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Opinion No. 12-95

Rights of Biological Parents and Adoptive Children

QUESTIONS

1. Would Senate Bill 2835/House Bill 3197 (hereinafter "SB2835"), proposed but not enacted in the Second Session of the 107th General Assembly (2012), alter the inheritance rights of adopted children, biological parents, or adoptive parents?

2. Would SB2835 alter the child support obligation of biological or adoptive parents?

3. Would SB2835 unconstitutionally interfere with an adoptive parent's fundamental right to parent a child?

4. Would SB2835 be otherwise unconstitutional?

OPINIONS

1. No.

2. No.

3. No.

4. No.

ANALYSIS

SB2835 as proposed would amend Tenn. Code Ann. § 36-1-121, which concerns the effect of adoption on the relationship of parent and child, and Tenn. Code Ann. § 68-3-311, which concerns new certificates of birth. SB2835 contains two sections.

The first section of SB2835 would delete the current language in Tenn. Code Ann. § 36-1-121(f) prohibiting judicial enforcement of "open adoption" agreements and replace it with language permitting enforcement of visitation and open adoption agreements between adoptive

parents and biological parents unless a court finds that enforcement of such an agreement is not in the best interest of the child. Tenn. Code Ann. § 36-1-121(f) currently states:

> The adoptive parents of a child shall not be required by any order of the adoption court to permit visitation by any other person, nor shall the order of the adoption court place any conditions on the adoption of the child by the adoptive parents. Any provision in an order of the court or in any written agreement or contract between the parent or guardian of the child and the adoptive parents requiring visitation or otherwise placing any conditions on the adoption shall be void and of no effect whatsoever; provided, that nothing under this part shall be construed to prohibit "open adoptions" where the adoptive parents permit, in their sole discretion, the parent or guardian of the child who surrendered the child or whose rights to the child were otherwise terminated, or the siblings or other persons related to the adopted child, to visit or otherwise continue or maintain a relationship with the adopted child; and provided further, that the permission or agreement to permit visitation or contact shall not, in any manner whatsoever, establish any enforceable rights in the parent or guardian, the siblings or other related persons.

The second section of SB2835 would amend Tenn. Code Ann. § 68-3-311 by adding a new subsection permitting an adoptive child, whose birth certificate had previously been reissued with the adoptive parent's name, to petition a court upon reaching the age of majority for an order requiring issuance of a new birth certificate replacing the adoptive parent's name with the name of a deceased biological parent where:

> (A) The adoptive child was born in wedlock in this state with the names of both biological parents stated on the original certificate of birth;
> (B) Subsequently, one of the adoptive child's biological parents died, the surviving parent remarried, and the surviving biological parent's new spouse legally adopted the adoptive child; and
> (C) the surviving biological parent and the adoptive parent subsequently divorced.

1. In Tennessee, the effect of an adoption on the inheritance rights of adopted children, biological parents, and adoptive parents is controlled by Tenn. Code Ann. § 36-1-121, which provides in pertinent part:

> (a) The signing of a final order of adoption terminates any existing guardianship orders and establishes from that date the relationship of parent and child between the adoptive parent(s) and the adopted child as if the adopted child had been born to the adoptive parent(s) and the adopted child shall be deemed the lawful child of

> such parent(s), the same as if the child had been born to the parent(s), for all legal consequences and incidents of the biological relation of parents and children.
>
> (b) The adopted child and the child's descendants shall be capable of inheriting and otherwise receiving title to real and personal property from the adoptive parents and their descendants, and of succeeding to the rights of either such parent or such parent's descendants in such property, whether created by will, by other instrument or by law, including, but not limited to, taking as a beneficiary of a remainder interest following a life interest or estate in either such parent or such parent's ancestor or descendant. The adopted child shall have the same such rights as to lineal and collateral kindred of either adoptive parent and the ancestors or descendants of such kindred, as the adoptive child has as to such parent, and the lineal and collateral kindred of either adoptive parent and the descendants of such kindred shall have the same such rights as to the adopted child and the child's descendants, but only as to property of the adopted child acquired after the child's adoption.
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> . . . .
>
> (e) An adopted child shall not inherit real or personal property from a biological parent or relative thereof when the relationship between them has been terminated by final order of adoption, nor shall such biological parent or relative thereof inherit from the adopted child. Notwithstanding the provisions of subsection (a), if a parent of a child dies without the relationship of parent and child having been previously terminated and any other person thereafter adopts the child, the child's right of inheritance from or through the deceased biological parent or any relative thereof shall be unaffected by the adoption.

SB2835, which addresses the enforcement of visitation and open adoption agreements and under certain circumstances permits the issuance of a new birth certificate, does not modify any inheritance rights conferred on the parties by Tenn. Code Ann. § 36-1-121. Accordingly, SB2835 would not alter the inheritance rights of adopted children, biological parents, or adoptive parents. *See Wells v. Tennessee Bd. of Regents*, 231 S.W. 3d 912, 917 (Tenn. 2007) (quoting *Limbaugh v. Coffee Med. Center*, 59 S.W. 3d 73, 84 (Tenn. 2001)) (stating that, when considering the meaning of a statute, courts will employ the Latin maxim, *express unius est elclusio alterius*, which translates as "the expression of one thing implies the exclusion of … things not expressly mentioned").

2. In cases of adoption and surrender or termination of the parental rights of the biological parents, the obligation of child support is strictly defined by Tennessee law. *See* Tenn. Code Ann. § 36-1-111(r)(1)(A)(i) (providing for termination of surrendering parent's child

support obligation or other future financial responsibilities upon child's adoption); Tenn. Code Ann. § 36-1-113(*l*)(1) (providing that order involuntarily terminating parental rights severs former parent's obligation for child support but does not affect past child support arrearages or financial obligations incurred prior to termination order); Tenn. Code Ann. § 36-1-121(a) (providing that signing of final order of adoption establishes relationship of parent and child between adoptive parent(s) and adopted child "for all legal consequences and incidents of the biological relation of parents and children"). SB2835 does not modify the provisions of these statutes or impose or reduce any child support obligation.[1] Thus, SB2835 would not alter the child support obligation of biological or adoptive parents.

3. It is well settled that "[a] biological parent's right to the care and custody of his or her child is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." *In re Audrey S.*, 182 S.W.3d 838, 860 (Tenn. Ct. App. 2005) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001)) (footnote omitted). The law of Tennessee also recognizes that "[a]doptive parents are entitled to the same constitutional protection of parenting decisions as natural parents." *Simmons v. Simmons*, 900 S.W.2d 682, 684 (Tenn. 1995).

Nonetheless, these fundamental constitutional rights can be voluntarily waived by those who possess them. *See, e.g., Peretz v. United States*, 501 U.S. 923, 936 (1991) ("[t]he most basic rights of criminal defendants are . . . subject to waiver"). Indeed, the Tennessee Supreme Court has recognized that "no aspect of the fundamental right of parental privacy is absolute" and that a parent's voluntary consent to cede custody to a non-parent defeats the ability of that parent to later claim superior paternal rights in a subsequent proceeding to modify custody. *Blair v. Badenhope*, 77 S.W.3d 137, 148 (Tenn. 2002).

Section 1 of SB2835 contemplating enforcement of open adoption agreements does interfere with the adoptive parent's fundamental right to parent the child. However, for the open adoption or visitation agreement to be enforceable, the adoptive parent must agree to the terms at the contract's creation, thereby waiving the right to parent the child without interference.[2] Given that an adoptive parent must waive the constitutional right to parent the child without interference in order to create the open adoption or visitation contract, SB2835 would not unconstitutionally interfere with the adoptive parent's parental rights.

4. The only remaining constitutional issue potentially raised by SB2835 is whether the proposed legislation would violate the equal protection provisions of the Tennessee and United

[1] SB2835 provides that when an agreement between the biological and adoptive parents requires visitation or an open adoption, any other terms in the agreement are enforceable as well. Should a factual situation arise in which biological parents contract to provide monetary support to the adoptive parents in an open adoption agreement, this would not impose a child support obligation upon the biological parents. However, agreements outside of the scope of the legal duty to provide child support are still enforceable, as they are contractual in nature. *See Penland v. Penland*, 521 S.W.2d 222, 224-25 (Tenn. 1975).

[2] Such a waiver only acts to permit interference in the adoptive parent's parental rights as contemplated by the open adoption or visitation agreement.

States Constitutions. Tennessee's Equal Protection Clause, Tenn. Const. art. 11, § 8, provides in relevant part:

> [t]he Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie [sic], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

Tennessee's Equal Protection Clause confers "essentially the same protection" as the Equal Protection Clause of the United States Constitution. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). Equal protection "does not require absolute equality from the State." *Posey v. City of Memphis*, 164 S.W.3d 575, 578 (Tenn. Ct. App. 2004). Equal protection only requires that "all persons and entities shall be treated the same under like circumstances and conditions, both as to privileges conferred and liabilities incurred." *Genesco, Inc. v. Woods*, 578 S.W.2d 639, 641 (Tenn. 1979). Accordingly, "as a threshold determination, a court must first consider whether classes are 'similarly situated so as to warrant application of the protection of the equal protection clause.'" *Dr. Pepper Pepsi-Cola Bottling Co. of Dyersburg, LLC v. Farr*, No. W2010-02445-COA-R3-CV, 2011 WL 5560685, at *7 (Tenn. Ct. App. Nov. 16, 2011) (citing *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003)).

The first step in an equal protection analysis of SB2835 is to determine if either section of SB2835 would disparately affect two similarly situated classes. Section 1 of SB2835 concerning enforcement of open adoption and visitation agreements does not implicate equal protection rights because it would not disparately affect two similarly situated classes. This section concerns itself with two classes of persons: adoptive parents with parental rights and biological parents who have surrendered their parental rights in favor of the adoptive parents. Under SB2835, each set of parents, adoptive and biological, may now enforce their open adoption and visitation agreements. As each set of parents is afforded the same enforcement rights, they would not suffer unequal treatment by SB2835. Further, were each set of parents afforded different rights under SB2835, they would not be similarly situated because adoption statutes permit only one set of parents to possess parental rights at any given time. Accordingly, an equal protection analysis is not applicable to this section of SB2835.

However, Section 2 of SB2835 contemplating reissuance of birth certificates would disparately impact two classes that are similarly situated. SB2835 would allow a class of adult adoptive children to have a birth certificate reissued with the adoptive stepparent's name removed and replaced with the name of their deceased biological parent, *so long as the adoptive stepparent and living biological parent have divorced*. Here, there exists a similarly situated class of adult adoptive children whose adoptive stepparent and living biological parent have not divorced. SB2835 does not provide this class the right to have its birth certificates altered and reissued. As these two classes are similarly situated in all relevant aspects, but only one is given the right to have birth certificates changed and reissued, equal protection rights are implicated

and SB2835 is subject to further analysis to determine if the General Assembly has justification for the disparate treatment.

In determining whether the General Assembly is constitutionally permitted to enact legislation that disparately affects similarly situated classes, it must first be determined if the legislative classification interferes with a fundamental right or disadvantages a suspect class. As the Tennessee Court of Appeals succinctly explained:

> When interpreting Article XI, Section 8, the courts of this state utilize the same framework developed by the United States Supreme Court for analyzing equal protection claims brought under the Fourteenth Amendment to the federal constitution. *See* [*Evans v. Steelman*, 970 S.W.2d 431, 435 (Tenn. 1998)] (citing *Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn.1994); *Tennessee Small Sch. Sys.*, 851 S.W.2d at 152–54). Under this framework, a legislative classification is subject to strict scrutiny when it interferes with a fundamental right or operates to the disadvantages of a suspect class of persons. *See id.* (citing *Newton*, 878 S.W.2d at 109). If, however, a legislative classification does not interfere with a fundamental right or adversely affect a suspect class of persons, then the classification is subject to rationale [sic] basis scrutiny. *See id.* (citing *Newton*, 878 S.W.2d at 110). Under rational basis scrutiny, a legislative classification will be upheld if a reasonable basis can be found for the classification or if any set of facts may reasonably be conceived to justify it. *See Tennessee Small Sch. Sys.*, 851 S.W.2d at 153 (citing *Harrison v. Schrader*, 569 S.W.2d 822, 825–26 (Tenn.1978)).

Caudill v. Foley, 21 S.W.3d 203, 211 (Tenn. Ct. App. 1999).

As adult adoptive children with one deceased biological parent and a living biological parent remarried to an adoptive stepparent are not suspect classes, the legislative classification would be subject to rational basis scrutiny. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973). Under rational basis scrutiny, "the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest." *Tennessee Small Sch. Sys*, 851 S.W.2d at 153 (Tenn. 1993) (quoting *Doe v. Norris*, 751 S.W.2d 834, 840-842 (Tenn. 1988)).

Here, the first class would be comprised of adoptive children now adults with one deceased biological parent and a living biological parent divorced from an adoptive stepparent. The second class would be comprised of adoptive children now adults with one deceased biological parent and a living biological parent still married to an adoptive stepparent. A reasonable basis can be conceived for permitting the members of the first class to have their birth certificates altered to replace the name of the adoptive stepparent with the name of the deceased biological parent. For example, the General Assembly could reasonably conclude that during the marriage the biological parent and the adoptive stepparent beneficially played the same roles as

the biological parents in a traditional nuclear family, but that after the biological parent and the adoptive stepparent have divorced and the adopted child has become an adult, those roles no longer need to be encouraged. On the other hand, with respect to the second class, the General Assembly could reasonably conclude that those roles deserve continued encouragement precisely because the marriage itself continues. Because the classifications arguably bear a reasonable relationship to a legitimate state interest, there would be a rational basis for the disparate treatment. Therefore, it is likely the classification would survive equal protection scrutiny. *See Gallaher v. Elam*, 104 S.W.3d at 462 (quoting *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn.), *cert. denied*, 522 U.S. 982 (1997)) (stating that under the rational basis test a classification will be upheld "if any state of facts may reasonably be conceived to justify it").

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