IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

HARRY VINSON — **PETITIONER**

VS. — **CAUSE NO. 2008-CA-00653**

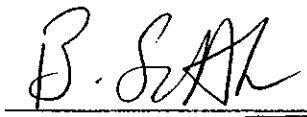
ELIZABETH VINSON VIDAL — **RESPONDENT**

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Harry Vinson, Appellant
2. B. Sean Akins, Attorney for Harry Vinson
3. Tracy Walsh, former Attorney for Elizabeth Vidal, Appellee
4. Christian Goeldner, Attorney for Elizabeth Vidal, Appellee
5. Randy Garner, former Attorney for Elizabeth Vidal, Appellee
6. Hon. Melvin McClure, original Trial Judge
7. Hon. Vicki Cobb, final Trial Judge.

This the 17th day of September, 2008.



B. SEAN AKINS, [redacted]
ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

A. Nature of the Case

Harry Vinson filed a Petition for Grandparents Rights in the Chancery Court of Desoto County, Mississippi. Chancellor Melvin McClure awarded temporary grandparents' visitation rights for more than two years. After Chancellor McClure's term ended, the case was transferred to his successor, Chancellor Vicki Cobb who suspended all visitation with the grandfather and ultimately ordered him to pay more than $18,000.00 in attorney's fees for the mother despite finding that the breakdown between the grandfather and the granddaughter was the mother's responsibility.

B. Course of Proceedings and Disposition of the Court Below

On August 19, 2004, Harry Vinson filed a Petition for Grandparents Visitation in the Chancery Court of Desoto County, Mississippi seeking visitation rights with his granddaughter, Reagan Vinson. The case was assigned to Chancellor Melvin McClure who ordered temporary visitation by order dated December 30, 2004. Chancellor McClure then expanded the visitation in subsequent orders until his last order dated March 7, 2006 which granted one Saturday per month for visitation with the minor grandchild. Chancellor McClure was defeated in his bid for re-election and Chancellor Vicki Cobb was assigned to the case beginning January 1, 2007. A trial was ultimately commenced on February 20, 2007 and concluded on its second day which was August 9, 2007. The Chancellor denied the Petition for Grandparent's Visitation and ordered the Petitioner/Grandfather to pay $18,226.79 in attorney's fees. The Petitioner filed a Motion to Reconsider on September 10, 2007 and an Amended Motion for Reconsideration on January 2, 2008 which was denied on March 28, 2008. The Petitioner filed a timely Notice of Appeal on April 14, 2008.

C. Statement of the Facts

Elizabeth Reagan Vinson (hereinafter "Reagan"), born January 27, 1994, is the daughter of Brad Vinson (hereinafter "Brad") and Elizabeth Vinson Vidal (hereinafter Elizabeth"). Brad Vinson is the son of the Petitioner, Harry Vinson (hereinafter "Harry"). Brad and Elizabeth separated when Reagan was an infant and a divorce was finally granted between the parties on grounds of irreconcilable differences in 1999 in Desoto County, Mississippi when Reagan was approximately five (5) years old. (T. 309, L. 23) During most of their separation, Brad was living in Union County, Mississippi and Elizabeth was living in Desoto County, Mississippi. Elizabeth testified about the turmoil that ensued while the divorce was pending. She described a rough relationship with Brad and Harry between 1996 and 1999 prior to the divorce being granted. Elizabeth described having to hire bodyguards and wear a bullet proof vest (T. 311, L. 1). While Elizabeth could not describe specific dates and times of her conflicts with Harry, individually, she agreed that she had not had any direct contact with Harry since 1999 and that Harry had not bothered her since 1999. (T. 317, L. 2). The transcript is replete with Elizabeth's general accusations against Harry. Most of the episodes she described arose from visitation conflicts between she and Brad. Significantly, all of the events she described occurred during Brad and Elizabeth's separation prior to 1999. Elizabeth also noted that in 1999, her other daughter, Jessica, died. On direct examination, Elizabeth testified that the last time that she had any communication with Harry was prior to Jessica's death on February 5, 1999. (T. 298, L. 8 - T. 299, L. 23).

After 1999, Brad received standard visitation with Reagan which he exercised regularly until his death on June 16, 2004. (T. 13, L. 16) (T. 15, L. 19 - T. 16, L. 7). Brad moved to Desoto County to be closer to Reagan shortly after the divorce was granted. During those weekend visits from 1999 until 2004, Harry and his granddaughter, Reagan, spent a great deal of time together visiting with

Brad. (T. 16, L. 20 - T. 18, L. 15). There was never any litigation of any sort between Brad and Elizabeth after the divorce was granted in 1999 regarding Reagan. There is no testimony or other evidence in the record of any conflict between Harry and Elizabeth since February 5, 1999.

Following Brad's death on June 16, 2004, Harry contacted Elizabeth about Reagan continuing to visit and she refused. On August 19, 2004, Harry filed a Petition for Grandparents Visitation Rights pursuant to Miss. Code Ann. Sec. 93-16-1 et seq. The case was assigned to Chancellor Melvin McClure who issued his first order on December 30, 2004, to permit Harry and Reagan to visit for two hours at a local restaurant. At the child's request, Chancellor McClure later entered an order granting visitation between Harry and Elizabeth with Elizabeth's step-father accompanying her. By all accounts, the visitations went well. Over the next two years, Chancellor McClure expanded the visitation to allow Reagan to visit with Harry on one Saturday per month. The visitation continued on one Saturday per month even after Judge McClure's last order expired.[1] At every temporary hearing, the Chancellor met with the child and dealt with any concerns that she had. During the pendency of the case, Elizabeth, her husband, and Reagan moved from Desoto County to Tishomingo County, Mississippi. Harry traveled to Tishomingo County from Union County every month to visit with Reagan.

Upon taking the bench following Chancellor McClure's defeat, Chancellor Vicki Cobb conducted the first day of the two day trial in February, 2007. Harry testified about the background facts and that he wanted more time with Reagan. The Court then took Reagan in chambers with counsel to consider her desires. By this time, Reagan was 13 years old and a seventh grader at Burnsville Middle School in Tishomingo County, Mississippi. She testified that she becomes

[1]Chancellor Melvin McClure was defeated for re-election in the fall of 2006 and refused to grant any hearings afterwards. Additionally, in the summer of 2006, he had health problems that prevented the case from being reset in the later part of 2006.

anxious when she has to see her grandfather. (T. 170 - 172). She said that she was scared of three of his dogs because she was bit by one of them when she was smaller. Reagan said that she was uncomfortable around men (T. 173 L. 4 - 6). However, she said that Harry had done nothing to make her feel uncomfortable and that she thought that Harry's girlfriend, Patty Young, was nice. (T. 173 L. 11 - 21). Reagan said that Harry had never been violent towards her. She placed the majority of her fears of Harry on things that she had been told by her mother and other relatives about Harry. She said, "He [Harry] was real mean to my dad and my mom and my grandparents. . .and I'm just scared if gets mad at me –."

The child confirmed that all of her current fears of her grandfather resulted from things that she had been told about him by other relatives. Consider this exchange between Harry's counsel and Reagan:

Q: And the source of that fear [of Harry] is really all of this history that people have told you about him, so that you would become scared of him?

A: Yes.

Q: Okay. And because of that you have never talked to him about any of that?

A: No, I haven't.

Q: And so you don't really know whether all of that history is true or not? You believe it obviously, right?

A: Yes.

Q: Okay. But you don't know that other than just the fact that your relatives have told you about that [Harry's past]?

A: Yes. And I don't think my family would ever lie to me.

(T. 180, L 5 - 19)

There was no testimony of any conflicts, problems, issues, complaint or otherwise that would justify Reagan being in fear of her grandfather other than statements made to her by her mother and

other relatives.

Mr. Akins : Why is it that you are so insistent that Reagan have just absolutely no contact with Harry Vinson at all today?

Elizabeth : She is terrified. Her nerves are shot. She needs a normal childhood. Her other grandparents don't put her through this. They love her just as much. I love my daughter. I don't want to see her suffer.

. . .

Mr. Akins : Okay. Let me say that again. You don't know personally of anything that you can say that he [Harry] has done improper during the entire two and one half years that he has visited with her [Reagan] on a very regular monthly basis?

Elizabeth : That I have seen?

Mr. Akins : Right

Elizabeth : No, I haven't been with them.

(T. 326, L. 3 - 26)

Elizabeth then went on to admit that during the two and one half years during which Harry visited with Reagan that Elizabeth lost her house due to foreclosure, separated from her husband due to marital problems and moved from Desoto to Tishomingo County. (T. 327 L. 1 - 19)

Mr. Akins : Okay. So I'm just trying to make the point that since Mr. Vinson has been visiting with Reagan your house was foreclosed on; your marriage with Mr. Vidal resulted in a separation; you had to relocate from Desoto County to Tishomingo County; Reagan had to establish new friendships; started a new school, and start a new church?

Elizabeth : You know why? But it doesn't make her nervous and throw up every – sick to her stomach either. She's –

Mr. Akins : I'm just asking you –

Elizabeth : She's not scared of that.

Mr. Akins : – is all of that true.

Elizabeth : Yes. Things happened. Yes.

In pages 332 of the trial transcript through the end of her cross examination on page 352, Elizabeth confirmed that Reagan is scared of Harry because of fears that relate to experiences between Elizabeth and Harry that happened in the 1990's. Elizabeth confirmed that Harry has not done anything to harm, endanger, intimidate, harass or otherwise bother her or Reagan since prior to 1999 other than the filing of this lawsuit for grandparent visitation. Elizabeth did not believe that she was contributing to Reagan's stress despite the aforementioned circumstances. She could not point to a single complaint that she had about the way that Harry had handled himself during the two and one half years that the visitation occurred.

Chancellor Cobb, in her bench ruling, made findings against both parties. The Chancellor said:

> And I stated all of those factors and I went over all of those factors because I have to go by the law, but the biggest concern that this Court has is what is in the best interest of Reagan, and I do not feel that it is in Reagan's best interest for her to continue at this point to have grandparent visitation.
>
> I don't think it is fair to traumatize a child and make her continue to have forced visitation, and this is where I was telling you earlier, Harry, I really want to encourage you to wait it out. She is 13 years old. She is a child.
>
> She is going to be a little bit older and a little more mature and you may miss a year of visitation with her, but children that age do not like to be pressured and ***she is already feeling pressure from Elizabeth not to go and to not want to have anything to do with Harry.***
>
> Whether, Elizabeth, you are saying it out loud or not she is feeling it. She is feeling pressure because she knows that y'all don't like each other. She is a little peace maker and she wants there to be peace and there is not peace when she is put in the middle of the conflict.
>
> (T. 414, L. 21 - T. 415, L. 24) (Emphasis added.)

Essentially, she found that Reagan did not want to visit with Harry primarily because of the history that was continually described by Elizabeth. In other words, despite Harry doing everything within his power to be a proper grandfather, Elizabeth had succeeded in instilling and retaining as

much fear as she possibly could for Reagan. In the end, the Chancellor determined that the best interest of Reagan would be served by discontinuing visitation entirely. Elizabeth won. She was able to so traumatize Reagan during periods of visitation that the Chancellor rewarded Elizabeth by ending the visitation.

The Chancellor then went on the require Harry to pay $18,226.79 in Elizabeth's attorney's fees.

STANDARD OF REVIEW

In a grandparents' rights case regarding the factual findings, "absent an abuse of discretion, this Court will not reverse the decision of the chancellor." *Martin v. Coop*, 693 So.2d 912, 914 (Miss.1997). "This Court will not disturb the factual findings of the chancellor unless said factual findings are manifestly wrong or clearly erroneous." Id. (citing *McAdory v. McAdory*, 608 So.2d 695, 699 (Miss.1992)).

Cited in *Solomon v. Robertson*, 980 So.2d 319, 321 (Miss.App.,2008)

Clearly, the Chancellor has discretion in the amount of attorney's fees when the Court has authority by statute to make an award. Regarding attorney's fees, "Unless the chancellor is manifestly wrong or has abused his discretion, his decision regarding attorney's fees will not be disturbed on appeal." *Zeman v. Stanford*, 789 So.2d 798, 806(¶ 30) (Miss.2001).

However, when the award of attorney's fees is dependent on a statute, the issues is a matter of law, not fact. In *Dobbins v. Coleman*, 930 So.2d 1246 (Miss. 2006), the Supreme Court affirmed a Chancellor's award of attorney's fees in a paternity case because they were specifically authorized by Miss. Code § 93-9-45. The Court outlined the legal standard by stating that the Supreme Court "will not disturb the findings of a chancellor unless the Court can say with reasonable certainty that the chancellor. . .applied an erroneous legal standard." Citing *Cummings v. Benderman*, 681 So.2d 97, 100 (Miss. 1996).

SUMMARY OF ARGUMENT

The Chancellor has discretion in the amount of attorney's fees when the Court has authority by statute to make an award. However, when the award of attorney's fees is dependent on a statute, the issues is a matter of law, not fact. The Chancellor did not make any finding of a financial hardship. She based her award of attorney's fees solely on the language of the statute. She applied an erroneous legal standard.

Harry was filing for grandparents rights pursuant to Miss. Code § 93-16-3(1) of the grandparent rights statute since his son, Brad, had died and was, therefore, absent as a parent. He no longer had the option of exercising his visitation with his granddaughter through Brad since Brad was dead. Miss. Code § 93-16-3(4) does not authorize an award of attorney's fees for cases filed pursuant to subsection 1 only subsection (2).

Subsection 4 says:

> (4) Any petition for visitation rights under ***subsection (2)*** of this section shall be filed in the county where an order of custody as to such child has previously been entered. If no such custody order has been entered, then the grandparents' petition shall be filed in the county where the child resides or may be found. The court shall on motion of the parent or parents direct the grandparents to pay reasonable attorney's fees 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 court may also direct the grandparents to pay reasonable attorney's fees to the parent or parents of the child and court costs regardless of the outcome of the petition. (Emphasis added.)

The statute's plain language as well as the legislative history clearly indicated that attorney's fees should only be awarded in cases where a grandparent is suing his own child and not in cases where the child is absent by death, loss of custody or termination of parental rights.

The Chancellor determined that Harry had been visiting with his granddaughter pursuant to the Court's temporary orders for two and one half years and that the child still was uncomfortable seeing him despite his best efforts. Neither the Chancellor nor Elizabeth could point to any action

that Harry had taken since 1999 that either of them saw as inappropriate. The Chancellor found that Reagan suffered physical and emotional problems by seeing Harry because her mother, Elizabeth, had continued to tell her about her history with Harry.

As a case of first impression in Mississippi, the Supreme Court is faced with a dilemma: Is it in the best interests of a grandchild to have a relationship with her grandfather where the grandfather and the parent have an adverse relationship but where the grandfather has done nothing improper towards the grandchild? The Chancellor answered the question by taking the drastic step of terminating the visitation entirely.

The grandparent/grandchild relationship should be protected where possible and the actions of the parent to create animosity between the grandchild and the grandparent should not trigger a termination of the visitation, it should trigger the Court's intervention to remove the animosity through restrictions, counseling, supervision or otherwise. The Chancellor abused her discretion in terminating the grandparent's visitation where he did nothing wrong.

ARGUMENT

ISSUE ONE

WHETHER THE CHANCELLOR ERRED AS A MATTER OF LAW IN DETERMINING THAT MISS. CODE § 93-16-3(4) AUTHORIZING ATTORNEY'S FEES APPLIES TO ALL GRANDPARENT RIGHTS CASE INSTEAD OF CASES LIMITED TO THOSE BROUGHT UNDER SUBSECTION 2 AS THE STATUTE CLEARLY STATES?

In the early 1980's Mississippi, along with other states, adopted statutes to permit grandparents certain rights to petition for visitation with their grandchildren. The Mississippi version of the statute was codified at Miss. Code § 93-16-3. The original 1983 version stated:

> (1) Any court of this state which is competent to decide child custody matters shall have jurisdiction to grant visitation rights with a minor child or children to the grandparents of such minor child as provided herein.
>
> (2) Whenever a court of this state enters a decree or order terminating the parental rights of one of the parents of a minor child, or whenever one of the parents of a minor child dies, either parent of the child's parents whose parental rights have been terminated or who has died may, but not sooner than one hundred twenty days after entry of such decree or order or after the death of the parent, petition the court in which the decree or order was rendered or, in the case of the death of a parent, petition the chancery court in the county in which the child resides, and seek visitation with such child.

Subsection 3 of the statute then identified who the proper parties would be. The history of this statute is significant because the original statute is different from the current statute in two significant ways. First, the original statute only allowed a petition for grandparent visitation based upon an absent parent due to death or termination of parental rights. In other words, a grandparent whose own child was simply refusing to allow the grandparent to visit with the grandchild had no cause of action. Additionally, the statute made no provisions for attorneys fees.

The simple Legislative intent derived from the original statutes was to permit a grandparent to 'stand in the shoes' of their absent child so that the grandparents could maintain a viable relationship with the grandchild with the child who had previously lost a parent by virtue of death

or termination. Since grandparents traditionally maintain a relationship with their grandchildren via a relationship with their own children, then the Legislature wanted to create a way for grandparents to see their grandchildren when their own children were absent.

The statute was amended in 1986 to add the cause of action to those parents who became absent due to a loss of custody. The 1986 version of Miss. Code § 93-16-3(1) stated:

> (1) Whenever a court of this state enters a decree or order awarding custody of a minor child to one (1) of the parents of the child or terminating the parental rights of one (1) of the parents of a minor child, or whenever one (1) of the parents of a minor child dies, either parent of the child's parents who was not awarded custody or whose parental rights have been terminated or who has died may petition the court in which the decree or order was rendered or, in the case of the death of a parent, petition the chancery court in the county in which the child resides, and seek visitation rights with such child.

Paragraph 1 of the statute as it was adopted in 1986 remains the current form of the statute. It is significant to note that the statute did not make any provision for attorney's fees in that form.

In 1990, the statute was again amended to add a totally different cause of action that did not involve an absentee parent who had died, lost custody or had his parental rights terminated. The 1990 version added a cause of action to permit grandparents to sue their own children for visitation with their grandchildren. The statute only permitted those grandparents who were suing their own children to prove that the grandparents already had a viable relationship with their grandchild and that the parents were being unreasonable in allowing the grandparents to visit. The statute also mandated that if a grandparent sued his own child, then the grandparent must first pay the attorney's fees for their own children in advance unless the Court finds that the parents can afford their own lawyer. The statute is designed to prevent a wealthy grandparent from suing his own, poor child to seek visitation with his grandchild.

Sections 2, 3 and 4 of the statutes that were added in 1990 say:

> (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.

(4) Any petition for visitation rights under subsection (2) of this section shall be filed in the county where an order of custody as to such child has previously been entered. If no such custody order has been entered, then the grandparents' petition shall be filed in the county where the child resides or may be found. The court shall on motion of the parent or parents direct the grandparents to pay reasonable attorney's fees 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 court may also direct the grandparents to pay reasonable attorney's fees to the parent or parents of the child and court costs regardless of the outcome of the petition.

Clearly, subsection 4 of the statute sets for the procedure for dealing with cases filed pursuant to subsection 2. Subsection 4 first established the proper venue for cases filed by grandparents against their own children and then directs the grandparent to post the attorney's fees in advance. The subsection also allows the Court to assess attorneys fees regardless of the outcome.

In the case *sub judice*, Harry was filing for grandparents rights pursuant to subsection 1 of the statutes since his son, Brad, had died and was, therefore, absent. He no longer had the option of exercising his visitation with Reagan through Brad since Brad was dead. Subsection 4 does not authorize an award of attorney's fees for cases filed pursuant to subsection 1.

Chancellor Cobb required Harry to pay more than $18,000.00 in attorneys fees for Elizabeth based upon subsection 4. The Chancellor acknowledged that she might be wrong in her

interpretation that subsection 4 permitted her to assess attorney's fees even when the case was filed pursuant to subsection 1. She said, "So based on my interpretation of this section [subsection 4] with regards to attorney's fees, I'm going to assess Elizabeth's attorney's fees against Mr. Vinson and award her a judgment in the amount of . . .$18,226.79."

Harry acknowledges that an award of attorney's fees is largely in the discretion of the Chancellor. See *Morgan v. West*, 812 So.2d 987 (Miss. 2002). Clearly, the Chancellor has discretion in the amount of attorney's fees when the Court has authority by statute to make an award. However, when the award of attorney's fees is dependent on a statute, the issues is a matter of law, not fact. The Chancellor did not make any finding of a financial hardship. She based her award of attorney's fees solely on the language of the statute. She applied an erroneous legal standard.

In *Dobbins v. Coleman*, 930 So.2d 1246 (Miss. 2006), the Supreme Court affirmed a Chancellor's award of attorney's fees in a paternity case because they were specifically authorized by Miss. Code § 93-9-45. The Court outlined the legal standard by stating that the Supreme Court "will not disturb the findings of a chancellor unless the Court can say with reasonable certainty that the chancellor. . .applied an erroneous legal standard." Citing *Cummings v. Benderman*, 681 So.2d 97, 100 (Miss. 1996).

The Chancellor relied on *Zeman v. Stanford*, 789 So.2d 798 (Miss. 2001) for the proposition that attorney's fees should be awarded under subsection 4 even in a subsection 1 case. In *Zeman*, the natural parent was denied attorney's fees because the trial court found that he had an ability to pay and was not under a financial hardship. However, *Zeman* never addressed that particular issue regarding whether subsection 4 even applied. The question of whether the Legislature intended for all grandparents in all grandparent rights cases to be required to post attorney's fees in advance where the parent has an ability to pay has never been considered by this court. The statute's plain language as well as the legislative history clearly indicated that attorney's fees should only be

awarded in cases where a grandparent is suing his own child and not in cases where the child is absent by death, loss of custody or termination of parental rights.

WHETHER THE CHANCELLOR ERRED IN TERMINATING THE GRANDPARENT'S VISITATION BECAUSE THE GRANDCHILD'S MOTHER HAD SUCCESSFULLY PLACED SO MUCH EMOTIONAL STRESS ON THE CHILD THAT THE CHILD DID NOT WANT TO VISIT HER GRANDFATHER.

The recent case of *Soloman v. Robertson*, 980 So.2d 319 (Miss. 2008) outlined the legal requirements to award grandparent visitation.

> It is well settled that "natural grandparents have no common-law 'right' to visitation with their grandchildren. Such right, if any, must come from a legislative enactment." *In re Adoption of Minor*, 558 So.2d 854, 856 (Miss.1990) (citing *Olson v. Flinn*, 484 So.2d 1015, 1017 (Miss.1986)). In 1983, the Mississippi Legislature enacted the grandparents' visitation rights statutes, codified at Mississippi Code Annotated sections 93-16-1 to 93-16-7 (Rev.2004). These statutes outline how a grandparent may seek the opportunity to secure visitation with a grandchild.

There is no doubt that Harry qualifies as a grandparent who is authorized by Miss. Code Section 93-16-3 to petition for grandparent rights since his son, Brad, died leaving Harry's granddaughter, Reagan. Pursuant to the statute, Harry is required to prove that his visitation with Reagan would be in her best interests.

> Although a grandparent has standing to petition for visitation, a natural grandparent's statutory right to visit her grandchild is not as comprehensive as a parent's visitation rights. *Settle v. Galloway*, 682 So.2d 1032, 1035 (Miss.1996). As always, the best interests of the child are the paramount consideration when determining visitation. *Morgan v. West*, 812 So.2d 987, 992(¶ 13) (Miss.2002). In *Martin v. Coop*, 693 So.2d at 916 (Miss. 1997) the Mississippi Supreme Court listed ten factors which should be considered in determining grandparent visitation. The 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.

The Chancellor appropriately addressed each of these factors when considering her decision to end Harry's right to visitation with Reagan. In reviewing each factor, the Chancellor determined that Harry had been visiting with his granddaughter pursuant to the Court's temporary orders for two and one half years and that the child still was uncomfortable seeing him despite his best efforts. Neither the Chancellor nor Elizabeth could point to any action that Harry had taken since 1999 that either of them saw as inappropriate. The Chancellor found that Reagan suffered physical and emotional problems by seeing Harry because her mother, Elizabeth, had continued to tell her about her history with Harry. The Chancellor encouraged Harry to "wait it out" (T. 415, L. 5 - 6) and mend his fences with Elizabeth. The Chancellor encouraged the parties to try to get along but, in the end, she refused to require any further contact between Harry and his granddaughter. The Chancellor said, "I just do not feel like it's in her best interest to make her feel sick for a week before she has to go to visitation and to make her feel sick after that." Both Reagan and Elizabeth confirmed that the reason that Reagan felt sick before and after visitation was the fears that Elizabeth and her family had placed in Reagan's head. The Chancellor found that "children that age do not like to be pressured and she [Reagan] is already feeling pressure from Elizabeth to not go and to not want to have anything to do with Harry. (T. 415, L. 13 - 14). None of the factor favored against Harry having visitation except that the child was found to not be close to Harry which was caused primarily from Elizabeth's continued efforts to alienate Reagan from Harry.

As cited above, the rights of a grandparent are not the same as the rights of a natural parent. However, the same "best interests" test has been applied to all custody cases whether they are between parents or between a grandparent and a parent. The Court has previously stated in Martin

that the list of factors is non-inclusive. The Chancellor should have given some weight to the fact that the reason for the alienation of Reagan from Harry was because of the Chancellor's findings that Elizabeth was the cause.

Mississippi has never addressed a situation where a grandchild has be alienated from his grandparent because the grandchild's parent and the grandparent hate each other. However, the issue has been addressed many times in cases between parents. One of the most recent cases involving parental alienation is *Ellis v. Ellis*, 952 So.2d 982 (Miss. 2006) which involved a custody fight between two parents where Ms. Ellis had continually refused to give Mr. Ellis his visitation. The Chancellor eventually took custody because of her continued refusal to follow the visitation schedule. The Court restated that "a non-custodial parent's right to visitation has been described a 'a right more precious than any property right." *Ellis* at 994 citing *Mord v. Peters*, 571 So.2d 981, 983 (Miss. 1990).

While Elizabeth in the case *sub judice* followed the visitation schedule, the Chancellor found that she was undermining any hope of Reagan having a meaningful relationship with her grandfather. In other words, Elizabeth was turning Reagan against Harry because of Elizabeth's hatred toward Harry and not because of anything that Harry had actually done to Reagan. The Court in *Ellis* noted that interference with visitation between a parent and child should be normally handled to contempt rather than modifying custody to the innocent parent. This case is an example of how a court can handle interference with a parent/child relationship. It is significant to note that despite the child being in the middle, there has never been a case where the solution was to terminate the relationship between the child and the non-custodial parent simply because the custodial parent had successfully turned the child away from the non-custodial parent. Put another way, the Courts have taken the position that if the mother turns the child against the father, then the father is still entitled to visitation and the courts should take action against the mother to stop the interference. Instead, the

Chancellor in the case *sub judice*, has taken the opposite approach. Instead of admonishing Elizabeth to encourage Reagan to visit with Harry despite Elizabeth's hatred of him, the Chancellor simply ended the visitation entirely and told the grandfather to wait it out and hope that Reagan would want to visit with him after she became free of Elizabeth.

As a case of first impression in Mississippi, the Supreme Court is faced with a dilemma: Is it in the best interests of a grandchild to have a relationship with her grandfather where the grandfather and the parent have an adverse relationship but where the grandfather has done nothing improper towards the grandchild? The Chancellor answered the question by taking the drastic step of terminating the visitation entirely. Despite having two and one half years of peaceful visitation with his granddaughter, the Chancellor chose to condone Elizabeth's behavior by ending the visitation instead of attempting to place any restriction, condition or otherwise on Elizabeth to try to help Reagan obtain a peace from the visits.

The evidence was uncontradicted that once Reagan was with Harry and Patty for the visitation, they had fun. Reagan described many of the visits including a trip to the veterinarian school at Mississippi State University. While Reagan was quick to point out that she did not want to go, her reasoning always went back to the fact that according to Elizabeth, Harry was mean and Reagan should be afraid of him.

The Mississippi Legislature has already adopted the same standard for visitation for non-custodial parents as it adopted for grandparents. The best interest of the minor child should always control. There has never been a case in Mississippi where it was in the best interest of a child or grandchild to have no relationship with the non-custodial parent or, in this case, grandparent, where the animosity by the child towards the non-custodial parent was caused by the custodial parent's dislike of the non-custodial parent or grandparent. To condone the Chancellor's decision would

create a simple rule for future grandparent rights' cases: If you don't want your kid to have to visit with their grandparent, then create as much unreasonable fear as possible so that the kid will not want to go. In *Touchstone v. Touchstone*, 682 So.2d 374 (Miss. 1996) the mother created an erroneous fear in the child of his father by convincing the child she had been sexually abused. There is no doubt such a fear made visitation fearful for the child since she was lead to believe that her father had molested her. Under Chancellor Cobb's logic, the Court should have terminated his visitation because the child felt frightened of his father. Instead, the Court in *Touchstone* referred to the child as a "pawn in his parents' games" but did not consider terminating the father's visitation as a valid option.

Court's in other states have written extensively about the importance of grandparents having visitation with their grandchildren over the objection of the parents, but a majority of the states have adopted statutes designed to give visitation to grandparents where their own child is absent such that the grandparents have no other way to visit. For example, the Nevada courts noted that all grandparent rights cases evolve from some sort of dispute between the parent and grandparent over the grandchild and that such conflict should not interfere with the grandchild/grandparent relationship:

> The common law rule against coercing grandparent visitation over parental objection demonstrates a respect for family privacy and parental autonomy. . . . It also recognizes that the parenting right is a fundamental liberty interest that is protected against unwarranted state intrusion. See *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982).
>
> The court went on to explain the legislative purpose and the derivative nature of the grandparental rights, stating:
>
> [The statute] was enacted to ameliorate the harshness of the common law in situations where grandparents could not seek derivative visitation rights from the parent who is their child. In those situations some event has taken the grandchildren from the custody of the parent from whom the grandparents would normally receive access to their grandchildren. The statutory exceptions thus presuppose a disruption

> of the family unit that deprives the grandparents of that natural avenue for seeking visitation. They envision a dispute over visitation between the grandparents and a custodian of the children who is not the child of the grandparents.
>
> *Steward v. Steward*, 890P.2d 777, 780 (Nev. 1995)

The grandparent/grandchild relationship should be protected where possible and the actions of the parent to create animosity between the grandchild and the grandparent should not trigger a termination of the visitation, it should trigger the Court's intervention to remove the animosity through restrictions, counseling, supervision or otherwise. The step of terminating visitation after two and one half years of success was an abuse of discretion.

As the South Carolina court noted:

> In our view, the allowance of grandparental visitation rights where such visitation is in the grandchild's best interests is a way of recognizing the value of kinship. Ingulli, Grandparent Visitation Rights: Social Policies and Legal Rights, 87 W. VA. L. REV. 295, 305 (1985). And few would argue with these observations by the Supreme Court of New Jersey regarding most grandparents and the role that they ordinarily play in a child's life:
>
> Grandparents ... are not authority figures and do not possessively assert exclusive rights to make parental decisions. At best, they are generous sources of unconditional love and acceptance....
>
> .....
>
> It is a biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms...Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship.
>
> *Mimkon v. Ford*, 66 N.J. 426, 437, 332 A. (2d) 199, 204 (1975).
>
> Cited in *Brown v. Earnhardt*, 302 S.C. 374 (1988)

The Chancellor believed that if she ended the mandatory visitation between Harry and Reagan, then at some point in the future the Chancellor believed that Reagan would come around

and want to visit. The Chancellor said:

> You are her connection to her daddy. I understand that and she understands that. And I am a firm believer in the fact that given time things work out. It may seem devastating right now but I feel like if you give it time and you don't push it she will come around. I just really believe that and I think things will work out.

(T. 416 L. 9 - 18).

Clearly the Chancellor would have committed reversible error to make the same statement to a non-custodial parent. The same standard for 'best interest' should be applicable to grandparents rights, as well.

CONCLUSION

The Court should reverse the decision of the Chancery Court of Desoto County which terminated the grandparent visitation of Harry Vinson with his granddaughter, Reagan and should remand the case for additional findings to reinstate visitation upon whatever conditions are necessary to prevent Elizabeth from continuing to interfere with the visitation. Additionally, the Court should reverse the judgment for attorneys' fees which were not allowable pursuant to the statute.

THIS, the 17th day of September, 2008.

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

I, B. Sean Akins, attorney of record for Appellant, do hereby certify that I have this day mailed, through United States Mail, proper postage prepaid, a true and correct copy of the foregoing **APPELLANT'S BRIEF** to the following:

Chancellor Vicki Cobb
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SO, CERTIFIED, this, the 17th day of September, 2008.

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