

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

No: 2010-CA-01982

T

STANLEY R. BOLIVAR and
CINDY BOLIVAR

APPELLANT

VS.

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 may evaluate possible disqualifications or recusal.

JOYCE WALTMAN

Appellee

**STANLEY R. BOLIVAR and CINDY
BOLIVAR**

Appellant

BILLIE J. GRAHAM, ESQ.

Attorney for Appellee

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Attorney for Appellant

HON. FRANKLIN C. MCKENZIE, JR.

Chancellor , Second Judicial District of
Jones County, Mississippi

This the 2ND day of June, 2011.



DEBRA L. ALLEN
Attorney for Appellant

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STATEMENT OF THE ISSUES

- I. THE COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN DECIDING WHETHER JOYCE WALTMAN SHOULD HAVE BEEN AWARDED VISITATION**
- II. THE COURT BELOW ERRED AS A MATTER OF LAW WHEN IT SHIFTED THE BURDEN OF PROOF TO THE CUSTODIAL PARTIES TO PROVE WHY THEY SHOULD NOT ALLOW THE VISITATION DEMANDED BY THE GRANDMOTHER**
- III. 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**
- IV. ASSUMING THE COURT DID NOT ERR IN GRANTING JOYCE WALTMAN GRANDPARENT VISITATION, THE COURT ERRED IN GRANTING EXCESSIVE VISITATION EQUIVALENT TO WHAT A NATURAL PARENT WOULD HAVE**
- V. THE CUSTODIAL GRANDPARENTS DESERVED SOME DEFERENCE BY VIRTUE OF BEING COURT APPOINTED GUARDIANS OF MINORS**
- VI. CONCLUSION**

STATEMENT OF THE CASE

A. NATURE OF THE CASE

B. COURSE OF THE PROCEEDINGS

C. DISPOSITION IN THE COURT BELOW

A. NATURE OF THE CASE

This is an appeal from a decision of the Chancery Court of the First Judicial District of Jones County granting grandparents visitation to the paternal grandmother of two minor children. Both children are the wards of their maternal grandparents who were appointed the Co-Guardians of two children prior to the filing of the Petition for Grandparents Visitation privileges by the paternal grandmother.

B. COURSE OF THE PROCEEDINGS

Cindy Bolivar (hereinafter, "Cindy") and Stanley R. Bolivar (hereinafter, "Stanley") are the maternal grandparents of the minor children Jason Blake Waltman (hereinafter, "Jake") and Kaylee Marie Waltman, (hereinafter, "Kaylee"). On May 18, 2008, the Chancery Court of the Second Judicial District of Jones County, Mississippi entered its Decree Appointing Co-Guardians appointing Cindy Bolivar and Stanley R. Bolivar as Co-Guardians of the minor children Jason Blake Waltman (hereinafter, "Jake") Kaylee Marie Waltman, (hereinafter, "Kaylee") and a third grandchild born to a different father and who is not in issue in this appeal.

The natural parents of all children agreed to the appointment of Cindy and Stanley as Co-Guardians. Neither parent is involved in the children's lives on any regular basis and each parent has a history of prolonged substance abuse. The parents are not parties below or on appeal and are legally irrelevant to this appeal.

After their appointment as Co-Guardians, Cindy and Stanley allowed Joyce Waltman to see Jake and Kaylee on a regular basis. In time, Joyce Waltman's behavior and attitude caused Cindy and Stanley to doubt whether it was in the best interests of the children to spend as much time with Joyce Waltman and began to place limitations on Joyce Waltman's time with the children.

On April 9, 2010, Joyce Waltman, the paternal grandmother of the minor children, Jake and Kaylee, filed her Petition for Grandparent Visitation Privileges.

On May 24, 2010, the Chancery Court of the Second Judicial District of Jones County, entered its Temporary Order awarding certain visitation to Joyce Waltman which were termed to be "the same visitation" "previously awarded to the natural father" in the divorce awarded to the natural parents. It is reasonable to refer to that visitation awarded to Joyce Waltman on a temporary basis as "standard" visitation regularly awarded to a non-custodial parent, being alternating weekends and certain times during major holidays.

C. DISPOSITION IN THE COURT BELOW

After a trial on the merits on, the Court gave its ruling awarding visitation rights to Joyce Waltman. (Record Excerpt 3) The Court later, *sua sponte*, entered its Supplemental Findings of Facts. (Record Excerpt 4) The Court then entered its Order on Petition for Grandparents Visitation Privileges, incorporating its opinion and Supplemental Findings of Facts. (Record Excerpt 2)

SUMMARY OF THE ARGUMENT

I. 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).

The Chancellor erred as a matter of law by not requiring Joyce Waltman to produce evidence and prove that she was entitled to seek grandparents visitation with the children at issue. Instead, the Chancellor relied almost solely upon the fact that Cindy and Stanley had previously allowed Joyce Waltman more extensive visitation before seeking to limit it as justification for granting grandparent visitation.

II. Joyce Waltman had the burden of proof to show that she was entitled to have court ordered grandparent visitation. The Court below erred as a matter of law when it shifted the burden of proof to Cindy and Stanley to show why Joyce Waltman should not be granted grandparent visitation.

III. The Court below erred as a matter of law when it failed to address or make specific findings of fact regarding the factors set out in *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997) to determine if it was in the best interest of the minor children to have court ordered visitation with Joyce Waltman.

IV. Assuming *arguendo* that there was sufficient evidence to award Joyce Waltman any grandparent visitation, the Court erred as a matter of law when it awarded her visitation equal to what a non-custodial parent would normally receive.

In Townes v. Manyfield, 883 So. 2d 93 (Miss. 2004) this Court stated that say, “ Furthermore, when a chancellor finds that there are circumstances that "overwhelmingly dictate" that a grandparent should be awarded equivalent visitation to that of a parent, those findings must be fully discussed on the record.” Id. at 97.

No such findings were made of record to justify the award of such extensive visitation or to support that such extensive visitation was in the best interests of the minor child.

V. Despite the fact that Cindy and Stanley are not the natural parents, they should be entitled to some deference from the Court to exercise discretion as the custodial grandparents to determine how much visitation Joyce Waltman had with the minor children.

ARGUMENT

A. STANDARD OF REVIEW

This Court will always review a chancellor's findings of fact, but the Court will not disturb the factual findings of a chancellor when supported by substantial evidence unless the Court can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard.

Cummings v. Benderman, 681 So.2d 97, 100 (Miss. 1996).

In matters that are questions of law, this 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 422, 424 (Miss. 1992); *Harrison County v. City of Gulfport*, 557 So.2d 780, 784 (Miss. 1990).

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

Mississippi Code Annotated § 93-16-3 establishes who may petition for visitation rights and under what specific circumstances.

(1) Whenever a court of this state enters a decree or order awarding custody of a minor child to one (1) of the parents of the child or terminating the parental rights of one (1) of the parents of a minor child, or whenever one (1) of the parents of a minor child dies, either parent of the child's parents may petition the court in which the decree or order was rendered or, in the case of the death of a

parent, petition the chancery court in the county in which the child resides, and seek visitation rights with the child.

(2) Any grandparent who is not authorized to petition for visitation rights pursuant to subsection (1) of this section may petition the chancery court and seek visitation rights with his or her grandchild, and the court may grant visitation rights to the grandparent, provided the court finds:

(a) That the grandparent of the child had established a viable relationship with the child and the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child; and

(b) That visitation rights of the grandparent with the child would be in the best interests of the child.

(3) For purposes of subsection (2) 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 (1) 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.

(Section 4 omitted)

Thus, 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 did not qualify under the parameters of Section 1 and therefore was required to proceed under Section (2). The Court below never followed the dictates of the statute and never required Joyce Waltman to meet the burden of proof established by the legislature in the three part test set out in Section 2.

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.

(1.) Viable Relationship

Mississippi Code Annotated Section 93-16-3(3) reads, “For purposes of subsection (2) 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 (1) 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."

It is conceded that Joyce Waltman had established a viable relationship with Kaylee and Blake as defined by the statute, in that she had had frequent visitation including occasional overnight visitation with said child for a period of not less than one (1) year.

(2.) Joyce Waltman never presented any proof that Cindy or Stanley had unreasonably denied her visitation with the children.

Joyce Waltman was asked if she had ever been told that she could not see the children. Her answer was that she couldn't remember "the correct date" but one time she was told she could have the children from eight a.m until five p.m. on a Saturday instead of having them the entire weekend.

Stanley testified that while he was opposed to the extensive visitation that Joyce Waltman demanded, he was not against her having visitation with the children. He had no objection to Joyce Waltman participating or attending the children's activities and events. (Trial Transcript P. 47, L. 28-29; P. 48, L. 5-17.) Stanley testified that he had asked Joyce Waltman to bring the

children to their church and join them on Sundays. She refused. Stanley asked that Joyce Waltman take the children to church. She told him she would take them to church. She lied to him. (Trial Transcript P. 5, L. 9 - 14)

Cindy testified that neither she or Stanley had ever told Joyce Waltman she could not see the children. (Trial Transcript P. 77, L. 15-18)

It is undisputed that from the time the guardianship was established in May, 2008 until shortly before Joyce Waltman had filed her Petition for Grandparent Visitation, that she had been having the same visitation that had been set out in the divorce decree between her son and the natural mother. (Record Excerpt 6) Stanley and Cindy believed that they were required by law to do that and so they did, whether they liked it or not. It was only after over a year of being frustrated by Joyce Waltman's attitude and hoping and waiting that the situation would get better that they sought to limit her contact with the children. (Trial Transcript P. 61, L. 13-26) Stanley and Cindy tried to work with Joyce Waltman but as Joyce Waltman testified she could what she wanted to do.

When Cindy and Stanley finally did try and cut back contact between the children and Joyce Waltman, they sought to limit it to every other Saturday from 8:00 a.m. until 5:00 p.m. (Trial Transcript P. 63, L. 23-29) In light of Cindy and Stanley's desire that the children attend church on Sunday mornings, in light of the fact that Joyce Waltman is not home on Friday nights, and in light of Joyce Waltman's clearly directing the children, by her own admission, to withhold information from Cindy and Stanley, it can hardly be said that this was an unreasonable denial of visitation.

In the case of *Stacy v. Ross*, 798 So.2d 1275, 1282 (Miss. 2001), the Mississippi Supreme

Court stated, “ The chancellor had not awarded custody of the children to one parent, and the grandmother offered no facts in her motion or at the hearing to demonstrate she had a viable relationship with the children and that she was being unreasonably denied visitation. Therefore, the chancellor's judgment denying the grandmother's motion to intervene is correct and is affirmed.

The Mississippi Supreme Court further stated in *Stacy*, “There is no finding of subsidiary facts concerning the disputes between the parties upon which to base a finding of unreasonableness. The record simply does not permit a finding of unreasonableness by the Stacys to justify the order imposed upon the Stacys.”

Joyce Waltman never met her burden of proof to show that she had been unreasonably denied visitation with the children. In fact, there is no evidence of record that would tend to show Cindy and Stanley Bolivar tried to prevent her from seeing the children.

(3.) Visitation with the children would be in the best interests of the children.

Joyce Waltman put on no evidence as to why it was in the children’s best interest to have visitation at all with her, much less the extensive visitation she was seeking.

On the contrary, ample evidence was presented as to why it is not in the best interest of the children to have such unfettered, frequent and lengthy contact with Joyce Waltman.

Rather than repeat herself unnecessarily, Counsel for Cindy and Stanley would show that the argument set out in Section III regarding application of the *Martin v Coop* factors to the facts of this case. It shows exactly why it is not in the children’s best interest to have extensive visitation with the minor children.

II. THE COURT BELOW ERRED AS A MATTER OF LAW WHEN IT SHIFTED THE BURDEN OF PROOF TO THE CUSTODIAL PARTIES TO PROVE WHY THEY SHOULD NOT ALLOW THE VISITATION DEMANDED BY THE GRANDMOTHER

The Court indicated its approach early at trial. From the time the case was called, the Court treated Cindy and Stanley as if they had done something wrong. The Court had previously entered a Temporary Order awarding Joyce Waltman the same visitation her son had once had because Cindy and Stanley at one time “allowed Joyce to have the same visitation that was awarded to her son.” (Trial Transcript) At the trial on the merits, the only issue the Court wanted to hear was why should Joyce Waltman not have the same visitation her son had been awarded in the divorce. When Counsel for Cindy and Stanley argued to the Court below that Joyce Waltman should first take the stand and put on evidence in support of her burden of proof to meet the three part test set out in the Grandparent Visitation Rights statute, the Court replied, “I’m not interested in that.”

In the Court’s “Supplemental Findings of Fact” it reiterated, “Although this matter was filed by Joyce Waltman as one for “grandparent visitation”, it is in reality a contest between grandparents because the natural parents have relinquished their custody to the Bolivars through a guardianship.” (Record Excerpts 6)

When Counsel for Stanley and Cindy attempted to put on proof regarding the *Martin* factors, the Court again evidenced its attitude towards Cindy and Stanley.

Q Now we’ve already had some discussions about casinos. But just tell me, what was her response when you asked her not to do these things?

MS. GRAHAM: My objection is the same, Judge.

We’ve entered into an agreement about that. I don’t see the necessity of going into testimony about it.

MS. ALLEN: Your Honor, I'm trying to move along. I think I'm doing so, but again my clients do not agree with the length of time that's being allotted to this non-custodial grandparent. These questions go to her lies to these people and her defiance of ...

THE COURT: Well, what it does is makes a bad situation worse, for y'all to get up here and do what you're doing here today. It's certainly not helping the children to have their grandparents at odds with each other – the only parents that they really know. That's not helping the situation one bit in the world for her to get up here and criticize them or for them to get up here and criticize her. That only makes a bad situation worse. But if that's what you choose to do, then we'll go forward with it.

MS. ALLEN: Your Honor, I agree with you; but it is unfair to blame the Bolivars for that problem when Mrs. Waltman filed the lawsuit when she was seeing these children on a regular basis. They're defending what she brought.

(Trial Transcript P. 55, L. 19-29; P. 56, L. 1-14)

Instead of requiring Joyce Waltman to prove that she should receive visitation rights, the Court below erroneously shifted the burden of proof to Cindy and Stanley to prove why they should not co-parent with Joyce Waltman.

The case of *Morgan v. West*, 812 So. 2d 987 (Miss. 2002), is surprisingly similar to the case before the Court. In *Morgan*, the paternal parents filed for visitation after the parents divorced and the mother received custody of the children. In *Morgan*, this Court revisited *Martin*

v. *Coop*, 693 So. 2d 912 (Miss. 1997), reiterated the importance of its proper application, and confirmed that, ultimately, it is the child's best interest that comes first, and not those of the grandparents.

In *Morgan*, this Court found that the Chancellor did not apply the *Martin* factors in an appropriate manner and remanded the case for further proceedings.

This Court also agreed with the parents in *Morgan* that the trial court had shifted the burden of proof to the parents to prove, in essence, why the grandparent should not have visitation. *Id.* at 994. For this finding this Court cited the open comments of the Chancellor that she had already reached a decision in favor of the grandparents; cited the fact that the Court below seemed impatient with the parents and cut their presentation short; cited the fact that the Court below relied much too heavily on the fact that grandparents had "helped [them] when they were down", and cited, in essence, the fact that the Court below wanted everybody to just "get along" and in essence sought to force an agreement of the issues with input from all parties. *Id.* at 995-996.

While accepting that the Chancellor in this case sincerely and in deed wanted all parties to just "get along", and rightfully so, the Appellant must submit that the Court below applied an erroneous standard and shifted the burden of proof to Cindy and Stanley. This error warrants reversal.

The case of *Stacy v. Ross*, 798 So.2d 1275, 1282 (Miss. 2001) is analogous to this case. In *Stacy*, the children at issue were in the custody of their parents within an intact marriage. There had been disputes between the natural parents and the grandparent. In *Stacy*, the Supreme Court determined that the Court below had made its "primary goal" to "reestablish visitation with

the grandparents rather than the best interest of the child.” Id. at 1277. That is the same approach the Court took here.

III. 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.

Application of those factors to the facts and circumstances of this case show that, ultimately, it is not in the best interest of the children to have extensive visitation with Joyce Waltman.

THE MARTIN FACTORS

1. The amount of disruption that extensive visitation will have on the child's life. This includes disruption of school activities, summer activities, as well as any disruption that might take place between the natural parent and the child as a result of the child being away from home for extensive lengths of time.

This factor was not addressed by the Court and Joyce Waltman presented no evidence on this

issue.

Cindy and Stanley did put on proof that Joyce Waltman was a very disruptive influence in the children's lives.

Cindy and Stanley expect Kaylee and Blake to attend church every Sunday and they are very committed to the children's religious training. Joyce Waltman claimed that she supported Cindy and Stanley's efforts to give religious training to the children and in taking them to church. (Trial Transcript P. 14, L. 26-30) When asked what church the children usually attended, Joyce Waltman testified, "I have no idea what the name of the church is." (Trial Transcript P. 15, L. 10-12)

Q: What church do the children attend when they are with you?

A: We go to Salem Heights Baptist Church. We do not go all the time, but we have attended.

Q: In fact you have taken the children to church one time; haven't you?

A: No ma'am, I've taken them more.

Q: Two times?

A: I don't know exactly how many.

Q: What church do the children usually attend when they are at their home?

A: I have no idea what the name of the church is.

Q: You don't know what church they attend.

A: No, I don't live in that community.

Q: When is the last time you took them to church?

A: About a month ago.

Cindy and Stanley asked Joyce Waltman to allow the children to come home on Saturdays so they could attend their church. Joyce Waltman refused to allow the children to attend their own church on her weekends. (Trial Transcript P. 16, Line 17-22)

Stanley testified that the children have special programs at their church, Oakland Grove

Baptist Church, and that the children missed some of their activities due to the visitation with Joyce Waltman. Stanley asked Joyce Waltman to bring the children to their church on Sundays, and Joyce Waltman's response was that she didn't have to do what Stanley and Cindy asked her to do. (Trial Transcript P. 50, L. 24-29; P. 51, Line 1-6)

Stanley testified that Blake would like to be in Cub Scouts and that he had not even asked Joyce Waltman about it because he knew it would "do no good" because she always said she had "papers" for her visitation. (Trial Transcript. 51, L. 7-15) Here you have a custodial guardian duly appointed by the Court, feeling as if he must ask permission of a family member regarding the raising of the child in his lawful care.

Cindy had made appointments for the children to see their doctors. Cindy testified that she had made them prior to Joyce Waltman telling her she had a right to summer visitation. Cindy cancelled the doctor's appointments to accommodate Joyce Waltman. Blake has suffered all of his life from severe atopic dermatitis with eczema to the point that his skin cracks and must be treated regularly with certain medications. (Trial Transcript P. 70, L. 18-24) . Blake was having an outbreak so severe that Joyce Waltman had to bring the child back from her visitation the day after she left with him so that he could go to his doctor's appointment. Cindy met Joyce at the pharmacy, gave her a new medication and specific instructions on how to use it, explaining that she should use it all by the time they got back. Cindy discovered that Joyce Waltman had not administered the medication as instructed. (Trial Transcript P. 69, L. 11-29)

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

This factor was not addressed by the Court.

Joyce Waltman is not present during a significant portion of the visitation she demands. Despite the fact that Cindy and Stanley are opposed to the children being exposed to people drinking alcohol, Joyce Waltman leaves them with her sister Bobbie Kizzar and her husband, Jerry. Jerry Kizzar is not willing to accede to the Co-Guardians wishes by not drinking. Instead, he has “a room on the back of his trailer that he goes out to and watches his TV and drinks his beer.” (Trial Transcript P. 17, L. 13-16)

Stanley does not believe that Joyce Waltman exercises good judgment with the children and cited allowing them to ride four wheelers without helmets, going bungee jumping, and inappropriate video games. (Trial Transcript P. 60, L. 23-29)

3. The age of the child.

This factor was not addressed by the Court. Joyce Waltman introduced no evidence on this factor. At the time of trial, Blake was six (6) years old and Kaylee was three (3) years old.

Cindy and Stanley testified that as the children had gotten older, the disruptive influences of Joyce Waltman had grown more troublesome.

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

This factor was not addressed by the Court.

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

This factor was not addressed by the Court. However, it is conceded that the children love Joyce Waltman and that she testified that she loves the children.

6. The moral fitness of the grandparents.

Joyce Waltman is a dishonest person. She lied to Cindy and Stanley and told them the law required that she have the son visitation her son used to have. She told Blake to, in essence, lie to Cindy and Stanley about her having bought him a cell phone – without asking their permission or even telling them about the purchase.

What kind of grandparent does such a thing? What natural parent would allow a grandparent to behave in this disrespectful, dishonest manner with their natural children. It is likely none and Cindy and Stanley should not have to tolerate Joyce Waltman's lack of character, lack of maturity, and her detrimental influence on these children.

Stanley testified that the children had not been telling him the truth about their visits with Joyce Waltman beginning about six to eight months before trial and "hiding stuff" and cited as specific examples that the children had withheld that had not attended church and the cell phone incident (Trial Transcript P. 52, L. 1-18; Trial Transcript P. 66, L. 22-28) Joyce Waltman admits that she told Blake that her giving him a cell phone was "none of their business"

Cindy likewise had observed the children being deceitful with her.

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

The parties live approximately seventeen (17) miles from each other. This factor was not addressed by the Court but is of little import as length of travel is not egregious.

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

This factor was not addressed by the Court. Joyce Waltman introduced no evidence on this factor. But freely admitted that she could do as she wished with the children in her home.

Stanley was very clear that Joyce Waltman made intentional efforts to undermine their ability

to discipline and rules and the children's home. (Trial Transcript P. 56, L. 15-17) Stanley and Cindy objected to Joyce Waltman allowing Blake to play video games as much as he wanted and stated that in his household, Blake was limited to one hour a day of playing. (Trial Transcript P. 58, L. 4-19) Stanley imposed this rule for Blake's best interest because as Stanley himself said, "[T]here are other activities that children need to be doing and other things they need to be experiencing." (Trial Transcript P. 58, L. 17-19)

Stanley and Cindy also objected to the violent video games that Joyce Waltman bought the children and directly contradicted her testimony that she only bought "cartoon" videos. Stanley specifically mentioned a "transformer" game and the fact that Blake would talk about how many people or characters he could "kill." (Trial Transcript P. 58, L. 23-29; P. 59, L. 1-2)

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

This factor was not addressed by the Court. Joyce Waltman introduced no evidence on this factor.

Joyce Waltman demands to have visitation as a grandparent and she demands to have it every other weekend from Friday at 5:00 to Sunday at 4:00. Yet, Joyce Waltman freely admits that she works Friday nights at Bumper's Drive-In until 11:15 p.m. (Trial Transcript P. 9, L. 25-29); Page 10, Line 1-5.) During this time that the children are taken out of their homes and Joyce Waltman is at work, the children are with her sister, Bobbie Kizzar and her husband, Jerry Kizzar.

Joyce Waltman later admitted that she had told the Bolivars that her sister, Bobbie Kizzar, as

well as herself, could do whatever they wanted to when the children are with them. (Trial Transcript P. 13, Line 6-9) This is particularly alarming because, as Joyce Waltman admitted, Kaylee spends each weekend night sleeping at Bobbie's house and with Bobbie, while Blake stays with Joyce Waltman. (Trial Transcript P. 13, Line 13-20)

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.

This factor was not addressed by the Court. Joyce Waltman introduced no evidence on this factor.

However, the initial questions addressed to Joyce Waltman and her responses reflect her attitude very clearly:

Q: You do understand that the Bolivars are legally responsible for the care, custody and control of these children.

A: Yes, I do.

Q: And, you understand that they are allowed to make certain rules in their household.

A: Yes, I do.

Q: But, you don't think you need to obey those rules in your household.

A: No, I don't.

(Trial Transcript P. 8 Lines 25 - 29; P. 9 Lines 1-5)

Joyce Waltman was later asked, "You have in fact told the Bolivars that when these children are with you, you can do whatever you want to, haven't you?" Her answer was a proud, "Yes, I have." (Trial Transcript P. 13, L. 6-9.)

And Joyce Waltman has been very good at her word that she can do whatever she wants to when the children are with her. Joyce Waltman bought six year old Blake a cell phone. When

questioned about this, the following exchange took place:

Q: Did you ask the Bolivars permission before you bought Blake a cell phone?

A. No, I did not.

Q. Did you tell them that you had bought him a cell phone?

A. No. I did not.

Q. You did not think it was important to ask their permission?

A. No. I did not.

Q. Why did a six year old boy need a cell phone.

A. Why? Because he likes to talk, and he likes to call me, and his cousins. And, he wanted his own phone. It was not an expensive phone.

Q. And because he wanted it, he got it.

A. Yes.

(Trial Transcript P. 18, L. 14-28)

Even more disturbing is Joyce Waltman's testimony that she encouraged Blake to withhold from Cindy and Stanley that she had bought him a cell phone.

Q: Isn't it true that you told Blake not to tell the Bolivars that you had bought him a cell phone?

A: I told him that it was none of their business.

Q: And isn't it true that when they found out he had a cell phone that they questioned you as to why you bought it?

A: Yes.

Q: And, when asked who did a six-year old boy need to call, didn't you tell them anybody he wants to?

A: That's correct.

Joyce Waltman, her sister Bobbie and her husband all smoke cigarettes. While Joyce Waltman admitted that she is aware that Blake suffers from asthma, she had no problem admitting that she smokes in the car while the children are with her. (Trial Transcript P. 20 Lines 19 -23) In fact, Joyce, her sister Bobbie and her husband Jerry took the children to Georgia.

While on that very trip with the three smokers, Blake suffered a serious asthma attack and had to be taken to the hospital, incurring a \$4,000.00 medical bill that Joyce Waltman had no intention of paying. (Trial Transcript P. 21 L. 10 -12)

Joyce Waltman admitted that she knew Blake was allergic to dog dander. Yet, she has a dog in her home and Bobbie has a dog in her home. (Trial Transcript P. 21, L. 28-29; P. 22, L. 1-16)

Joyce Waltman admitted that Cindy and Stanley asked her not to take the children to casinos. Yet, she proudly defied them repeatedly, taking the children to stay in casinos. (Trial Transcript P.22, L. 11-17)

Joyce Waltman does not have the courtesy, foresight or attitude to honor even the simplest, reasonable, common sense requests Cindy and Stanley have made: Cindy and Stanley asked that Joyce Waltman not take the children for fast food at McDonald's or such places on the way home on Sundays so as not to ruin their dinner. And Joyce Waltman did it anyway. (Trial Transcript P. 25, L.23-29; P. 26, L. 1-8) (Trial Transcript, P. 52, L. 19-29; P. 53, L. 1-2)

Cindy testified that she has asked Joyce Waltman not to take Blake to the beach because the sand aggravates his skin condition. Joyce Waltman's response was, as usual, was to do it anyway. (Trial Transcript P. 71, L. 1-14)

Stanley testified that he had asked Joyce Waltman to bring the children to their church and join them on Sundays. She refused. Stanley asked that Joyce Waltman take the children to church. She told him she would take them to church. She lied to him. (Trial Transcript P. 5, L. 9 - 14)

The children have missed activities at their church. Joyce Waltman told Stanley she didn't have to do what he said. (Trial Transcript P. 50, L. 28-29; P. 51, L. 1-5.)

The list goes on and on of Joyce Waltman's intentional and determined efforts to not only interfere with Cindy's and Stanley's efforts to raise the children in a certain manner, but to actively and consciously teach these children to lie, teach them that Stanley and Cindy are not to be respected or obeyed, teach them that rules do not matter and are meant to be broken. Joyce Waltman is a present and future danger to these children.

IV. ASSUMING THE COURT DID NOT ERR IN GRANTING JOYCE WALTMAN GRANDPARENT VISITATION, THE COURT ERRED IN GRANTING EXCESSIVE VISITATION EQUIVALENT TO WHAT A NATURAL PARENT WOULD HAVE

The Court erred as a matter of law, in awarding visitation to Joyce Waltman which was the equivalent of visitation a natural parent would receive.

A grandparent does not have a right of visitation as comprehensive as that of a parent. *Settle v. Galloway*, 682 So. 2d 1032, 1035 (Mis. 1996)

In *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997), this Court reversed a Chancellor who abused his discretion by awarding "all visitation which would normally be awarded to a natural parent" Id. At 915. The *Martin* Court went on to further provide certain factors the Court is required to consider and apply in each case where a grandparent seeks court ordered visitation. In *Martin*, this Court also said, "It is clear to this Court that visitation granted to grandparents should not be the equivalent to that which would be granted to a non-custodial parent unless the circumstances overwhelmingly dictate that it should be. The Chancellor in this case granted visitation equal to that of a non-custodial parent, but the grandparents have none of the responsibility of the non-custodial parent. It is up to the parents to provide all support financially, socially, and otherwise for their children, and to provide care, custody and management of the

child. Id. at 916.

In *Townes v. Manyfield*, 883 So. 2d 93 (Miss. 2004) this Court relied upon *Martin* and *TTC* to say, “ Furthermore, when a chancellor finds that there are circumstances that "overwhelmingly dictate" that a grandparent should be awarded equivalent visitation to that of a parent, those findings must be fully discussed on the record.” Id. at 97. The Court erred by not making specific findings that such extensive visitation was in the best interests of the children.

Here, with the consent of the parents and Joyce Waltman, Cindy and Stanley have stepped into the shoes of parents. This is not a case where the guardianship was established as a ruse or for ulterior motives as in *Woodell v. Parker*, 860 So.2d 781 (Miss. 2003) where the maternal grandparents adopted their grandchild by the agreement of the natural parents but without the knowledge of the paternal grandparents. In *Woodell*, the child lived as much with the mother as she did the adoptive grandparents, knew who her mother and father were and that her grandparents were not her parents.

As the record shows and apparently all parties agree, Cindy and Stanley have been the only stable influence in these children’s lives, have provided the only home the children know or remember, and the natural parents are not actively involved in the children’s lives. Cindy and Stanley are for all purposes these children’s parents now and forever.

The visitation granted was too extensive as a matter of law and the award should be vacated.

V. 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.

With respect to the precedential value of *Woodell*, Counsel would respectfully ask the Court to revisit the apparent global holding of *Woodell*, 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 on their own accord reasonable visitation between the child in their custody and grandparents who desire visitation. 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?

Stanley and Cindy have never denied Joyce Waltman contact with the children. They have indicated on the record below that they have no desire to keep the children from her.

VI. CONCLUSION

Stanley Bolivar said it best. He was asked by Joyce Waltman's attorney if he liked to "be in charge." Stanley responded, "Someone has to be." (Trial Transcript P. 64, L. 8-9)

Ultimately, that is the issue. What does it mean to take on the legal responsibility to be the Guardian of the person of minors if it doesn't mean that you are charged with the care, custody and control of them? In this family, a guardianship was ordered because two selfish, immature parents polluted with drugs and alcohol could not care for their own children. Stanley and Cindy has been the only people responsible for the care and safety of these children since birth and they were the only people who stepped up to the plate and said, "We will be responsible."

Joyce Waltman did not want or volunteer for the job of raising Kaylee and Blake. In fact she admits that actively she supported Stanley and Cindy seeking guardianship.


Joyce Waltman was required to present evidence and meet her burden of proof before she was entitled to receive court ordered grandparent visitation rights. She did not do so.

This case should be reversed and a finding made that the award of grandparent visitation was not supported by the evidence and was in fact against the overwhelming weight of the evidence that was presented. Stanley and Cindy Bolivar should be allowed some discretion in deciding the amount of time KAYlee and Blake spend with Joyce WAltman, who by her own admissions, has

no intention of ever respecting the efforts of Cindy and Stanley to raise these children in a way they see fit. This Court should revisit the ruling of *Woodell v. Parker* that non-parent custodians receive little respect for their efforts.

Respectfully submitted,
STANLEY R. BOLIVAR and
CINDY BOLIVAR

BY: 

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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 Brief* via United States mail, postage prepaid, on the following persons:


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This the 2nd day of June, 2011.



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