

EXTENDED FAMILY AND CUSTODY

By K. Dean Kantaras

YOU MAY VERY WELL HAVE heard that grandparents have no rights with regard to custody or visitation of children in a divorce or a paternity case. That's partially correct, but not entirely so. The Florida legislature enacted "grandparents' rights" statutes, in which it attempted to provide certain rights to grandparents. Because of our state's strong constitutional provision regarding the right to privacy, all three of those statutory provisions have been declared unconstitutional by the Florida Supreme Court. The provisions giving grandparents certain rights were enacted in 2005 and were fairly broad. One of the sections provided that, if a child had been living with a grandparent "in a stable relationship," the grandparent would have the same right to custody of the child as the parent. The determining factor was to be the best interests of the child. Another provision granted grandparents visitation rights and the right to enforce visitation through the courts. In declaring these statutes unconstitutional, the rationale of the court was that the parent's fundamental right to raise a child free from governmental interference and the parent's right to privacy under the Florida constitution was infringed upon by these statutes and, therefore, could not pass constitutional muster. This was a blow to grandparents who, despite loving their grandchildren, could not force an unwilling parent to allow them to have contact with the child. When situations such as those arise, we must recognize that we do not live in a perfect world.

However, there are instances when grandparents may have custody or visitation rights, as Florida has adopted a statute, Ch. 751, which allows extended family members to seek custody of a child under certain circumstances. Under these provisions, an extended family refers to a relative that is within the third



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degree of consanguinity (blood relationship). Therefore, the statute includes grandparents, as well as other relatives. The intent of this statute is to provide for a child on a temporary basis in the event that the child isn't being properly cared for by its parents. The burden of proof is on the petitioning relative to show that the parent or parents are unfit. If that cannot be proven, an order of the court will not be entered giving the extended family member custody of the child.

To get custody of a child under this statute is difficult under most circumstances. The public policy of Florida is, clearly, that parental rights should not be interfered with short of abuse, neglect or abandonment by the parents, as it should be. However, there have been cases where a court proceeding involving the dependency of a child have occurred.

Those cases are usually filed by the State, when a case worker believes that the child's home situation requires the state's intervention to protect the child.

In one such case, the state, the parents and the grandparents agreed to dismiss the dependency case if the grandparents would file a custody proceeding under Ch. 751. The dependency case was then dismissed; and the grandparents, as agreed in writing, filed for custody under Ch. 751. When a hearing was scheduled on the grandparents' petition, the mother objected even though she had entered into the agreement. She said she objected to the agreement and wanted to contest the grandparents' request for custody. Despite her previous consent, the Appellate Court sided with the mother. It held that she had a right to contest the grandparents' request. They further established a more difficult burden on the grandparents by requiring proof by "clear and convincing" evidence. That proof is somewhere between "just tipping the scales," as is usually required in a civil case, and "beyond a reasonable doubt," as is required in criminal cases.

Accordingly, even though grandparents do have some rights, they're few and are difficult to establish under the current laws. ■■■

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