In Face of Reduced Rights, Here's How to Advise Grandparents on Family Law Issues

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In recent years, the courts and legislature have significantly reduced the rights of grandparents. The family lawyer should have familiarity with pertinent statutes and cases in order to properly advise grandparents with family law issues.

The Texas Family Code contains separate provisions regarding issues of conservatorship (custody) and possession and access (visitation).

Conservatorship

The threshold question in a grandparent case is whether the grandparent has the necessary standing to be able to bring and maintain suit. Texas Family Code Section 102.003 sets forth a list of individuals with general standing to file suit seeking conservatorship of a child. §102.003 (a)(9) provides that an original suit may be filed by a person who has had actual care, control, and possession of the child for at least six months ending not more than 90 days before the date the petition is filed.

Some disagreement exists among Texas appellate courts as to what constitutes actual control of a child. Some courts have required evidence that the parents intended to and did abdicate their parental duties and responsibilities to the grandparents. Others have found the statute does not require a showing of legal authority to care for the child. Instead, those courts have focused upon whether relationships existed in fact, reasoning that the statute intends to include relationships developed and maintained over time.

In computing the time necessary for standing, the court may not require that the time be continuous and uninterrupted. Instead, the court shall consider the child's principal residence during the relevant time period.

Section 102.003 may provide standing for a grandparent where one or both of the child's parents are deceased.

Another standing opportunity may exist under §102.004 in circumstances where there is satisfactory proof to the court that an order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development. Under this section, a grandparent may not file an original suit requesting the lesser possessory conservator status. However, the court may grant a grandparent with substantial past contact with the child leave to intervene in a pending suit if there is satisfactory proof that appointment of the parent (or parents) as a conservator would significantly impair the child's physical health or emotional development.

If the grandparent has standing to bring suit, the next hurdle is the "parental presumption" that a parent should be appointed as the primary conservator unless the court finds that such appointment would not be in the best interest of the child because it would significantly impair the child's physical health or emotional development. The courts have found this to be a heavy

burden that is not satisfied merely by evidence that the non-parent would be a better custodian of the child. Further, evidence of past misconduct is not sufficient if the parent is presently suitable to have custody.

The parental presumption is rebutted by a finding of a history of family violence involving a parent of a child. Additionally, the presumption is rebutted where a parent has voluntarily relinquished actual care, control, and possession of the child to a non-parent for a period of one year or more, a portion of which was within 90 days preceding the date of filing if the appointment of the non-parent is in the best interest of the child.

It is important to note that the parental presumption exists only in an original suit. There is no parental presumption in a modification case.

Possession and Access

In Troxel v. Granville, the U.S. Supreme Court addressed a Washington state statute that permitted any person to petition for visitation at any time. The court found the statute to be "breathtakingly broad" and held that it inappropriately put the burden on the parent to disprove visitation. However, the opinion stated that it did not consider whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.

Regardless, the Texas Legislature then amended the Family Code to create a new presumption that a parent acts in the best interest of the child and should be permitted to deny grandparent visitation if the parent deems that to be appropriate. This new presumption requires a showing of harm for rebuttal and eliminates many grandparents from consideration.

Pursuant to §153.432 Texas Family Code, in either an original suit or modification seeking visitation, the grandparent must attach an affidavit establishing with facts that the denial of the grandparent's visitation would significantly impair the child's physical health or emotional well-being. As a threshold matter, the court must determine if the facts stated in the affidavit, if true, would be sufficient to meet the statutory burden. If not, the court must deny the relief sought and dismiss the suit.

If the affidavit is deemed sufficient, the grandparent must rebut the §153.433 (a)(2) presumption at a temporary hearing or final trial by proving that denial of visitation would significantly impair the child's physical health or emotional well-being. The Texas Supreme Court has ruled that this high burden is not met simply by evidence that the child would benefit from visitation. Similarly, the Court found that the "lingering sadness" of the child because of not seeing the grandparent is insufficient to rebut the presumption.

Recent opinions raise the question of whether lay testimony alone is sufficient to overcome the presumption. As a practical matter, it is often difficult for the grandparent to obtain expert psychological testimony when the grandparent lacks access to the child and is unable to take the child to a professional for evaluation. The Supreme Court held that the trial court may appoint an expert as a guardian ad litem or other evaluator to provide court-appointed expert testimony. Consequentially, the lawyer should consider setting a preliminary hearing (prior to any hearing on the merits) in order to request the appointment of an expert or access to the child for evaluation. This request should also seek specific authorizations to access the child's medical and other records.

Jonathan J. Bates is a partner in Kinser & Bates in Dallas and is board certified in family law by the Texas Board of Legal Specialization. He serves on the State Bar of Texas Family Law Council and the board of trustees of the Texas Family Law Foundation. He also serves as an officer of the Texas Academy of Family Law Specialists, and he is a fellow with the American Academy of Matrimonial Lawyers.