

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2007-TS-00169

LENADRA TUSHONE BOYD SOLOMON

and TIM SOLLOMON

APPELLANT

VS:

BARBARA ANN ROBERTSON

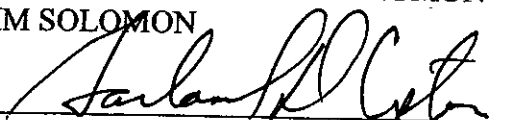
APPELLEE

BRIEF OF APPELLANT

(ORAL ARGUMENT WAIVED)

LENADRA TUSHONE BOYD SOLOMON
And TIM SOLOMON

BY: _____



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STATEMENT OF THE ISSUES

COME NOW THE APPELLANT, Lenadra Tushone Boyd Solomon and Tim Solomon and file this their statement of issues present for review.

1. WHETHER THE TRIAL COURT COMMITTED MANIFEST ERROR IN GRANTING GRANDPARENTS VISITATION UNDER THE MISSISSIPPI CODE OF 1972, ANNOTATED, AS AMENDED, SECTION 93-16-3.

2. WHETHER THE TRIAL ERRED IN FAILING TO AWARD ATTORNEY'S FEES PURSUANT TO MISS CODE ANN. SEC. 93-16-3.

3. WHETHER THE TRIAL COURT COMMITTED MANIFEST ERROR IN OVERRULING THE DEFENDANT MOTION TO DISMISS TIM SOLOMON AS A DEFENDANT.

STATEMENT OF THE CASE

This case involves a father, a mother, a child, a step-father and a grandparent. The parents, Joseph Shannon Boyd, hereinafter referred to as Joseph, the father, Lenadra Tushone Boyd Solomon, hereinafter referred to as Tushone, the mother, the child, Ashley Nicole Boyd, hereinafter, referred to as Ashley, Timothy Wayne Solomon, hereinafter referred to as Tim, the step-father, and Barbara Ann Robertson, hereinafter referred to as Barbara, the grandparent.

Joseph and Tushone were duly and legally married to each other on or about January 22, 1993 in Marion County, Mississippi. Unto the marriage one child was born, namely, Ashley, on July 8, 1996. The marriage continued until a complaint for divorce, child custody, child support and property settlement was filed on February 3, 2000. Answer, Motions, entry of appearance, counter-claim, answer to counter-claim and numerous other papers were filed and on or about July 7, 2001, a divorce absolute on the grounds of irreconcilable differences was granted unto the parties, accompanied by a child custody, child support and property settlement agreement.

On or about November 19, 2001, Tushone filed a Petition for Modification, alleging serious problems had arisen since the Judgment of Divorce with reference to child custody, support and visitation. That on July 1, 2003, a Temporary was entered Ordering Joseph to submit to drug testing within 30 days of May 15, 2003, Ordering Joseph to provide medical insurance for Ashley and Ordering Joseph within 30 days of May 15, 2003, to pay \$292.00 for medical expense. All of which was no completed.

On of about July 28, 2003, Final Judgment of Modification was entered, read and

approved as to form and content by all parties, namely Lanedra Tushone Boyd Solomon, Plaintiff, Joseph S. Boyd, Defendant and James R. Hayden, Attorney for Plaintiff. This Final Judgment of Modification provided that Tushone would have the paramount care, custody and control of the minor child, Ashley, that the child **shall not stay overnight with Barbara Ann Robertson and if the child visits with Barbara Ann Robertson, said visits shall be supervised at all times (emphasis added).**

That Joseph S. Boyd and Barbara Ann Robertson filed a Petition for Contempt and Modification file dated March 9, 2004 asking the Court to find the Tushone in contempt for abiding by the Final Judgment of Modification entered on July 28, 2003. On or about April 23, 2004, Tushone filed an answer to the petition of Joseph and Barbara, denying any violation of the Final Judgment of Modification of July 28, 2003. It should be noted that the petitioners, Joseph and Barbara failed to pursue the Petition for Contempt and Modification.

Thereafter, it became apparent that Joseph was not paying his child support obligation and was notified by the Marion County Department of Human Services, Child Support Enforcement. An Order for Withholding was entered January 14, 2005 and filed dated January 25, 2005. There are several Exhibits giving record of child support payments and the amount of arrearage.

A Petition for Grandparents' Visitation was filed on June 30, 2006 by Barbara against Lenadra Tushone Boyd Solomon, Tim Solomon and Joseph S. Boyd. It should be noted that Barbara did not know where her son, Joseph resided. Barbara alleged that Joseph was an adult resident citizen of Marion, Lamar, Walthall or Jefferson Davis Counties. She alleges that she has had a viable relationship with child and that Tushone has unreasonably denied visitation and such visitation would be in the child's best interest. Barbara further ask that the Court award

her attorney fees and expense because Tushone has abided by the Final Judgment of Modification entered July 28, 2003. The lawyers for the parties drew up the Final Judgment of July 28, 2003, the parties signed the agreed Judgment and the trial judge signed the Agreed Judgment establishing the visitation and the restriction therein and the same became binding on all parties and the defendants abided by said judgment. There was no provision for supervised visitation as to who would be the supervisor or any specified times for the supervised visitation to occur. Would the trial judge have held the defendants in contempt if they had permitted Barbara to exercise unsupervised visitation or for possible overnight visitation.

An answer to the Petition for Grandparents Visitation was filed by Tushone and Tim admitting most of the allegation but denying Barbara had a viable relationship with the child had and further deny that Tushone and Tim unreasonably denied Barbara visitation.

On December 14th, 2006, a trial was conducted in the matter of grandparents visitation and the trial judge granted extensive visitation to Barbara.

STATEMENT OF FACTS

1. Complaint for Divorce filed February 3, 2000. (R-6)
2. Temporary Order granting temporary visitation to Joseph for two days a week beginning Friday 5:00 p.m., to Sunday at 5:00 p.m.. The exchange to take place at the Columbia Police Station, beginning March 17, 2000 and shall occur on the first and third weekend of the month. (R-22).
3. Order of Summer Visitation entered granting summer visitation to occur the second and third week of July 2001. Also, Joseph was to provided a wage statement and begin immediately paying 14% of his adjusted gross income as child support. (R-42)
4. Order Dismissing Contested Pleadings on "fault grounds" for divorce. (R-44)

5. Child Custody, Child Support and Property Settlement Agreement granting ample visitation to Joseph (CHILD CUSTODY) (CHILD VISITATION)(R-46).

6. Judgment of Divorce (R-51).

7. Petition for Modification and Contempt filed on November 19, 2002 alleging defendant's visitation should be supervised, restricted or terminated, for child support to be increase to \$200.00 per month and for a Withholding Order, medical insurance, dental eye care, eye care, prescription drug and other reasonable medical expense, a reimbursement for incurred medical expense on child and for a Judgment in the amount of \$1,400.00 for Plaintiff's share of the 1999 income tax refund. (R-58,59).

8. Temporary Order providing that Joseph shall have 30 days form May 15, 2003 to submit to drug testing, thirty (30) day from May 15, 2003 to provide medical insurance for the child, thirty (30) days from May 15, 2003 to refund Tushone for medical expense for child. (R-73).

9. Final Judgment of Modification entered July 28, 2003 restricting Barbara's visitation and the visitation of Joseph (R-75-76).

10. Petition for Contempt and Modification filed by Joseph S. Boyd and Barbara Ann Robertson on March 9, 2004 seeking visitation and contempt charges, all contrary to the Order of Modification entered July 28, 2003. (R-77-80).

11. That Tushone filed an answer to the Petition for Contempt and Modification on April 23, 2004, (R-93-95) and no action has been taken on the Petition for Contempt and Modification as filed by Joseph and Barbara.

12. There has been several action taken by the Marion County Department of Human Services, Child Support Enforcement Division to assist Tushone in collection of the child

support due (R-96, 97 & 98).

13. An Order of Withholding was entered to take effect on February 1, 2005 for support in the amount of \$200.00 per month (R-99, 100).

14. Notice of Withholding was issued to Joseph S. Boyd and to Wallace Construction Co. (R-111, 112).

15. An affidavit of accounting was issued on or about July 5, 2005 which reflects that Joseph was in arrears as of July 5, 2005 in the sum and amount of \$1,150.00. (R-113).

16. An Agreed Order of Consolidation was entered on October 19, 2005, consolidating cause 00-0045-W and 2006-0189-G-W (R-114-115).

17. An Order Granting Grandparent's Visitation, etc., was entered January 4, 2007, granting Barbara visitation. (R-116-119).

18. Additional reports from the Child Support Enforcement of Marion County was introduced as exhibits showing the amounts of arrearage which reflects Joseph's has in the support and maintenance of his child (R-120-126).

19. Answer to Petition for Grandparent's Visitation filed by the named defendants, Tushone and Tim, on August 24, 2006 neither admitting nor denying that Joseph was an adult resident citizen of Marion, Lamar, Walthall or Jefferson Davis Counties, Mississippi, that Joseph was a necessary party to the proceedings but admitted that Joseph did execute the custody agreement of July 28, 2004. Tushone and Tim admit that Tushone is the natural mother of the child and that Tushone has the paramount care, custody and control of the minor child. Further denying that Barbara has established a viable relationship with the minor child and deny that they unreasonably denied visitation to Barbara. Defendant ask for attorney fees.(R-144-147).

was an adult resident citizen of Marion, Lamar, Walthall or Jefferson Davis Counties, Mississippi, that Joseph was a necessary party to the proceedings but admitted that Joseph did execute the custody agreement of July 28, 2004. Tushone and Tim admit that Tushone is the natural mother of the child and that Tushone has the paramount care, custody and control of the minor child. Further denying that Barbara has established a viable relationship with the minor child and deny that they unreasonably denied visitation to Barbara. Defendant ask for attorney fees.(R-144-147).

20. Defendant filed affirmative defenses which were un-answered.(R-145-146).

21. Defendant filed a Motion for Attorney Fees with attached Promissory Note (R-148-151).

22. Order Granting Grandparent's Visitation, etc. was entered on January 4, 2007 (R-154-157).

SUMMARY OF THE ARGUMENT

The parties to this action are Lenadra Tushone Boyd Solomon, Timothy Wayne Solomon, Ashley Nicole Boyd, (the minor child) Joseph S. Boyd and Barbara Ann Robertson and they are referred to as Tushone, Tim, Ashley, Joseph and Barbara, respectfully.

Tushone and Joseph were married on January 22, 1993 and the marriage was terminated in a divorce and child custody action. The parties agreed to a child custody, child support and property settlement agreement wherein Tushone was to have full physical custody of the child and Joseph was to have specific visitation, pay child support, secure and maintain reasonable medical insurance for the child. They owned no real property and all personal property was equitably divided and Tushone was to receive, but never did, one-half of the 1999 tax refund, and the agreement covered other items not essential to this proceeding. The Child

Custody, Child Support and Property Agreement was ratified and approved by the Court.

Joseph did not keep up his child support obligations and other obstacles arose in the aftermath of the divorce, namely allegations of drug abuse, misconduct on the part of the grandparent which were alleged but never denied. These allegations were alleged in a Petition for Modification and Contempt filed dated November 19, 2002 by Tushone and no answer or denial being filed by Joseph, and a Judgment of Modification was entered as a result of the filing of said petition August 8, 2003, restricting the visitation of both Joseph and Barbara.

On or about March 9, 2004, Joseph and Barbara filed a Complaint for Modification and Contempt but never pursued the matter. It would appear that the complainants did not wish to contest nor challenge the the Final Judgment entered on July 28, 2003.

Barbara admitted on the stand she had no visitation with the child from sometime in 2003 until September of 2006. She accused Tushone of denying her visitation but Tushone was only abiding by the Judgment of Modification. The Judgment of Modification restricted Barbara's visitation to supervised without naming a supervisor and without designating a time schedule and no overnight visitation.. Said Judgment also restricted Joseph's visitation to no overnight visitation.

On June 30, 2006, Barbara filed a Petition for Grandparents' Visitation, alleging that she had established a viable relationship with the child alleging that Tushone had unreasonable denied Barbara visitation with the child and visitation would be in the best interest of the child. But, it would appear the Joseph, the natural living father, should share his visitation time with Barbara. However, Joseph cannot share his visitation time because he does not exercise his visitation time. Whether this is because he does not pay his child support obligations or for some other unknown reason. Tushone was questioned as to whether she

permitted her parents to have visitation with Ashley and she replied in the affirmative. There is no record of Joseph ever asking Tushone for visitation so that he could take Ashley to visit his mother, Barbara.

After a hearing on the Petition for Grandparents Visitation, the Court granted visitation to Barbara and denied defendants motion for attorney fee's and further failed to make a ruling of defendants motion for dismissal of Tim from the proceedings.

ARGUMENT

WHETHER THE TRIAL COURT COMMITTED MANIFEST ERROR IN GRANTING GRANDPARENTS VISITATION UNDER THE MISSISSIPPI CODE OF 1972, ANNOTATED, AS AMENDED, SECTION 93-16-3?

There are three reported cases where the court agreed that the grandparents were entitled to visitation rights, Settle v. Galloway, 682 So. 2d 1032 (No. 93-CA-00947-SCT) 1996, Martin v. Coop, 693 So.2d 912 (No. 95-CA-01174-SCT) 1997, and Zeman v. Stanford, 789 So.2d 798 (No. 2000-CA-00757-SCT) 2001 and in each of these cases the non-custodial parent was either deceased or incarcerated or serving his nation in a branch of the armed forces of the United States.

In the case at bar, Joseph, the parent is neither dead, incarcerated nor in the armed services. In the property settlement agreement, the non-custodial parent had ample rights of visitation as well as other rights and obligations, most of which he neglected to exercise. The parties agreed on child custody, child visitation, child support, medical insurance, property, marital debts, tax deduction, tax refund, separate domiciles, alimony, additional documents (no attorney fees), non-dischargeability (debts of each other), voluntary execution and construction

agreement. (R-45-50) A Judgment of Divorce was entered on August 7, 2001 (file dated August 9, 2001). (R-51-53). The property settlement agreement was ratified and approved by the Court and the Court admonished and ordered the parties to comply with the terms and conditions of said Agreement as and when the same are required (R-53)

That Joseph apparently did not take the agreement to heart as he didn't take care of his support obligation or other obligations.

Tushone filed her Petition for Modification and Contempt (R-58) on November 19, 2002, asking for a modification of the Judgment of Divorce alleging that there had been a material change of circumstances and that Joseph's visitation should be supervise, restrict or terminated. There being no answer or denial to the allegation of Tushone, the Court entered a Temporary Order (R-73) on July 2, 2003, requiring Joseph to submit to drug testing within thirty (30) days. Since there is no report of the results of a drug test, there obviously was none. The Order gave Joseph thirty (30) days from May 15, 2003, to pay \$292.00 for medical expenses. There is no evidence of record that he ever paid the medical expenses.

The proof showed that Joseph was continuously in arrearage in his support obligation, as of July 5, 2005, he was \$1,150.00 in arrears (R-113). As of January 5, 2007, Joseph was in arrears in the sum of \$1,029.20 (R-126)

On March 9, 2004, Joseph and Barbara filed a Petition for Contempt and Modification (R-77) asking the Court to hold Tushone in contempt for abiding by the Final Judgment of Modification (R-75) which was filed by Tushone. However, Joseph and Barbara never pursued their petition to fruition. Joseph agreed to the Final Judgment of Modification and acknowledged that he "read and approved as to form and content." (R-75) This is the Order that

Tushone has abided by up and until the filing of the petition of Barbara for grandparents visitation rights.

There was no viable relationship existing between Barbara and Ashley for a period of six (6) months prior to the filing of the petition. There was no viable relationship existing between Barbara and Ashley for a period of twelve (12) months prior to the filing of the petition. If anyone has unreasonably denied the grandparents visitation it is the non-custodial parent, Joseph. Joseph is neither dead, incarcerated or serving in the armed services of his country.

WHETHER THE TRIAL COURT ERRED IN DENYING ATTORNEY'S FEES PURSUANT TO MISSISSIPPI CODE OF 1972, ANNOTATED, AS AMENDED, SECTION 93-16-3(4)?

On September 7, 2006, Tushone filed a Motion for Attorney Fee's (R-148-151) alleging that it was necessary for her to employ an attorney to defend the action of the grandparent, that she was unemployed and that the action of the grandparent imposed a financial hardship upon her, and the initial cost was \$2,500.00 and she attached a copy of a promissory note evidencing such obligation. The trial court, without comment or inquiry, overruled Tushone's motion. Section 93-16-3 states that "The court **shall**, on motion of the parent or parents, direct the grandparent to pay reasonable attorney fee's to the parent or parents in advance and prior to any hearing, except in cases in which the court finds that no financial hardship will be imposed upon the parents. The trial court may also direct the grandparents to pay reasonable attorney fee's to the parent or parents of the child and court costs regardless of the outcome of the petition.

WHETHER THE TRIAL COURT COMMITTED MANIFEST ERROR IN
OVERRULING DEFENDANT'S MOTION TO DISMISS TIM SOLOMON AS A
DEFENDANT?

On August 31, 2004, Tushone married Tim Solomon and Tim became the
stepfather of Ashley and a stepfather is under no duty to a stepchild because of that relationship.
(OUTLINES OF THE LAW, STEPPARENTS, a comprehensive Summary of the Major Subjects
of American Law, by V. A. Griffith, Chief Justice of the Supreme Court of Mississippi,
(Mississippi Edition) Copyright 1949 by Bobbs-Merrill, Company (P90-99),

“A stepfather is under no duty to a stepchild merely because
of that relationship.....the remarriage of the father or mother
often occurs as the consequences of an absolute divorce, and
generally the decree makes special provisions or
requirements for the care and custody of the children of the
divorced parties ”

The divorce in the case at bar by way of the property settlement agreement obligates
Joseph for the support of Ashley along with visitation privileges.

It is well recognized that stepparents sometimes cause more confusing in child
raising and child discipline than previously existed in the natural parent-child relationship. It take
time for children and stepparents to bond. There is no evidence of record whether Tim and Ashley
ever bonded. There is no evidence whether Tim ever attempted to discipline Ashley. There is no
evidence of record that Tim ever said yea nor nay to Ashley visiting with her grandparent. Tim
should not be held responsible whether the grandparent was ever allowed to visit with Ashley.

Therefore, Tim should have never been made a party to this action.

CONCLUSION

Who is responsible for the grandparents being permitted to visit with their

grandchildren? Is it the custodial parent? Is it the non-custodial parent? Customarily, it is the responsibility of the parent to see to it that their children get to visit with their grandparents. In the case at bar, Tushone has permitted her parents (Ashley's maternal grandparents) visitation. The question before the court is why isn't Joseph exercising his visitation and carrying Ashley to the paternal grandparent for visitation. The answer is that he does not feel any responsibility toward his daughter, Ashley, or his mother (Barbara). He has never maintained a home for his family. There is no evidence that he ever communicated to Tushone that he wanted to pick up Ashley and take her to grandmother's house for visitation. Fact is, his support obligation has only occurred when he his wages or his income tax return was garnished. What a father?

The appellant is of the opinion that this matter should be reversed and rendered and remanded, directing the trial court to order Joseph bring current with his support obligation and to exercise his visitation and upon such visitation, to take his daughter to visit with his mother. Grandparents visitation should only be through their **LIVING** son or daughter. And of course, if their child in dead, incarcerated or serving in the armed forces of the United States in a distance land or location or foreign country, the grandparents visitation should be what ever the non-custodial parents visitation was ordered and agreed to.

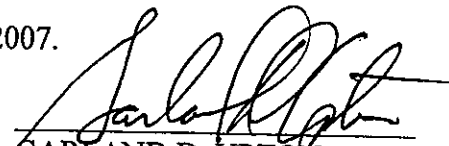
The appellant is also of the opinion that she should have been awarded attorney fee's and feels that this Court should reverse and remand the order directing the appellee all court cost, pay the attorney fees of the appellant and to dismissal of the supercedeas bond, and to direct reimbursement of any and all assessment ordered of the appellee in any subsequent proceedings.

The appellant is also of the opinion that the Order of the lower court should be reversed and remanded, dismissing Tim Solomon as a party defendant.

CERTIFICATE OF SERVICE

I, GARLAND D. UPTON, Attorney at Law, of Counsel for the Appellants, Lenadra Tushone Boyd Solomon and Tim Solomon, do hereby certify that I have this day hand mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT and RECORD EXCERPT to Honorable John Gordon Roach, Jr., Attorney at Law, P. O. Box 506, McComb, Mississippi 39649 attorney of record for Barbara Ann Robertson, Appellee.

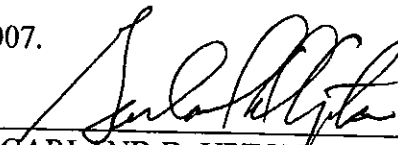
This the 25th day of July, A.D., 2007.


GARLAND D. UPTON

CERTIFICATE OF SERVICE

I, GARLAND D. UPTON, Attorney at Law, of Counsel for the Appellants, Lenadra Tushone Boyd Solomon and Tim Solomon, do hereby certify that I have this day hand mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT and RECORD EXCERPT to Honorable Johnny L. Williams, Chancellor, Tenth Chancery Court District, P. O. Box 1664, Hattiesburg, Mississippi 39403-1664, trial judge in the above captioned matter..

This the 25th day of July, A.D., 2007.


GARLAND D. UPTON