

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICKEY LEN CONERLY AND
LINDA R. CONERLY,

Appellants

vs.

Supreme Court No.:
2009-CA-00534

NAN B. DAVIS,

Appellee

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

BRIEF OF APPELLANTS
ORAL ARGUMENT NOT REQUESTED

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RICKY LEN CONERLY AND
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record, in accordance with Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, 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 may evaluate possible disqualifications or recusal.

Rickey Len Conerly and Linda R. Conerly, Appellants


Wayne Smith, Attorney for Appellants

Nan B. Davis, Appellee

Ronald L. Whittington, Attorney for Appellee

Honorable Debbra K. Halford, Chancellor

Fourth Chancery Court District



WAYNE SMITH

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STATEMENT OF THE ISSUES

1. Did the Chancellor err in her ruling by not following the dictates of Section 93-16-3 of the MS Code of 1972, Annotated, as amended, in determining whether a viable relationship existed between Nan B. Davis and Mason Connor Conerly?

2. Did the Chancellor err in failing to specifically address the *Martin* factors relevant to the award of grandparent visitation?

STATEMENT OF THE CASE

This is a cause of action that was filed by Nan B. Davis against Rickey Lynn Conerly and Linda R. Conerly as a petition for grandparent's visitation. The petition in this case was duly filed with the Chancery Court of Amite County, Mississippi on April 7, 2006.

The history of this case is that Rickey Lynn Conerly and Linda R. Conerly had adopted their grandson, Mason Connor Conerly, by a Final Decree of Adoption with the Chancery Court of Amite County, Mississippi dated April 19, 1999. That the child was the biological son of Charles E. Davis Jr. and Sherry Lynn Conerly (formerly Davis). That the Final Decree of Divorce of Charles E. Davis Jr. and Sherry Lynn Conerly (formerly Davis) was entered by the Chancery Court of Amite County, Mississippi, on the 19th day of April, 1999.

Sometime beginning in March 2001, Sherry Lynn Conerly and Charles E. Davis Jr. began living together and did so until May 2005. That Nan B. Davis is the mother of Charles E. Davis Jr. That she saw the minor child on different occasions during the time that Sherry Lynn Conerly and Charles E. Davis Jr. were living together.

The Charles E. Davis Sr. was the father of Charles E. Davis Jr. and the husband of Nan B. Davis. That Charles E. Davis Sr. died in December 2004. That immediately following the death of

Charles E. Davis Sr., there was little, if any, visitation by Nan B. Davis with the minor child.

The suit for grandparent visitation and other relief was filed by Nan B. Davis on April 7, 2006 stating that Nan B. Davis had a close and loving relationship with the minor child and it would be harmful for her to be denied visitation with the child. Further, that pursuant to Section 93-16-3 of the MS Code 1972, Annotated, as amended, that she should be allowed grandparent visitation in that she had a viable relationship with the child.

That an Order dated March 6, 2009, establishing grandparent's visitation for Nan B. Davis was entered in this cause of action on March 6, 2009 by the Chancery Court of Amite County, Mississippi. From this order Rickey Len Conerly and Linda R. Conerly appeal.

SUMMARY OF THE ARGUMENT

The two (2) issues which the Appellants claim to be in error by the Chancellor basically deal with MS Code Section 93-16-3 and the case law which deals with the *Martin v. Coop*, 693 So.2d 912, and the application of the *Martin* factors dealing with grandparent visitation.

It is the contention of the Appellants that the proof presented by Nan B. Davis was insufficient to comply with Section 93-16-3 of the MS Code 1972, Annotated, as amended. That a ruling by the Chancellor should have included and followed the dictates of MS Code Section 93-16-3 and if, in fact, a viable relationship existed, then the second prong of the test would be the application of the *Martin* factors to award grandparent's visitation.

The Appellants would show that Nan B. Davis did not provide sufficient evidence to prove a viable relationship existed and further, that the Court did not make a ruling concerning the *Martin* factors.

ARGUMENT AND AUTHORITIES

Issue One:

Did the Chancellor err in her ruling by not following the dictates of Section 93-16-3 of the MS Code 1972, Annotated, as amended, in determining whether a viable relationship existed between Nan B. Davis and Mason Connor Conerly?

This cause of action was duly filed with the Chancery Court of Amite County, Mississippi, on the 7th day of April, 2006. That the petition filed by Nan B. Davis, as the paternal grandmother of Mason Connor Conerly (formerly Davis) claims that Mrs. Davis had developed a close and loving relationship with Mason Connor Conerly and that she should be awarded grandparent visitation in that she had a viable relationship with the minor child. (CP 1-2)

MS Code Section 93-16-3 states as follows:

"(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.

(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 interest 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."

This code section requires that the grandparent of a child had established a viable relationship with the child. Further, that the parent or custodian of the child has unreasonably denied the grandparent visitation with the child.

This code section also continues by defining "viable relationship" as "...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" (emphasis added) occasional overnight visitation with said child for a period of not less than one (1) year."

In reviewing the testimony in this cause of action, there was absolutely no proof presented at any point during any part of the hearing that would show or indicate that Nan B. Davis had 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 the filing of her petition for visitation rights with the child. There is no indication found in the record that Nan B.

Davis provided any type of financial support or any support whatsoever for the minor child at any time within the six (6) period prior to the filing of her petition for visitation. Therefore, the plaintiff failed to prove that she had complied with this requirement.

This would leave Nan B. Davis with but one option under Section 93-16-3. This option is to prove that she had a frequent visitation with the child including overnight visitation with the child for a period of not less than one (1) year before the filing of the petition for grandparent visitation.

The plaintiff, Nan B. Davis, was the sole and only witness called in support of her case. Her testimony included the introduction of several photographs of Mason Connor Conerly as well as a financial statement.

The photos that were presented during the trial as composite Exhibit P3 are a wide range of pictures dating from Christmas 1999 until the year 2003. There are no pictures introduced into evidence that were taken after 2003. (TE 6-10)

By definition as set out in MS Code Section 93-16-3, the petitioning grandparent must prove and establish that a viable relationship existed between that grandparent and the child. The testimony of Nan B. Davis has eliminated one possible way to prove this relationship. No proof of financial support was produced or submitted. Therefore, the question would be *Did Nan B. Davis have sufficient frequent visitation with the minor child within one (1)*

year before she filed her petition with the Chancery Court?

It appears from the testimony that a key date would be the death date of Charles E. Davis Sr. The testimony of Nan B. Davis was that Mr. Davis died on the 14th day of December 2004. (T 16) The testimony also indicated that the child stayed with Charles E Davis Jr. and Sherry Lynn Conerly overnight during this time at the home of Nan B. Davis. After this date, there were no additional overnight stays.

The specific question was raised to Nan B. Davis on direct examination.

Question: Would he spend nights with you?

Answer: He did not spend nights with me. He did - the whole family stayed in my home two nights, but he never spent the night there alone or with his sister.

Question: And when you say the whole family would stay with you on occasion, what whole family are you talking about?

Answer: I'm talking about Mason, his sister Shelby, Charlie, Sherrie and they stayed there a couple of times overnight. (T 6)

There was no other testimony forthcoming on direct examination which would show or indicate that the child had been having frequent visitation with the grandmother or occasional overnight visitation. In fact, the testimony was to the contrary. The grandmother, Nan B. Davis, was specifically questioned concerning this matter on cross-examination.

The examination established that her son and Sherry Lynn

Conerly were having trouble beginning the first part of January 2005. Further, that she did not see the child on any regular basis after January 1, 2005. This position was further enforced by the testimony of Sherry Lynn Conerly who indicated that there was a problem between the families which began sometime following the death of Charles E. Davis Sr.

The undisputed testimony of Sherry Lynn Conerly is that during the year 2005, Nan B. Davis had seen the child on one (1) occasion. On this occasion, Mrs. Davis had stopped by her home to visit with the child. (T 47)

There was no testimony at any point to indicate that visitation was denied by any party. In fact, the testimony clearly indicated that Nan B. Davis had not contacted anyone about seeing the child except on the one visitation during 2005 and had made a phone call in an attempt to carry the child shopping during Christmas 2005. These are the sole and only attempts by Nan B. Davis to see the child before she filed the petition in April 2007.

It would appear that Mrs. Davis would attempt to use the separation date of her son and Sherry Conerly as the point in time to begin the running of the one (1) year requirement under Section 93-16-3. The evidence is that Mrs. Davis testified that the visitation was little or none beginning in January 2005 and this is confirmed by the testimony of Sherry Conerly.

It is interesting to note that upon cross examination of Mrs. Davis, she was asked specific questions dealing with visitations.

The court must keep in mind that from January 1, 2005 to April 2005 Charles E. Davis Jr. and Sherry Lynn Conerly were still living together. Nan B. Davis had testified that she had little or no contact with the child during this time. The specific questions to Mrs. Davis at this point dealt with the time after her son and Sherry Conerly had separated. Mrs. Davis testified that she had attempted to contact the child on only one occasion, being Christmas 2006. (T 22-23)

This is interesting in that Mrs. Davis did not recall a visit with the child at the home of Sherry Conerly. This visit is noted by Sherry Conerly in her direct examination.

In reviewing the testimony, one must conclude that from January 1, 2005 until the suit was filed on April 7, 2006, Nan B. Davis had one visit with the child and attempted one additional visit during Christmas 2005. This is undisputed by the testimony.

Appellant, Linda R. Conerly, testified that the home she and her husband, Rickey Len Conerly, live in is directly across the road from that of Sherry Lynn Conerly. That the minor child, Mason Connor Conerly, stays at their home two to three nights each week. Further, that when Sherry Conerly is sick, the child will stay with them additional nights. (T 61) This arrangement varies. Sherry Lynn Conerly testified that she suffers from bronchiectasis. (T 35)

There was absolutely no testimony or evidence to show or indicate that Nan B. Davis had a viable relationship with the child in accordance with Section 93-16-3 MS Code of 1972, Annotated, as

amended. Further, that there was no finding within the court order to indicate or show that the terms and provisions of said code section had been met and that a viable relationship had been established or proven.

Issue Two:

Did the Chancellor err in her ruling by failing to specifically address the *Martin* factors relevant to the award of grandparent visitation?

The Appellants would show that it appears from the Mississippi law that the first thing a grandparent must do is comply with Section 93-16-3 of the MS Code of 1972, Annotated, as amended. The grandparent must prove that there was a viable relationship that existed between the parties.

In reviewing the testimony in this cause of action, it is evident that there was no proof to comply with the aforementioned MS Code Section 93-16-3. It would be the Appellants' position that if the Chancellor had found that no viable relationship existed then there would be no need to apply the *Martin* factors. However, in this case, it appears that the Chancellor did find that there was a viable relationship, even though the ruling itself does not recite that this viable relationship existed. (CP 43 and 44)

It would appear that in the event there was a viable relationship, then it would be necessary to review the *Martin* factors. These factors are duly noted in *T.T.W. a/k/a B.W. v. C.C. and J.C.*, 839 So.2d 501 citing the case of *Martin v. Cooper*, 693

So.2d 912. The record is void of the *Martin* factors. The evidence that has been presented in this case would not meet the requirements of Section 93-16-3 in order to determine a viable relationship, therefore, it may be harmless error that the *Martin* factors were not listed. In the alternative, the Appellants would show that if a viable relationship did exist, that each *Martin* factor should be separately listed and taken into consideration, and, therefore, did not speak to the best interest of the minor child.

CONCLUSION

The laws of the State of Mississippi have taken huge steps to accommodate visitation between grandparents and grandchildren. These laws have been enacted by the legislature with a specific purpose in mind which is to allow the grandparent visitation with the grandchild. The case law of the State of Mississippi has also indicated that grandparents that qualify should have visitation with grandchildren.

However, in order for a grandparent to have visitation with a grandchild, this grandparent must comply with the laws of the State of Mississippi, and the case law developed by the State Supreme Court.

The applicable MS Code Section in this case is 93-16-3. It requires that the grandparent have a viable relationship with the child which has been specifically defined within said code section. Further, if the court would find there is a viable relationship, there are other factors that the court must consider and apply to allow the grandparent visitation.

In this case, the grandparent has attempted to come before the Chancery Court of Amite County, Mississippi and claim that she had a viable relationship with the minor child. By definition, this viable relationship is described two ways: (1) the grandparent supporting the grandchild in whole or in part for not less than six (6) months prior to the petition being filed; and (2) the grandparent had frequent visitation including overnight visitation

for a period of one year prior to the filing of the petition.

In applying the facts to this definition, the record is void of any support that the grandparent may have provided to the minor child for six (6) months prior to the petition having been filed on April 7, 2006. Therefore, the grandparent in this case would have had to prove that she had frequent visitation with the child including overnight visitation for a one (1) year period prior to the filing of the petition.

The testimony by all participants in this case indicates that there was a defining point in time when the contact between Nan B. Davis and Mason Connor Conerly began a rapid decline or basically stopped. This event was immediately following the death of Charles E. Davis Sr. In December 2004.

It is apparent from the testimony that beginning January 2005, that there was little, if any, contact between Nan B. Davis and the grandchild, Mason Connor Conerly. Further, the testimony is that Mason Connor Conerly had no overnight visitation with Nan B. Davis for a period of time of approximately 16 months prior to the filing of the petition for grandparent visitation with this Court. This period being January 1, 2005 until the filing of the petition on April 7, 2006.

The testimony in this matter further indicated that Nan B. Davis had only one (1) visit with the minor child after May 2005 and made one attempt to have an additional visitation with the minor child on Christmas 2007. In fact, upon cross examination of

Nan B. Davis, she admitted that the request for the Christmas 2005 visitation was the sole and only contact she had made with the child beginning January 1, 2005 until she filed the petition on April 7, 2006.

The testimony in this case leaves little or no doubt that Nan B. Davis had only minimal contact with the minor child beginning January 1, 2005. Therefore, she does not fit the definition as provided in Section 93-16-3 of the MS Code 1972, Annotated, as amended. That due to her failure to meet said definition, Nan B. Davis should be denied any and all grandparent visitation with the minor child. Further, that the case that has been filed by Nan B. Davis against Rickey Len Conerly and Linda R. Conerly should be reversed and rendered.

In the alternative, if the court should deem that there has been proof of a viable relationship, the Honorable Chancellor then failed to provide the appropriate ruling in compliance with *Martin v. Coop*, 693 So.2d 912. That the court failed to list each factor and make the appropriate ruling concerning the factors to be considered.

The Appellants would request that this case be reversed and rendered.

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LINDA R. CONERLY,

Appellants

vs.

NAN B. DAVIS,

Appellee

Supreme Court No.:
2009-CA-00534

CERTIFICATE OF SERVICE

I, Wayne Smith, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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Honorable Debbra K. Halford
Chancellor
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Kathy Gillis, Clerk
Supreme Court of Mississippi
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This the 13th day of November, A.D., 2009.


WAYNE SMITH