

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2007-TS-02237

PAMELA L. FERGUSON

APPELLANT

VS.

JUANITA H. LEWIS

APPELLEE

On Appeal from the Chancery Court of the Second
Judicial District of Hinds County, Mississippi

BRIEF OF APPELLEE

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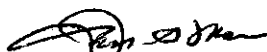
CERTIFICATE OF INTERESTED PERSONS

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 this Court and/or the Judges of this Court may evaluate possible disqualifications or recusal.

1. Pamela L. Ferguson, Appellant
2. Juanita H. Lewis, Appellee
3. Hannah Grace Ferguson, Minor child at issue
4. Staci B. O'Neal, Attorney for Appellant
5. Jack G. Moss, Attorney for Appellee

Respectfully Submitted

JACK G. MOSS



ATTORNEY FOR APPELLEE,
JUANITA H. LEWIS

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STATEMENT OF THE CASE

The nature of this case is a petition for grandparent's visitation rights pursuant to MISS CODE ANN Section 93-16-3(2) (Supp. 2008) filed by Appellee, Juanita H. Lewis (Juanita) in the Chancery Court of the Second Judicial District of Hinds County, Mississippi. Appellant, Pamela L. Ferguson (Pamela) filed a response thereto and a hearing was conducted on October 16, 2007, before Honorable William H. Singletary, Chancellor, in Jackson, Mississippi, pursuant to agreement of counsel. At the hearing, testimony was given by the parties, the minor child, Hannah Grace Ferguson (Hannah Grace) with whom Juanita sought visitation, Shelton Lee Holiday, the maternal great uncle of the minor child, and Rebecca Vaught, another granddaughter of Juanita (and Hannah Grace's first cousin).

Based upon the Court's bench opinion, an Interlocutory Decree allowing Juanita to treat both Hannah Grace and Pamela to a meal on one weekend per month was entered on November 1, 2007, which was also the date of the Chancellor's Opinion of the Court granting Juanita, in addition to the aforementioned

STATEMENT OF THE FACTS

Juanita H. Lewis (Juanita) is a seventy-four (74) year old widow and the maternal grandmother of Hannah Grace Ferguson (Hannah Grace), the fourteen (14) year old daughter of Pamela L. Ferguson (Pamela), who is also a widow (Tr. 3-4). Since the birth of her child and prior to the filing of the petition for visitation, Pamela (and Hannah Grace) had lived in the Oklahoma City, Oklahoma and in Clinton, Ridgeland, Brandon, and for a short period of time, Raymond, Mississippi (all in the greater Jackson Metropolitan area), where Juanita has maintained a four bedroom, two bath house for over twenty-four (24) years. (Tr. 5). Pamela and Hannah Grace recently moved to Madison, Mississippi. (Tr. 32)

The facts are uncontradicted that Juanita and Hannah Grace love each other very much and have had a close and viable relationship (Tr. 35, Tr. 43, Tr. 68, Tr. 93), spending much time together (Tr. 68), taking vacations and other out-of-town trips (Tr. 69), and shopping excursions (Tr. 37). Hannah Grace was a frequent overnight guest in Juanita's house (Tr. 36, Tr. 43, Tr. 69) and enjoyed gardening and "yard work" (Tr. 37) during her visits in Raymond at her

grandmother's house. Hanna Grace also attended the church and Bible school in Raymond where Juanita is an active member. (Tr. 10, Tr. 4)

Although there is mention in the record of some conflict between Juanita and her other daughter (Karen) and other granddaughter (Rebecca Vaught, who testified in the lower Court), according to Pamela, there has been no such history of conflict between Juanita and Hannah Grace. (Tr. 54).

In the fall of 2006, Juanita purchased a house for Pamela in Raymond for \$234,000.00 (Tr. 13) (the Appellant's Statement of Facts contained in her brief, represents that the purchase was a "gesture of Mr. Lewis' (Juanita's late husband) legacy", however there is no such evidence in the record). Shortly after Christmas, 2006, Pamela began denying Juanita of Hannah Grace's company (Tr. 17). From that time until the filing of the petition in the lower Court (September, 2007), Juanita had only had the opportunity to talk with Hannah Grace on one occasion (Tr. 18) even though Pamela and Hannah Grace lived only about two hundred (200) yards from Juanita's Home during that time. (Tr. 38).

ARGUMENT

I. THE AWARD OF GRANDPARENT VISITATION IN THIS CASE WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Under common law principals, there were no legal rights of grandparents for visitation privileges with their grandchildren where the parents did not permit such communications. Olson v. Flinn, 484 So.2d 1015 (Miss. 1986). In Mississippi, the grandparents' visitation rights statute became effective in 1983 allowing grandparents limited visitation rights. The Mississippi Legislature determined that a grandparent may petition the Court for visitation, including the provisions of MISS CODE ANN Section 93-16-3 (2) and (3), which allow as follows:

(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 rights with his or her grandchild, and the court may grant visitation rights 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 rights with the child; and

(b) That visitation rights of the grandparent with the child would be in the best interests of the child.

(3) For purposes of subsection (3) of this section, the term "viable relationship" means a relationship in which the 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 rights with the child or the grandparents have had frequent visitation including occasional overnight visitation with said child for a period of not less than one (1) year.

In the instant case, after hearing the witnesses' testimony and argument of counsel, the Court made specific findings of fact that:

1. Juanita had established a viable relationship with Hannah Grace. (R. 36)
2. Pamela's conduct denying Juanita the opportunity to see and visit with Hannah Grace constituted an unreasonable denial. (R. 36)
3. Pamela's conduct in denying Juanita the opportunity to see and visit with Hannah Grace was not in Hannah Grace's best interest (ie. that visitation rights of Juanita with Hannah Grace would be in the best interest of Hannah Grace). (R. 39)

In addition to the statutory prescribed requirements (establishing a viable relationship, proof

of unreasonable denial of visitation, and showing that the visitation rights would be in the best interest of the child), this Court has outlined ten factors in Martin v. Coop, 693 So.2d 912 (Miss. 1997), which are guidelines in determining the amount of visitation grandparents should be afforded. The Appellant argues that the lower Court did not properly consider the Martin factors. However, in the instant case, the Chancellor painstakingly weighed and addressed each of these ten factors in making his decision. (R. 16-19).

These factors are:

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.

Martin at 916.

Appellant either does not address, or appear to contest, the lower Court's summation as to factors outlined in number 4, number 6, (other than to make a unsubstantiated backhanded allegation that the grandparent was hostile towards and verbally abused members of her family) number 7 and number 9, hereinabove - so Appellee will address those remaining factors which were discussed in length in Appellant's brief:

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.

There was no testimony at trial or evidence that revealed that the visitation between Hannah Grace and Juanita was emotionally disturbing to Hannah Grace. Counsel and the Court examined Hannah Grace and the Chancellor commented that it was the parent (Pamela) that appeared to be hypersensitive to the grandparent's (Juanita's) need for contact with Hannah Grace. (R. 39). The lower Court, in other parts of its opinion, noted that the record was devoid of contradictory evidence of any conduct by Juanita to justify withholding visitation. (R. 36). Appellee submits that the length of the visitation awarded in the lower Court in this case: 1 hour with a supervised meal once each month; 4 hours during the Christmas season; and 2 weeks in the summer, was certainly much less than that typically allowed to a non-custodial parent.

2: The suitability of the grandparents' home with respect to the amount of supervision received by the child.

As pointed out by the Chancellor and uncontroverted at the trial level, Juanita had a

suitable home for a 14 year old child, with separate living quarters - Appellant again attempts to focus that the determination of this factor should be based solely on Pamela's wishes. This argument is without merit.

3: The age of the child.

Again, Appellant argues matters that have nothing to do with age. There is no evidence in the record to support "that many children stop spending the night with grandparents when they are teenagers" as alleged by the Appellant.

4: The age and physical and mental health of the grandparents.

The Court found that Juanita, at age 74, was mentally and physically capable of providing for Hannah Grace and her needs when Hannah Grace is at Juanita's home. (R. 37).

5: The emotional ties between the grandparents and the grandchild.

Appellant admits that there had been an emotional tie between Juanita and Hannah Grace when Hannah Grace was younger, there is no evidence that Juanita's

actions toward either Pamela or Hannah Grace served to sever the emotional ties. The lower Court, after extensive testimony, found that whatever strain existed in that relationship was largely the result of the parent's (Pamela's) efforts to pit herself and the child (Hannah Grace) against the grandparent (Juanita) and to recruit the child to her side in that battle. (R. 38). The lower Court recognized this and commented that as a young and impressionable child, Hannah Grace would naturally adopt her mother's (Pamela's) attitude. (R. 38).

6: The moral fitness of the grandparents.

Not a factor for consideration in this case.

7: The distance of the grandparents' home from the child's home.

Not a factor for consideration in this case.

8: Any undermining of the parent's general discipline of the child.

While Juanita questioned some of Pamela's decisions as to schooling and discipline, there was no showing of any attempt by Juanita to undermine Pamela's general discipline of Hannah Grace. The lower Court certainly took note of the above and found no testimony

or evidence of any action by Juanita to undermine Pamela's parental rights. (R. 38).

9: Employment of the grandparents and the responsibilities associated with that employment.

Not a factor for consideration in this case.

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 the child rearing is not to be interfered with by the grandparents.

As pointed out by the Court below, there was no evidence of Juanita's unwillingness to accept the fact that the rearing of Hannah Grace was Pamela's responsibility nor any interference by Juanita in Pamela's manner of child rearing. Appellant argues that the Chancellor in this case, made statements from the bench, commenting on other "reasons" why that interlocutory visitation should be allowed. This Court in Martin, said that the ten (10) factors set forth above are not all inclusive - that the Chancellor can weigh all circumstances and factors that he feels appropriate. Id at 916.

II. THE CHANCELLOR DID NOT ABUSE HIS DISCRETION BY GRANTING OVERNIGHT VISITATION.

The Chancellor in the instant case awarded Juanita visitation with Hannah Grace by allowing: (1) (at Juanita's expense) one supervised meal per month; (2) 4 hours on Christmas Eve; (3) and one week during the month of June and one week during the month of July, each summer.

Appellant argues that it is unconstitutional for the State to inject itself into the private realm of a parent's right concerning the rearing of that parent's child and that the lower Court infringed upon Pamela fundamental right as a fit parent. Appellee agrees that there is no allegation of Pamela's unfitness and no evidence of Pamela's unfitness in the case below. Appellee submits that a showing of Pamela's unfitness is not required by statute.

In the Martin case, this Court, citing Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) has said that the constitutional provisions proscribing governmental interference with individual liberties such as a parent's rights to determine his child's care, custody, and management, is not absolute.

Martin at 915, see also Stacy v. Ross, 798 So.2d 1275 (Miss. 2001). In Martin, where the Appellant argued in order to grant visitation under MISS CODE ANN Section 93-16-3 (1) there must be a disruption of the family unit, subsection (2) of the Grandparent's Visitation Statute does not require the grandparent to show that the parent is unfit. See MISS CODE ANN Section 93-16-3(2) (Supp. 2007)

In the Stacy v. Ross, cited by the Appellant, the lower Court awarded grandparents visitation rights, but did not make an express finding that visitation was in the child's best interest, as required by the Grandparent's Visitation Statute. In reviewing the lower Court in that case, this Court also considered the physical distance between the custodial parent and grandparent, the parent's willingness to accord some visitation, and the evidence by mental health professionals to determine that visitation was not in the best interest of the child. Id at 1282.

In the instant case, unlike Stacy, the parent (Pamela) was unwilling to accord any visitation to the grandparent (Juanita). Also in the instant case, Pamela agrees that travel distance between parent and

grandparent is not a factor (as it was in Stacy). After considering the testimony of the parties, including an extended session with the child, and two other non-party witnesses, the Chancellor found that it was in Hannah Grace's best interest to have visitation with her grandmother (R. 36) and that having monthly supervised visitation with Juanita for a period of eight (8) months, prior to overnight visitation, was a good schedule to reestablish trust in the relationship between Hannah Grace, Pamela, and Juanita (child, mother and grandmother).

III: THE GRANDMOTHER WAS UNREASONABLY DENIED VISITATION WITH THE GRANDCHILD.

As set forth hereinabove, the Court made a specific finding of fact that a viable relationship existed between Juanita and Hannah Grace and the record is devoid of any evidence which justified Pamela's withholding Hannah Grace from visiting Juanita. (R. 36). The Appellant argues that she was "removing" Hannah Grace from a hostile environment. However there is no proof of what "hostile environment" existed - the testimony showed that Hannah Grace had not visited

Juanita for nearly a year before the filing of the petition for visitation. (R. 17, R. 32).

IV: THE CHANCELLOR'S RULING DID NOT AMOUNT TO ABUSE OF DISCRETION, WAS NOT MANIFESTLY IN ERROR AND CORRECTLY APPLIED LEGAL STANDARDS:

The Appellant is correct in arguing that this Court should not disturb the findings of a Chancellor, unless the findings were not supported by creditable evidence, manifest error was committed or erroneous legal standards were applied. McAdory v. McAdory, 608 So.2d 695, 699 (Miss. 1992). This is applicable in Grandparent visitation cases. See Woodell v. Parker, 860 So.2d 781, 785 (Miss. 2003). Also in matters concerning Grandparents visitation, a Chancellor is afforded a wide range of discretion. See Settle v. Galloway, 682 So.2d 1032 (Miss. 1996).

The Appellee (Juanita) is the maternal grandmother of Hannah Grace Ferguson. The Court found that Juanita had established a viable relationship with Hannah Grace and that the parent (Pamela) unreasonably denied Juanita visitation rights with Hannah Grace. The Court, to the apparent chagrin of the Appellee, expounded on the definition of "viable relationship" as prescribed by statute and after a thorough examination

of the grandparent, parent, and child, determined that the visitation rights of Juanita with Hannah Grace would be in the best interest of the child (Hannah Grace). (R. 36).

The statute is clear and applies to this case. All the proof necessary under the statute was present and the lower Court did not err in deciding that Juanita was entitled to visitation.

After making that determination, the Chancellor took up the question as to the amount of visitation that should be granted pursuant to this statute. He took into consideration the factors as propounded by this Court in Martin and commented on other factors and circumstances that he felt appropriate, taking into consideration the witnesses, testimony, the evidence (or lack thereof) before the Court and the factual findings that he described in detail.

Contrary to what Appellant's argument seems to indicate, it is not incumbent upon a grandparent to meet the requirements of the Grandparent's Visitation Statute, and to show that the custodial parent was something near unfit as a parent in order to be entitled to reasonable visitation rights with a

grandchild. To add that burden to the decision-making process would render the statute useless in those cases where any fit parent, for whatever reason, withhold visitation between a child and its grandparent(s). As this Court has noted on at least one occasion, there is no language in this statute that a finding of the fitness of a parent is to be made. Woodell v. Parker, 860 So.2d 781, (Miss. 2003) at 787.

V. THE CHANCELLOR DID NOT ABUSE HIS DISCRETION BY AWARDING VISITATION TO THE GRANDPARENT DESPITE THE CHILD'S WISHES.

The Chancellor did not abuse his discretion by awarding visitation to the Grandparent, despite the Appellant's argument that the lower Court made its decision to do so on the premise that Hannah Grace's religious convictions were "dubious" and "brain-washing". The Court, for good reason, interviewed Hannah Grace in chambers at the conclusion of the testimony in open Court. While another statute, as cited by Appellant, allows a Chancellor to consider the preference of a child over the age of twelve (12) years to have some preference in choosing a custodial parent (MISS CODE ANN Section 93-11-65 (1)(a)), that statute (which addresses the custody and support of dependants)

is not applicable in this case. The Chancellor, as finder of fact, was able to observe the testimony and demeanor of the witnesses, and noted that the child was "very much under the emotional and psychological influence of her mother (Pamela) to the point of appearing "brainwashed". (R. 15). The Chancellor did not say, as Appellant argues, that Hannah Grace's religious convictions were dubious and brain washing. The lower Court did note that Hannah Grace's belief concerning her opinion about Juanita appeared to be the result that Pamela has "inculcated her with such a dubious notion". (R. 36).

Again, the Chancellor has the right to consider a number of factors in determining whether or not Juanita was entitled to visitation and if so, how much. There is nothing in the record to show that the Chancellor inserted his own religious beliefs to measure whether Hannah Grace's alleged anxiety over granting Juanita visitation was meritorious or dubious. The child's (Hannah Grace) testimony was considered by the lower Court and Appellee submits that deference should be given to that Court's determinations as to the weight

and creditability of the witnesses where there is conflicting testimony. Woodell at 785.

Appellee submits that if the parent and/or child have absolute veto power over the rights afforded to grandparents under the visitation statute, when the requirements of the statute and the Martin factors are favorable to the grandparent, what relief is afforded the grandparent?

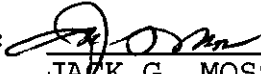
CONCLUSION

The Appellee, Juanita H. Lewis, submits that she was entitled to visitation pursuant to MISS CODE ANN Section 93-16-3 (2) and that she met all of the necessary elements as required by the Grandparent's Visitation Statute. There is no creditable evidence in the record undergirding the determinative findings of fact made by the Chancellor that Juanita was entitled to visitation with Hannah Grace. Furthermore, the Chancellor, after considering each of the Martin factors and the testimony of the parties and witnesses, did not abuse his discretion by granting Juanita such visitation as was awarded. Appellee respectfully requests that this Court affirm the decision of the

lower Court and dismiss this appeal accordingly.

Respectfully submitted this 25th day of July,
2008.

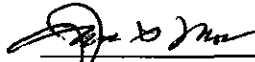
JUANITA H. LEWIS

BY: 
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Attorney for
Appellee

C E R T I F I C A T E

I, the undersigned Jack G. Moss, Attorney for Appellee, Juanita H. Lewis, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief to the Honorable William H. Singletary, Chancery Court Judge for the Fifth Chancery Court District, P.O. Box 686, Jackson, Mississippi 39205; to the Honorable Staci B. O'Neal, O'Neal Law Firm, 214 Key Drive, Suite 1100, Madison, Mississippi 39110, Attorney for the Appellant.

This the 25th day of July, 2008.



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