

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO: 2010-CA-02002

**STEPHEN BRIAN SMITH AND
MELISSA LUANN SMITH**

APPELLANTS

VS.

**LARRY WILSON AND
CHARLOTTE WILSON**

APPELLEES

**APPEAL FROM THE CHANCERY COURT OF
LOWNDES COUNTY, MISSISSIPPI**

APPELLANTS' REPLY BRIEF

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<i>Troxel v. Granville</i> , 530 U.S. 57 (2000)	pp. 1, 2

REPLY ARGUMENT

Appellants, Stephen Brian Smith and Melissa Luann Smith (the Smiths), are submitting this reply brief to highlight Issues I and II, which address questions of the constitutionality of the trial court's decision granting grandparent visitation. The Smiths believe that issues III and IV are fully briefed and require no further response.

After 28 years the constitutional framework for grandparent visitation in Mississippi is still unclear. The Mississippi Legislature first passed legislation addressing grandparent visitation in 1983 and as recent as 2009 amended Section 93-16-3 addressing a grandparent's standing to bring a visitation action. This Court handed down *Martin v. Coop* in 1997 adopting factors for analyzing the child's best interests and the United States Supreme Court handed down *Troxel v. Granville* in 2000 mentioning Section 93-16-3(2)(a) with approval. There are numerous decisions rendered by this Court addressing trial court's application of the factors for analyzing the child's best interests, a grandparent's common-law right to visitation, parental rights, deference to parental rights, the proper award of grandparent visitation and attorney fees, among other issues. Despite all of the decisions and amendments by the Legislature, this Court is herein presented with 97 pages of briefing in this matter addressing the constitutional framework for grandparent visitation.

The Smiths' issues I and II ask this Court to address the "as applied" and "on its face" constitutionality of the framework for grandparent visitation in Mississippi. This Court's resolution of these issues should resolve the confusion surrounding the constitutional framework for grandparent visitation.

The Smiths contend that the following is the constitutional framework for grandparent visitation in Mississippi:

Threshold Question - Is the statute within the constitutional limitations for standing?

Threshold Question - Does the statute infringe on the fundamental right of parents to make decisions concerning the care, custody and control of their children? See Brief of Appellants, pp. 14-16.

Question during analysis of each *Martin v. Coop* factor - Is the custodial parent a fit parent? If the parent is fit, the court should presume that the parent is acting for the best interests of the minor children and give such regard to the parent's decisions regarding grandparent visitation. See Brief of Appellants, pp. 16-19. The parent's decisions regarding grandparent visitation should be given consideration in every applicable *Martin v. Coop* factor.

Burden of proof for analysis of all questions - Is the evidence clear and convincing? See Brief of Appellants, pp. 21-23.

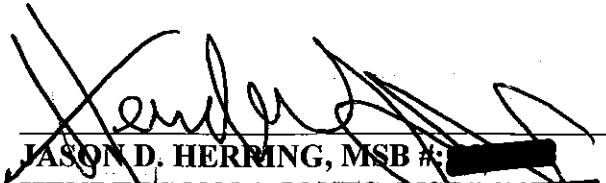
In the case *sub judice* the trial court failed to consider that the minor children's father, Stephen Smith, was a fit parent and that his decisions and preferences concerning the minor children should be given consideration. To the contrary, the trial court applied a presumption adverse to the fit custodial parent requiring Stephen Smith to prove that grandparent visitation disrupted the children's lives. Also, the trial court did not impose the clear and convincing burden of proof in deciding the issues.

In *Troxel* the Court stated "[t]he decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interests of his or her child." *Troxel*, 530 U.S. at 69 (emphasis added). This case is another example where the decisional framework employed by the trial court was flawed.

Notwithstanding the trial court's unconstitutional application of the Mississippi Grandparent Visitation Act, the Act is unconstitutional on its face as it patently infringes upon the fundamental parental rights of a fit natural parent and does not require clear and convincing evidence (Issue II). The Wilsons' brief continually argues that the Mississippi Grandparent Visitation Act is constitutional wherein it restricts the circumstances for which a non-parent can seek visitation with a child. The Smiths acknowledge that the Act limits who may seek visitation, and such limitation is necessary for the Act to fit into the constitutional framework. The Smiths' argument that the Act is unconstitutional on its face goes beyond a constitutional analysis of the component of the Act that addresses standing. The Smiths' argument in Issue II is that the Act omits and ignores the two most important elements in the constitutional framework for grandparent visitation—1) the fundamental rights of a fit natural parent to make decisions concerning the care, custody and control of his or her child; and 2) that the grandparents' evidence be clear and convincing.

Among other matters for review, this Court must determine whether the trial court employed the correct legal standard in granting grandparent visitation. The legal standard imposed by the trial court ignored fundamental constitutional protections bestowed upon Stephen Smith, and accordingly, the trial court's decision to grant grandparent visitation should be reversed.

RESPECTFULLY SUBMITTED, this the 16TH day of December, 2011.



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CERTIFICATE OF SERVICE

This is to certify that I, Henderson M. Jones, Attorney for Appellants, have this day served a true and correct copy of the above and foregoing Appellants' Reply Brief by placing a copy of same in United States Mail, postage prepaid, to the following addresses:

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This the 16TH day of December, 2011


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