

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ARTHUR LEONARD MACKEY III,  
Plaintiff-Appellant,

UNPUBLISHED  
September 9, 2014

v

No. 317146  
Eaton Circuit Court  
Family Division  
LC No. 09-000290-DP

ALESSANDRA BENAVIDES,  
Defendant-Appellee,

and

FABIAN AND JUDY BENAVIDES,  
Petitioners-Appellees.

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Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

This case concerns EM, a child born in 2007 to defendant Alessandra Benavides and plaintiff Arthur Mackey. Benavides and Mackey never married, and prior to 2009, they informally shared legal and physical custody of EM. In 2009, a temporary custody order was entered providing for the parties to have equal parenting time in a week-on, week-off arrangement. On December 15, 2010, a permanent order was entered to the same effect. At some point during this period, Benavides began living with her parents, petitioners Fabian and Judy Benavides.

Mackey entered the United States Navy and, beginning in July 2010, was stationed outside Michigan as a submariner. It does not appear that this change was brought to the attention of the court; instead, it appears that Mackey and Benavides informally agreed that EM would stay with her paternal grandmother, i.e., Mackey's mother, during the times EM was scheduled to be with Mackey. According to petitioners, Benavides and EM's paternal grandmother had a falling out that resulted EM staying with Benavides most of the time, only seeing her paternal grandmother upon request, and only seeing Mackey when he was home on leave from the Navy. It is unclear from the pleadings whether Mackey agrees that the parenting time situation evolved in this fashion.

On October 12, 2012, Benavides died due to a heroin overdose at petitioners' home. According to Mackey, he had never been notified by Benavides or petitioners that Benavides was abusing heroin nor that she had suffered, but survived, another overdose a few weeks prior to her death.

On October 15, 2012, three days after Benavides's death, petitioners obtained an ex parte order in Clinton County granting them temporary guardianship over EM. By this time, Mackey had learned of Benavides's death and had obtained emergency leave from the Navy to return to Michigan. Upon his return on October 19, he learned of the temporary guardianship order and successfully moved to have it vacated on the grounds that: (a) petitioners had falsely alleged that Mackey did not have legal custody of EM; (b) petitioners lacked standing as they were not interested parties, and; (c) Clinton County lacked jurisdiction because the prior custody orders had been issued in Eaton County.

Also on October 19, the Eaton County trial court entered an order submitted by Mackey that awarded him sole legal and physical custody over EM in light of Benavides's death. The order also provided that Mackey could remove EM from Michigan. Later that same day, petitioners moved to have this order vacated. Petitioners concurrently moved for "grandparenting visitation" and alleged that Mackey had "never exercised any continuous, effort-driven parenting" of EM. They also alleged that they had been EM's primary caregivers for an extended period of time, that EM was bonded to them and had come to rely upon them for physical and emotional support, and that severing that relationship by allowing Mackey to move EM to the west coast of the United States would create a substantial risk of harm to EM. Mackey responded, denying these claims and asserting that petitioners had allowed Benavides to use heroin in their home and had acted improperly by seeking guardianship upon Benavides's death despite their knowledge of Mackey's parental rights.

At the October 25, 2012 hearing, the trial court confirmed its prior ruling that the Clinton County temporary guardianship order had been properly vacated, thus vesting full legal and physical custody of EM with Mackey. The court set a hearing date for November 7, 2012 on petitioners' request for grandparenting time. On November 1, 2012, the court referred the matter to the Friend of the Court (FOC) for a grandparenting time evaluation. On November 6, 2012, Mackey moved for a stay of proceedings under the relevant provision of the Servicemembers' Civil Relief Act, 50 USC 501 *et seq.*, which protects servicemembers from litigation disadvantages resulting from service-mandated absences. The record suggests that the FOC did not proceed with an investigation regarding grandparenting time in light of Mackey's service-mandated absence from Michigan and the fact that his naval service aboard a submarine prevented even telephone communication. Petitioners eventually filed a motion to compel the FOC investigation and set a hearing for April 30, 2013. In response, Mackey opposed any FOC grandparenting time investigation as well as petitioners' requests for a psychological examination and in camera interview of EM, arguing that until the court had made a determination that a denial of grandparenting time would "create[] a substantial risk of harm to the child" pursuant to MCL 722.7b(4)(b), no such proceedings could take place.

On April 11, 2013, the parties entered into a stipulation cancelling the April 30, 2013 hearing, apparently due to the Navy's refusal to grant Mackey leave to attend the proceeding. The matter was adjourned to May 28, 2013. Although a motion to adjourn cannot be located in

the record, on May 2, 2013, petitioners filed a response opposing any further adjournments, stating that they had not seen EM for six months and that Mackey had not fully informed them of the status and timing of his naval leaves.

On May 7, 2013, Mackey filed a motion for summary disposition under MCR 2.116(C)(8) and (10). The court clerk set an “evidentiary hearing on motion for grandparent visitation” for June 18, 2013. At that hearing, petitioners offered the testimony of a psychologist who had not examined or evaluated EM,<sup>1</sup> but who testified as to the risk of harm to a hypothetical child who, after living with her mother and maternal grandparents for an extended time, experienced the sudden death of her mother and shortly thereafter was cut off from all contact with her maternal grandparents. Petitioners also presented testimony from a kindergarten teacher whose class EM attended during the fall of 2012 and a pastor from petitioners’ church. After hearing the testimony of these three witnesses, the trial court conditionally ruled that petitioners had met their burden of proof on the question of whether Mackey’s decision to deny grandparenting time created a substantial risk of harm to EM’s mental, physical or emotional health. The court stated that petitioners had met this burden under both a preponderance of the evidence standard and a clear and convincing standard. The court noted that the statute did not require proof of “actual harm” but only “a substantial risk of harm” and that the testimony of the psychologist was sufficient to support the court’s finding.

After petitioners and Mackey testified, the court delivered its opinion from the bench. First, it confirmed its conditional ruling that petitioners had met their burden, under both the preponderance and clear and convincing standards, to overcome the rebuttable presumption that a fit parent’s decision to deny grandparenting time does not “create[] a substantial risk of harm to the child’s mental, physical, or emotional health.”<sup>2</sup> Second, the court reviewed the ten best-interest factors set forth in MCL 722.27b(6), found that it was in EM’s best interests to enter an order for grandparenting time, and set a schedule for “reasonable grandparenting time.”

In its review of the facts, the court praised both Mackey and petitioners, describing the former as “almost that of a model father” and the latter as having “the best interests of [their] grandchild front and center at all times.” The court indicated that it would “order a schedule of visitation . . . perhaps starting out slow and expanding.” Petitioners’ counsel suggested that initial visitation be ordered for every weekend and with shared holidays, “but with a caveat that at any time Mr. Mackey was here on leave” that their time would be forfeited in favor of Mackey. Mackey’s counsel argued for a “very narrowly tailored” visitation schedule and noted that “the intrusion has to be narrowly tailored for minimal interference with the parent’s choice,

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<sup>1</sup> As noted, Mackey opposed petitioners’ request for a psychological evaluation of EM.

<sup>2</sup> The court later denied a motion for reconsideration on this issue.

not with the parent's time. So whether or not Mr. Mackey is available here is not relevant to that."<sup>3</sup>

In its ruling from the bench, the court directed that, except for times when Mackey was home on leave, petitioners were to have grandparenting time every other weekend, Friday evening to Sunday evening, with some increase during the summer months. Counsel for Mackey pointed out "the child may not be in Michigan" and requested that any costs of transportation be borne by petitioners. The court granted counsel's request. On June 20, 2013, petitioners submitted a proposed order under the seven-day rule, MCR 2.602(B)(3), to which Mackey objected in part. The court settled the order at a hearing on July 9, 2013 by entering a written order consistent with its ruling from the bench. At that hearing, Mackey requested a stay of the order pending appeal which the trial court denied. This appeal followed.

Mackey first argues that the trial court lacked subject-matter jurisdiction over petitioners' motion for grandparenting time.<sup>4</sup> Mackey posits that the circuit court had already granted him sole legal and physical custody of EM and, therefore, there was no longer a custody dispute over which the court could exercise jurisdiction. Under MCL 722.27b(3), a moving grandparent must seek grandparenting time by filing a motion if the circuit court has continuing jurisdiction over a child, or by filing a complaint if the circuit court does not have jurisdiction over the child. Accordingly, petitioners' motion was improper if the circuit court did not have continuing jurisdiction over EM at the time their motion was filed.

In this case, the circuit court had continuing jurisdiction over the child and, despite Mackey's assertion to the contrary, that jurisdiction was not concluded when Mackey was granted sole legal and physical custody of EM. While an award of sole legal and physical custody to one parent in the wake of the death of the other parent would seem to conclude a court's jurisdiction, in the instant case, petitioners filed ex parte objections to the custody order that were not formally denied by the circuit court until November 27, 2012. Thus, as petitioners' motion for grandparenting time was filed on October 2, 2012, the circuit court had not ceased exercising jurisdiction over EM when petitioners filed their motion for grandparenting time, and jurisdiction was properly exercised under MCL 722.27b(3)(a).

Mackey also asserts that the circuit court lacked jurisdiction to hear petitioners' motion for grandparenting time as they had never been denied grandparenting time. This assertion, however, is easily rebutted by the record, which shows that Mackey only offered petitioners the opportunity to Skype with EM once per month on the condition that they would seek no further

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<sup>3</sup> Mackey's counsel did not state where EM's primary residence would be located while Mackey was on naval duty. It appears from the record as a whole, however, that the parties accepted that it would be with Mackey's mother.

<sup>4</sup> Whether the trial court has subject matter jurisdiction is a question of law that is reviewed de novo. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 49-50; 620 NW2d 546 (2000). Questions of statutory interpretation are reviewed de novo. *Wexford Med Group v Cadillac*, 474 Mich 192, 202; 713 NW2d 734 (2006).

grandparenting time for a period of two years. Characterizing such a proposal as an offer of grandparenting time is disingenuous. Accordingly, because the circuit court possessed subject-matter jurisdiction to hear the instant case under MCL 722.27b(3)(a), the trial court did not err by exercising such jurisdiction.

Mackey next argues that MCL 722.27b is unconstitutional because it infringes upon a fit parent's due process right to raise his child as he wishes.<sup>5</sup>

Parents have a fundamental constitutional right to determine the care, custody, and control of their children. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000). *Troxel* stated that although a fit parent is presumed to act in the best interests of the parent's child, *id.* at 68-69, the Court was "hesitant to hold that specific non-parental visitation statutes violate the Due Process clause as a per se matter," *id.* at 73-74.

In light of *Troxel*, our Supreme Court held in *DeRose v DeRose*, 469 Mich 320; 666 NW2d 636 (2003), that Michigan's prior grandparent visitation statute was unconstitutionally overbroad and that due process required that the decisions of fit parents be given "deference" and "weight" by the trial court. *Id.* at 332-334. As a result, the Legislature enacted the current grandparent visitation statute, MCL 722.27b. Under MCL 722.27b(4)(b), "[i]n order to give deference to the decisions of fit parents, it is presumed in a proceeding under this subsection that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health." In order to rebut this showing, the moving party "must prove by a preponderance of the 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." MCL 722.27b(4)(b). Even if a moving party makes such a showing, a court must still determine whether it is in the child's best interest to order grandparenting time, a decision that again accords deference to the decisions of a fit parent. MCL 722.27b(6)(i).

In sum, neither the United States nor the Michigan Supreme Court has ever ruled that a trial court may not order grandparenting time under any circumstances in the face of a fit parent's objection. Rather, they have held that, to pass constitutional muster, a grandparenting time statute must afford sufficient deference to the decisions of a fit parent. Given the deference provided to the decisions of fit parents by MCL 722.27b(4)(b), it does not violate *Troxel* or *DeRose* and, therefore, Mackey's argument fails.<sup>6</sup>

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<sup>5</sup> "The constitutionality of a statute is a question of law we review de novo on appeal." *Complete Auto & Truck Parts, Inc v Secretary of State*, 264 Mich App 655, 659; 692 NW2d 847 (2004).

<sup>6</sup> Mackey also argues that MCL 722.27b is unconstitutional due to the use of a preponderance of the evidence standard for the substantial harm and best-interests determinations required under the statute. Despite the evidentiary standards employed by the statute, the trial court applied the clear and convincing standard to both determinations. Because we conclude that the trial court did not err by finding that both requirements had been established by clear and convincing evidence, as discussed below, we need not address this constitutional argument. See *Lawrence*

Finally, Mackey argues that the trial court erred by finding that petitioners proved, by clear and convincing evidence,<sup>7</sup> that his decision as a fit parent to deny petitioners grandparenting time posed a substantial risk of harm to EM and that the entry of a grandparenting time order was in EM's best interests.<sup>8</sup> After a review of the entire record, we disagree.

The trial court stated that it relied "heavily" on the testimony of Dr. Sharon Hobbs, Ph.D., a child and adolescent psychologist with significant pertinent clinical experience. Like the psychologist in *Keenan*, 275 Mich App at 682, she did not merely testify that "grandparenting is good, therefore it should occur." Rather, she testified specifically about the effect on very young children who are abruptly removed from non-abusive caregivers with whom they are bonded and the particular risk to the child's mental and emotional health if this occurs in conjunction with the death of a parent. She characterized these events as "traumatic changes" and described the risk of depression, developmental delays, self-blaming and other effects that can arise. She also testified that these risks are heightened where the remaining parent is not available for extended periods.

We similarly conclude, after a review of the record, that the trial court's best-interest findings were not against the great weight of the evidence nor clearly erroneous. As the court concluded, the evidence demonstrated that the petitioners had "a very close relationship with their granddaughter" and for an extended period, at least 2 ½ years prior to her mother's death, they played a daily, consistent role in her life. There was also evidence to support the court's conclusions that petitioners were physically and mentally healthy, supported a close relationship between EM and Mackey, had not abused or neglected EM, were morally fit despite their daughter's drug abuse, and that the hostility between petitioners and Mackey arose from misunderstood actions by petitioners and Mackey in the immediate wake of the sudden death of EM's mother.

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*M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 275; 803 NW2d 151 (2011) (citation omitted) ("[T]his Court does not decide cases on constitutional grounds when doing so can be avoided.").

<sup>7</sup> The trial court stated that the preponderance standard provided by MCL 722.27b(4)(b) "did not make a lot of sense to me[.]" and, accordingly, applied the clear and convincing standard.

<sup>8</sup> "Orders concerning grandparenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. A trial court's findings of fact are not against the great weight of the evidence unless the evidence clearly preponderates in the opposite direction." *Keenan v Dawson*, 275 Mich App 671, 679-680; 739 NW2d 681 (2007) (quotation marks, brackets, and citations omitted).

Accordingly, we find that the trial court properly ruled that petitioners established, by clear and convincing evidence, that the decision to deny petitioners grandparenting time would pose a substantial risk of harm to EM and that the entry of an order for grandparenting time was in EM's best interests.

Affirmed.

/s/ Douglas B. Shapiro

/s/ Jane E. Markey

/s/ Cynthia Diane Stephens