IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STANLEY R. BOLIVAR and CINDY BOLIVAR — **APPELLANTS**

V. — **NO. 2010-CA-01982**

JOYCE WALTMAN — **APPELLEE**

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. Stanley R. Bolivar and Cindy Bolivar – Appellants
2. Debra L. Allen – Attorney for Appellants
3. Joyce Waltman – Appellee
4. Billie J. Graham – Attorney for Appellee
5. Hon. Franklin C. McKenzie, Jr. – Chancellor, Second Judicial District of Jones County, Mississippi
6. Sherry L. Lowe – Former Attorney for Appellants

Billie J. Graham

Billie J. Graham,
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

The Defendants, Stanley and Cindy Bolivar ("the Bolivars"), were designated the Co-Guardians of the minor children in this cause on May 28, 2008. Prior to the entry of the Decree Appointing Co-Guardians, the Bolivars urged Joyce Waltman ("Waltman") to assist them in having the father of the minor children sign the guardianship petition and assured her that if she would do so, she would have the same visitation privileges that had been awarded to her son in the divorce of the childrens' parents. Waltman complied with the Bolivars' wishes and for nearly two (2) years, the Bolivars kept their word about allowing her visitation with the children. However, in early 2010, the Bolivars began to deny and/or drastically restrict Waltman's visitation with her grandchildren. The Bolivars have begun to micromanage Waltman's visitation with the children and have even threatened to cease visitation entirely. Waltman has a close, loving relationship with her grandchildren and has provided financial support to them both before and after their parents' divorce. Waltman believes it is in the best interest of the children for them to be allowed to continue to visit her so that they will have relationships with her and other paternal family members. The Bolivars have unreasonably attempted to restrict Waltman's established visitation schedule with her grandchildren.

SUMMARY OF THE ARGUMENT

Miss. Code Ann. § 93-16-3 requires three (3) factors for visitation to be granted to a non-custodial grandparent – (1) a viable relationship between grandparent and child; (2) unreasonable denial of visitation by the custodian of the child; and (3) that said visitation is in the best interest of the child. Miss. Code Ann. § 93-16-3(2). In this instance, the burden of proof was not improperly shifted to the Bolivars. Waltman met her burden of proof, all factors set forth in the statute were met and the chancellor's finding should be upheld.

Although not addressed one by one in his Order, testimony was presented at trial

pertaining to the factors set forth in *Martin v. Coop*, 693 So.2d 912 (Miss. 1997). In making his ruling, Judge McKenzie specifically stated that his Order was based on the parties' testimony. As such, given that the chancellor's finding was not clearly erroneous, manifestly wrong or an abuse of discretion, it should be allowed to stand. *Zeman v. Stanford*, 789 So.2d 798, 804 (Miss. 2001).

The Mississippi Supreme Court has set forth no concrete guidelines pertaining to the amount of visitation that is appropriate for grandparents. *Settle v. Galloway*, 682 So.2d 1032, 1035 (Miss. 1986). Additionally, a chancellor is afforded a ***wide range of discretion*** on matters of visitation. *Zeman*, 798 So.2d at 805. Thus, Judge McKenzie's finding that it is in the best interest of the minor children to have substantial visitation with Waltman should be upheld.

In *Woodell v. Parker*, it was determined that the wishes of "custodial adoptive parents" are not given the same amount of deference as "natural parents." *Id.*, 860 So.2d 781, 788 (Miss. 2003). In this case, the Bolivars are only legal guardians, and should be given even less deference as they are not adoptive parents. The lower court was correct in not taking the Bolivars' preferences into account when making his determination that Waltman's continued visitation is in the children's best interest.

ARGUMENT

I. STANDARD OF REVIEW

The scope of review in domestic matters is limited. *Bratcher v. Surette*, 848 So.2d 893, 896 (Miss.App. 2003). The findings of a chancellor will not be disturbed unless the Court finds 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). Additionally, deference is given to the trial court's determinations as to the weight and credibility of witnesses when there is conflicting testimony. *See Scott Addison Constr., Inc. v. Lauderdale County Sch.*

Sys., 789 So.2d 771, 773-74 (Miss. 2001); *Murphy v. Murphy*, 631 So.2d 812, 815 (Miss. 1994); *Culbreath v. Johnson*, 427 So.2d 705, 708 (Miss. 1983).

In matters that are questions of law, the Court employs a *de novo* standard of review and will only reverse for an erroneous interpretation or application of the law. *Bank of Mississippi v. Hollingsworth*, 609 So.2d at 424; *Harrison County v. City of Gulfport*, 557 So.2d 780, 784 (Miss. 1990).

II. THE CHANCELLOR DID NOT ERR WITH REGARD TO THE BURDEN OF PROOF

The Bolivars submit that Waltman did not meet her burden of proof under Miss. Code Ann. § 93-16-3 or, in the alternative, that the burden of proof was improperly shifted to them to show why Waltman should not have visitation rights. The applicable portion of this statute requires three (3) factors for visitation to be granted to a non-custodial grandparent – (1) a viable relationship between grandparent and child; (2) unreasonable denial of visitation by the custodian of the child; and (3) that said visitation is in the best interest of the child. Miss. Code Ann. § 93-16-3(2). In this instance, the burden of proof was not improperly shifted to the Bolivars. Waltman met her burden of proof and the chancellor's finding should be upheld.

The first factor has clearly been met as, after specifically stating that he had listened to testimony from the parties at the hearing in this matter, Judge McKenzie determined that Waltman "had established a viable relationship with the grandchildren." (Record p. 19). *See also* Judge McKenzie's Supplemental Findings of Fact (Bolivars' Record Excerpts Document # 4). Furthermore, the Bolivars concede that Waltman has a viable relationship with her grandchildren. (Appellants' Brief, p. 9).

As to the second factor, the Bolivars maintain that Waltman presented no proof that her visitation with the children had been unreasonably denied. Neither the Mississippi Legislature nor the Mississippi Supreme Court has defined "reasonable" visitation for a grandparent. *Settle*

v. Galloway, 682 So.2d at 1035. It logically follows that if "reasonable" visitation has not been defined, "unreasonable" visitation is subjective and must be determined by the chancellor on a case by case basis from the facts and/or testimony presented. In this case, Waltman's Petition for Grandparent Visitation Privileges states that visitation has been denied and/or drastically restricted. (Record, p. 8). At the hearing before the chancellor, Stanley Bolivar himself testified that the Bolivars went from allowing Waltman visitation for the entire weekend every other weekend and on holidays to visitation only when it is convenient for the Bolivars. (Hearing Transcript, p. 48, lines 2-8). Bolivar also testified that he had threatened to cease allowing visitation completely. (*Id.*, p. 64, lines 1-4).

In *Zeman v. Stanford*, the Stanfords filed a petition for grandparents' visitation rights. *Id.*, 789 So.2d at 799. In a situation akin to the one currently before the Court, "[t]he Stanfords were not denied visitation, but they testified that attempting to visit the children became a 'constant hassle,' and that [the children's father] . . . attempted to 'dictate' the terms of the visitation." *Id.* at 800. Like the Bolivars, Zeman, the father, asked the Court to allow the grandparents to visit the children only when "specifically invited by him and under the circumstances and conditions . . . as dictated by him and him alone." *Id.* at 801. Even though visitation had never been specifically denied, the Mississippi Supreme Court upheld the chancellor's finding that a viable relationship existed between the Stanfords and their grandchildren and that it would be in the best interest of the children to maintain a relationship with the Stanfords through an award of visitation. *Id.* at 804. Judge McKenzie made these same findings – that Waltman and her grandchildren have a viable relationship and that it is in the best interest of the children for this relationship to continue. (Record p. 19).

The final factor enumerated in Miss. Code Ann. § 93-16-3(2) requires proof that visitation is in the best interest of the child. This is a determination that must be made by the

chancellor after hearing testimony from the parties and examining the record before him. Judge McKenzie clearly weighed the testimony that was presented by each side before making his ruling that continued visitation with Waltman is in the children's best interest. In this instance, Judge McKenzie's Order states, in relevant part, as follows: "[h]aving heard testimony in support of the respective positions of the parties after setting forth the [visitation rules], the Court heard additional testimony in support of and in opposition to the respective positions of the parties[]" and finds "there is no reason why visitation should not continue" and that "visitation is in the best interest of the children." (Record p. 19; Bolivars' Record Excerpts Document # 4).

The Bolivars also claim that the burden of proof was improperly shifted to require them to show why Waltman should not have visitation rights. As discussed in the preceding paragraphs, Waltman met all three (3) factors set forth in Miss. Code Ann. § 93-16-3(2). Thus, it was appropriate for the Bolivars to set forth testimony to refute Waltman's claims. At the hearing on this matter, testimony was presented by both sides regarding Waltman's suitability to have continued visitation with her grandchildren and Judge McKenzie made his finding based upon this testimony.

The Bolivars have failed to state any relevant statue or case law in support of their theory that the burden of proof was improperly shifted. The Bolivars improperly cite *Morgan v. West* and *Stacy v. Ross* in support of their position. Neither *Morgan* nor *Stacy* discusses an improper reversal of the burden of proof.[1] In *Morgan*, remand was appropriate because the lower court apparently made his decision based on the best interest of the grandparent rather than the best interest of the child. *Morgan*, 812 So.2d 987, 994 (Miss. 2001). Likewise, in *Stacy*, the chancellor failed to find that visitation was in the child's best interest as required by Miss. Code

[1] Although *Morgan* contains a paragraph with the heading "The chancellor applied an erroneous standard by reversing the burden of proof" – neither what each party was required to prove, nor what each party actually did prove is discussed therein. *Morgan*, 812 So.2d at 994. What is actually discussed is the fact that the court incorrectly applied the law because it did not take into account the best interest of the child. *Id.*

Ann. § 93-16-3-(2). *Stacy*, 798 So.2d 1275, 1282 (Miss. 2001). In this case, Judge McKenzie "heard testimony in support of the respective positions of the parties after setting forth the [visitation rules]," and "heard additional testimony in support of and in opposition to the respective positions of the parties." (Record p. 19). Then, the chancellor clearly made a finding that continued visitation with Waltman was in the best interest of the children. *Id.*

Based on testimony elicited at the hearing on Waltman's Petition for Grandparent Visitation Privileges, the burden of proof was not improperly shifted to the Bolivars and the lower court appropriately found that Waltman met her burden of proof to show that the Bolivars were being unreasonable with regard to visitation under Miss. Code Ann. § 93-16-3. Thus, the chancellor's finding should be upheld.

III. THE CHANCELLOR CONSIDERED ALL RELEVANT FACTORS IN MAKING HIS AWARD OF VISITATION

The Mississippi Supreme Court, in *Martin v. Coop*, set forth guidelines to be followed in determining whether a grandparent should be awarded visitation rights. *Id.*, 693 So.2d 912 (Miss. 1997). However, the Court clearly indicated that the ten (10) factors set forth in *Martin* ***are each to be afforded the same amount of weight*** and ***they are not the only relevant factors to be considered*** by the chancellor in making his decision. *Id.* at 916. "The chancellor should weigh all circumstances and factors she feels to be appropriate." *Id.* Further, the paramount consideration remains the best interests of the children. *Id.*

The Bolivars contend that the chancellor did not properly consider the *Martin* factors. A chancellor's failure to follow enumerated guidelines is manifest error when specific findings of fact corresponding to such guidelines are required. *Gray v. Gray,* 745 So.2d 234, 238 (Miss. 1999). However, it is presumed on appeal that the chancellor has taken all factors into consideration. *Voda v. Voda,* 731 So.2d 1152, 1155 (Miss. 1999) (citing *Tanner v. Tanner,* 481

So.2d 1063, 1064 (Miss. 1985)). The Mississippi Supreme Court upheld an award of grandparent visitation in *Zeman*, and stated that

> [w]hile the Chancellor may not have specifically mentioned certain testimony or evidence when making his findings on the *Martin* factors, this Court will not disturb those findings unless (1) his findings are not supported by substantial credible evidence, (2) he has either committed manifest error, or (3) he applied an erroneous legal standard.

Id., 798 So.2d at 804 (citing *Bredemeier v. Jackson,* 689 So.2d 770, 775 (Miss. 1997)).

In *Morgan v. West*, remand was for a determination as to the best interest of the child, ***not*** for application of the Martin factors as is erroneously set forth by the Bolivars. In fact, in *Morgan,* when finding that the Martin factors were not all specifically addressed by the chancellor, the Mississippi Supreme Court looked to the underlying testimony with regard to each Martin factor. In this instance, a review of the record shows the following with regard to the Martin factors:

1. The amount of disruption that extensive visitation will have on the child's life.

Visitation with Waltman would not unduly disrupt the children's lives. Waltman lives only seventeen (17) miles from the Bolivars. (Hearing Transcript, p. 64, lines 27-29; p. 65, lines 1-2). Waltman testified that she would take the children to scheduled activities. (*Id.*, p. 89, lines 17-22). She would also take them to doctor's appointments if needed. (*Id.*, p. 68, lines 10-22).

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

Each party has a suitable home and the children are appropriately supervised. On Friday nights when Waltman works, the children are cared for by her sister, Bobbie, who lives next-door to her. (*Id.*, p. 10, lines 12-16; p. 82, lines 23-25).

3. The age of the child.

The children are six (6) and four (4) years old. (Hearing Transcript, p. 47, lines 21-24). Although this is not technically old enough for their opinions to be considered, even Cindy Bolivar has testified that the children want to visit Waltman. (*Id.*, p. 76, lines 25-29).

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

This issue was not specifically addressed at the hearing. However, it is apparent from testimony given that each party is capable of caring for the children. Furthermore, these factors were not disputed by either party.

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

Cindy Bolivar has testified that the children want to visit Waltman. (Hearing Transcript, p. 76, lines 25-29). Waltman also testified that she and the children love each other. (*Id.*, p.14, lines 7-17).

6. The moral fitness of the grandparents.

Waltman and her sister do not drink. (Hearing Transcript p. 16, lines 26-28). Waltman ensures that her brother-in-law does not drink around the children. (*Id.*, p. 17, lines 1-16). Both Cindy Boliver and Waltman smoke in the car with the window down while the children are in the car. (*Id.*, p. 20, lines 20-23). Waltman supports the children going to church. (*Id.*, p. 15, lines 29-30). Although Waltman has taken the children on vacations where they stayed in casino hotels, she did not gamble and she took the children to play on rock walls and to the beach. (*Id.*, p. 22, lines 16-29; p. 23, lines 1-2).

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

Waltman lives only seventeen (17) miles from the Bolivars. (Hearing Transcript, p. 64, lines 27-29; p. 65, lines 1-2).

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

There have been instances in which Waltman did not uphold the Bolivar's wishes with regard to the discipline of the children. For example, after one of the children broke a toy, Waltman bought him a replacement without trying to make the child learn about responsibility. (Hearing Transcript, p. 37, lines 25-29; p. 38, lines 1-5).

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

Waltman works at a fast-food restaurant near her home. (Hearing Transcript, p. 9, lines 25-29; p. 10, lines 1-18). She is only required to work for a few hours during the children's visitation. *Id.* On Friday nights when Waltman works, the children are cared for by their great aunt, Bobbie, who lives next-door to her. (*Id.*, p. 10, lines 12-16; p. 82, lines 23-25). Stanley Bolivar works as a poultry grower. (*Id.*, p. 47, lines 25-26). Waltman's job does not interfere with her being able to care for the children anymore than Bolivar's.

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.

There have been instances in which Waltman did not uphold the Bolivar's wishes with

regard to the manner of child rearing they prefer The Bolivars think the types of toys Waltman buys are inappropriate. (Hearing Transcript, p. 18, lines 10-13; p. 19, lines 13-29). Waltman also bought one of the children a cell phone that the Bolivars disapproved of. (*Id.*, p. 17-27). Waltman allows the children to play video games for longer periods of time than the Bolivars. (*Id.*, p. 58, lines 7-15). There are also issues regarding the appropriate bedtime for the children. (*Id.*, 27, lines 26-29; p. 28, lines, 1-19).

Although he did not specifically indicate that he was considering the Martin factors, in his Order Judge McKenzie took into account "the parties . . . specific requests for implementation of rules and the disagreement with regard thereto." (Bolivars' Record Excerpts Document # 2, p. 2). The chancellor's Order stated that he heard "testimony is support of and in opposition to the respective positions of the parties." *Id.* Clearly, this means that Judge McKenzie heard and took into account the testimony pertaining to each Martin factor as set forth in the preceding paragraphs.

As mentioned previously, of the factors set forth in Martin, none "should receive more weight in the chancellor's analysis than any other." *Martin*, 693 So.2d at 916 (emphasis added). Of the ten (10) factors, only three (3) – moral fitness of the grandparents, undermining of the parent's general discipline and respect for child-rearing decisions – can, in any manner, be seen as unfavorable to Waltman. As Stanley Bolivar himself testified, he simply disagrees with Waltman's judgment. (Hearing Transcript, p. 63, lines 16-18). In fact, there is no "tried and true" test for findings with regard to any of the factors the Bolivars claim do not favor Waltman. When weighing the Martin factors equally, seven (7) of the ten (10) factors (a clear majority) point to allowing Waltman to have visitation rights. Given the substance of the testimony set forth at the hearing, deference should be given to the chancellor, who is in the best position to weigh the credibility of opposing witnesses. *Scott Addison Constr., Inc.*, 789 So.2d at 773-74. Judge McKenzie's award of visitation rights to Waltman was appropriate and should stand.

IV. THE CHANCELLOR DID NOT AWARD JOYCE WALTMAN EXCESSIVE VISITATION

The Mississippi Legislature enacted Miss. Code Ann. § 93-16-3 as a means to allow grandparents visitation rights with their minor grandchildren. However, the Legislature failed to address what constitutes an appropriate amount of visitation. Although it has been determined that a grandparent should not generally be awarded the same amount of visitation as the non-custodial parent, the Mississippi Supreme Court has set forth no concrete guidelines pertaining to the amount of visitation that is appropriate for grandparents. *Settle v. Galloway*, 682 So.2d at 1035. The Mississippi Supreme Court has held that "[v]isitation and restrictions placed upon it are within the discretion of the trial court." *White v. Thompson*, 569 So.2d 1181, 1185 (Miss. 1990). The Mississippi Supreme Court has since extended this rule, finding that a chancellor is afforded a ***wide range of discretion*** on matters of visitation. *Zeman*, 798 So.2d at 805.

In *Settle v. Galloway* and *Zeman v. Stanford*, the non-custodial grandparents were awarded visitation rights similar to those Joyce Waltman has enjoyed since the Bolivars became the legal guardians of the minor children. Further, in *Zeman*, as in the instant case, the custodial party attempted to unreasonably limit visitation with the minor children. *Id.* at 800. Also, the custodial father in *Zeman*, like the Bolivars, wanted to dictate all circumstances and conditions of visitation. *Id.* at 801. Although this case is distinguishable from *Settle* and *Zeman* as Waltman's son is not unable to exercise his visitation rights, the fact remains that Waltman has a well-established relationship with the children. The minor children should not be kept from their father's family simply because the father chooses not to exercise his full rights to visitation. The specification of times for visitation rights is committed to the broad discretion of the chancellor. *Cheek v. Ricker*, 431 So.2d 1139, 1146 (Miss. 1983). After hearing all testimony, Judge McKenzie found that it is in the best interest of the children for them to know Waltman and other

members of their father's family. The chancellor did not abuse his discretion and this finding should not be altered.

V. THE CHANCELLOR DID NOT ERR IN DEFERRING TO THE WISHES OF THE BOLIVARS AS THEY ARE NOT THE NATURAL PARENTS OF THE CHILDREN

In the case currently before the Court, the Bolivars want to limit the visitation rights of the non-custodial grandparent, Waltman, because visitation is inconvenient, the children have gotten older and Waltman does not always take the children to church. (Hearing Transcript p. 48, lines 5-8; p.77, lines 19-22; p. 72, lines 16-26). As discussed previously, the reasons given by the Bolivars for limiting the children's visitation with Waltman have more to do with what the Bolivars prefer than with what is in the best interest of the children. In 2003, the Mississippi Supreme Court, in *Woodell v. Parker*, determined that when it comes to the amount of visitation to be allotted to grandparents, the preferences of the "custodial adoptive parents" are not given the same amount of deference as "natural parents." *Id.*, 860 So.2d 781, 788 (Miss. 2003). In this case, the Bolivars are ***only*** legal guardians, and should be given even less deference than a custodial adoptive parent. As in *Woodell*, the minor children at the heart of this case still have some visitation with their natural parents and know that the Bolivars, despite the fact that they are their main caregivers, are their grandparents. *Id.* (Hearing Transcript, p. 36, lines 15-27). Thus, in keeping with *Woodell*, the fact that some deference may be afforded the custodial grandparent, ***does not*** supersede the findings of the chancellor that it is in the best interest of the children to have regular visitation with Waltman. *Id.* The lower court was correct in not taking the Bolivars' preferences into account when making his determination that Waltman's continued visitation is in the children's best interest.

Additionally, to the extent the Bolivars argue that *Woodell* should be overturned, with all due respect, this Court does not have the authority to grant the Bolivars' request. *See Spears v.*

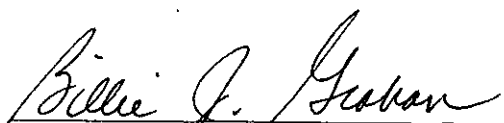
State, 942 So.2d 772, 773 (Miss. 2006) (holding that the Supreme Court is the ultimate expositor of the law of the state). *See also Bevis v. Linkous Const. Co., Inc.*, 856 So.2d 535, 541 (Miss.App. 2003) (holding that the Court of Appeals, sitting as an intermediate appellate court, is bound by established precedent as set out by the Supreme Court and does not have the authority to overrule the decisions of that court). In this instance, taking all factors before him into account, the chancellor made an appropriate determination that regular visitation with Waltman is in the best interest of the minor children and this decision should be upheld.

CONCLUSION

On visitation issues, as with other issues concerning children, the chancery court enjoys significant discretion in making its determination of what is in the best interest of the child. *Haddon v. Haddon*, 806 So.2d 1017, 1020 (Miss. 2000). In this case, Judge McKenzie "heard testimony in support of the respective positions of the parties after setting forth the [visitation rules]," and "heard additional testimony in support of and in opposition to the respective positions of the parties." (Record p. 19). Then, the chancellor clearly made a finding that continued visitation with Waltman was in the best interest of the children. *Id.* The chancellor's findings were based on substantial evidence and Judge McKenzie, in no way, abused the significant discretion afforded him. Joyce Waltman, respectfully submits that the Bolivar's appeal should be denied and the lower court's decision should be affirmed in full.

RESPECTFULLY SUBMITTED, this the 29th day of July, 2011.

JOYCE WALTMAN, APPELLEE



By: Billie J. Graham

CERTIFICATE OF SERVICE

I, Billie J. Graham, counsel for Appellee do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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This, the 29th day of July, 2011.

Billie J. Graham