STATE OF MICHIGAN

COURT OF APPEALS

RITA HOLLIS, Plaintiff-Appellee,	UNPUBLISHED November 8, 2012
v	No. 306090 Clinton Circuit Court
JASON MILLER, Defendant-Appellant.	LC No. 10-022075-DZ

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

GLEICHER, J., (*concurring*).

I concur with the majority's determination that plaintiff failed to overcome the presumption that defendant's denial of grandparenting time served the child's best interests. I write separately to respectfully express my belief that a grandparent must establish by clear and convincing evidence, rather than by a preponderance of the evidence, that denial of visitation substantially risks harm to the child. I believe that application of the clear and convincing standard is necessary to protect against erroneously depriving parents of their constitutional rights to control the care and custody of their children.

Citing *Keenan v Dawson*, 275 Mich App 671, 682; 739 NW2d 681 (2007), the majority holds that Michigan's grandparenting-time statute, MCL 722.27b, creates a presumption that a fit parent's decision to deny grandparenting time "does not, in and of itself, create a substantial risk of harm." *Ante* at 3. Again citing *Keenan*, the majority continues: "However, the grandparent may meet his or her burden of rebutting that presumption by showing by a preponderance of the evidence that there is a substantial risk of harm in denying grandparenting time." *Id.* I respectfully suggest that *Keenan*'s adoption of the preponderance standard contravenes fundamental principles governing parental rights.[1]

[1] MCL 722.27b(4)(b) states that to rebut the presumption that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm, a grandparent must prove the contrary by a preponderance of the evidence. MCL 722.27b(4)(c) provides:

> If a court of appellate jurisdiction determines . . . that the burden of proof described in subdivision (b) is unconstitutional, a grandparent filing a complaint

A natural parent possesses a fundamental interest in the companionship, custody, care and management of his or her child, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and article 1, § 17, of the Michigan Constitution. *In re Rood*, 483 Mich 73, 91-92; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). The United States Supreme Court reaffirmed the constitutional rights of parents in *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000), invalidating a Washington statute permitting a court to order grandparent visitation despite parental opposition. The Supreme Court explained that the Washington statute "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69. The preeminence of a parent's precious right to raise his or her child is so firmly rooted in our jurisprudence that it needs no further explication.

Thus, defendant enjoys a fundamental constitutional right "to make decisions concerning the care, custody, and control" of his son. *Id.* at 66. Those decisions necessarily include denying grandparent visitation. I would hold that because defendant's constitutional right qualifies as fundamental, to override his decision plaintiff was obligated to clearly and convincingly establish "a substantial risk of harm to the child's mental, physical, or emotional health." MCL 722.72b(4)(b). In my view, an evidentiary preponderance does not suffice to trump constitutionally-protected rights.[2]

My analysis flows from bedrock legal principles mandating deference to a fit parent's decisions concerning child-raising, and that the clear and convincing standard of proof apply when the state or a third party seeks to override a fit parent's choice. In *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the Supreme Court emphasized the constitutionally protected rights of natural parents while foreshadowing the application of a heightened standard of proof: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (Citation omitted). A decade later, in *Santosky v Kramer*, 455 US 745, 755; 102 S Ct 1388; 71 L Ed 2d 599 (1982), the Supreme Court observed that "in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." The Court continued: "Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.'" *Id.* (citation omitted). When the individual interest at stake in a

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> or motion under this section must prove by clear and convincing evidence that the parent's decision to deny grandparenting time creates a substantial risk of harm to the child's mental, physical, or emotional health to rebut the presumption created in subdivision (b).

[2] Here, plaintiff failed to introduce any relevant evidence supporting her claim that denial of visitation created a substantial risk of harm to the child's well-being. Thus, the applicable burden of proof does not impact the outcome.

proceeding is both "particularly important" and "more substantial than mere loss of money," the Supreme Court mandates "an intermediate standard of proof – 'clear and convincing evidence[.]'" *Id.* at 756. The Supreme Court held in *Santosky* that a state must establish by at least clear and convincing evidence constitutionally sufficient grounds for termination before it may terminate parental rights. *Id*. at 768-770.

The termination of parental rights extinguishes the parent-child relationship, while unwanted grandparent visitation merely frustrates parental prerogatives. But in both situations, state action interferes with a core parental right to control a child's associations. The state possesses "a *parens patriae* interest in preserving and promoting the welfare of the child[,]" *id.* at 766, permitting it to terminate parental rights upon clear and convincing proof of unfitness. A grandparent's interest is more attenuated. Grandparenting statutes serve "to ensure the welfare of the children . . . by protecting the relationships those children form with . . . third parties." *Troxel*, 530 US at 64. But a grandparent's desire to visit generally must yield to a fit parent's liberty interest in controlling a child's associations. And I discern no logical basis to hold a grandparent's interest in visitation more compelling that a state's *parens patriae* interest in protecting children. Accordingly, I believe that before a court may constitutionally contravene a parent's fundamental right to oppose grandparent visitation, it must require clear and convincing evidence that protection of the child's best interests supersedes parental choice.

The Supreme Court's decision in *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009), reinforces my analysis. In *Hunter*, the Supreme Court held that when a court hears a custody dispute between a child's natural parents and a third party with whom the child has an established custodial environment, it must determine the child's best interests by applying the clear and convincing evidence standard. *Id.* at 265. The third parties who sought custody in *Hunter* enjoyed a long-term, settled relationship with the involved children. Undoubtedly, the custodians and the children shared a strong emotional bond. Nevertheless, to rebut the presumption that the children's best interests would be served by parental custody, the Supreme Court required the custodians to present clear and convincing evidence. I would hold that because of the identical importance of the constitutionally protected rights at issue in a grandparent visitation action, the same standard of proof should apply.[3]

/s/ Elizabeth L. Gleicher

[3] Unlike in termination proceedings, parents facing grandparent visitation lawsuits have no right to court-appointed counsel. Here, defendant lacked sufficient funds to pay this Court's filing fee, which this Court waived. *Hollis v Miller*, unpublished order of the Court of Appeals, entered September 16, 2011 (Docket No. 306090). In my view, a stricter standard of proof also serves to protect parents such as defendant from lawsuits filed by more financially secure grandparents.