COPY

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-TS-00925

JESSICA A. HEWETT — Appellant

v.

JONATHAN L. HEWETT — Appellee

FILED
OCT 24 2007
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

ON APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI
Cause No. 2006-0177-D

BRIEF FOR APPELLANT

DAVID SHELBY VAN EVERY, SR.
ATTORNEY FOR APPELLANT
516 SECOND AVENUE NORTH
P O BOX 761
COLUMBUS, MS 39703
TEL: 662.327.4065
FAX: 662.329.5083
MSB#[redacted]

AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. **Parties:**

Appellee	**Jonathan L. Hewett**
Appellant	**Jessica A. Hewett**

2. **Attorneys:**

For Appellee	**J. Douglas Ford, Esq.** **Rodney A. Ray, Esq.** **Ford & Ray, PLLC** **P. O. Box 1018** **Columbus, MS 39703** **Tel: 662.329-0110** **Fax: 662.329.3522**
For Appellant	**David Shelby Van Every, Sr.** **516 Second Ave. North** **P. O. Box 761** **Columbus, MS 39703** **Tel: 662.327.4065** **Fax: 662.329.5083**

3. **Paternal Grandparents:** **Linda and Jim Hewett**

By: _____
J. DOUGLAS FORD (MSB[redacted])
ATTORNEY FOR APPELLEE

CERTIFICATE OF INTERESTED PERSONS

1. Parties:

Appellee	Jonathan L. Hewett
Appellant	Jessica A. Hewett

2. Attorneys:

For Appellee

J. DOUGLAS FORD, ESQ.
RODNEY RAY, ESQ.
ATTORNEY AT LAW
P. O. BOX 1018
COLUMBUS MS 39703

For Appellant

DAVID SHELBY VAN EVERY, SR.
516 SECOND AVENUE NORTH
P O BOX 761
COLUMBUS, MS 39703
TEL: 662.327.4065
FAX: 662.329.5083

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

CASES Pages

Authorities

STATEMENT OF FACTS

The parties to this action are plaintiff Jonathan L. Hewett, the appellee (hereinafter referred to as "Jonathan") and defendant Jessica A. Hewett, the appellant (hereinafter referred to as "Jessica"). The parties were divorced on August 29, 2006 and sole legal and physical custody of the parties minor child, Jonathan Conner Hewett (hereinafter referred to as "Conner"), then age 1, was granted to Jonathan with liberal visitation rights to Jessica. At the time of the divorce, August 29, 2006, Jonathan was a member of the U. S. Army stationed in Germany, soon to be deployed to Iraq. In fact, Jonathan was stationed overseas from March, 2006 and is still in Iraq today. As a result of his military duty, Jonathan was not able to exercise custody of Conner. Jessica, the natural mother of the infant, has had physical custody of Conner at all times, other than a short period when Jonathan came home for the court hearing herein.

On January 11, 2007, Jonathan filed a Petition to Cite for Contempt in the Chancery Court of Lowndes County, Mississippi, R. 70 -76, seeking to hold Jessica in contempt of court for refusing to surrender custody of the parties' minor child, Conner, to Jonathan's parents, i.e. Conner's paternal grandparents (hereinafter referred to as the "Hewetts"). The contempt petition alleged that Jessica was in contempt of court because she had violated a court order. The purported court order Jessica allegedly violated was actually a Certificate of Acceptance As Guardian or Escort/Power of Attorney, being military form AF 600-20. R. 72-76. The document, part of a soldier's family care plan, designated Jonathan's father, James W. Hewett, the paternal grandfather of Conner, as the guardian/escort of Conner. Apparently Jonathan believed that by virtue of these military forms, he could assign his custody rights to his father, James Hewett. The Contempt

Petition further alleged that the Hewett's had tried to "retrieve" Conner from the natural mother, Jessica, R. 70, and that Jessica refused to surrender Conner to the Hewetts. The Petition for Contempt alleged that Jessica, the child's natural mother, was in contempt by not surrendering custody of Conner to the Hewetts based solely on the military family care plan documents attached to the contempt petition, i.e. the guardian/ power of attorney forms. No court order was attached to the petition. The only pleadings in the entire case consist of the Petition To Cite for Contempt, R.70-76, and Jessica's response to the Petition to Cite for Contempt. R.77-96. Jonathan did not even ask the court for general relief. R. 70-76.

The contempt hearing was heard on April 17, 2007 and the chancellor found Jessica was not in contempt of court as the temporary guardianship/power of attorney was not a court order and was part of the military's family care plan. The chancellor stated, " I don't put any credence in the power of attorney. " Transcript page 67 Lines 21-22. "You can't, by power of attorney, grant custody." Transcript Page 67 Lines 25-26.

However, the chancellor, over objections of defense counsel, proceeded to hold a custody/grandparent visitation hearing when the only matter pled or before the court was a contempt action.

The chancellor allowed Jonathan to proceed beyond the pleadings to inquire into issues such as "...where that child needs to be today.", Transcript page 25 Lines 6-7; "...why she [the Mother] feels justified in maintaining custody.", Transcript page 25 Lines 20-21; and "...why she [the Mother] has custody and why she thinks she is the better parent to have custody. So these issues may come out anyway. I don't see a way around it." Transcript page 25 Lines 25-28.

In essence, the chancellor required Jessica to justify why she had physical custody of Conner when the divorce decree, which was not at issue, grants physical and legal custody to Jonathan. The chancellor stated, "...the Court does need to hear enough to know where we need to go, maybe on a temporary basis or whether or not there is contempt or whether or not there is some justification for what she is doing." Transcript Page 26 Lines 1-5.

The chancellor, in explaining his reasoning about going forward with a custody/grandparents visitation issue based on a pleading of only contempt explained, "I do think that the Court has to make a decision about who is right and wrong in where that child should be in this regard, and so in that regard, I want to hear the testimony about where we are today and to help me make a decision. ...I don't want to get jumbled up with who has got the right pleadings or whether we've got the right witnesses here. I think the bottom line is, what are we going to do about that child right now, and that's what I want to hear." Transcript Page 21 Lines 17-22, 26-29; Page 22 Line 1.

It is important to note that Jonathan was stationed overseas at all times from before the date of the divorce onward and as of the date of this brief, Jonathan is still deployed in Iraq.

The chancellor announced that "We've got an issue of custody here and an issue of contempt that's been properly brought by both parties". Transcript Page 6 Lines 24-27. Jessica filed no pleadings other than a Response to the Petition to Cite for Contempt.

The chancellor further described his version of the issues as, "The theme of this case, as I understand it, is really not contempt. It's really what we're going to do under this decree with that child, and in that regard, I need to hear what -- all the evidence --.

Transcript Page 20 Lines 14-18. Again, the only pleading was a Petition to Cite for Contempt and a Response thereto.

Jessica's counsel objected to the chancellor's going beyond the pleadings:

"Mr. Van Every: Objection, your Honor, this really goes outside of the complaint. They just have – they're not–this is not a change of custody issue. This is not an unfit, you know, parent change of custody matter." Transcript Page 20 Lines 9-13.

Jessica's counsel objected further to the chancellor morphing a contempt of court hearing into a custody/grandparents visitation case:

"Mr. Van Every: Well, your Honor, that should have been planned and let me have an opportunity to defend that and bring witnesses on myself. All I was confronted with was a contempt of not obeying this power of attorney and guardianship, and we would object to that. We're not prepared to do that. There is no pleading to that effect. They didn't even ask for general relief, you Honor." Transcript Page 20 Lines 19-27.

At the hearing Jonathan testified that it was his belief that the military form AR 600-20 entitled "Certificate of Acceptance as Guardian or Escort" filed as an exhibit to his Contempt of Court Petition R. 72-76 was, in effect, tantamount to a court order transferring or assigning the custody of his son to the Hewetts. Jonathan testified, "My understanding was this [the Certificate of Acceptance as Guardian or Escort] would give my parents accessability to raise my son legally while I was deployed and could not do so myself." Transcript page 10 lines 6-8. In other words, Jonathan was under the delusion that by merely filling out a bureaucratic military family care plan he could assign his custody rights to Conner to his parents to the exclusion of the natural mother.

After the hearing, the Court went on to grant the Hewetts liberal grandparents

visitation consisting of every other week and one full week during the summer. R. 113-114.

The Court's order of May 2, 2007 did state that Jonathan was under a misconception that the custody of the child could be transferred by power of attorney (guardianship) R. 110. The Court's order agreed that "the grandparents were not parties nor do they have standing to raise issues." R. 112. However, during his bench opinion the chancellor ruled, "I want you to come up with a plan between the four parties here with the advice of the attorneys to give me some sort of very liberal visitation for the Hewetts,..." Transcript page 69 Lines 3-6. The chancellor again referred to the grandparents as parties, to-wit, "...something that would be liberal for everybody concerned that accommodates the parties in their respective positions." Transcript Page 69, Lines 12-14.

ISSUES

ISSUE ONE.

DID THE CHANCELLOR ERR IN AWARDING GRANDPARENT VISITATION IN THE CASE AT BAR?

ISSUE TWO.

WAS THE VISITATION CHANCELLOR AWARDED TO GRANDPARENTS EXCESSIVE?

ISSUE THREE.

DID THE CHANCELLOR DENY DEFENDANT'S CONSTITUTIONAL DUE PROCESS RIGHTS BY AWARDING GRANDPARENT VISITATION?

ISSUE FOUR.

DID CHANCELLOR ERR, BY GIVING CREDENCE TO PLAINTIFF'S FALSE OR MISLEADING TESTIMONY, PLAINTIFF'S MISLEADING PLEADINGS AND PLAINTIFF'S ARGUMENT TO THE COURT IN AWARDING GRANDPARENT VISITATION?

SUMMARY OF THE ARGUMENT

In the case at bar, the chancellor awarded grandparent visitation to the Hewetts who were not parties to the action, did not file a petition for grandparent visitation pursuant to Mississippi's Grandparent Visitation Act, did not appear or testify in the case and had no standing in the case. The chancellor's action was clearly erroneous and in contradiction to the provisions of the Mississippi Grandparent Visitation Act and case law interpreting the Grandparent Visitation Act. The chancellor exceeded his authority by allowing a hearing on a Petition for Contempt of Court to be expanded into a custody/grandparent visitation hearing. The chancellor, in going beyond the pleadings to award grandparent visitation, abused his discretion herein. In Mississippi, a chancellor may only award grandparent visitation pursuant to the Grandparent Visitation Act and then only after insuring that certain criteria and factors concerning the grandparent's visitation have been set forth on the record. The chancellor failed to do this in the case at bar. As such, chancellor had no jurisdiction and authority to award grandparent visitation herein. Finally, by not following statutory procedure in awarding grandparent visitation, chancellor denied the defendant, her constitutional due process rights to make decisions for her child.

ARGUMENT

The appellate court employs a limited standard of review in reviewing the decisions of the chancellor. *Reddell v. Reddell*, 696 So.2d 287, 288 (Miss. 1997). The findings of a chancellor will not be disturbed unless this Court finds the chancellor abused his discretion, was manifestly wrong, or made a finding which was clearly erroneous. *Park of Mississippi v. Hollingsworth*, 609 So.2d 422,424 (Miss. 1992). The Court reviews

questions of law, however, under a de novo standard. *Zeman v. Standford*, 789 So.2d 798, 802 (Miss. 2001).

ISSUE ONE: DID THE CHANCELLOR ERR IN AWARDING GRANDPARENT VISITATION IN THE CASE AT BAR?

A. Necessary parties were excluded.

Jessica and her counsel were placed in the awkward position of rather than simply defending a contempt of court allegation, which was the only relief pled for, to having to prove her superior right to custody of her son, Conner, an issue not pled. It should have been obvious to the Court that the natural mother automatically has physical custody of a one year old child when the custodial father is stationed in a military war zone.

In the case at bar, the Court itself recognized that the grandparents had no standing and were not parties to the action and can only pursue this action by filing under a separate action pursuant to the Mississippi Grandparent Visitation Act. R. 111. Despite this finding, the chancellor went forward with a custody/grandparent visitation hearing and gave the paternal grandparents liberal visitation, equal to the visitation of a non-custodial parent. R. 113-114.

The chancellor erred in hearing the custody/grandparent visitation matter without requiring the grandparents to file a separate petition for grandparents visitation and at the very least, be made a party to the action. Miss. Code Ann. §93-16-5 states that, "all parties required to be made parties in child custody proceedings or proceedings for the termination of parental rights shall be made parties to any proceeding in which a grandparent of a minor child or children seeks to obtain visitation rights with such minor child or children and/or to make them parties to a grandparents visitation request."

It is fundamental that a court cannot award relief to anyone not made a party to the action. In this case, grandparents were not a party and were awarded grandparent's visitation rights. A court cannot proceed to a full and final relief without joining a necessary party to the action. It would stand to reason that a necessary party to an award of grandparent visitation would be the grandparents.

Rule 17(a) of the Mississippi Rules of Civil Procedure provides that "Every action shall be prosecuted in the name of the real party in interest." As stated, the necessary or real party in interest to an award of grandparents visitation must, by definition, include the grandparents.

Mississippi Rules of Civil Procedure Rule 19(a) further states that "A person who is subject to the jurisdiction of the court shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action..."

It is clear that one of the real parties in interest to an award of grandparent visitation are the grandparents, the beneficiaries of the award. The plaintiff and the Court violated MRCP Rules 17(a) and 19(a)(1)(2) by not prosecuting the actions in the name of the grandparents and by not joining the grandparents in as a party plaintiff. In their absence, complete relief could not be accorded to those already parties and a real party in interest, a necessary party to the action, was excluded therefrom. Since the grandparents were not parties to the action the order granting them visitation is void ab initio.

B. Court's award of grandparent visitation was outside pleadings and without jurisdiction.

Judge V. A. Griffith in his treatise on Mississippi Chancery Practice has written at

length about a chancellor's jurisdiction.

Griffith states that a court must have jurisdiction of the particular case, a jurisdiction which is conferred by the scope and content of the pleadings.

> § 29a. **The jurisdiction that is conferred by the pleadings.** —In the third place the court must have jurisdiction of the particular case,—a jurisdiction which is conferred by the scope and contents of the pleadings. It is essential to the maintenance of a free government, one controlled by laws rather than by men, and especially so in periods of stress and strain, that all the powers of government shall rest within such limitations as will prevent unconfined and boundless use of the authority conferred upon any one agency of the government. It is the particular province of courts in civil cases to settle disputes between litigants, and a civil suit presupposes some contestable issue or issues between adversary parties. Such is the whole of the province of courts in civil cases. They therefore do not initiate litigation nor stir up questions in the quieting of which the parties have not formally requested judicial aid. If this were not so, courts would, or at least could, become fomenters of disputes instead of the settlers thereof and their powers would be without bounds or limits,—the action of judges could become personal and run to unrestrained lengths. It would be utterly inadmissible, therefore, in any system making a pretense to the orderly and responsible administration of justice to allow a party who has sued, for instance, for the cancellation of a contract concerning personal property to appear at court with his witnesses and thereupon put the defendant to trial on a demand for the foreclosure of a mortgage on land. The requirement that causes shall be presented by written pleadings signed by the respective parties or their solicitors rests upon a deeper foundation than mere practical convenience. And if, in such a case, the defendant knew when he came into court that the real case that he was to defend was the demand to foreclose rather than the suit to cancel, and he had come prepared, and without objection to the pleading he had gone into the trial on the demand for a foreclosure, and if therefore it should be contended that having done so he should be bound by the result although the case actually tried was not pleaded,— which at best could be only an arbitration,—let it be answered that the rule has a higher concern than the rights of any one defendant,—it goes to all defendants present and prospective, not only in that case but in all cases.

> § 30. **Jurisdiction is limited by the pleadings.**—It follows therefore, as a matter of indispensable principle, that although the court may have potential jurisdiction to adjudicate all cases of a certain class, that jurisdiction does not become actual in any particular case within that class until it is presented to the court by a formal pleading, stating the facts of the case which must

include an injury to, or a right withheld from, the complaining party by the opposite party and a request for the appropriate aid of the court with respect thereto. It equally follows, under the principle stated and for the preservation of its full integrity, that the extent of the interference of the court is limited by the pleadings,—by the facts and issues as stated therein, and extends no further; in other words, the court has no proper jurisdiction of the facts and issues other than as presented to the court by the pleadings and an assumption to act beyond the scope thereof, although there be proof of such extraneous facts, is unauthorized, and is either void or erroneous according to the extent that the action overruns the issues made in the record of the pleadings. And as a consequence, it also follows that if no case for relief is made by the pleadings, or by valid amendments thereto, then the court will not act therein at all beyond a dismissal of the pretended cause out of court; and this will be done even though no defense is made; for, if there be no case stated it is made no better by a neglect to defend. It will still be no case.

Mississippi Chancery Practice, page 30, 31, (2d ed. 1950 Bobbs Merrill).

The chancellor herein allowed the case to go way beyond the pleadings and held in effect, a mini-custody/grandparents visitation hearing, when custody was not pled for nor at issue.

According to Judge Griffith's treatise, the court in the case at bar was without jurisdiction by hearing issues of custody/grandparent visitation when only a contempt of court action was pled. Any order resulting from going beyond the issues raised by the pleadings is either erroneous or void. As stated hereinabove, the Court was totally without jurisdiction to grant grandparent visitation herein.

C. Grandparent Visitation Act was not invoked.

Neither the custody of the child nor grandparents visitation should have been an issue in the case at bar. Jessica is the natural mother who has had physical custody of the minor child of the parties from the birth of the child, throughout the time of the divorce, and up until the present time. This is due to the fact that the natural father was unable to exercise his legal and physical custody rights awarded in the divorce decree due to his

military deployment overseas. The proof is clear that Jonathan was stationed in Germany and Iraq since on or about March 16, 2006 through the date of this brief except for a two week period of R and R during which the hearing herein was held i.e. April 17, 2007.

Asked by Jessica's counsel when he left to go overseas Jonathan replied;

Jonathan: A. March 15th, I think.

Mr. Van Every: Q. Of 2006?

Jonathan: A. Yes. Transcript page 30 Lines 7-11.

Mr. Van Every: Q. ...When did you come home from Iraq on leave during 2006, if any?

Jonathan: A. None, during 2006.

Mr. Van Every: Q. Okay. So you - - it was impossible for you to have custody of your child during that period of time from August 29, the day of the divorce, for the rest of the year; is that correct?

Jonathan: A. Yes, it was.

Mr. Van Every: Q. Okay. So when did you next come back to the United States from your deployment?

Jonathan: A. Just now for my R and R.

Mr. Van Every: Q. Just now. Okay. And so you - - it was impossible for you to have custody during that time, is that right? You were in battle in Iraq, is that correct?

Jonathan: A. Yes, I was. Transcript Page 36 Lines 14 -28.

Jonathan admitted that it was impossible for him to exercise physical custody of Conner during the entire year of 2006 and only came home for two weeks in April, 2007,

making it impossible for him to care for or have physical custody of Conner after the divorce (August 29, 2006).

There is a fundamental presumption that, absent abandonment or unfitness, it is in the best interest of children to be in the custody of a natural parent. A parent has the fundamental right to raise his or her children in the manner they see fit. *Martin v. Martin*, 744 So.2d, 817, 820 (Miss. 1999), citing *Carter v. Taylor*, 611 So.2d 874, 876 (Miss. 1992). The natural parents are superior to all other persons, Miss. Code Ann. §93-13-1.

The mother, being the natural parent, by default, has custody and need not prove to anyone why she is the better parent to have custody as she is the only parent that could have exercised custody in this situation. A hearing on the issue of who should have custody or is the better parent to have custody, was superfluous, unnecessary and wholly without jurisdiction. The case should have been summarily dismissed and if the grandparents wanted visitation, they should have done so pursuant to law.

In Mississippi, grandparents have no common law right of visitation with their grandchildren. *Hale v. Hood*, 313 So. 2d 18, 19-20 (Miss. 1975). Such rights, if any, must come from a legislative enactment; *Matter of Adoption of a Minor*, 558 So.2d 854, 856 (MS 1990); that any rights a grandparent has to visitation with their grandchildren are purely statutory. *Woodell v. Parker*, 860 So.2d 781, 786 (Miss. 2003). "Standing to seek visitation rights by grandparents may be established only by legislative enactment, *Miss. Divorce, Alimony and Child Custody*, 6th Ed. Shelton Hand Page 802, fn 33 (2003).

To address this issue, the Mississippi Legislature enacted the Grandparents Visitation Rights Act, Miss. Code Ann. §93-16-1 to 93-16-7. The Grandparents Visitation Rights Act provides a way in which grandparents in Mississippi may petition the Chancery

Court for visitation rights with their grandchildren. It is also the only manner, absent removal of a child from an unfit parent, that a chancellor can award grandparents visitation.

The Grandparents Visitation Act requires the chancellor to make certain findings from the evidence. This is to insure that the grandparents have met certain conditions before they can obtain relief from the court. Since the Hewetts (grandparents) were the parents of the custodial parent herein, the relevant criteria and factors are found in Mississippi Code Sections 93-16-3(2) and (3). Section 93-16-3(2)(3) provides, in pertinent part:

> (2) Any grandparent who is not authorized to petition for visitation rights pursuant to subsection (1) of this section may petition the Chancery Court and seek visitation with his or her grandchild, and the court may grant visitation to the grandparent, provided the court finds:
>
> (a) that the grandparent of the child had established a viable relationship with the child and the parent or custodian of the child unreasonably denied the grandparent visitation with the child; and
>
> (b) that visitation of the grandparent with the child would be in the best interest of the child.
>
> (3) For purposes of subsection (3) of this section, the term viable relationship in 93-16-3(2)(a) means a relationship in which grandparents or either of them have voluntarily and in good faith supported the child financially in whole or in part for a period of not less than six (6) months before filing any petition for visitation with the child or the grandparents have had frequent visitation, including overnight visitation, with said child for a

period of not less than one (1) year.

The record proves that the Hewett's did not have a viable relationship with Conner. Jonathan's own attorney proved this in his examination of his own client as follows:

> Mr. Ford: Q. Did you have a conversation or an understanding with your ex-wife about who would take custody of your child, Conner?
>
> Jonathan: A. We discussed it, and I had talked about bringing him to my parents' house. It was discussed that it wasn't a good idea to throw him into my parents' house with them not knowing him, because it would be a gradual process, bringing Conner over, you know, for one night and then maybe a weekend, maybe every other weekend, just for him to get to know my parents again and get used to them, but that process never took place. Transcript Page 19 Lines 11-22.

The plaintiff, Jonathan, just informed the Court that his parents did not even know their grandson! As stated, in order for a chancellor to award grandparent visitation under the Act, the petitioners must prove the grandparents had a viable relationship with the grandson, financially supported the grandchild for over six months or had frequent visitation with the grandchild for a period of not less than one year. Hand's treatise states that "Grandparents desiring to enjoy visitation times with his or her grandchildren may bring an action under the "viable relationship" guidelines of the current Act. The term "viable relationship" was clearly defined in statute and the statute established guidelines by which the evidence might be developed and presented for the consideration of the court." Hand at 799. Jonathan testified his parents did not even know his son, therefore the chancellor had no authority to award grandparent visitation pursuant to Mississippi Grandparent

Visitation Act, absent a clear showing of a viable relationship between the grandparents and the grandchild.

Further, the record also contains no evidence that the grandparents were unreasonably denied visits with the grandchild. In fact, the only evidence in this regard was testimony from the mother, Jessica Hewett as follows:

> Mr. Van Every: Q: Now, his other grandparents, James Hewett and his wife, have they seen the child this year? (2007)
>
> Jessica: A: Yes, sir.
>
> Mr. Van Every: Q: Okay. On how many different occasions?
>
> Jessica: A: I believe Conner has been with his family three or four times since January. (2007, the hearing was April 19, 2007)
>
> Mr. Van Every: Q: Okay. But they have seen the child this year, which this is the fourth month of the year, on four different occasions, it that correct?
>
> Jessica: A: Yes, sir. Trial Transcript page 54 lines 26-29, Trial Transcript page 55 line 1-2; 10-13

Even if the grandparents had properly petitioned the court for grandparents visitation and become parties to the action pursuant to the Act, they would have failed to meet the criteria and factors required by Mississippi statutes and case law in order to be awarded grandparents visitation. The criteria proving a viable relationship with the grandchild or to have been unreasonably denied visitation with the grandchild was not met and the record contains little or no proof of either of these requirements. The grandparents did not even appear or testify in the case. This is because they did not petition the court in a separate action for grandparents visitation and become parties as required by Mississippi statute.

Under the Act, the Court had no authority to grant grandparent visitation in the case at bar.

Mississippi case law has found that, if the grandparents properly petition the court for visitation, are made parties to the action and even prove they have a viable relationship with the grandchild, the court must still go further and examine a minimum of ten factors to determine whether the grandparents are entitled to visitation and if so, the extent thereof. These factors are found in *Martin v. Coop*, 693 So.2d 912, 916 (Miss. 1997) .

The *Martin* factors are as follows:

> 1. The amount of disruption that extensive visitation will have on the child's life. This includes disruption of school activities, summer activities, as well as any disruption that might take place between the natural parent and the child as a result of the child being away from home for extensive lengths of time.
>
> 2. The suitability of the grandparents' home with respect to the amount of supervision received by the child.
>
> 3. The age of the child.
>
> 4. The age, and physical and mental health of the grandparents.
>
> 5. The emotional ties between the grandparents and the grandchild.
>
> 6. The moral fitness of the grandparents.
>
> 7. The distance of the grandparents' home from the child's home.
>
> 8. Any undermining of the parent's general discipline of the child.
>
> 9. Employment of the grandparents and the responsibilities associated with that employment.
>
> 10. The willingness of the grandparents to accept that the rearing of the child is the responsibility of the parent, and that the parent's manner of child rearing is not to be interfered with by the grandparents.

It would be helpful for the chancellor to have inquired into the Hewetts fitness for visitation. But somehow, without being asked to grant grandparent visitation, without a petition, without grandparent's as parties, the chancellor somehow determined it was in the

minor child's best interest to visit with his grandparents.

Clearly, the grandparents herein have not made a case for grandparents visitation pursuant to the Mississippi Statute which is the only way a grandparent may be awarded visitation with their grandchild, absent proof of abandonment or unfitness.

Further, the chancellor made no specific findings of fact/conclusions of law with regard to the *Martin* factors as required by Mississippi case law. No inquiry was made about the grandparent's home, their age, physical and mental health of the grandparents, whether the grandparents could drive, their moral fitness, emotional ties between grandparents and grandchild, whether they owned a pit bull dog, criminal history, who else, if anyone, lives in their home and numerous other inquiries to determine whether the liberal visitation granted by the chancellor to the grandparents was proper and truly in the best interest of Conner. The grandparents could not be evaluated by the chancellor and cross-examined by opposing counsel.

Mississippi law requires that, "to establish visitation rights the grandparents must clearly satisfy the dictates of the statute adopted solely for the purpose of granting such rights to them. Miss. Code Ann. §93-16-1 et seq." *Shelton Hand* at 799. Hand further noted that the guidelines promulgated in *Martin v. Coop* are important and must (emphasis added) be referenced, carefully considered and followed by the chancery court in all (emphasis added) cases pertaining to grandparent visitation. Hand at 799.

The case of *Givens v. Nicholson*, 878 So.2d 1073, 1079 (Miss. Ct. App. 2004), held that the chancellor erred in granting grandparent visitation and stated: "The Mississippi Legislature has clearly outlined the steps a grandparent should take to pursue visitation...Furthermore, because the child's best interest is the fundamental concern, a

Chancellor must (emphasis added) review all relevant factors as outlined in *Martin v. Coop* before (emphasis added) granting grandparent visitation. The *Martin* requirements provide more than a mere formality; they protect the interests of the parents, the grandparents, and most importantly, the child." *Givens* at 1079.

Givens noted the chancellor erred at two points, "First, the grandparents did not petition the court for visitation as provided for in Miss. Code Ann. Section 93-16-3. The grandparents were never parties to the litigation, and they never sought visitation from the court. Second, the chancellor heard no evidence concerning the grandparents as required under Martin. There was no testimony regarding the grandparent's fitness, character, home life, emotional ties to the child, employment or even their desire to care for the child..." *Givens* at 1078.

Givens went on to state that, "Although this Court understands and appreciates that contact with extended family may be of great benefit to a child, the Legislature has clearly outlined the steps a grandparent should take to pursue visitation. This is in no way a denial of the grandparent's ability to seek visitation, which may be pursued by a separate process if they so desire. Furthermore, because the child's best interest is the fundamental concern, a chancellor must review all relevant factors as outlined in Martin before granting visitation." *Givens* at 1079.

The Mississippi Supreme Court has held that the polestar consideration in awarding grandparent visitation must be the best interest of the child. *T. T.W. v. C.C.*, 839 So.2d 501, 504 (Miss. 2003).

In a case in which the chancellor was reversed and remanded where she did not articulate her findings regarding the Martin factors, the Mississippi Supreme Court held:

> "We conclude that the chancellor did not speak to the best interest of the child and that several factors set forth in Martin were not adequately addressed. First and foremost, this Court has repeatedly held that in matters regarding child custody and visitation the best interest of the child is of paramount importance. Martin clearly sets forth this standard prior to outlining the factors to be considered in a grandparent visitation matter." *Morgan v. West*, 812 So.2d 987, 992 (Miss. 2002).

The *Morgan* case further held that, "making findings of fact under the Martin factors is an integral part of a determination of what is in the best interest of the child. *Morgan* at 992.

Applying the aforesaid principles to the case at bar, the chancellor, by not even considering the Martin factors in his decision, by definition, did not decide the case based on the best interests of Conner. As the consideration and annunciation of the Martin factors are an integral part of the polestar consideration herein, i.e. the best interest of the child, the chancellor, by neglecting to consider those factors, neglected to consider what was in the best interest of the child. As a result, his award of visitation to the grandparents was clearly erroneous and manifestly wrong.

"A chancellor's failure to follow enumerated guidelines is manifest error when specific findings of fact corresponding to such guidelines are required." *Gray v. Gray*, 745 So.2d 234, 238 (Miss. 1999).

The chancellor was manifestly wrong in not considering the Martin factors in the case at bar. As such, the chancellor decided the case without proper consideration of the best interest of Conner and the award of grandparent visitation is void.

ISSUE TWO: : WAS THE VISITATION CHANCELLOR AWARDED TO GRANDPARENTS EXCESSIVE?

Even if this court finds that the chancellor had jurisdiction and that the grandparent's

were parties and had properly petitioned the court for visitation under §93-16-1 et seq., the chancellor's award of grandparent visitation of every other weekend and an entire week in the summer is excessive. *Settle v. Galloway,* 682 So.2d 1032, 1035 (Miss.1996). Another case has held that, "Where a Chancellor awards grandparents equivalent visitation to that of a non-custodial parent these findings must be fully discussed on the record." *Townes v. Manyfield*, 883 So.2d 93, 97 (Miss. Ct. App. 2004). No discussion of this award was done in the case at bar.

In *Martin v. Coop*, supra, the Mississippi Supreme Court found that the chancellor abused his discretion in awarding the grandparents the same visitation awarded to a non-custodial parent. *Martin v. Coop*, citing *Settle v. Galloway,* said "It is clear to this Court that visitation granted to grandparents should not be equivalent to that which would be granted to a non-custodial parent." The reasoning that a grandparent should not have equal visitation to a non-custodial parent is that "the grandparents have none of the responsibility of the non-custodial parent. It is up to the parents to provide all support financially, socially and otherwise for their child and to provide care, custody and management of the child." *Martin* v. Coop at 916. The case reiterated that grandparent visitation must be less than that which would be awarded to a non-custodial parent and stated that grandparents do not stand in lieu of or in the shoes of the deceased parent. The *Martin v. Coop*, decision, quoting Settle at 1035, expressed the Mississippi's Supreme Court's concerns over excessive grandparent visitation while reversing the chancellor for awarding excessive visitation.

In the case at bar, every other weekend and a week in summer is roughly equivalent to visitation routinely granted a non-custodial parent and as such, is excessive. The case

should be remanded to the lower court for the setting of a less excessive visitation period for the grandparents.

ISSUE THREE: DID THE CHANCELLOR DENY DEFENDANT'S CONSTITUTIONAL DUE PROCESS RIGHTS BY AWARDING GRANDPARENT VISITATION?

The Fifth and Fourteenth Amendments to the United States Constitution proscribe governmental interference with individual liberties such as a parent's right to determine her child's care, custody and management. *Santosky v. Kramer*, 455 US 745, 753, 102 S. Ct. 1388, 1394-95, 71 L.Ed. 2d 599 (1982). Mississippi's grandparent's visitation statute does not intrude upon this parental liberty, and as such, it is constitutional, *Martin v. Coop* at 915. However, since the Mississippi Grandparent Visitation Act was not invoked in the case at bar and grandparent's did not petition for visitation rights, and were not made parties to the action, the chancellor's order granting grandparents visitation in this matter was clearly unconstitutional and a denial of due process to defendant Jessica.

The case of *Troxel v. Granville*, 530 U.S. 57 (2000), affirmed the State of Washington's Supreme Court's overturning of that State's third party visitation statute. The U. S. Supreme Court held that the state of Washington Statute unconstitutionally infringed on a parent's fundamental due process rights to rear their children. The Court stated the 14th Amendment's Due Process Clause has a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests, citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

The *Troxel* case noted that the liberty interest at issue, i.e., the interest of parents in the care, custody and control of their children is "perhaps the oldest fundamental liberty interest recognized by the Court." *Troxel* at 62. It further held that the "parents have a right to limit visitation of their children with third persons," and that between parents and judges

"the parents should be the ones to choose whether to expose their children to certain people or ideas." *Troxel* at 61.

Significantly, the United States Supreme Court recognized Mississippi's method of awarding grandparent visitation. The *Troxel* court referenced the Mississippi Grandparent Statute 93-16-(2)(a) in that it expressly provides "that courts may not award visitation unless a parent has denied or unreasonably denied visitation to the concerned third party." *Troxel* further stated that in Mississippi "the Court must find that the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child." *Troxel* at 64 and "that there is a strong presumption that a fit parent will act in the best interest of his or her child." *Troxel* at 62.

In the case at bar, Jessica's due process rights to raise her child as she saw fit were violated. Jessica's fundamental right and liberty interest to raise her child without grandparent interference was breached by the Court. This was done by awarding grandparent visitation without following the Mississippi statutory procedures or the well settled case law in awarding grandparent visitation. As such, the Court acted arbitrarily, and without jurisdiction and such action was unconstitutional.

ISSUE FOUR: DID CHANCELLOR ERR, BY GIVING CREDENCE TO PLAINTIFF'S FALSE OR MISLEADING TESTIMONY, PLAINTIFF'S MISLEADING PLEADINGS AND PLAINTIFF'S ARGUMENT TO THE COURT IN AWARDING GRANDPARENT VISITATION?

The court was confused in this case due to the false testimony of plaintiff, the misleading representations via argument, and the misrepresentations contained in plaintiff's Petition for Contempt. By attaching weight to the false testimony and other material misrepresentations, the court erred in awarding grandparent visitation. The court was led to believe that Jessica had not surrendered custody of Conner to Jonathan after

the divorce, which was totally false.

Jonathan correctly testified under oath that he was granted full legal and physical custody of Conner pursuant to the divorce decree of August 29, 2006. However, Jonathan further testified, disingenuously, to the court that his ex-wife refused to surrender custody of Conner to him after their divorce.

Mr. Ford: Q. Did you ever–were you ever able to take custody of Conner after the divorce?

Jonathan: A. No, I wasn't.

Mr. Ford: Q. Did you seek to?

Jonathan: A. Yes, I did.

Mr. Ford: Q. Okay. Why were you unable to take custody of the child after the divorce was entered?

Jonathan: A. Due to where I was with the military, I immediately went to Schweinfurt, Germany, and shortly thereafter was deployed to Baghdad, Iraq, so that didn't help the situation.

Mr. Ford: Q. Before being deployed, had you asked Jessica to bring Conner to you?

Jonathan: A. Yes, sir.

Mr. Ford: Q. Did she?

Jonathan: A. No, sir. Transcript Page 8 Lines 13-28.

Jonathan misled the chancellor into thinking Jessica refused to surrender custody of Conner to Jonathan after the divorce and prior to Jonathan being deployed overseas. However, Jonathan was deployed overseas from March, 2006 until April, 2007. The

divorce was final August 29, 2006. He was untruthful when he said that he asked Jessica to bring Conner to him after the divorce because at the time of his deployment, March, 2006, he was still married to Jessica and no divorce decree had been entered. Jonathan further testified untruthfully, as follows:

Mr. Ford: Q. After you received notice you were going to be deployed, which was after the divorce, correct?

Jonathan: A. Yes. Transcript Page 19 Lines 7-10.

The Final Judgement of Divorce - Irreconcilable Differences was filed for record on August 29, 2006. R. 83. Jonathan signed the Property Settlement and Child Custody and Child Support Agreement on August 8, 2006. Jonathan further testified that when he signed the divorce papers on August 8, 2006, he was in Germany.

Mr. Van Every: Q. All right. Because did you sign your divorce papers in front of Jennifer Doris Tabor? Do you recall?

Jonathan: A. Jennifer Gable, no.

Mr. Van Every: Q. Gable?

Jonathan: A. No.

Mr. Van Every: Q. You didn't?

Jonathan: A. No, my father.

Mr. Van Every: Q. Okay.

Jonathan: A. My father had that notarized for me.

Mr. Van Every: Q. Okay. And this is your divorce papers?

Jonathan: A. Yes.

Mr. Van Every: Q. You didn't sign these divorce papers in front of this notary

public in Oktibbeha County?

Jonathan: A. No.

Mr. Van Every: Q. You weren't in the country, were you?

Jonathan: A. No, I was in Germany. Transcript page 32 Lines 13-28.

Jonathan testified untruthfully that he was deployed after the divorce and was denied custody of Conner by Jessica after the divorce when in fact he was overseas at the time of the divorce and when he signed the divorce papers. Jonathan signed the Amended Property Settlement and Child Custody and Child Support Agreement on August 8, 2006. R. 51, while he was stationed in Germany.

In essence, Jonathan's prior testimony that Jessica did not give him custody after the divorce was misleading at best and perjurious at worst. The fact of the matter is that Jonathan was deployed overseas for some time prior to the divorce, August 29, 2006. It would have been highly improbable, no impossible, that Jonathan asked his now ex-wife to surrender custody of their one year old son while Jonathan was deployed in Germany, awaiting orders to be deployed to the war zone in Baghdad, Iraq. Jessica, as the natural parent, has had physical custody of Conner, by default, since before the parties were divorced. This is due to the natural father's overseas military duty. As such, the Court was grossly misled by Jonathan's untruthful testimony about Jessica's failure to surrender custody to him after the divorce and any inquiry by the court into why Jessica had physical custody of the infant should have been self-evident.

Jonathan's attorney further misled the Court in his statements to the Court as follows:

> "The problem here is, Judge, after this divorce decree was entered by the Court, the Defendant never turn the child - never brought the child to my

client, and shortly thereafter, he, in the United States Army, has been deployed to Iraq,...Since that time, she has made him virtually unaccessible, the child, the minor, virtually unaccessible to my client, telephone calls." Transcript Page 6 Lines 3-14.

Again, it was impossible for Jessica to bring Conner to Jonathan as he was deployed overseas at all relevant times herein.

Jonathan's pleadings also misled the Court. The Petition to Cite for Contempt alleged that upon leaving for Iraq, Jonathan gave temporary guardianship to his parents, James and Linda Hewett. R. 70. This led the Court to believe that prior to his leaving for Iraq, Jonathan gave temporary guardianship to his parents by some sort of judicial order. The fact is, that Jonathan executed the documents on October 2, 2006, at a time he was overseas in Germany and Iraq. Jonathan testified as follows:

Mr. Van Every: Q....during the month of August, 2006, where were you? Were you in the United States, Germany, or Iraq, or do you know?

Jonathan: A. Part of it was Germany, and part of it was Iraq.

Mr. Van Every: Q. And you weren't in the United States during that time? August, 2006.

Jonathan: A. No. Transcript page 30 Lines 28-29, page 31 Lines 1-5.

The pleadings, Jonathan's misleading testimony and misleading arguments from counsel for Jonathan misled the Court into believing that Jessica had somehow denied Jonathan his custodial rights to Conner by not surrendering custody of Conner to Jonathan after the divorce decree. However, the evidence clearly shows that Jonathan was overseas from March, 2006, only to return to the United States for the contempt hearing in April, 2007.

Jonathan was unable to exercise his custody due to his military deployment.

The Court was misled and confused that Jessica had somehow denied Jonathan his custody rights to Conner, when nothing could be further from the truth. The chancellor erred in putting credence into these obviously false or misleading allegations in awarding Jonathan's parents visitation.

What Jessica was doing was raising her son, Conner, while her ex-husband was deployed overseas in a war zone since the date of the divorce. There was no option for custody other than to send Conner to Baghdad where his father Jonathan could exercise his rights of custody to the minor child.

CONCLUSION

The chancellor's award of grandparent visitation should be reversed as it was clearly erroneous. The only way to award grandparent visitation, outside of neglect or abuse situations, is to petition the court for grandparent visitation pursuant to the Grandparent Visitation Act. Further, the grandparent's were not parties and as a result the court had no jurisdiction to rule as it did. The appellate court has no recourse other than to reverse the chancellor's award of grandparent visitation.

Respectfully submitted,

JESSICA A. HEWETT,
DEFENDANT-APPELLANT

By: David S. Van Every, Sr.
DAVID S. VAN EVERY, SR.

DAVID S. VAN EVERY, SR.
ATTORNEY AT LAW
P. O. BOX 761
516 SECOND AVENUE NORTH
COLUMBUS, MS 39701
(662) 327-4065
MS BAR [redacted]

CERTIFICATE OF SERVICE

I, David S. Van Every, do hereby certify that I have this date, hand delivered, a true and correct copy of the above and foregoing to Honorable J. H. Davidson, Jr., Chancellor, P. O. Box 684, Columbus, MS 39703, J. Douglas Ford, Esq., and Rodney Ray, Esq., Attorneys for Appellee, P. O. Box 1018, Columbus MS 39703.

SO CERTIFIED, on this the 24th day of October, 2007.

David S. Van Every, Sr.