

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
PO BOX 20207  
NASHVILLE, TENNESSEE 37202

April 24, 2009

Opinion No. 09-66

Constitutionality of “Equal and Fair Parenting Act”

---

**QUESTIONS**

1. Does the “Equal and Fair Parenting Act” proposed in House Bill 2 violate any provision of the United States Constitution or the Tennessee Constitution?
2. Specifically, does the rebuttable presumption for equally shared parenting in House Bill 2 violate a parent’s fundamental right to raise his or her child?

**OPINIONS**

1. No, the “Equal and Fair Parenting Act” proposed in House Bill 2 does not violate any provision of the United States Constitution or the Tennessee Constitution.
2. No, the rebuttable presumption for equally shared parenting in House Bill 2 does not violate a parent’s fundamental right to raise his or her child.

**ANALYSIS**

You have asked whether proposed legislation affecting custody decisions in suits for annulment, divorce or separation is constitutional. Specifically, you have questioned whether the “Equal and Fair Parenting Act” proposed in House Bill 2 violates a parent’s fundamental right to raise his or her child by creating a rebuttable presumption that equally shared parenting is in the best interest of the child. House Bill 2 provides:

(i) Except as provided in subdivision (a)(2)(A), the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child. Unless the court finds by a preponderance of evidence to the contrary, or where the parents have agreed to a different custody arrangement, at a hearing for the purpose of determining the custody of the minor child, there shall be a rebuttable presumption that equally shared parenting is in the best interest of the child. For the purpose of assisting the court in making a determination whether an award of equitably-shared

parenting is appropriate, the court may direct that an investigation be conducted. The burden of proof necessary to modify an order of shared parenting at a subsequent proceeding shall be by a preponderance of the evidence.

In evaluating the constitutionality of a statute, the Tennessee Supreme Court begins with the presumption that an act of the General Assembly is constitutional. *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). The Court “must indulge every presumption and resolve every doubt in favor of the statute’s constitutionality.” *Id.* The Court applies this presumption “with even greater force when the facial constitutional validity of a statute is challenged.” *Id.*

Any constitutional analysis of this bill must begin with the general legal principles governing parental rights. Both the United States and Tennessee Constitutions protect a parent’s right to the care, custody and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Tennessee Baptist Children’s Homes, Inc. v. Swanson*, 2 S.W.3d 180, 187 (Tenn. 1999). But this right is not absolute. *Santosky v. Kraemer*, 455 U.S. 745, 102 S.Ct. 573, 71 L.Ed.2d 599 (1982). If a statute infringes on a fundamental right or creates an inherently suspect classification, the statute is subject to strict judicial scrutiny which requires the state to establish a compelling interest in its enactment. *See State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). It has long been settled that the state has a compelling interest in the well being of children. *State of Tennessee Department of Human Services v. Ogle*, 617 S.W.2d 652 (Tenn. Ct. App. 1980).

The “Equal and Fair Parenting Act” proposed in House Bill 2 creates a rebuttable presumption that equally shared parenting is in the best interest of the child. As such, it does not unconstitutionally discriminate based on the gender of the parent. This proposed act provides the court with discretion to decide a custody arrangement based on the best interest of the child. *See also* Tenn. Code Ann. § 36-6-106 (relevant factors in determining child custody). In addition, the proposed Act applies a preponderance of evidence standard which has long been accepted as an appropriate standard of proof as to custody matters arising from a divorce or annulment. *Whitaker v. Whitaker*, 957 S.W.2d 834, 836-37 (Tenn. Ct. App. 1997). *See also* Op. Tenn. Att’y Gen. 96-068 (April 10, 1996). Accordingly, it is our opinion that the “Equal and Fair Parenting Act” proposed in House Bill 2 does not violate any provision of the United States Constitution or the Tennessee Constitution. Specifically, this proposed Act does not violate a parent’s fundamental right to raise his or her child.

ROBERT E. COOPER, JR.  
Attorney General and Reporter

MICHAEL E. MOORE  
Solicitor General

DIANNE STAMEY DYCUS  
Deputy Attorney General

Requested by:

Honorable G.A. Hardaway, Sr.  
State Representative  
109 War Memorial Building  
Nashville, TN 37243