

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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July 31, 2009

Opinion No. 09-141

Constitutionality of 2009 Tenn. Pub. Acts, ch. 442 relating to transfer of visitation rights

**QUESTIONS**

1. Is 2009 Tenn. Pub. Acts, ch. 442 (“Public Chapter 442”) constitutional?
2. Does Public Chapter 442 circumvent the current Tennessee statutes on grandparent visitation?

**OPINIONS**

1. Yes. We believe a court would likely find Public Chapter 442 constitutional.
2. No. By each statute’s explicit terms, Public Chapter 442 and Tennessee’s current statutes regarding grandparent visitation apply to different factual situations.

**ANALYSIS**

1. You have asked whether Public Chapter 442, which was passed by the Legislature in the 2009 legislative session and became effective on July 1, 2009, is constitutional. Public Chapter 442 is aimed at protecting the relationship between a child and a non-custodial, divorced parent through the non-custodial parent’s family if the non-custodial parent must leave the state on active duty military service.

When parents divorce, Tenn. Code Ann. § 36-6-301 requires that the non-custodial parent be granted visitation with his or her child to “enable the child and the non-custodial parent to maintain a parent-child relationship” unless such visitation “is likely to endanger the child’s physical or emotional health.” Under Public Chapter 442, if a parent who has been granted visitation with his or her child must leave the state for at least 90 days for active duty military service, the parent may petition the court to modify the visitation order to temporarily transfer the parent’s visitation to a legal or biological relative. The petition must identify the relative or relatives with whom the parent wishes his or her child to visit, set out a proposed visitation schedule (not to exceed the visitation time currently granted the non-custodial parent), and contain an affidavit from the individual indicating his or her willingness to visit with the child.

A court may grant the petition upon such terms as the court deems appropriate and in the best interest of the child. Any assignment of visitation ends immediately upon termination of the parent's active duty military service.

When evaluating the constitutionality of a statute, courts begin with a strong presumption that an act of the Legislature is constitutional. *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997); *In Re Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995). The party attacking a statute bears the burden to show its unconstitutionality. *Fritts v. Wallace*, 723 S.W.2d 948, 950 (Tenn. 1987). When one assails or questions the right of the Legislature to enact a law, the person attacking the law has the burden of showing that the law does not rest upon a reasonable basis and that it is essentially arbitrary and unreasonable. *Tennessee Bd. of Dispensing Opticians v. Eyear Corp.*, 400 S.W.2d 734, 742 (Tenn. 1966). This is true even when the statute affects a fundamental right. *In re: E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001).

Both the United States and Tennessee constitutions protect a parent's fundamental constitutional right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 650, (1972); *Tennessee Baptist Children's Homes, Inc. v. Swanson*, 2 S.W.3d 180, 187 (Tenn. 1999). Generally, in a dispute between a parent and non-parent, a court will not award visitation to a non-parent absent proof by clear and convincing evidence that the child will be exposed to substantial harm without such visitation. *Hawk v. Hawk*, 855 S.W.2d 573, 581 (Tenn. 1993). However, in a situation between two parents, such as that presented in Public Chapter 442, parents have equal constitutional rights to their child. See *Smallwood v. Mann*, 205 S.W.3d 358, 362-363 (Tenn. 2006); *Holloran v. Kostka*, 778 S.W.2d 454, 456-457 (Tenn. Ct. App. 1988). Because Public Chapter 442 requires that the parent request a modification in visitation, as opposed to a third party, we believe a court would find it constitutional.<sup>1</sup>

The Tennessee Supreme Court addressed the issue of visitation when a non-custodial parent is unavailable to exercise his or her visitation rights due to military service in *Smallwood*, 205 S.W.3d at 362-363. In *Smallwood*, paternal grandparents, acting under their son's power of attorney, sought visitation rights for both themselves and their son (who was out of the state on military service) with the son's young child. 205 S.W.3d at 360. The juvenile court, which had originally granted the father "reasonable visitation rights" in an earlier paternity suit, denied the grandparents' request for independent visitation, finding that under the facts of the case, grandparent visitation was not allowed under Tenn. Code Ann. § 36-6-306, the grandparent visitation statute. *Smallwood*, 205 S.W.3d at 363. The juvenile court did, however, award visitation to the father and provided that if the father was unavailable to visit for a month, the grandparents could exercise his visitation on the last weekend of the month. *Smallwood*, 205 S.W.3d at 363. The Supreme Court found that "the juvenile court awarded grandparent visitation in excess of that allowed by statute or constitution." *Smallwood*, 205 S.W.3d at 363. The Court reversed the juvenile court's award of visitation:

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<sup>1</sup>This proposition is further supported by the fact that one of the express purposes of Public Chapter 442 is to allow a non-custodial parent to continue to exercise his or her parental rights by exposing his or her child to family members while the parent is out of state on military service.

There is simply no statutory authority for allowing a non-custodial parent to “transfer” or “assign” his or her visitation rights to the grandparents. Accordingly, section 36-6-306 of the Tennessee Code Annotated provides the only vehicle available to establish the grandparents’ visitation in this case. Allowing a *grandparent* to procure visitation without first requiring a showing of harm to the child if such visitation is denied not only violates section 36-6-306(b)(1) which specifically requires such a showing, it also constitutes an infringement on the fundamental rights of parents to raise their children as they see fit. *See Hawk*, 855 S.W.2d at 581.

*Smallwood*, 205 S.W.3d at 363 (emphasis added).

Public Chapter 442 provides the statutory authority that was lacking in *Smallwood* for a non-custodial parent to seek to have his or her child continue to visit with family members when the non-custodial parent is absent on active duty military service. Because Public Chapter 442 requires that the parent petition the court to modify visitation to allow family members to exercise the parent’s visitation in his or her absence, we believe it adequately addresses the constitutional concerns raised in *Smallwood*.

2. You further ask whether Public Chapter 442 circumvents Tenn. Code Ann. § 36-6-302. The grandparent visitation statute currently codified at Tenn. Code Ann. § 36-6-302 pertains only when a child has been removed from the custody of both parents and placed in a foster home, a licensed child care agency, or other facility operated by a juvenile court. Tenn. Code Ann. § 36-6-302(a)(1)(B). Public Chapter 442, however, applies when the parents are divorced and the non-custodial parent has been awarded visitation. Because the two statutes apply to different situations, Public Chapter 442 does not circumvent Tenn. Code Ann. § 36-6-302.

While not explicitly referenced in your letter, another statute, Tenn. Code Ann. § 36-6-306, provides additional statutory authority for a grandparent to seek visitation with his or her grandchild. Again, we do not believe that Public Chapter 442 circumvents Tenn. Code Ann. § 36-6-306.

Tenn. Code Ann. § 36-6-306 provides that a court may award visitation to a grandparent against a parent’s wishes in six circumstances:

- (1) when the child’ father or mother is deceased;
- (2) when the child’s parents are divorced, legally separated, or were never married;
- (3) when the child’s father or mother has been missing for more than six months;
- (4) when the court of another state has ordered visitation;

(5) when the child lived in the grandparent's home for a year or more, and was removed by the parents; or

(6) when the child and the grandparent maintained a significant relationship for a year or more, and the relationship was severed by the parents for some reason other than abuse or the presence of a substantial danger to the child.

Tenn. Code Ann. § 36-6-306(a) (1)-(6). If one of these circumstances is present then the court must hold a hearing to determine whether there is a danger of substantial harm to the child. Tenn. Code Ann. § 36-6-306(b). Only if the court determines that there is a danger of substantial harm to the child can the court go on to determine whether visitation between the grandparent and child is in the child's best interest and award such visitation. Tenn. Code Ann. § 36-6-306(c). Because Public Chapter 442 applies only to situations in which a parent must be out of state for at least 90 days on active duty military service, we do not believe that it conflicts with Tenn. Code Ann. § 36-6-306. In addition, both Tenn. Code Ann. §§ 36-6-302 and 36-6-306 anticipate that the grandparent will be the party seeking visitation, while Public Chapter 442 requires that the parent petition the court to modify a child's visitation schedule while that parent is out of state on active duty military service. Accordingly, we do not believe that Public Chapter 442 conflicts with either Tenn. Code Ann. § 36-6-302 or Tenn. Code Ann. § 36-6-306.

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