IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2010-CA-00409

LORI LYNN WALLEY AND
CHRISTOPERH BLAKE WALLEY **APPELLANTS**

VS.

KATHY LYNN PIERCE AND
TONY CURTIS PIERCE **APPELLEES**

Appeal from the Chancery Court of Greene County, Mississippi
Cause No. 2009-22-RP

BRIEF OF THE APPELLEES

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of 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 disqualification or recusal.

Appellant Parties

Lori Lynn Walley
Christopher Blake Walley

Counsel for Appellants

Chris D. Hennis

Appellee Parties:

Kathy Lynn Pierce
Tony Curtis Pierce

Counsel for Appellees

Joey Fillingane

Other Interested Parties

Honorable G. Charles Bordis, IV
Chancellor Sixteenth Chancery Court District
Post Office Box 998
Pascagoula, Mississippi 39567

Respectfully submitted this the 3rd day of November, 2010.

Joey Fillingane

Joey Fillingane

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Statement of the Issues

1. Whether the trial court committed manifest error in finding that Lori and Blake Walley had unreasonably denied visitation with their children to Kathy and Tony Pierce.

2. Whether the trial court committed manifest error in failing to accord special weight to Lori and Blake Walley's determination as to the amount and type of visitation Kathy and Tony Pierce should have with their children.

3. Whether the trial court's application of the Mississippi's Grandparent Visitation Act violated Lori and Blake's constitutional rights under the Fourteenth Amendment.

Statement of the Case

1. Nature of the Case

This is a grandparent visitation case involving Lori Lynn Walley and Christopher Blake Walley (hereinafter referred to as "the Walleys") and the maternal grandparents, Kathy Lynn Pierce and Tony Pierce (hereinafter referred to as "the Pierces"). The Walleys are the parents of three children: namely, Melonie Walley, age 6; Juliana Walley, age 4; and Rachel Walley, age 9 ½ months at the time of trial. The Pierces are the maternal grandparents of the three aforementioned grandchildren.

All parties, with the exception of Mrs. Lori Walley, work at Performance Industries in Pascagoula, Mississippi. Mrs. Lori Walley is a stay-at-home mother and housewife, who also home schools the two eldest children.

From the time of the Walleys' marriage until October 2008, the Walleys resided in a mobile home provided by the Pierces and located on the Pierces' property just behind the Pierce's home. During this time the two eldest children (as the youngest was not yet born) spent much time back and forth between the Walleys' mobile home and the Pierces' home – only a yard separating the two residences.

It was not disputed – in fact, it was repeatedly admitted – that the Pierces' provided financial support for the grandchildren in the form of money as well as clothing, medical care, entertainment, not to mention the home that the grandchildren and their parents (the Walleys) lived in for all those years.

It was further admitted that there was a viable relationship established during this time between the grandparents (Pierces) and their grandchildren. This was all stipulated by the Walleys at the trial.

2. Course of the Proceedings

On February 11, 2009, the Pierces filed a Petition for Grandparent Visitation Rights against the Walleys in the Chancery Court of Greene County, Mississippi. The Pierces maintained that the Walleys had unreasonably denied them visitation with their grandchildren. The Walleys, on March 19, 2009, filed their Answer denying that the Pierces were entitled to visitation with the grandchildren. On April 6, 2009, the parties entered into an Agreed Temporary Order which allowed the Pierces temporary visitation with the grandchildren. The Order provided that the Walleys would supervise all temporary visitation in an order to force both the Pierces and Walleys to spend not only time with the grandchildren but time together also in an effort to heal the schism between the two families and alleviate the need for court-ordered visitation. The Agreed Temporary Order also ordered the Pierces to pay to the Walleys the sum of $1,000.00 in attorney's fees.

The trial was held on November 30, 2009, at the Greene County Courthouse. The trial court, in its Findings of Fact, Conclusions of Law, Rulings and Judgment of the Court, dated December 4, 2009, and filed on December 8, 2009, granted the Pierces limited grandparent visitation with their grandchildren after finding that a viable relationship had been established between the Pierces and their grandchildren, that the Pierces had financially supported their grandchildren, that the Walleys had unreasonably denied the Pierces visitation with the grandchildren and that it would be in the grandchildren's best interests to order reasonable grandparent visitation with the grandchildren.

On December 16, 2009, the Walleys filed their Motion for Reconsideration, For Relief from the Judgment and to Amend the Judgment. After hearing the arguments on the Walleys' Motion for Reconsideration, the trial court amended its award of visitation to the Pierces only to the extent that the eldest grandchild's birthday fell on one of the times scheduled for grandparent

visitation and the Court amended the Order to ensure that the child was with the Walleys on her birthday, that during the times the grandchildren were anywhere near the Pierces' pool, they would have to be "personally supervised" by the Pierces and that in the event the Pierces were both at work during the scheduled visitation times with their grandchildren and could not spend the time with the grandchildren, the Pierces would forfeit such visitation times. The hearing was held on January 29, 2010, and the Court entered its judgment on February 3, 2010, denying the remaining portions of the Motion for Reconsideration. In its February 3, 2010 Order, the Court stated, "The Court feels that the visitation schedule set forth herein will promote a healthy relationship between the grandparents and grandchildren and will serve the best interests of the minor children." (See February 3, 2010, Judgment, Pages 3-4). On March 3, 2010, the Walleys perfected their appeal to this Honorable Court.

3. Disposition in the Court Below

The trial court, in its Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court (filed December 8, 2009) found that the Pierces had established a viable relationship with their grandchildren and had financially supported those grandchildren. The Court further found that "[t]he grandchildren have always enjoyed a close relationship with the [Pierces]. The Court has searched for some justifiable reason to deny the grandparents unsupervised visits with their grandchildren. The Court concludes that the refusal to allow unsupervised visits results from the tension between the Walleys and the Pierces. The Walleys are denying the unsupervised visitation in an effort to spite the Pierces because [The Walleys] know that the children have been in no danger with the Pierces." (Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court, Page 5).

In its Conclusions of Law, the trial court judge made a detailed application of the controlling statutory and case law to the specific facts presented in this case and accorded great

weight to the preferences of the Walleys, but also recognized that it was ultimately in the minor children's best interests for there to be reasonable, unsupervised visitation ordered herein. This analysis included a finding that the Walleys both testified that their children should have a relationship with the Pierces and that there was no doubt at all that the Pierces loved their grandchildren and that the grandchildren love the Pierces. Further, it was found that a viable relationship had been established between the Pierces and the grandchildren and had provided financial support for their grandchildren. (Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court, Page 6).

Further, the Court found that the ordered visitation would be beneficial to the children but that the Walleys had only wanted to allow visitation supervised by the Walleys and on their own terms. The Court looked to ***Stacy v. Ross***, 798 So.2d 1275 (Miss. 2001) and ***Plaxico v. Michael***, 735 So.2d 1036 (Miss. 1999). The Court accorded special weight to the decision of the Walleys but still concluded that supervised visitation (supervised by the Walleys) with the Pierces and their grandchildren would not serve the best interest of the children. (Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court, Page 7).

The Court stated, "By requiring [the Walleys] to constantly be in the presence of [the Pierces] for extended periods of time increases the likelihood that the tense situation between the parties could erupt in the presence of the children. Further, to allow parents acting out of spite to deny any unsupervised visitation when there has been no established pattern of unsupervised visitation would alleviate the need for the grandparent visitation statutes. The position taken by the Walleys would make the statute unnecessary because the parents of a child could deny visitation for any reason at any time." (Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court, Page 7).

The trial Court then made a detailed analysis of the requirements of ***Martin v. Coop***, 693 So.2d 912 (Miss. 1997) as the facts-at-hand applied to the requisite case law analysis. This included determining the amount of disruption that extensive visitation will have on the children's lives, the suitability of the grandparents' home, the age of the children, the age, and physical and mental health of the grandparents, the emotional ties between the grandparents and the grandchildren, the moral fitness of the grandparents, the distance of the grandparents' home from the children's home, any undermining of the grandparents' general discipline of the children, employment of the grandparents and the responsibilities associated with that employment, and the willingness of the grandparents to accept that the rearing of the children is the responsibility of the parent, and that the parent's manner of child rearing is not to be interfered with by the grandparents. (Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court, Pages 7-11).

4. Statement of the Facts

The Walleys are the married custodial parents of three minor children, namely: Melonie, Walley, age 6, Juliana Walley, age 4, and Rachel Walley, 9½ months old at the time of the trial. The Pierces are the natural maternal grandparents of the grandchildren. All parties are adult resident citizens of Greene, County, Mississippi.

All parties, with the exception of Lori Walley, work at Performance Industries in Pascagoula, Mississippi. Lori Walley is a stay-at-home mother and housewife who home schools her children.

At the time of trial, the Walleys had been married approximately eight years. From the time of their marriage until October 2008, the Walleys resided in a mobile home located on (and provided by) the Pierces. Due to Walleys living on the Pierces property and in a mobile home provided by the Pierces, the Pierces saw their grandchildren on a daily basis and enjoyed a close

relationship with the children, including spending the night at the Pierces home on occasion and sharing many meals and family occasions together.

Early in 2008, there was an argument involving Lori Walley and her mother-in-law, (Blake Walley's mother) and her seventeen-year-old sister-in-law. Blake Walley had to intervene to stop the physical altercation which resulted in bruises and scrapes to Lori Walley (pictures of the physical injuries were documented as exhibits in the trial). Later, due to this first altercation, Kathy Pierce and Blake Walley's now eighteen-year-old sister, there was a second confrontation at a horse show.

Charges and counter-charges were filed against the Pierce's and Walley's. All these charges were eventually dropped by all involved but there were tensions between the families that never were alleviated between the Pierces and Walleys. In October 2008, due to the continuing animosity existing between the parties, the Walleys moved out of the Pierces mobile home in their backyard and into a rental property several miles away and immediately began greatly limiting the amount of contact between the Pierces and the grandchildren. All visits after this time were supervised by the Walleys and were held only under their terms and it was testified to at trial that all further visits would be on Blake Walley's terms and until he felt that Kathy Pierce had made a sincere apology to his family and his Church (where his family continues to attend after the Pierces chose to move to another Church due to the continuing animosity) there would be no liberalizing of the visitation between the Pierces and their grandchildren. In fact, prior to the filing of the Petition for Grandparents Visitation the Pierces had gone almost an entire year without having any meaningful visits with their grandchildren. There were a handful of visits which had to take place under the specific terms and conditions set out by Blake Walley. These included a few holiday visits at the Walleys' home that included demands for apologies from Blake Walley to Kathy Pierce.

During the time the Temporary Order was put in place, the Court ordered supervised visitation between the Pierces and the grandchildren which were supervised by the Walleys and alternated between the Pierces' home and the Walleys' home. Testimony revealed that these visits were abject failures because the Walleys literally shadowed every move the Pierces made with their grandchildren, going so far as to follow them outside if the grandparents attempted to play in the yard with the children, though the Walleys refused largely to communicate with the Pierces during these supervised visits – merely monitoring every move the grandparents made with the children, hovering next to them the entire time but not participating in the visits in any meaningful way.

The Walleys and Pierces were all found to be fit parents and grandparents, but the Court found that it was in the grandchildren's best interests for the Pierces to have unsupervised, meaningful, limited visitation with their grandchildren, uninterrupted by the hovering Walleys. It was determined that the type of restrictions placed on the visits by the Walleys was unreasonable and not in the grandchildren's best interests.

SUMMARY OF THE ARGUMENT

The Greene County Chancery Court was presented with a classic case of parents who unreasonably deny their parents visitation with their grandchildren even though the grandparents had clearly established a viable relationship and had provided mountains of financial support for both their child and their grandchildren – providing them a free home for eight years.

The trial court went to great pains to accommodate the wishes of the Walleys herein, attempting to provide in the Agreed Temporary Order the version of visitation that the Walleys requested and are still fighting for in this appeal. The Temporary Order provided for only very limited supervised visitation, supervised by the Walleys themselves. That experiment proved to be an abject failure as the Walleys used this time to shadow the Pierces every move with their grandchildren as though they were criminals in need of ankle bracelets or constant video monitoring.

The Pierces have only asked for very limited unsupervised visits with their grandchildren like they had enjoyed for the entire lives of their grandchildren prior to the Walleys and Pierces having a falling out over a fight wherein Kathy Pierce was attempting to only protect her own daughter, Lori Walley, from her sister-in-law and mother-in-law. While it is a tragedy that the two families have allowed the tensions to sour the familial ties that existed at one time, the trial court determined that this conflict had nothing to do with the grandchildren and should not be used to destroy the viable relationship that existed between the Pierces and their grandchildren.

The Appellants argue that the trial court erred by awarding unsupervised visitation over the vehement objections of fit parents. Further, the Appellants allege that the trial court erred when it found that the Walleys had *unreasonably* denied the Pierces visitation rights with their grandchildren. Finally, the Appellants argue that the visitations awarded by the trial court are

extensive, forced and unsupervised and that this was error because the Walleys were not found to be unfit parents.

The Appellants either misunderstand the Mississippi Grandparent Visitation statute or simply believe it to be unconstitutional. It is clear that the Walleys do not like Mississippi Code Section 93-16-3(2)(a), but that does not mean that it is not the law nor that it is unconstitutional. The learned Chancellor Bordis rightly applied the applicable case law and statutory requirements to the present set of facts and did a masterful job of detailing why it was that he ruled as he did. His findings of facts and conclusions of law are right on point with both the jurisprudence of this Honorable Court and the letter and spirit of the statute allowing Mississippi Grandparents in some circumstances to ask the Chancery Court for visitation rights with their grandchildren.

ARGUMENT

Standard of Review

In the case of ***Stacy v. Ross***, 798 So.2d 1275, 1278 (Miss. 2001) this Court held that "[a] limited standard of review is employed by this Court in reviewing decisions of a chancellor. ***Reddell v. Reddell,*** 696 So.2d 287, 288 (Miss. 1997). Findings will not be disturbed on review unless the chancellor abused his discretion, was manifestly wrong, or made a finding which was clearly erroneous. ***Bank of Miss. v. Hollingsworth***, 609 So.2d 422, 424 (Miss. 1992). The Court reviews questions of law, however, under a de novo standard. ***Zeman v. Stanford***, 789 So.2d 798, 802 (Miss. 2001).

I. Mississippi Code Annotated Section 93-16-3(2)(a) Requires a Trial Court to First Determine That a Grandparent has Established a Viable Relationship with a Grandchild and Then the Trial Court Must Find that the Parent of the Child has Unreasonably Denied the Grandparent Visitation with the Child.

The Appellants seek to make an issue of the findings of the trial court relative to the requirements of the clear intent of Mississippi's Grandparent Visitation Statute (Mississippi Code Section 93-16-3(2)(a)) where none exists. The requirements for satisfaction of the Grandparent Visitation statute in Mississippi could not be more clear or understandable.

Mississippi Code Annotated Section 93-16-3(2) and (3) states:

> **(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 her 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, the grandparents have had frequent visitation including occasional overnight visitation with said child for a period of not less than one (12) year, or the child has been cared for by the grandparents or either of them over a significant period of time during the time the parent has been in jail or on military duty that necessitates the absence of the parent from the home.

There are a couple of requirements under the above-cited statute that a grandparent must prove when seeking grandparent's visitation rights with their grandchildren. First, they must prove that there existed an established "viable relationship" between the grandparent and grandchild. Second, as part of the "viable relationship", subsection (3) defines further that the grandparent financially supported the grandchild.

In the present case, not only do the Appellants admit in their brief (Appellants Brief Page 7) that they (the Walleys) stipulated that the Pierces had established a viable relationship with their minor children (the grandchildren). Also, in the trial transcript (Trial Transcript Pages 3-4) the attorney for Appellants, stipulated that the viable relationship existed under the statute in the present case.

The Court: Are there any stipulations or pretrial statements to be made?

Mr. Hennis (Attorney for Appellants): Your Honor, we're going to stipulate that Mr. and Mrs. Pierce have a viable relationship with the children involved in this case.

The Court: Okay. So there does exist a viable relationship between the grandparents and the grandchildren; is that right?

Mr. Hennis: Yes, Your Honor.

The Court: Do you agree with that, sir?

Mr. Fillingane (Attorney for Appellees): Yes, sir.

The Court: Any other stipulations or statements?

Mr. Fillingane: Well, we're willing to stipulate, if not, we can put proof on, but there was also financial contributions towards the bringing up of the children, the grandchildren.

The Court: Is that a stipulation?

Mr. Hennis: Your Honor, I think that goes to the viable relationship. You either – that's part of the two-part test. You've either had an extensive visitation or you've provided financial support. That gets you to the viable relationship, so I think the viable relationship covers that.

Mr. Fillingane: Just want to be sure.

The Court: Okay. Thank you. . . .

There was much other testimony from all sides that I will not belabor this Honorable Court with that went into minute detail about the type of loving, intensive relationship that the Pierces had established with their grandchildren over many years of living only a yard apart from them. However, as the Appellants (and their attorney) both stipulated both at trial and in their brief that such a viable relationship existed, I will not bore the Court with further argument over this point.

The point of contention that the Appellants do make with regard to the statute is that they claim that Court wrongly decided that Walleys had "unreasonably" denied the grandparent visitation with the grandchildren. To this point the Appellants rely on several cases: ***Troxel v. Granville,*** 530 U.S. 57, 68, 12 S.Ct. 2054, 2061 (2000); ***Stacy v. Ross,*** 798 So.2d 1275 (Miss. 2001); and ***Hillman v. Vance,*** 910 So.2d 43 (Miss.Ct.App. 2005).

The Appellees will first address the arguments forwarded by Appellants under ***Troxel v. Granville,*** 530 U.S. 57, 68, 120 S.Ct. 2054 (2000), that the United States Supreme Court has recognized that there is a "presumption that parents act in the best interest of their children." While it is true that there is a presumption that parents act in the best interest of their children; it

is just that – a presumption. Therefore, the evidence in any given trial may be offered to rebut that presumption as was done in the present case.

The learned Chancellor heard hours of testimony from all sides (the Walleys and the Pierces) wherein he observed the childish, spiteful behavior of the Walleys relative to using their children as pawns in a game of retribution with the Pierces over some hurt feelings related to a physical altercation that took place between Lori Walley and her mother-in-law and sister-in-law. Kathy Pierce, in an effort to take up for her daughter, then got into a physical altercation with the same sister-in-law and after that the Walleys moved from the mobile home that had been provided by the Pierces (in the Pierces backyard) into a rental home several miles away and immediately the daily visits with the grandchildren and the Pierces halted and did not resume except under very strict guidelines determined by the Walleys that numbered in the low single digits over a period of nearly a year.

In the trial transcript, Kathy Pierce (maternal grandmother) testified on direct examination that after the Walleys moved due to the tension that existed between the two families connected to the altercation involving Lori Walley and her mother-in-law and sister-in-law that the visits were severely curtailed and that she tried to smooth over the feelings of the Walley family by going over to the Walley home and attempting to offer an apology so that the visits could resume with her grandchildren. (See Trial Transcript Pages 26-27). During the trial in response to a question about whether Kathy Pierce went to the Walley home to see the children, Kathy Pierce responded as follows:

> **Q. And you did go to her (Lori Walley) house?**
>
> **A. (Kathy Pierce) Yes, sir. I went there with the full intentions of apologizing to him (Blake Walley), hoping that the matter would be through. And I knew, at that time, that me and my husband would probably get very little visitation with the children, like we usually had. Which, when they lived on my property, I kept them all day long from morning until evening,**

until Blake came home. He probably wasn't even aware of that, but I had both children from early morning until a little bit before he came home. Made it very convenient for Lori, did all of her wash, all of her ironing, helped her clean. Whatever she wanted, I did.

Q. So your testimony now is, before they moved, you were responsible for the children all day long?

A. More so, yes. More so, yes.

In the testimony of Blake Walley, it was also very clear that his idea of the Pierces being welcome at his home anytime for visits with the children was not what most people would consider a truly welcoming environment. It is also transparently clear that there were preconditions of apologies associated with any future visitations that would be allowed by Blake Walley between the Pierces and their grandchildren. (See Trial Transcripts Pages 83-84):

Q. And you said that they're [the Pierces] welcome to come over to your house at anytime, to visit y'all or the children?

A. (Blake Walley) Yes, sir.

Q. Okay. Now, would you agree [with] me that there is a difference in the meaning of the word *welcome*? If I say, you're welcome to come over to my house at any time, that's one thing, but *feeling* welcome when I'm over there, would you agree with me that that's something totally different? (Emphasis added)

A. Yes, sir, I would.

Q. Okay. I mean, for instance, do you feel welcome at their [the Pierces] home?

A. No, sir, I don't.

Q. And yet have they told you, you can't come over here?

A. One incident, where my wife was talking to them on the phone, they did tell me I was not welcome at a family gathering, which was not at their home, but it was with his side of the family on the 4th of July.

Q. But at their home, have you ever been told, you're not welcome here on this property?

A. No, sir.

Q. And yet you testified that you don't feel welcome there when you're there, correct?

A. Yes, sir.

Q. Would you understand how, perhaps, the Pierces would feel exactly like you do? You say they can come over anytime they want to see the children, but they don't feel welcome while they're there to visit freely with the kids. Do you understand how they might feel that way?

A. No, sir, I can't.

Q. But you feel the same way at their house, but you can't understand how they would feel the same way at your house?

A. Well, can I explain?

The Court: Sure.

A. You know, as far as them not being welcome, that's the choice they've - - - I mean, I can't help how they feel. I mean, I don't control their feelings. But the issue is, whether or not we've unreasonably denied the visits - - coming over there. So, I mean, I don't think we've been unreasonable.

Q. Well, I haven't asked you any legal questions about that. I simply asked if you could understand how they would not feel welcome at your house.

A. Okay. No, sir, I can't.

Q. Okay. Fair enough. Now, you also just testified, concerning Mrs. [Kathy] Pierce, if I'm remembering your words correctly, that she's vindictive and manipulative.

A. Yes, sir.

Q. And you stand by those allegations?

A. Yes, sir.

Q. Okay. Well, knowing that you feel that way about her, would that not be also another reason why she might not feel welcome at your home? Would that help you understand that better?

A. Well, sir, it's the truth. I mean, so - - I mean, the truth hurts sometimes.

Q. I agree. I completely agree. I'm just simply asking you, knowing that you've testified about her like that in open court, I mean, I wouldn't feel welcome at your house, if that's the way you felt about me. I mean, can you understand how I might not feel welcome at your house if those were your thoughts about me?

A. Well, what about the past nine months? She's never heard those words come out of my mouth until today.

Q. Actions speak more loudly than words sometimes, right?

A. Sometimes.

Q. Okay. Now, you said, concerning the apologies back and forth to who[m]ever, and I'm really, honestly, not concerned that much about who did what to whom. All I'm trying to get to is the visitation issue, which we're here on today. You said that you didn't require an apology to anyone, but that you recommended an apology both to your family and, possibly , to the church, though you weren't sure if you had recommended that about the church or not; is that right?

A. I'm not sure if I recommended an apology to the church, but I did recommend one to my family.

Q. But then you also said that based on rumors that you had heard after that, that you made the determination that her apology to you was not sincere and authentic.

A. Right.

Q. So that's the reason that you did not follow up and try to get the families together. Am I misunderstanding what you're saying?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Because you didn't feel like any apology from her would be sincere to them anyway?

A. Right.

It also became abundantly clear during the testimony of Blake Walley that all visitations in the future between his children and the Pierces would have to on his terms. The Trial Court pointed this as the foundations of the unreasonableness that it found in a rivalry that had nothing to do with the grandchildren, and everything to do with the petty differences that these two families had allowed to cloud their judgment with regard to what was in the best interest of the children. (See Trial Transcripts Pages 88-89).

Q. All right. Now, you said that you want the grandchildren to have a relationship with their grandparents; is that true?

A. Yes, sir.

. . .

Q. But it strikes me that when you also said they could come over to your house, it seems to me that you want them to have a relationship, but only on your own terms; is that a fair statement?

A. Because, as has been mentioned before – is that yes or no question? Do I answer, yes, or, no?

The Court: You can answer, yes, or, no, and you can explain your answer.

A. Okay. Repeat the question.

Q. Okay. You said that you are wanting to encourage a relationship between your children, which are the Pierces' grandchildren, and with them. But it seems to me that you only want that relationship to develop on your own terms; not necessarily the grandchildren's terms or the grandparents' terms. You want it to be at your house, while you're there,

while you're listening to everything that's said, following them anywhere they go in the house or the yard. It seems to me that's the way you want the relationship to develop; is that true?

A. That's pretty close. And may I explain my –

Q. Sure.

A. God has given us those children and entrusted us with those, so I believe it should be our duty and our right on what kind of environment they're put in.

Q. Okay. When your children go to spend time with your parents, do you follow them around?

A. No, sir, I don't.

In the case cited by the Appellants of ***Troxel v. Granville,*** 530 U.S. 57, 120 S.Ct. 2054 (2000), the Appellants argue that if a parent is found to be fit, her/his actions are presumed to be in the best interests of the child. (Appellants Brief Page 8). The case of ***Troxel*** is distinguishable from the present case on several points. First, that case emanated from a Washington State statute that permitted, "any person" to petition a superior court for visitation rights "at any time," and authorized that court to grant such visitation rights whenever "visitation may serve the best interest of the child".

The United State Supreme Court struck down the Washington State Statute because of the "sweeping breadth of [the Washington statute] and the application of that broad, unlimited power in th[e] case . . . ." ***Troxel*** at 73. In the ***Troxel*** case, the statute in Washington State allowed for "any person" to petition for visitation rights with someone's children "at any time" so long as the petition could satisfy the court that it was "in the child's best interests." Further, in the ***Troxel*** case, it was not like ours a situation where visitation between the grandparents and grandchildren had been virtually cut off. In ***Troxel,*** the disagreement was over the amount of scope of the visitations – the Troxels (grandparents) requested two weekends per month and two

full weeks in the summer, while Granville (the mother) asked the Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville's family celebrations. ***Troxel*** at 71.

In the present case, the record is clear that if left to their own devices there would be virtually no visits ever allowed or encouraged by the Walleys between their children and the Pierces. In fact, left to their own devices, the Appellants could only cite a handful of visits that had taken place prior to the Petition for Grandparent's Visitation Rights in the year preceding the trial and on those occasions, there were preconditions to the meetings; the cite was predetermined by Blake Walley, he had to be present and monitor every move made by the Pierces with the grandchildren and apologies were demanded before any thawing of his rules would be considered. He even admitted that though he claimed to give an open invitation to the Pierces to come and visit the grandchildren at his home, that he did not really make the Pierces *feel* welcome when they attempted on several occasions to visit the grandchildren at his home.

Further, it is clear in the present case, that unlike in ***Troxel***, the trial court did give deference to the parents' wishes and preferences with regard to the visitations. The trial court went to great pains to accommodate the wishes of the Walleys herein, attempting to provide in the Agreed Temporary Order the version of visitation that the Walleys requested and are still fighting for in this appeal. The Temporary Order provided for only very limited supervised visitation, supervised by the Walleys themselves. That experiment proved to be an abject failure as the Walleys used this time to shadow the Pierces every move with their grandchildren as though they were criminals in need of ankle bracelets or constant video monitoring.

Despite the presumption noted by the Court and pointed out correctly by the Appellants in ***Troxel***, it is a rebuttable presumption that the trier of fact was convinced through the testimony presented during the trial was overcome due to the best interests of the grandchildren.

This Court drew a clear distinction to the ***Troxel*** case in the case of ***Stacy v. Ross***, 798 So.2d 1275, 1279 (Miss. 2001) when it held:

> **Unlike the "breathtakingly broad" "any person" language in Washington's statute, as characterized by Justice O'Connor writing for the majority in *Troxel*, 120 S.Ct. at 2061, Mississippi Grandparents' Visitation Act expressly permits state courts to grant visitation to grandparents. But before doing so, the court must find that (1) the grandparent has established a viable relationship with the grandchild, (2) that the custodial parents have unreasonably denied grandparent visitation, and (3) visitation between the grandparent and the grandchild would be in the best interest of the child. Miss. Code Ann. Section 93-16-1(2). The Washington statute did not enumerate the same or even similar limitations and, significantly, the Supreme Court distinguished Mississippi as being among those states which expressly provide limitations (that Mississippi courts may not award visitation unless a parent has unreasonably denied visitation).**

The Court in ***Stacy*** held that "The chancellor never made an express finding that visitation was in Kevin's best interest as required by Miss. Code Ann. Section 93-16-3(2), much less a finding that overnight and unsupervised visitation was in his best interest." ***Stacy v. Ross,*** 798 So.2d 1275, 1282 (Miss 2001). ***Stacy*** is distinguishable from the present case in various ways, not the least of which was the fact that several hundred miles separated the grandchildren and grandparents and placed a great burden on both parties to travel such great distances as opposed to just a few miles in the present case. Also, in the ***Stacy*** case, the Mississippi Supreme Court found that although there was a conflict and tension between the families, the Stacy's had been willing to accord some visitation. Unlike in our case, the warring factions in ***Stacy*** had been able to put their differences aside for some limited visitations between the grandparents and the grandchildren even though some 200 miles separated the parties. ***Id.***

If anything, the ***Stacy*** case stands for the proposition that Mississippi Grandparent visitation statue is well-written and should be followed explicitly. Unlike the Washington State statute, at issue in ***Troxel***, our statute has a very simple set of provable requirements which, according to our trier of fact in the instant case, was satisfied were met based upon the testimony presented at trial. Also unlike in ***Stacy***; it is abundantly clear that given the unreasonable restrictions and preconditions placed upon any visitation between the grandparents (the Pierces) and the grandchildren by the Walleys, absent the Court's ordered reasonable visitation, the Pierces would be completely without any meaningful visitation with their grandchildren. It occurs to the Appellees, that their situation is exactly what the Mississippi Legislature contemplated Mississippi's Grandparent's Visitation Statute to address.

Finally, the Appellants point to ***Hillman v. Vance***, 910 So.2d 43 (Miss.Ct.App. 2005), as an example of a similar case where grandparent visitation was rightfully denied by the Mississippi courts interpreting Mississippi Code Ann. Section 93-16-3 in an effort to ask this Honorable Court to do the same in the instant case. ***Hillman*** is easily distinguished from the present case, however. In ***Hillman***, the petitioning grandparent did not comply with the statutory requirements set out in 93-16-3. The Court found, "Although Eva (grandparent) presented testimony that she cared for the children for three months; that falls short of the six month requirement outlined in the statute." ***Id.*** at 47. Further, the Chancellor in the ***Hillman*** case applied the factors from ***Martin [v. Coop***, 698 So.2d 912 (Miss. 1997)] and determined that it was not within the children's best interests to order such visitation." ***Id.***

In the present case, the learned Chancellor also applied the ***Martin*** factors and found that it was in the grandchildren's best interests to order grandparent visitation. (See Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court, Pages 7-11). In that detailed analysis of the law and application of the facts to those legal standards, the Greene County Chancery Court determined that the Walleys unreasonably withheld visitations from the Pierces. In fact, the Court did so, even after specifically recognizing that extra weight must be afforded the parents' preferences with regard to their children in its Judgment:

> **In determining appropriate visitation to be awarded to the Plaintiffs, [the Pierces] the Court first recognizes the fact that natural parents have a right to control the physical, social and emotional environment to which their children are exposed. Cf. *Stacy v. Ross* 798 So.2d 1275 (Miss. 2001) and *Plaxico v. Michael* 735 So.2d 1036 (Miss. 1999). In this case, the Defendants [the Walleys] expressed a desire to have visitation limited to supervised instances with no overnight visitation. As such, the Court must accord at least some special weight to the decision of the parents. See *Stacy v. Ross* 798 So.2d 1275 (Miss. 2001). While taking into consideration the desires of Blake and Lori [the Walleys], the Court concludes that visitation supervised by Lori and Blake will not serve the best interest of the children. By requiring Lori and Blake to constantly be in the presence of Kathy for extended periods of time increases the likelihood that the tense situation between the parties could erupt in the presence of the children. Further, to allow parents acting out of spite to deny any unsupervised visitation when there has been no established patterned of unsupervised visitation would alleviate the need for the grandparent visitation statutes. The position taken by the Walleys would make the statute unnecessary because the parents of a child could deny visitation for any reason at any time.**

(See Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court Page 7).

In the Appellants' Brief (See Page 9), they argue that because of all of the animosity present between the two families that they should not be forced to

allow visitation between the grandchildren and the Pierces. This, however, begs the question of who caused the animosity? If the standard is animosity between parties equals the ability of the parents to disallow any contact or visitation with the grandparents then there would truly be no need for Mississippi Code Ann. Section 93-16-3(2).

If parents can veto any visitation with their children and the children's grandparents then that code section should be deleted from the Mississippi Code. This is the exact argument made by the Appellants. They argue that as parents, they can determine whether and under what conditions (and preconditions) any visits between a grandchild and a grandparent may take place. This is what the Judge observed in his Judgment and what the Appellees ask this Honorable Court to also recognize. The evidence clearly suggests that the Appellants have a bone to pick with the Appellees over some past disagreements regarding a school-yard-type fight between several of the adult family members and as a direct result the Walleys attempted to punish the Pierces for their unwillingness to cower to their demands of apologies for said past conduct. This should not be allowed to stand. The bond between grandparent and grandchild is too valuable to use as a pawn or chit in a game of "I'll show you who's the boss".

On page 10 of the Appellants' Brief, they try to argue the *reasonableness* of their position with regard to denying visitation with the Pierces. They point to the animosity (which has nothing to do with the grandchildren) and decry the trial judge's finding that they were acting out of spite. What is clear from a complete reading of the rather short trial transcript is that the trial court judge was exactly right. The Walleys were acting completely out of spite in their handling of the

visitation between their children and the Pierces who had practically raised the children since their birth until this family argument gave rise to all these restrictions and the halting of any meaningful visitation between the grandchildren and the Pierces.

II. The Trial Court Committed Error and Abused Its Discretion in Its Failure to Accord Special Weight to Lori and Blake Walley's Determination as to How Much Visitation Kathy and Tony Pierce Should Have with Their Children.

Out of respect for this Court's time, the Appellees will not seek to rehash the same arguments made in Issue I, which overlaps a great deal with Issues II and III. The arguments being made here are the same ones argued earlier in Issue I, which is that the trial court did not afford appropriate weight to the preferences of the Walleys in denying any meaningful visitation with the grandchildren. Suffice it to say, there is a great deal of difference between someone testifying on the stand (as both Walleys did) that they have an open-door-policy with regard to the Pierce's visiting the grandchildren anytime they wish so long as it is in their home and under their supervision, versus the reality of how they actually act towards the Pierces and approach the idea of visitation between their children and the Pierces.

It is clear, again, from a reading of the entire transcript and even from the above-quoted portions from Blake Walley's questioning in the Issue I argument that the reality of the situation was that the Pierces were not welcome in the home of the Walleys and further, that the Walleys never intended to allow the Pierces to exercise any voluntary, meaningful visitation until and unless they determined that Kathy Pierce had adequately and sincerely apologized to the Walley family and to their Church (where the Walleys belong) for past conflicts.

Blake Walley (in the above-quoted portions of his testimony) even went so far as to say that even if Kathy Pierce apologized that would not be good enough for him because he knew she would not be sincere about it; but rather would only apologize in a ruse to get some semblance of visitation with her grandchildren back and he would not accept such an insincere apology from her. (See Trial Transcript Pages 85-86). This would guarantee that no such reinstatement of any meaningful visitation would occur.

Further, one only has to look at the past history of how the Walley's operated with regard to this issue of grandparent visitation prior to the court's intervention. Testimony bears out that in a period of close to a year's time, only two or three (the actual number is in dispute depending on whose testimony you believe) times did any visits occur and all those visits were monitored by the Walleys who stalked the Pierces every move and eavesdropped on every word spoken between the Pierces and their grandchildren. The trial court rightly decided that this restrictive form of visitation was not reasonable nor was it in the best interests of the minor children involved. (See Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court).

The Appellants cited once again ***Stacy v. Ross*** 798 So.2d 1275, 1280 (Miss. 2001) for the proposition that unless the parents are found to be unfit, the grandparents cannot be awarded visitation. This is certainly not an accurate reading of either our Mississippi Grandparent Visitation Statute (See Miss. Code Ann. Section 93-16-3), or the applicable case law as discussed in the argument to Issue I above.

III. The Trial Court's Application of Mississippi's Grandparent Visitation Statute to Lori and Blake Violates Their Due Process Rights Under the Fourteenth Amendment.

Here, the Appellants argue that the "extensive unsupervised visitation, including overnight visitation, with Lori and Blake's children over their stated objections" equates to a violation of their Fourteenth Amendment Due Process Rights. (See Appellants' Brief Page 14). Again, the Appellants hang this entire argument on the ***Troxel v. Granville***, 530 U.S. 57, 65 (2000) case.

The Appellants do not wish to bore the Court with repetitious arguments. Appellants believe that this argument is sufficiently addressed earlier in the brief in the Issue I argument. Also, this Honorable Court in ***Stacy v. Ross*** 798 So.2d 1275, 1280 (Miss. 2001), pointed out that unlike the United States Supreme Court's finding that Washington State's visitation statute was unconstitutional, Mississippi's was quite constitutionally appropriate as it did restrict the visitation requests to family members and only after they meet the requirement of proving a viable relationship (including time spent with the child and monetary contributions to said child).

Under the Appellants' view of the constitution, there would be no grandparent visitation statute in any state that would pass constitutional muster. Obviously, the United States Supreme Court in ***Troxel*** was interpreting an unconstitutionally overbroad grant of visitation rights to anyone who petitioned for them – even a non-family member.

The Supreme Court struck down the Washington State statute in ***Troxel*** not because grandparent visitation rights statutes are unconstitutional but because Washington State's visitation statute was not restrictive enough to family

members and did not provide enough particulars as to what the grandparent seeking visitation rights would have to show. If anything, the United States Supreme Court (according to ***Stacy v. Ross***) cited Mississippi's Grandparent Visitation Statute (See Miss. Code Ann. Section 93-16-3) as an example of a state that did it correctly.

The trial court did find compelling reasons – that the Walleys were simply acting spitefully towards the Pierces – to disregard the stated objections of the Walleys to grandparent visitation for the Pierces. (See Findings of Fact, Conclusions of Law, Ruling and Judgment of the Court).

What is clear from a careful reading of both ***Troxel*** and ***Stacy*** is that parents' decisions with regard to visitation decisions must be granted weight by the trial court. Further, what is equally clear is that the presumption that parents act in the best interests of their children is a rebuttable one and one that was clearly rebutted in the present case.

The trier of fact, in this case, Chancellor Bordis, went to great lengths to state that he did carefully weigh the Walleys' preferences with regard to their children visiting with the Pierces, but after all of the testimony was considered and weighed in light of the best interests of the children and the unreasonableness of the withholding of said visitation from the Pierces by the Walleys, the judge made the correct decision to order limited, unsupervised visitation between the grandchildren and the Pierces.

Conclusion

Although the Walleys are fit and married parents, Miss. Code Ann. Section 93-16-3 affords grandparents (like the Pierces) in Mississippi the

opportunity to petition the Chancery Courts for grandparent visitation rights. It is clear that the parents' preferences with regard to this decision must be given due deference and weight, but that it is not in the best interests of grandchildren to allow parents to disallow any visitation purely out of spite or out of retaliation towards grandparents who have developed viable relationships with their grandchildren over years and have invested financially in their upbringing. For these reasons, the Chancellor herein rightly decided to Order limited, unsupervised visitation between the Pierces and their grandchildren over the objections of the Walleys.

The Appellees pray that this Honorable Court affirm the findings and judgment of the Greene County Chancery Court.

Respectfully submitted, this the 3rd day of November, 2010.

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellees, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of foregoing Brief to:

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Honorable G. Charles Bordis, IV
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This, the 23rd day of November, 2010.

JOEY FILLINGANE