IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUPREME COURT NO. 2009-CA-00534

RICKEY LEN CONERLY AND LINDA R. CONERLY

APPELLANTS

VS.

NAN B. DAVIS
APPELLEE

APPEAL FROM THE CHANCERY COURT OF AMITE COUNTY, MISSISSIPPI
HONORABLE DEBBRA HALFORD, PRESIDING

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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RICKEY LEN CONERLY AND
LINDA R. CONERLY **APPELLANTS**

VS. **SUPREME COURT NO. 2009-CA-00534**

NAN B. DAVIS **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee, Nan B. Davis, in accordance with Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, certified that the following listed persons have an interest in the outcome of this case. These representations are made in order so the Justices of this Court may evaluate possible disqualifications or recusal.

1. Honorable Debbra K. Halford, Chancellor, Fourth Chancery Court District, Post Office Box 575, Meadville, Mississippi 39649;
2. Honorable Wayne Smith, Attorney for Appellants Rickey Len Conerly and Linda R. Conerly, Post Office Box 525, Liberty, Mississippi 39645;
3. Rickey Len Conerly and Linda R. Conerly, Appellants;
4. Nan B. Davis, Appellee;
5. Mason Connor Conerly, paternal grandson of Nan B. Davis; and,
6. Sherry Conerly, natural mother of Mason Connor Conerly.

SO CERTIFIED this the 16th day of February, 2009.

RONALD L. WHITTINGTON
Attorney for Appellee Nan B. Davis

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RICKEY LEN CONERLY AND
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VS. — SUPREME COURT NO. 2009-CA-00534

NAN B. DAVIS — APPELLEE

BRIEF OF APPELLEE

STATEMENT OF ISSUES

This appeal follows the ruling of the Chancery Court of the Fourth Chancery Court District, Amite County, Mississippi that Nan B. Davis ("Mrs. Davis"), the paternal grandmother of Mason Connor Conerly ("Mason"), was entitled to visitation with her grandson for three (3) visitation periods of not less than five (5) hours per visit, pending further review and subsequent order of the court.

As a matter of law, Mrs. Davis qualified as a grandparent entitled to visitation under the provisions of § 93-16-3(1), Miss. Code Ann. (Rev. 2009).

The issues before this Honorable Court are:

1. **DID THE CHANCELLOR ERR IN DETERMINING THAT MRS. DAVIS WAS ENTITLED TO GRANDPARENT VISITATION PURSUANT TO § 93-16-3(1)?**

2. **WAS THE CHANCELLOR MANIFESTLY WRONG OR GUILTY OF AN ABUSE OF HER DISCRETION IN FIXING VISITATION WITH THE GRANDMOTHER, NAN B. DAVIS, FOR THREE (3) PERIODS OF VISITATION PER MONTH TOTALING A MINIMUM OF FIFTEEN (15) HOURS PER MONTH?**

STATEMENT OF THE CASE

This appeal is taken from an order rendered on March 6, 2009 by the Chancery Court of the Fourth Chancery Court District, Amite County, Mississippi. The order granted Mrs. Davis grandparent's visitation rights.

Mrs. Davis filed her complaint on April 7, 2006. The Appellants, Rickey Len Conerly and wife, Linda R. Conerly, adoptive parents of the child involved, Mason, thereafter filed an answer and counterclaim. The answer denied that Mrs. Davis should be awarded visitation rights and the counterclaim sought an award of attorney fees payable to them by Mrs. Davis.

On August 13, 2007, an agreed temporary order was entered by the court wherein the parties agreed to participate in family counseling. The purpose of the agreed order and counseling provided for therein was "to allow Dr. Pat Brawley to determine a possible course of action to allow Nan B. Davis grandparent visitation . . ."

Dr. Brawley issued two (2) reports after the agreed order, same dated July 15, 2007 and February 2, 2008 respectively.

Trial commenced and concluded on March 5, 2009.

The referenced reports were admitted into evidence, along with other exhibits, without objection. The record, through pleadings, admissions in pleadings, testimony and judicial notice of the court, established that Mrs. Davis' son, Charles Davis, was the natural father of Mason Connor Conerly; that Rickey Len Conerly and Linda R. Conerly adopted Mason on April 19, 1999; and, that the natural father's parental rights were terminated by the decree of adoption. (CP 1-8, 25-29, T.R. 66).

At the conclusion of the trial, the court took the matter under advisement and on March 6, 2009, entered its order which produces this appeal. Neither side requested that the court make

findings of fact and conclusions of law prior or subsequent to the March 6, 2009 order.

SUMMARY OF THE ARGUMENT

The Chancellor properly concluded that Mrs. Davis' right to grandparents visitation is found in Miss. Code Ann. § 93-16-3(1) (Rev. 2009). The most recent amendment to this subsection, effective July 1, 2009, does not impact Mrs. Davis' standing and legislative rights. The provisions of Section 93-16-3(2) and (3) do not apply if Section 93-16-3(1) does. The Conerlys' arguments based on "viable relationship" have no relevance to and are not outcome determinative of Mrs. Davis' right to visitation. At most, such evidence could relate only to the appropriate measure or amount of visitation to be awarded in the discretion of the Chancellor.

The testimony elicited by counsel and all of the exhibits, except the Conerlys' attorney fee bill, addressed the factors listed in *Martin v. Coop*, 693 So.2d 912 (Miss. 1997). Further, the court's own questioning of several of the witnesses, including the child, clearly and directly addressed the *Martin* factors. The award of fifteen (15) hours of visitation per month, divided into three (3) separate periods was reflective of and consistent with the not all-inclusive factors identified in *Martin*. The Chancellor was neither manifestly wrong nor abusive of her discretion in the order of March 6, 2009 .

The judgment of the lower court should be affirmed.

ARGUMENT

I. DID THE CHANCELLOR ERR IN DETERMINING THAT MRS. DAVIS WAS ENTITLED TO GRANDPARENT VISITATION PURSUANT TO § 93-16-3(1)?

This court is well familiar with the rights of grandparents for visitation privileges with a grandchild. There were no legal rights for grandparents' visitation at common law. *Olson v. Flinn*, 484 So.2d 1015 (Miss. 1986).

These rights, since 1983, have had their source in legislation and became effective in 1983. Miss. Code Ann. Section 93-16-3(1) constitutes the bases for Mrs. Davis' right in this case and this section states:

> **(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 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.**

Mrs. Davis' son's parental rights were terminated by the April 19, 1999 decree of adoption of Mason Connor Conerly by Rickey Len Conerly and Linda S. Conerly. (CP 5-8, T.R. 66)

This issue of law was decided clearly in *Solomon v. Robertson*, 980 So.2d 319 (Miss. 2008). Like *Solomon*, the Conerlys argue incorrectly that Mrs. Davis failed to prove a viable relationship between her and her grandson.

As in *Solomon*, this argument is without basis in the statute and must fail. The *Solomon* court held:

> **However a chancellor needs only address section 93-16-3(2) and (3) if section 93-16-3(1) does not apply. As mentioned above, Robertson's situation as addressed by section 93-16-3(1) because Boyd, her son, was not awarded custody. Solomon's argument in this instance is without merit.**

980 So.2d at 322 ¶ 6.

Likewise, Mrs. Davis' situation is address by Section 93-16-3(1) because the parental rights of Charles, her son, were terminated by the adoption of his child, Mason. In the case at bar there was and is no requirement of proof of a viable relationship as a condition precedent to Mrs. Davis

seeking and receiving a grandparent's visitation right.

Mrs. Davis's position is bolstered and confirmed by the Mississippi Supreme Court decision in *Martin v. Coop*, 693 So.2d 912 (Miss. 1997). The application of Section 93-16-3(1) is legally correct. The only difference in *Martin* and this appeal is that the Coops' son had died while Mrs. Davis' son's parental rights had been terminated.

The *Martin* court wrote:

> **Section 93-16-3(1) of the Mississippi Code Annotated provides that when a parent "of a minor child dies, either parent of the child's parents who ... has died may petition the ... chancery court in which the child resides, and seek visitation rights with such child." Miss. Code Ann. § 93-16-3(1) (1994 rev. ed.). The chancellor in this case found that under this section the petitioners are in fact the grandparents of Jesse and that their son is deceased. Thus, all the proof necessary under § 93-16-3(1) was present and, therefore, the grandparents should be awarded visitation. The statute reads very clearly and applies to this case. The grandparents had a statutory right to petition the court to grant them visitation and they proved the necessary facts. Thus, the chancellor did not err in granting the grandparents visitation.**

693 So.2d at 914.

This same, correct result was obtained by the chancellor in this case.

II. WAS THE CHANCELLOR MANIFESTLY WRONG OR GUILTY OF AN ABUSE OF HER DISCRETION IN FIXING VISITATION WITH THE GRANDMOTHER, NAN B. DAVIS, FOR THREE (3) PERIODS OF VISITATION PER MONTH TOTALING A MINIMUM OF FIFTEEN (15) HOURS PER MONTH?

The review by this court of the chancellor's decision is one of manifest error or abuse of discretion. Unless the factual findings of the chancellor are manifestly wrong or clearly erroneous this court will not disturb those findings. *Martin v. Coop, supra* at 914; *McAdory v. McAdory*, 608 So.2d 698, 699 (Miss. 1992). This is applicable in grandparent visitation cases. See *Woodell v.*

Parker, 860 So.2d 781, 785 (Miss. 2003). And, in matters concerning grandparents visitation, a chancellor is afforded a wide range of discretion. See *Settle v. Galloway*, 682 So.2d 1032 (Miss. 1996) and *Vinson v. Vidal*, 2009-MS-0624.1695 decided June 23, 2009.

The trial record addresses all the *Martin* factors. The testimony shows that three five-hour visits per month would not disrupt Mason's activities, school or extra curricular. Exhibit P-4 and Mrs. Davis' testimony prove the suitability of her home. (T.R. 9). The child was eleven at the time of trial and in good physical and mental health. (T.R. 62, 84). Mrs. Davis testified of her love for Mason and her ties to him. (T.R. 14, 15). Mason testified before the chancellor stating that his interim contact with his grandmother, assisted by Dr. Brawley, went well. He said he was somewhat nervous, not unlike nervousness before a math test. The moral fitness of Mrs. Davis was not questioned in any way. Approximately twenty miles separate Mrs. Davis and the Conerlys home. (T.R. 61). Mrs. Davis testified that she had disciplined Mason only one time and then in an appropriate way. (T.R. 24). Mrs. Davis manages rental properties and that work was not suggested to render her compromised in visiting with her grandson. (T.R. 23, 24, 32, 71). Factor 10: "The willingness of the grandparents to accept that the rearing of the child is the responsibility of the parent, and that the parents' manner of child rearing is not to be interfered with by the grandparents." The following is Mrs. Davis' answer to this factor:

Q Mrs. Davis, you understand that Mr. and Mrs. Conerly are the parents, the legal mother and father of Mason today; don't you?

A Yes.

Q You have no quarrel with that, do you?

A No.

Q Do you wish to have visitation to in any way interfere with their love, affection, care, and nurturing of their child Mason?

A Absolutely not.

Q Okay. As Mr. Smith pointed out and you are aware through third parties Mason has a good extracurricular activity, as well as his school activity, correct?

A Yes.

Q Would you in any way want to interfere with that or disrupt that?

A No.

Q Is there any problem with your health or your age or your physical condition that would impede or in any way compromise your ability to visit with this child?

A No.

(T.R. 32).

Martin and its prodigy have never admonished or required that an on the record finding on each factor is required. The factors are some--not all--circumstances that should be considered in setting a visitation schedule. By statute, section 93-16-5 Miss. Code Ann. and case law, the chancellor has appropriately wide discretion in determining how to serve the best interest of the child. In this case, the chancellor determined how to serve Mason's best interest by visitation with his grandmother.

The precedent of *Ferguson v. Lewis*, 2009-MS-0506.160, decided May 5, 2009, directs the result here.

> **We conclude that this matter was within the discretion of the chancellor. Miss. Code Ann. § 93-16-5. The chancellor's discretion was broad, and this court will not disturb the chancellor's findings unless the chancellor was manifestly wrong, abused his discretion, or applied an erroneous legal standard. *Andrews v. Williams*, 723 So.2d 1175, 1177 (¶7) (Miss. Ct. App. 1998) (citing *Sandlin v. Sandlin*, 699 So.2d 1198, 1203 (Miss. 1997)). Based on the evidence presented, we cannot find that the chancellor was manifestly wrong, abused his discretion, or applied an erroneous legal standard. *Glass v. Glass*, 726 So.2d 1281, 1284 (¶11) (Miss. Ct. App. 1998). Accordingly, the chancellor's judgment is affirmed.**

2009-MS-0506.160 at ¶ 20.

Mrs. Nan Davis is a grandmother who loves her grandson, Mason, and wants to be a small but significant part of his life. Mason is a significant part of Nan's life. The evidence in this case personifies what the Legislature addressed in the Grandparents Visitation Rights Statute. Pursuant to our statutory and case law, this relationship should be fostered as best the law can.

CONCLUSION

The chancellor was not manifestly wrong, she did not abuse her discretion nor did she apply an erroneous legal standard. Her judgment should be affirmed.

Respectfully submitted,

APPELLEE NAN B. DAVIS

BY: _____

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CERTIFICATE OF SERVICE

I, Ronald L. Whittington, attorney for Appellee Nan B. Davis, do hereby certify that I have this date mailed, United States Mail, postage prepaid, a true and correct copy of the above and foregoing *BRIEF OF APPELLEE* to:

Honorable Debbra K. Halford
Chancellor of the Fourth Chancery Court District
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Honorable Wayne Smith
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Attorney for Appellants Rickey Len Conerly and Linda R. Conerly

Kathy Gillis, Clerk
Supreme Court of Mississippi
Court of Appeals
Post Office Box 249
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THIS the 16th day of February, 2010.

RONALD L. WHITTINGTON