary termination of parental rights due to abuse, neglect, or the conviction of certain crimes). The component of the government's *parens patriae* responsibility implicated here is its interest in ensuring that children are not deprived of beneficial relationships with their grandparents.

Id. at 210–11 (footnotes omitted).

Following a lengthy discussion, the majority concluded that the separated parent standing provision was not narrowly tailored to satisfy strict scrutiny and thus violated parental rights under

the due process clause.[5] Id. at 215-16. The court held that the fact of a parental separation for six months or more did not render the state's *parens patriae* interest sufficiently pressing to justify potentially disturbing the decision of presumptively fit parents concerning the individuals with whom their minor children should associate. Id. at 215-16. As a remedy for the due process violation, the court severed the first part of Section 5325(2) but left intact other standing provisions therein. Id. at 216.

Under D.P., parental separation is no longer a valid ground upon which maternal grandparents may be conferred standing to seek custody. Father argues that the reasoning set forth in D.P. applies equally to the standing provision in the second part of the Section 5325(2) and requires that this court find it unconstitutional as well. In D.P., two judges issued a concurrence and dissent stating that they would have stricken the second part of the Section 5325(2) standing provision as unconstitutional. Id. at 219-221. On this point, the majority responded that "any such judgment should be left for a future controversy in which the issue is squarely presented, the Court has the benefit of focused adversarial briefing, and the Attorney General is apprised that the constitutional validity of the second half of Section 5325(2) has been called into question and is given an opportunity to defend it." Id. at 217.

While this court agrees that there is a strong case to made for finding that the second part of the Section 5325(2) is unconstitutional under the reasoning set forth in D.P., this court's reading of the majority opinion reveals that such a finding is not clear and that there exist some potentially significant distinguishing factors upon which our Supreme Court might find the second part of Section 5325(2) constitutional. Notably, a distinction recognized by the majority in D.P. between grandparent standing based upon separation versus that based upon commencement (and continuation) of divorce proceedings, is that in the former situation, prior court decisions acknowledged the existence of empirical studies reflecting objective evidence of harm caused to children of divorce. Id. at 611-612. On the other hand, the court noted that "we cannot assume that any empirical studies relating to the effects of divorce carry over to mere separation." Id. at 212. Thus, a strict scrutiny analysis would very likely acknowledge a more compelling state interest in protecting children involved in divorce proceedings as opposed to children of "mere separation,"

[5] Because the court found the provision violated due process, it did not reach the question of whether it violated the parents' rights of equal protection under the law.

potentially resulting in a finding that grandparent standing conferred by virtue of divorce proceedings might pass constitutional muster.

In addition, the D.P. majority elaborated upon the distinction between separation and divorce proceedings and the increased level of government involvement engendered by the latter. In situations of separation, parents "do not always initiate divorce proceedings or otherwise request court involvement in their family affairs" and "thus children are often shielded from having to participate in court proceedings and are, likewise, free from having to assimilate the knowledge that the government is now involved in their family life," again noting a lack of empirical data "tending to suggest that separation has the same adverse effects upon children as divorce." Id. at 215 (citation omitted). "These factors [among others] render any court-mandated association with such third parties more intrusive to the parents' constitutional prerogatives than in a context where the parents have already invoked the court's oversight as to matters of custody and/or marital dissolution." Id. (citation omitted). Because government involvement and oversight is more significant where divorce proceedings are commenced than when the parties merely separate, the governmental interest is greater and the constitutional analysis would again potentially acknowledge this heightened state interest in protecting children of divorce proceedings as opposed to children of separation.

Finally, the court in D.P. found of some significance that the parents in D.P. were unified in their decision to exclude the grandparents from their grandchildren's lives. The court recognized that separated parents who are able to jointly decide such important issues do not "disturb the ordinary presumption, credited by the United States Supreme Court, that fit parents act in their children's best interests." Id. at 207 (citation omitted); *see also*, Id. at 214 ("where there is no reason to believe presumptively fit parents are not acting in their children's best interests, the government's interest in allowing a third party to supplant their decisions is diminished"). On the other hand, parents who disagree as to whether grandparents should have custodial rights certainly can be considered as disturbing the presumption that they act in their children's best interests. Id. at 212 (noting that the "breakdown in unified parental decision-making [is] more severe" in such cases). Again, the state interest in helping prevent potential harm to children caused by a severing the grandparent relationship may be significantly heightened in cases such as that presented here, as compared to those situations where parents reach unified decisions. The potentially greater state

interest in protecting such children provides another basis upon which the standing provision at issue might withstand a constitutional challenge.

D.P. thus acknowledges significant differences between grandparent standing based upon parental separation of at least six months and standing based upon the commencement (and continuation) of divorce proceedings by parents. As outlined above, these include the existence of empirical evidence of harm to children of divorce whereas such evidence does not yet exist as to children of separation. Furthermore, in cases of divorce, the parties have requested court involvement and oversight into their lives whereas they make no such requests upon separation. In addition, D.P. recognizes that in the case of separated or divorced parents, the state interest in protecting children by promoting the grandparent relationship may be greater in cases where the parents are unable to make a unified decision as to the nature and extent of the grandparent-grandchild relationship. All of these factors distinguish and weaken the application of D.P. to this case.

Accordingly, because the law is not clear that the grandparent standing provision under the second part of 23 Pa.C.S.A. § 5325(2) is unconstitutional, I enter the following:

ORDER

AND NOW, this 5th day of December, 2016, Plaintiff's Motion to Dismiss Intervenor's Petition - in which he seeks that this court reverse its Order issued August 24, 2016 and direct that Grandparent-Intervenors have no standing under the second part of 23 Pa.C.S.A. § 5325(2) on the grounds that the second part is unconstitutional - is DENIED.[6] All other grounds raised by Plaintiff seeking dismissal of the Grandparent-Intervenors from this action are additionally DENIED.

BY THE COURT:

[6] This court notes that it would entertain a petition seeking permission to appeal this interlocutory order, if requested. 42 Pa.C.S.A. § 702(b); Pa.R.A.P. 1311.

Jeannine Turgeon, Judge

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