[Cite as *Rugola-Dye v. Dye*, 2009-Ohio-2471.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARY C. RUGOLA-DYE

Plaintiff-Appellee

-vs-

MICHAEL C. DYE, et al.

Defendants-Appellants

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 08 CAF 06 0038

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 06 05 1128
JUDGMENT:	Reversed and Vacated
DATE OF JUDGMENT ENTRY:	May 22, 2009

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellants Michael C. and Jessica L. Dye, fka Ward appeal the decision of the Delaware County Court of Common Pleas, Juvenile Division, which granted a complaint for grandparent visitation in favor of Appellee Mary C. Rugola-Dye. The relevant facts leading to this appeal are as follows.

{¶2} Appellants are the parents of a son, hereinafter "H.D.", born in 2005. Appellants were not married to each other at the time H.D. was born. Appellant Michael has legally acknowledged paternity of the child. Appellants did marry about eighteen months after H.D.'s birth.

{¶3} Appellee, H.D.'s paternal grandmother, filed a complaint in the trial court on May 22, 2006 seeking grandparent visitation under R.C. 3109.12. Appellants filed an answer on June 29, 2006. The matter came on for an initial hearing on October 24, 2006. On November 14, 2006, the magistrate issued temporary visitation orders.

{¶4} On December 11, 2006, the magistrate conducted a hearing on appellee's motion for grandparent visitation. On December 27, 2006, the magistrate issued a decision recommending a detailed visitation schedule concerning D.H.

{¶5} On January 9, 2007, upon motion by appellants, the trial court granted a motion for extension of time to file objections to the decision of the magistrate, pending preparation of a transcript.

{¶6} On January 25, 2007, appellants filed a copy of their marriage record with the trial court, setting forth that they were married in Panama City, Florida, on December 7, 2006 (about five months subsequent to appellee's complaint for grandparent visitation).

{¶7} Despite the pending extension for an objection to the magistrate's decision, appellee's complaint came on for an evidentiary hearing on August 10, 2007 and September 11, 2007. Each side thereafter filed proposed findings of fact and conclusions of law.

{¶8} In the meantime, on November 16, 2007, a transcript of the magistrate's proceedings of December 11, 2006, was finally filed with the trial court. On December 4, 2007, appellants filed their objections under Civ.R. 53. Appellee thereafter responded to said objections via a memorandum contra.

{¶9} On June 2, 2008, the trial court issued a judgment entry incorporating the evidentiary hearing on August 10, 2007 and September 11, 2007, as well as the aforementioned objections. The court ruled, in pertinent part:

{¶10} "Grandmother Mary C. Rugola-Dye is granted 'reasonable' Companionship time with her grandson. 'Reasonable' contemplates a minimum of once every six weeks of a duration that would, in ordinary understanding, be a real visit sufficient to promote bonding and acquaintance. The parents may determine location of the visits, and the composition of those present ***." Judgment Entry at 7.

{¶11} On June 27, 2008, appellants filed a notice of appeal. They herein raise the following four Assignments of Error:

{¶12} "I. WHETHER THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO HEAR THE PLAINTIFF'S COMPLAINT.

{¶13} "II. WHETHER THE JUDGMENT OF THE TRIAL COURT WAS AN ABUSE OF DISCRETION.

{¶14} "III. WHETHER THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶15} "IV. WHETHER THE TRIAL COURT'S DECISION IS AN UNCONSTITUTIONAL APPLICATION OF THE LAW."

{¶16} We will address appellant's fourth assigned error first.

IV.

{¶17} In their Fourth Assignment of Error, appellants argue that the trial court's decision in this matter is an unconstitutional application of R.C. 3109.12. We agree.

{¶18} In *Troxel v. Granville* (2000), 530 U.S. 57, 64, 120 S.Ct. 2054, 2059, the United States Supreme Court stated: "Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons-for example, their grandparents. ***."[1] Nonetheless, the United States Supreme Court also recognized in the *Troxel* opinion that the parents' interest in the care, custody and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by [the] Court." Id. at 65. The Ohio Supreme Court has stated that grandparents have no constitutional right of association with their grandchildren. See *In re Schmidt* (1986), 25 Ohio St.3d 331, 336, 496 N.E.2d 952.

[1] Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in the result.

{¶19} The Ohio Revised Code contains at least three main subsections governing non-parent visitation with minor children. See *In re C.C.*, Montgomery App.No. 21707, 2007-Ohio-3696, ¶5, citing *In re E.H.,* Lorain App. No. 04CA008585, 2005-Ohio-1952. The statute at issue in the case sub judice is R.C. 3109.12(A), which authorizes a visitation complaint by a relative if the minor child was born to an unmarried woman. R.C. 3109.12 (A) reads in pertinent part:

{¶20} " *** If a child is born to an unmarried woman and if the father of the child has acknowledged the child and that acknowledgment has become final pursuant to section 2151.232, 3111.25, or 3111.821 of the Revised Code or has been determined in an action under Chapter 3111. of the Revised Code to be the father of the child, the father may file a complaint requesting that the court of appropriate jurisdiction of the county in which the child resides grant him reasonable parenting time rights with the child and the parents of the father and any relative of the father may file a complaint requesting that the court grant them reasonable companionship or visitation rights with the child."

{¶21} We generally afford a presumption of constitutionality to legislative enactments. See, e.g., *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224. Appellants herein direct us to *Nicoson v. Hacker*, Lake App.No. 2000-L-213, 2001-Ohio-8718, wherein the Eleventh District Court of Appeals found that R.C. 3109.12, supra, violates the Equal Protection Clause of the United States Constitution as applied to the facts of that case, concluding "[t]here is no rational basis for distinguishing between a child born prior to the marriage of the natural parents and a child born to the same parents after their marriage." Id. at 3. Appellants further contend

that their marriage has created an intact family unit subsequent to appellee's visitation complaint, and the allowance of appellee's involvement in the child's life by judicial process violates their right to parental care, custody, and control pursuant to *Troxel*, supra.

{¶22} We find the constitutional question before us under these facts is whether there is an Equal Protection violation in the statute's differentiation of married parents who were unmarried at the time of the complaint's filing from those who were married at the time of such a complaint. "The constitutional guarantee of equal protection requires that laws operate equally upon persons who are alike in all relevant respects." *State v. Williams*, 179 Ohio App.3d 584, 598, 2008-Ohio-6245, citing *McCrone v. Bank One Corp.,* 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 20. "When suspect classes are not involved, the equal-protection clause permits class distinctions in legislation if the distinctions bear some rational relationship to a legitimate government objective." Id., citing *State ex rel. Vana v. Maple Hts. City Council* (1990), 54 Ohio St.3d 91, 92, 561 N.E.2d 909. Under the rational basis test, the legislation must be upheld unless the classification is totally unrelated or irrelevant to the state's goals or purpose for enacting the legislation. *Menefee v. Queen City Metro* (1990), 49 Ohio St .3d 27, 29, 550 N.E.2d 181. We find that under R.C. 3109.12, the General Assembly has provided a means for extended family members of children born to unwed parents to involve themselves in the lives of such children, who do not benefit from a marital two-parent nuclear home environment. However, where, as in this case, the parents of the child indeed marry each other during the pendency of the relative's visitation complaint, we

find no rational basis for differentiating married parents who were unmarried at the time of the complaint's filing from those who were married at that time.

{¶23} We therefore hold R.C. 3109.12 is unconstitutional as applied to the particular facts and circumstances of this case. Appellants' Fourth Assignment of Error is sustained.

I.

{¶24} In their First Assignment of Error, appellants contend the trial court lacked subject matter jurisdiction to hear appellee's complaint for visitation. We disagree.

{¶25} The gist of appellants' argument in this assigned error is that their marriage, which occurred subsequent to D.H.'s birth and to appellee's complaint for grandparent visitation, removed the subject matter jurisdiction from the trial court under R.C. 3109.12(A), supra, making the complaint subject to dismissal. However, we note R.C. 3109.12(B) specifically states: "The marriage or remarriage of the mother or father of a child does not affect the authority of the court under this section to grant the natural father, the parents or relatives of the natural father, or the parents or relatives of the mother of the child reasonable companionship or visitation rights with respect to the child."

{¶26} In *Stout v. Kline* (March 28, 1997), Richland App.No. 96-CA-71, this Court addressed the same issue and found that the doctrine of parental autonomy, as set forth in *In re Gibson* (1991), 61 Ohio St.3d 168, 573 N.E.2d 1074, did not override the application of R.C. 3109.12(B), supra, and thus the trial court had subject matter jurisdiction to address the complaint for grandparent visitation.

{¶27} We find the precedent of *Stout* applicable herein. Although we have previously found an equal protection violation in this case, technically speaking we hold the trial court did not err in concluding it had subject matter jurisdiction to proceed on appellee's complaint.

{¶28} Accordingly, appellant's' First Assignment of Error is overruled.

II., III.

{¶29} In their Second and Third Assignments of Error, appellants maintain that the trial court's allowance of grandparent visitation was an abuse of discretion and against the manifest weight of the evidence.

{¶30} Based on our redress of appellant's Fourth Assignment of Error, supra, we find these arguments are moot. We therefore will not further address appellants' Second and Third Assignments of Error.

{¶31} For the reasons stated in the foregoing, the decision of the Court of Common Pleas, Juvenile Division, Delaware County, Ohio, is reversed and vacated.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ PATRICIA A. DELANEY

JUDGES

JWW/d 427

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARY C. RUGOLA-DYE	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL C. DYE, et al.	:	
Defendants-Appellants	:	Case No. 08 CAF 06 0038

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Delaware County, Ohio, is reversed and vacated.

Costs to be split 50% to appellants and 50% to appellee.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES