**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**
**COURT OF APPEALS**

**No: 2010-CA-01982**

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

**VS.**

**JOYCE WALTMAN** — **APPELLEE**

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**APPEAL FROM THE CHANCERY COURT OF JONES COUNTY,**
**STATE OF MISSISSIPPI**

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# APPELLANT'S RESPONSE BRIEF

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Oral Argument Not Requested

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## 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 may evaluate possible disqualifications or recusal.

**JOYCE WALTMAN**
Appellee

**STANLEY R. BOLIVAR and CINDY BOLIVAR**
Appellant

**BILLIE J. GRAHAM, ESQ.**
Attorney for Appellee

**DEBRA L. ALLEN, ESQ.**
Attorney for Appellant

**HON. FRANKLIN C. MCKENZIE, JR.**
Chancellor , Second Judicial District of Jones County, Mississippi

This the 22 day of August, 2011.

DEBRA L. ALLEN
Attorney for Appellant

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## INTRODUCTION

It is Cindy and Stanley Bolivar's intent to only respond to that portion of the Brief of Appellees as are necessary. Therefore, Appellants only Respond regarding the following issues .

## I. THE COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN DECIDING WHETHER JOYCE WALTMAN SHOULD HAVE BEEN AWARDED COURT ORDERED VISITATION

A grandparent may petition the court for visitation in two instances: (1) whenever a court of this state enters a decree or order awarding custody of a minor child to one of the parents of the child; or (2) whenever the grandparent has established a viable relationship with the child, the custodian of the child unreasonably denies visitation with the grandparent, and the visitation rights of the grandparents are in the best interest of the child. *See* Miss. Code Ann. § 93-16-3(1), (2) (Rev. 2004). See also *T.T.W. v. C.C.*, 839 So.2d 501, 504 (Miss. 2003).

Joyce Waltman was simply never required to prove that:

(1) she had established a viable relationship with the child; and

(2) that Cindy or Stanley had unreasonably denied the her visitation rights with the children ; and

(3) that her visitation with the children would be in the best interests of the child.

Cindy and Stanley Bolivar stand by their position that Joyce Waltman was never required to prove that visitation was in the children's best interest. That is a shifting of the burden of proof.

Cindy and Stanley stand by their having cited the cases of *Morgan v. West*, 812 So. 2d 987 (Miss. 2002) and *Stacy v. Ross*, 798 So.2d 1275, 1282 (Miss. 2001) where in each case, the Court below essentially reversed the burden of proof and did not apply the law properly.

Both cases clearly support reversal of the lower Court herein.

## III. (AS NUMBERED IN THE ORIGINAL BRIEF) THE COURT ERRED AS A MATTER OF LAW WHEN IT FAILED TO APPLY THE "MARTIN FACTORS" SET OUT BY THE MISSISSIPPI SUPREME COURT IN MARTIN V.COOP

The Court never applied or considered the factors set out in *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997).

In *T.T.W. v. C.C.*,839 So.2d 501, 505 (Miss.2003), this Court held that "[M]aking findings of fact under the *Martin* factors is an integral part of a determination of what is in the best interest of a child. In *Townes v. Manyfield*, 883 So. 2d 93 (Miss. 2004) this Court relied upon *Martin* and *TTC* this Court reiterated the holdings in both case saying, "Therefore, the *Martin* factors are to be applied and discussed in every case in which grandparent visitation is an issue. Id. at 97.

This Court only recently decided wherein paternal grandparents sought grandparent visitation rights to visit with a child who was adopted by her maternal grandparents after both parents parental rights were terminated. *Conerly v. Davis*, 46 So.3d 858 (Miss.App. 2010) This case should have been cited on Appellant's Brief and Counsel apologizes for missing this casein her research.

The ruling from this Court in *Conerly* is applicable to the case at hand in many ways such that it is important to set out the following language from *Conerly v. Davis*, 46 So.3d 858, 860 (Miss.App. 2010)

> In this case, the chancellor did not mention the *Martin* factors or make any on-the-record finding supporting the visitation award. **From language appearing in the record, it seems the chancellor believed Davis was**

**statutorily entitled to be awarded visitation with Mason.** However, the grandparent-visitation statutes simply give a grandparent such as Davis standing to file a request seeking visitation rights. It is then within the chancellor's discretion to award or deny visitation after reviewing the *Martin* factors and considering the best interest of the child. Therefore, we vacate the chancellor's judgment and remand this case for an on-the-record consideration of the *Martin* factors and the entry of an appropriate judgment based on those factors. (Emphasis added)

This case should be reversed for the Court's failure to address the *Martin* factors

## V. (AS NUMBERED IN THE ORIGINAL BRIEF) THE CUSTODIAL GRANDPARENTS DESERVED SOME DEFERENCE BY VIRTUE OF BEING COURT APPOINTED GUARDIANS OF MINORS

*Woodell v. Parker*, 860 So.2d 781 (Miss. 2003) stands for the proposition that while this Court through precedent has given natural parents a form of deference to their opinion regarding visitation with grandparents and the extent of it, there is no deference to be given to any custodian other than natural parents. Id. at 788.

A review of *Woodell* reveals a very unusual set of facts. The adoptive parents were the maternal grandparents who adopted the child with the consent of the natural parents but without the knowledge of the paternal grandparents who later sought visitation. The Court applied the *Martin* factors and determined that visitation rights should be granted over the adoptive grandparents objection.

In doing so, the Court in *Woodell* relied heavily on certain factors: the apparent sham nature of the adoption, that periodic visitation by the grandparents would not be near as disruptive as the

nightly visitation enjoyed by the natural mother, that there was no question presented as to moral fitness, there was no evidence that the grandparents would undermine or interfere with the general discipline of the child, that the grandparents indicated a willingness to work with the adoptive parents, and the adoptive parents were adamant that there be no visitation whatsoever primarily because of animosity due to the deterioration of the natural parent's relationship. Id. 789-790.

Further, in *Woodell*, the Court said, "Any deference that may be afforded the Woodells cannot necessarily be said to supersede the findings of the chancellor that it is in the best interest of Shelby to remain in close contact with her paternal grandparents." Id. At 788.

The Chancellor below in this case, unlike in *Woodell*, made no findings of fact regarding what was in the child's best interest and made no findings as required under *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997). Joyce Waltman concedes this in her Brief of the Appellee wherein she stated, "Although he did not specifically indicate that he was considering the Martin factors, ... ." at Page 9. (Clarification added.)

With respect to the precedential value of *Woodell*, Counsel would respectfully ask the Court to reconsider the applicability of *Woodell* to the case before it. The general holding of *Woodell* means that no permanent custodian of a child, established as such by adoption, guardianship, court order or otherwise, who is not a natural parent, should be given any right to determine, reasonable visitation between the child in their care, custody and control and the grandparents who desire visitation but who do not have or want the responsibilities of raising a child.

This Court should acknowledge the many holdings of the Mississippi Supreme Court which have significantly and repeatedly eroded the "rights" of natural parents who relinquish custody of their children to third parties.

For the first time in *Grant v. Martin*, 757 So.2d 264, 266 (Miss. 2000), the Supreme Court

held that a natural parent who voluntarily relinquishes custody of a minor child, through a court of competent jurisdiction, has forfeited the right to rely on the existing natural parent presumption. A natural parent may reclaim custody of the child only upon showing by clear and convincing evidence that the change in custody is in the best interest of the child.

Then, *Hill v. Mitchell*, 818 So.2d 1221 (Miss.App. 2002) the Mississippi Supreme Court added "constructive abandonment" to the list of actions that would result in a parent losing the natural parent presumption.

In 2010, the Mississippi Supreme Court held in *Vaughn v. Davis*, 36 So 2d 1261, 1265-66 (Miss. 2010) that a parent's desertion of their children, as distinguished from a voluntary relinquishment or an abandonment of them, would also result in that parent losing the natural parent presumption. In *Vaughn*, the Supreme Court granted *in loco parentis* status to a grandparent who had assumed the care, custody and control of her grandchild. Id. At 1266-1267

At the same time that the Mississippi Supreme Court is cutting back the rights of parents who choose not to raise their children and decide to delegate it to third parties, the Court is strengthening the rights of custodial third parties who have assumed the responsibilities and duties of absent parents.

In *Vaughn v. Davis*, 36 So 2d 1261, 1265-66 (Miss. 2010) the Mississippi Supreme Court affirmed a Chancellor who granted *in loco parentis* status to a grandparent who had assumed the care, custody and control of her grandchild. Id. at 1266-1267.

In *Adams v. Johnson*, 33 So. 3rd 551 (Miss. Ct App. 2010) this Court found as a matter of first impression, that when a parent has been found unfit and custody was awarded to a third party, the parents lost the natural parent presumption.

Thus, this Court, as well as the Supreme Court have been shrinking the unfettered rights of

parents to reclaim children left behind for others to care for while strengthening the rights of those third parties who step up to the plate and accept the responsibility and duties of raising somebody else's children.

*Woodell* has been eroded by the litany of more modern cases set out above. In light of recent rulings from bith the Mississippi Supreme Court and this Court, the continued viability of *Woodell* is suspect.

**CONCLUSION**

Stanley and Cindy have stepped up to the plate. Joyce Waltman has not. Stanley and Cindy Bolivar make the daily commitment to do what is best for their three (3) grandchildren that neither their daughter or their father care to raise or support. Joyce Waltman has not.

Stanley and Cindy Bolivar must disburse discipline and structure and no Court could fault Stanley and Cindy Bolivar for the kinds of "rules" they impose on these children they are raising: no violent, bloody video games, no tattoos- even fake ones, no make-up for little girls, no automatic replacement for a toy if you break it, that they all go to church on Sunday, and that the children do not lie.

Under the Chancery Court's ruling, Joyce Waltman is allowed to fault Cindy and Stanley. Worse, she is allowed to undermine Cindy and Stanley, she is allowed to proudly tell these children to lie to their grandparents, and she is allowed to thwart their efforts at providing a reasonable and traditional religious education.

Is it reasonable and fair to entrust children to a permanent custodian, giving them specific legal obligations, duties, and responsibilities without entrusting them to make decisions about who and how much time the children spend with any family member, including grandparents?

As the Mississippi Supreme Court said in *Logan v. Logan,* 730 So.2d 1124 (Miss.1998),

when it held that the custody of a minor child should be awarded to its stepfather under the *in loco parentis* doctrine, " With the burden should go the benefit." Id. at 1126

Where is the benefit, the equity and the reason when Stanley and Cindy Bolivar cannot make simple, fundamental rules for the children they are rasing to follow and expect third parties to respect those rules?

Respectfully submitted,
**STANLEY R. BOLIVAR and**
**CINDY BOLIVAR**

BY: 
DEBRA L. ALLEN, MSB [redacted]
Attorney for Appellant

## CERTIFICATE OF SERVICE

I, Debra L. Allen, attorney of record for the Appellant, Stanley R. Bolivar and Cindy Bolivar, certify that I have this date served a true and correct copy of the above and foregoing *Appellant's Response Brief* via United States mail, postage prepaid, on the following persons:

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This the 22 day of August, 2011.

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