

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

**CASE NO: 2010-TS-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**

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**BRIEF OF APPELLANTS**

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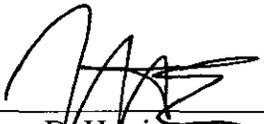
**ORAL ARGUMENT REQUESTED**

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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 and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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2. Melissa Luann Smith, Appellant
3. Larry Wilson, Appellee
4. Charlotte Wilson, Appellee
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## STATEMENT REGARDING ORAL ARGUMENT

The Appellants, Stephen and Luann Smith, believe that oral argument would be beneficial to the Court in this case due to the significance of the constitutional issues raised in this appeal and the fact-intensive nature of the *Martin v. Coop* analysis. The Smiths therefore request that the Court grant the parties the opportunity to argue this case orally.

## STATEMENT OF THE ISSUES

- I. Whether sections 93-16-3(1) and 93-16-5 of the Mississippi Code Annotated, the factors promulgated by the Mississippi Supreme Court in *Martin v. Coop*, and the elements considered by the United States Supreme Court in *Troxel v. Granville*, as applied to the Smiths in the instant case, violated petitioners' fundamental parental rights pursuant to the due process clause of the Fourteenth Amendment of the Constitution of the United States and article 3, section 14 of the Constitution of the state of Mississippi.
  
- II. Whether sections 93-16-1 through 93-16-7 of the Mississippi Code Annotated and the factors enumerated in *Martin v. Coop* are unconstitutional on their face, when considered with respect to the United States Supreme Court's holding in *Troxel v. Granville*, because they violate petitioners' fundamental parental rights pursuant to the due process clause of the Fourteenth Amendment of the Constitution of the United States and article 3, section 14 of the Constitution of the state of Mississippi.
  
- III. Whether the trial court abused its discretion, was manifestly wrong, or applied an incorrect legal standard when it failed to properly consider certain key factors pursuant to *Martin v. Coop*.
  
- IV. Whether the trial court abused its discretion, was manifestly wrong, or applied an incorrect legal standard when it granted excessive grandparent visitation rights to the Wilsons in this case.

## STATEMENT OF THE CASE

On June 7, 2010, Larry Wilson and Charlotte Wilson (the Wilsons) filed a Complaint for Grandparent Visitation with the Chancery Court of Lowndes County seeking visitation of their minor grandchildren, Stephen Banks Smith and Breely Adeline Smith, from the children's natural father, Stephen Brian Smith, and his wife, Melissa Luann Smith (the Smiths). R. 2-7<sup>1</sup>. On July 15, 2010, an Answer was filed by Stephen Brian Smith and Melissa Luann Smith denying all material allegations contained in the Complaint. R. 23-24. The Smiths filed a Motion for Continuance on July 14, 2010, and the Wilsons filed their Response to Motion for Continuance and Alternatively, Motion for Temporary Visitation on July 26, 2010. R. 25-28. An Order of Continuance was issued by the court on July 26, 2010. R. 29.

On August 2, 2010, the Smiths filed a number of documents with the court. Included among these were a Motion for Mental Examination of Mrs. Wilson, R. 30-31, a Motion for Attorney's Fees, R. 32-33, a Motion to Dismiss alleging that the Mississippi grandparent visitation statutes violate both the Constitution of Mississippi and the Constitution of the United States, R. 34-35, and a Response to the Wilsons' Request for Temporary Grandparents' Visitation Rights, R. 36-54. The Wilsons filed their Reply to Response to Request for Temporary Visitation, R. 73-83, Reply to Defendant's Motion for Attorney's Fees, R. 84-86, Reply to Defendant's Motion to Dismiss, R. 87-89, and Reply to Defendants' Motion for Mental Examination, R. 90-92, on August 9, 2010. On September 13, 2010, the Smiths filed their Reply to Plaintiffs' Response to Motion for Attorney's Fees. R. 97-98, and their Reply to Plaintiffs' Response to Motion for Mental Examination, R. 99-101. A Surreply to Plaintiff's Reply to Defendants' Objection for Temporary Visitation was filed by the Smiths on September 17, 2010. R. 111-12.

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<sup>1</sup> The Citation "R." shall refer to the pages of the Trial Court Record.

On October 8, 2010, Melissa Luann Smith filed a separate Motion to Dismiss, alleging that she was not a proper party to the suit, as she had no legal authority over the children. R. 122-23. On October 11, 2010, the Smiths filed a Motion to Abate or Dismiss, R. 124-31, and they also filed a Brief in Support of Motion to Dismiss on October 13, 2010. R. 132-48. A hearing on the merits of this case was held on October 13 and 14, 2010. The trial court filed its Opinion on November 15, 2010, in which it denied the Smiths' Motion for Mental Examination, Motion for Attorney's Fees, Melissa Luann Smith's Motion to Dismiss, and the Smiths' Motion to Dismiss or Abate. R. 150-66. This Opinion also included the trial court's findings of fact, its legal analysis, and its decision to award visitation rights to the Wilsons. *Id.* The trial court then filed its Judgment on November 29, 2010, incorporating its Opinion by reference and awarding the following visitation rights to the Wilsons:

a. *Thanksgiving Holidays.* In the event that Stephen returns to Mississippi in odd numbered years, the Wilsons shall have visitation on the Friday following Thanksgiving at 9 a.m. until Saturday at 6 p.m. Stephen shall be responsible for delivering the children to the home of the Wilsons and picking them up. Stephen shall also bear all transportation costs. Should Stephen not bring the children to Mississippi in odd numbered years for the Thanksgiving Holidays, the Wilsons shall be entitled to exercise visitation during Christmas holidays in odd numbered years as set forth and provided for in paragraph (b). This change to the original Decree is intended to avoid a scenario wherein Stephen chooses not to visit in Mississippi during odd years for Thanksgiving, thereby causing a one year gap in grandparent visitation. The grandparents therefore will now be assured of visits with the grandchildren at least twice yearly. R. 190-91.<sup>2</sup>

b. *Christmas Holidays.* In even numbered years, the Wilsons shall have visitation with the minor children from 5:00 p.m. on December 26th until 6:00 p.m. on December 31st. The Wilsons shall be responsible for picking the children up and delivering the children back to Stephen and shall bear all costs except as set forth hereinafter. Should Stephen return to Mississippi in either odd or even years, Stephen shall deliver the children to the Wilsons at 5:00 p.m. on December 26th and pick them up by 6:00 p.m. on December 31st, and Stephen shall be responsible for all travel costs. R. 167-69.

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<sup>2</sup> In order to avoid confusion, paragraph (a) regarding Thanksgiving visitation is the amended final Order of the trial court. See R. 190-91. The original award of Thanksgiving visitation award may be found on page 168 of the Trial Court Record.

c. *Summer Visitation.* The Wilsons are awarded visitation with the minor children beginning on June 1st at 5:00 p.m. and ending on June 14th at 6:00 p.m. The Wilsons shall be responsible for picking the children up and delivering the children back to Stephen and shall bear all travel costs. *Id.*

d. *Telephone Visitation.* The Wilsons shall be permitted to call the children once per week on Thursday at 7 p.m. central time, and Stephen and/or Luann shall make the children available for this phone call or make alternative arrangements should a scheduling conflict arise. *Id.*

A Notice of Appeal was properly and timely filed by the Smiths on December 7, 2010. R. 170.

The Smiths subsequently filed their Motion for Stay Pending Appeal on December 7, 2010, R. 175-81, and they also filed a Motion to Reconsider, Alter or Amend Judgment on December 8, 2010. R. 183-87. The Motion for Stay Pending Appeal was denied by the trial court, and a modification regarding Thanksgiving visitation was made to the trial court's judgment in its Order filed on December 22, 2010. R. 190-91. A Supplemental Notice of Appeal was properly and timely filed by the Smiths on January 4, 2011. R. 192.

## STATEMENT OF FACTS

Stephen Brian Smith (Stephen) was married to Crystal Wilson in December of 2001. T. 18.<sup>3</sup> Soon thereafter, they had two children; Breely, who was born June 23, 2002, and was eight years old at the time of trial and Banks, who was born on August 28, 2006, and was four years old at the time of trial. T. 18-19. About five months after Banks was born, Stephen and Crystal moved with their two children to Ohio so that Stephen could take a job with Boeing. T. 19, 194. The family had been living in Ohio for approximately a month when Crystal was tragically killed in a single-car accident on January 31, 2007. *Id.*

Within a few days after Crystal's death, Stephen and the children moved back to Mississippi, where they stayed with Crystal's parents, Larry and Charlotte (the Wilsons), at their home in Hamilton. T. 19-20, 56-58, 120, 197. At Charlotte's insistence, Stephen and the children lived together with the Wilsons for a few months. T. 58. By all accounts, Crystal's death was extremely difficult for the entire family, and Stephen had an especially difficult time coping with his grief. T. 83, 182, 196, 198-99. In late April or early May of 2007, Stephen felt like it was time to move from the Wilsons' home to the home that he owned in Columbus, MS; however, he felt that it would be in the children's best interests that they remain with the Wilsons at that time. T. 20, 58, 196-98. Soon thereafter, Stephen began to take the steps necessary to better provide for his children as a single parent, and he enrolled at the Mississippi University for Women in Columbus, Mississippi (MUW). T. 22-23. During this time the children remained with the Wilsons as Stephen was trying to finish his studies as quickly as possible by taking eighteen to twenty-one hours per semester and taking summer classes. T. 20, 199-200. Stephen graduated magna cum laude from MUW in August of 2009 with a degree in psychology. T. 199-200.

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<sup>3</sup> The citation "T." shall refer to the pages of the Trial Court Transcript.

While Stephen was studying at MUW he met Melissa Luann Smith (Luann), and they were married on October 31, 2008. T. 23. While Stephen and Luann (Smiths)<sup>4</sup> completed their studies at MUW, the children remained with the Wilsons. T. 200. During this time, Stephen frequently visited the children at the Wilsons, and he did so without issue. T. 21-22, 58. He would bring anything that the children or the Wilsons needed, he would play with the children and bathe them, he would help Breely with her homework, and he would put the children to bed. T. 198. Sometime in late 2008, when Stephen's life became more stable, he began having discussions with the Wilsons about bringing Breely and Banks to come live with him. T. 63, 200-05. These discussions continued for some time while the Smiths allowed the children to continue living with the Wilsons. *Id.* The Smiths realized that Breely would have to change schools when she moved from Hamilton to Columbus, so as the 2009-2010 school year was approaching, the Smiths got the children from the Wilsons in July of 2009. T. 23, 205.

While the children were living with the Smiths in Columbus, Stephen still allowed the Wilsons to enjoy extensive visitation with Breely and Banks. T. 23, 65-66, 209. After some time, however, he began to observe that issues were arising as a result of the Wilsons' influence on the children. Stephen began to notice by the children's statements and behavior that the Wilsons were interfering with and undermining his discipline of the children. T. 24-25, 49, 160. The Wilsons refused to observe and enforce Stephen's rules with respect to the children, they told the children that Stephen and Luann did not like them or members of their family, and they would inform the children of the disagreements that they had with Stephen about his rules and the way he chose to raise them. T. 54-55, 209-15. As a result of this, Stephen had discussions with the Wilsons to inform them of how upset he was. T. 211. He

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<sup>4</sup> Although Luann claims no legal right or authority over the children, she and Stephen will be collectively referred to in this brief as the Smiths as Luann was named a party in the Complaint.

also reduced the children's contact with the Wilsons on a number of occasions, but he always allowed them to come back and visit. T. 29, 81, 211-12, 215.

This pattern continued until early April of 2010, when Stephen decided that he would allow the children to go stay with the Wilsons over Easter weekend. T. 27, 150, 215. On the Thursday before Easter, Charlotte was giving Banks a bath when she noticed a bruise. T. 96-97, 121. The following day while Charlotte was at work, Larry took the children to the Sheriff's Department so that the bruise could be documented. T. 97-98, 122. The Sheriff's Department called Mississippi Department of Human Services (DHS), which initiated an investigation. T. 30, 122. Unaware at that time of the actions that the Wilsons had taken, Stephen picked the children up on the Monday after Easter. T. 216. He was made aware of the Wilsons' conduct the following day, however, when a representative from DHS showed up at his home to conduct an investigation. *Id.* At the conclusion of the investigation, all involved parties, even Charlotte Wilson, agreed that there was no indication of abuse and that the bruise was merely incidental to Banks being "all boy." T. 31-32, 103, 124.

The Smiths were suspicious that it was the Wilsons that had made the report to DHS, and they began trying to determine whether their suspicions were correct. T. 80, 92-95, 98-101, 123-24, 218-20. They contacted the Wilsons a number of times, but the Wilsons always avoided the question or denied having any knowledge. *Id.* The Wilsons did not confess that they caused the initiation of the DHS investigation until the investigation had finally concluded. T. 123-24.

Stephen naturally felt betrayed by the Wilsons' actions and their active concealment of those actions, and he felt like they were a threat to him and his family. T. 23-30, 36, 37, 222-23. According to Stephen, this event was the "final straw," and from that point forward, he

refused to allow the Wilsons to enjoy visitation with the children. T. 27, 53, 221. The Wilsons filed the Complaint approximately two months later on June 7, 2010. R. 2-7.

## STANDARD OF REVIEW

The scope of review of a Chancellor's determination of grandparent visitation is limited to whether the Chancellor abused his discretion, was manifestly wrong or applied an incorrect legal standard. *Ivy v. Ivy*, 863 So. 2d 1010, 1012 (Miss. Ct. App. 2004). A Chancellor's findings of fact will not be disturbed where they are supported by substantial evidence. *Cooper v. Crabb*, 587 So. 2d 236, 239 (Miss. 1991). The Mississippi Court of Appeals has held:

The resolution of disputed questions of fact is a matter entrusted to the sound discretion of the chancellor. On appeal, we are limited to searching for an abuse of that discretion; otherwise, our duty is to affirm the chancellor. Our job is not to reweigh the evidence to see if, confronted with the same conflicting evidence, we might decide the case differently. Rather, if we determine that there is substantial evidence in the record to support the findings of the chancellor, we ought properly to affirm.

The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. It is necessarily the case that, when conflicting testimony on the same issue is presented, the chancellor sitting as trier of fact must determine which version he finds more credible.

*Carter v. Carter*, 735 So. 2d 1109, 1114 (Miss. Ct. App. 1999). That is, the Appellate Court “does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder.” *Bower v. Bower*, 758 So. 2d 405, 412 (Miss. 2000). Rather, the Court has stated “[i]f there is substantial evidence in the record to support the chancellor's findings of fact, no matter what contrary evidence there may also be, we will uphold the chancellor”. *Bower*, 758 So. 2d at 412.

When reviewing a chancellor's interpretation and application of the law, however, the appellate court will apply a *de novo* standard of review. *Reed v. Fair*, 56 So. 3d 577, 580

(Miss. Ct. App. 2010). If it is determined that the chancellor applied an incorrect legal standard, the appellate court must reverse. *Sturdavant v. Sturdavant*, 53 So. 3d 838, (Miss. Ct. App. 2011).

In the present case, the Smiths' fundamental parental rights were violated by the unconstitutional application of Miss. Code Ann. §§ 93-16-3(1) and 93-16-5, the factors in *Martin v. Coop*, and the threshold elements considered by the United States Supreme Court in *Troxel v. Granville*. Their rights were further violated due to the fact that §§ 93-16-1 through 93-16-7 of the Mississippi Code and *Martin* are unconstitutional on their face. The trial court also failed to properly consider a number of the *Martin* factors, resulting in an erroneous and excessive award of grandparent visitation; therefore, the Smiths respectfully request that this Court reverse the trial court's decision and render a judgment in favor of the Smiths, or, alternatively, remand for further proceedings consistent with this Court's opinion.

## SUMMARY OF THE ARGUMENT

The appellants, Stephen Brian Smith and Melissa Luann Smith, will first argue that the trial court unconstitutionally applied Sections 93-16-3(1) and 93-16-5 of the Mississippi Code Annotated, the factors promulgated by the Court in *Martin v. Coop*, and the threshold elements considered by the United States Supreme Court in *Troxel v. Granville* in their case. They will argue that, although the trial court considered §§ 93-16-3(1) and 93-16-5 and the *Martin* factors, it failed to consider the remaining threshold elements addressed by the Supreme Court in *Troxel*, resulting in the unconstitutional deprivation of their right to make decisions concerning the care, custody, and control of their children. They will secondly argue that §§ 93-16-1 through 93-16-7 and *Martin* are unconstitutional on their face because they do not direct Mississippi courts to contemplate the *Troxel* elements when considering a petition for grandparent visitation rights.

Finally, the Smiths will contend that the trial court committed reversible error by failing to properly consider a number of the key *Martin* factors in its award of grandparent visitation, and that the improper consideration of these key factors directly resulted in inappropriate and excessive award of grandparent visitation rights to the Wilsons. The Smiths therefore request that this Court (1) find that the trial court unconstitutionally applied §§ 93-16-3(1) and 93-16-5, the *Martin* factors, and the *Troxel* elements in the present case; (2) strike down §§ 93-16-1 through 93-16-7 and *Martin* as being unconstitutional on their face; (3) find that the trial court committed reversible error due to its improper consideration of the *Martin* factors resulting in the inappropriate and excessive award of grandparent visitation to the Wilsons; and (4) reverse the trial court's decision and render a decision in favor of the Smiths, or, in the alternative, remand for further proceedings consistent with the opinion of this Court.

## ARGUMENT

The Smiths raise four issues before this Court on appeal. They first contend that Sections 93-16-3(1) and 93-16-5 of the Mississippi Code Annotated, the factors promulgated by the Court in *Martin v. Coop*, and the threshold elements considered by the United States Supreme Court in *Troxel v. Granville* were applied by the trial court such that they were deprived of their fundamental parental right to make decisions concerning the care, custody, and control of their minor children. Secondly, they contend that Sections 93-16-1 through 93-16-7 and the *Martin* factors are unconstitutional on their face. Finally, they contend that the trial court improperly considered a number of the *Martin* factors in its award of grandparent visitation rights to the Wilsons and that, as a result, the trial court ordered inappropriate and excessive grandparent visitation to the Wilsons. The Smiths respectfully request that the trial court's decision be overturned as it was the direct result of these errors, and they would set forth the following issues to the Court in support of their argument.

**I. WHETHER SECTIONS 93-16-3(1) AND 93-16-5 OF THE MISSISSIPPI CODE ANNOTATED, THE FACTORS PROMULGATED BY THE MISSISSIPPI SUPREME COURT IN *MARTIN V. COOP*, AND THE ELEMENTS CONSIDERED BY THE UNITED STATES SUPREME COURT IN *TROXEL V. GRANVILLE*, AS APPLIED TO THE SMITHS IN THE INSTANT CASE, VIOLATED PETITIONERS' FUNDAMENTAL PARENTAL RIGHTS PURSUANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 3, SECTION 14 OF THE CONSTITUTION OF THE STATE OF MISSISSIPPI.**

The trial court erred in its application of Miss. Code Ann. §§ 93-16-3(1) and 93-16-5, the *Martin v. Coop* factors, and the threshold elements considered by the United States Supreme Court in *Troxel v. Granville* to the Smiths in the present case.<sup>5 6</sup> While the trial court applied

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<sup>5</sup> It should be noted that under Issue (I) the Smiths are strictly challenging the trial court's application of the applicable law to the present case. All argument with respect to the constitutionality of the statutes and the *Martin* factors on their face will be reserved for Issue (II).

§§ 93-16-3(1) and 93-16-5 and the *Martin* factors, it failed to consider the threshold elements contemplated by the United States Supreme Court in *Troxel v. Granville*. 530 U.S. 57, 65. As a result of the trial court's failure to apply these elements to the Smiths' case, they were deprived of their fundamental parental right to make decisions concerning the care, custody and control of their children. Accordingly, the trial court's decision should be reversed.

The Fourteenth Amendment Due Process Clause of the Constitution of the United States "includes a substantive element that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" U.S. Const. amend. XIV, § 1; *Troxel*, 530 U.S. at 65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719). Included among these fundamental rights and liberty interests receiving heightened protection from government interference is *the interest that parents have "in the care, custody and control of their children."* *Troxel*, 530 U.S. at 65 (emphasis added). This is "perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme Court]," and it includes the rights of parents to "*establish a home and bring up children*," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added), the right to "*direct the upbringing and education of children under their control*," *Pierce v. Society of Sisters*, 268 U.S. 501, 534-35 (1925) (emphasis added), and the right of parents to make determinations concerning "*the custody, care and nurture of the child*," *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). *Troxel*, 530 U.S. at 65-66. The Supreme Court has stated, "[I]t cannot now be doubted that the Due Process Clause of the

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<sup>6</sup> It is not necessary that the Attorney General be notified pursuant to Miss. R. Civ. P. 24(d) for a claim that does not seek to invalidate a statute, but only challenges the constitutionality of its application. See *Aarco Oil and Gas Co. v. EOG Resources, Inc.*, 20 So. 3d 662, 665 (Miss. 2009). It was therefore not necessary that the Smiths notify the Attorney General regarding this issue, but because Issue (II) challenges the constitutionality of the statutes and the *Martin* factors on their face, the Attorney General has been notified pursuant to Miss. R. Civ. P. 24(d).

Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Id.* at 67.

*Troxel* is the seminal case addressing the constitutionality of grandparent visitation, and it is very similar factually to the case at bar. In *Troxel*, the paternal grandparents petitioned for visitation of their grandchildren after their son committed suicide. *Id.* at 60-61. The mother of the children opposed their petition, and the case was ultimately taken up by the United States Supreme Court. The Court determined that the Washington statute, “as applied to Granville and her family in this case, unconstitutionally infringes on [the fundamental right of parents to make decisions concerning the care, custody and control of their children.]” *Id.* at 66.

The Court cited a number of reasons in support of its position that the Washington statute, as applied, was unconstitutional. The first reason was that “the parent’s decision that visitation would not be in the child’s best interests is accorded no deference.” *Id.* at 67. The Court noted that the Washington statute contained “no requirement that a court accord the parent’s decision any presumption of validity or any weight whatsoever.” *Id.* The Court concluded that, in effect, the Washington statute allowed its courts to substitute their own judgment for that of a fit custodial parent and override that parent’s estimation of a child’s best interests merely because the judge disagrees with the determination of the parent. *Id.*

The Court also reasoned that the trial court’s order was not based on any factors that “would justify the State’s interference with [the mother’s] fundamental right to make decisions concerning the rearing of her two daughters.” *Id.* at 68. It determined that the trial court’s decision was based on a mere disagreement between the parent and the judge with respect to the best interests of the children. *Id.* The Court further reasoned that the grandparents never alleged that the mother was unfit and no court had ever found her to be

unfit. *Id.* The Court went on to say, “[t]hat aspect of the case is important, for there is a *presumption that fit parents act in the best interests of their children*. Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” *Id.* at 68-69 (citing, e.g., *Reno v. Flores*, 507, U.S. 292, 304; 113 S.Ct. 1439 (1993)).

The Court noted that the Washington court failed to give any special weight to the mother’s determination of the children’s best interests. *Id.* at 69. The Court stated, “if a parent’s decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent’s own determination.” *Id.* at 70 (emphasis added). The Court finally reasoned that the trial court failed to consider the fact that there was no allegation that the mother ever sought to cut off visitation entirely. *Id.* at 71.

The trial court, in its application of Miss. Code Ann. §§ 93-16-3(1) and 93-16-5, the *Martin* factors and the *Troxel* elements to the Smiths in this case, violated their fundamental constitutional right to make decisions concerning the care, custody, and control of their children. In the present case, as in *Troxel*, the court failed to accord any deference to Stephen’s determination of whether visitation was in the best interests of his children. As noted above, when a court is charged with making a determination on a petition for grandparent visitation, that court “must accord at least some special weight to the parent’s own determination.” *Troxel*, 530 U.S. at 70.

Section 93-16-3(1) of the Mississippi Code, Annotated provides that, “whenever one of the parents of a minor child dies, either parent of the child’s parents may...petition the chancery court in the county in which the child resides and seek visitation rights with the

child.<sup>7</sup> The chancery court then “may, in its discretion, if it finds that such visitation rights would be in the best interest of the child, grant to a grandparent reasonable visitation rights with the child.” Miss. Code Ann. § 93-16-5. The best interest of the child is determined by analyzing the factors enumerated by the Mississippi Supreme Court in *Martin v. Coop*, 693 So. 2d 912 (Miss. 1997). These factors include: (1) the amount of disruption that extensive visitation will have on the child’s life; (2) the suitability of the grandparents’ home with respect to the amount of supervision received by the child; (3) the age of the child; (4) the age, and physical and mental health of the grandparents; (5) the emotional ties between the grandparents and the grandchild (6) the moral fitness of the grandparents; (7) the distance of the grandparents’ home from the child’s home; (8) any undermining of the parent’s general discipline of the child; (9) employment of the grandparents and the responsibilities associated with that employment; (10) the willingness of the grandparents to accept that the rearing of the child is the responsibility of the parent, and the parent’s manner of child rearing is not to be interfered with by the grandparents. *Id.* at 916. The trial court, in its analysis of the present case, considered §§ 93-16-3(1) and 93-16-5 and the *Martin* factors; however, it failed to address Stephen’s preference regarding his children’s visitation with the Wilsons. Because the trial court failed to consider this threshold element, its decision is in direct conflict with the

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<sup>7</sup> Miss Code Ann. § 93-16-3(2) provides that, “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 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.” The trial court declined to take on an analysis pursuant to Subsection (2) due to the fact that the death of the children’s natural parent had been established pursuant to Subsection (1). *See* R. 159-60 n. 10.

Court's ruling in *Troxel*. The trial court's failure to correctly interpret and apply applicable law constituted clear error, for which its ruling should be reversed.

The trial court also failed to consider the fact that Stephen has never been found to be an unfit parent.<sup>8</sup> Similar to *Troxel*, this fact is important in the present case because of the presumption that fit parents make decisions that are in their children's best interests. The trial court failed to acknowledge this presumption in its analysis; rather, it seems to have presumed that Stephen's preference regarding visitation was not in the best interests of his children. The trial court concluded, "no credible proof was presented to show that the children were emotionally damaged by spending time with Grandparents." R. 155. The trial court further stated, "[t]here was no proof presented to show visiting with Grandparents would disrupt the children's lives..." R. 160. This is the type of analysis that was criticized by the Supreme Court in *Troxel*:

The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be 'impacted adversely.' *In effect, the judge placed on [the mother], the fit custodial parent, the burden of disproving that visitation would be in the best interests of her daughters...* *The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child.* In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her daughters.

*Troxel*, 530 U.S. at 69 (emphasis added). In the present case, the trial court also applied a presumption adverse to the fit custodial parent by finding key factors to be in the Wilsons' favor because Stephen, in the trial court's opinion, did not prove that the Wilsons disrupted the children's lives or that the children would be harmed by visitation. The error in the trial court's logic is that Stephen is not required to prove these things. They are presumed to be in

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<sup>8</sup> The Wilsons actually admitted that he was a good father that made decisions in the best interests of his children. T. 55, 58, 138, 142

his favor, and it is the Wilsons who should have been required to bear the burden of proof, a burden that they did not meet. Further, when the Wilsons admitted that Stephen was a good father and that he acted in the children's best interests, the trial court should have properly concluded that the presumption could not be rebutted. Because, however, the trial court applied an adverse presumption in this case, or alternatively failed to properly apply a presumption that a fit parent acts in his children's best interests, its decision violated Stephen's fundamental parental rights, and as such, the trial court's decision should be reversed.

The trial court also erred by improperly considering the fact that Stephen never intended to permanently terminate visitation. Pursuant to Miss. Code Ann. § 93-16-3(2)(a), a trial court is required to find that the custodial parent unreasonably denied visitation with the grandparents before an award of visitation can be granted under Type 2, a requirement cited with approval by the Supreme Court in *Troxel*. 530 U.S. at 71. However, in a case of Type 1 visitation pursuant to § 93-16-3(1), a fit custodial parent is afforded no such protection from interference by the state. According to the trial court, "Stephen gave no indication to this Court that he would voluntarily grant any visitation to Grandparents in the near future;" however, this is clearly contrary to the evidence presented at trial. R. 158-59. Although Stephen testified that he informed Larry that he would not consider visitation so long as the present action was pending, he did express his desire to allow the Wilsons to resume visitation in the future. T. 38, 221-22, 225. At trial, Stephen expressed his concern that his young family – he, Luann, Breely and Banks – needed time to gel as a family unit without the interference of the Wilsons. T. 52, 222. He further testified that he wanted the children to mature in their discipline and behavior before they resumed regular visitation. T. 222. In light of all the things

that the children have endured in their young lives, such concerns are not only reasonable, but they are also indicative of Stephen's desire to do what is best for his children. Whether or not the statute with respect to Type 1 visitation expressly required that the custodial parent unreasonably denied visitation, the trial court, pursuant to *Troxel*, should have considered Stephen's reasons for denial of visitation. When considering the evidence presented at trial, it becomes clear that Stephen's denial of visitation was reasonable both in justification and in scope. If § 93-16-3(1) had required an analysis of the reasons for denial of visitation, a grant of visitation would not have been awarded to the Wilsons. Accordingly, the statute and the *Troxel* elements as applied (or not applied) to the facts of this case resulted in an unconstitutional infringement of Stephen's fundamental parental rights for which the decision of the trial court should be reversed.

The trial court further interfered with the Smith's fundamental parental rights due to the fact that it did not prescribe a heightened burden of proof commensurate with the increased level of protection that is provided to parents by the Fourteenth Amendment. As discussed above, for an award of visitation to be granted pursuant to § 93-16-3(1), the grandparents need only meet the burden of showing that it is in the child's best interests under the factors enumerated in *Martin v. Coop*. This is quite similar to the approach taken by Mississippi courts in determining the custody of a child in a contest between natural parents. In such a case, the natural parent seeking custody must merely show that an award of custody to that parent would be in the child's best interests.<sup>9</sup> The determination of the child's best interests is made by considering the factors enumerated in *Albright*.<sup>10</sup> The factors in *Martin* are very

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<sup>9</sup> The Mississippi Supreme Court has said, "the polestar consideration in child custody cases is the best interest and welfare of the child." *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).

<sup>10</sup> These factors include: (1) age, health, and sex of the child; (2) which parent had continuity of care; (3) which parent has better parenting skills and the willingness and capacity to provide primary child

similar to the factors in *Albright* and they address many of the same concerns with respect to the best interests of the child.

The key distinction in a case of child custody and a case of grandparent visitation, however, is in the status of the parties. In contrast to grandparent visitation, the parties in a case of child custody between natural parents are equally entitled to the same fundamental constitutional protections. In a case of grandparent visitation, the natural parent is afforded constitutional protection while the grandparent is not. In effect, a case of child custody between natural parents is a contest between equals. The same cannot be said for the parties in a case of grandparent visitation.

Although there is a presumption that a fit natural parent acts in the best interests of his children, the trial court, when considering the Wilsons' petition for visitation, followed an approach similar to that followed in an action for custody between natural parents. This resulted in the Wilsons being placed on equal footing to that of the Smiths, a result that is directly in conflict with the Supreme Court's opinion in *Troxel*. In order to protect the Smiths' constitutional rights in this case, the trial court should have required the Wilsons to meet a heightened burden of proof, and an award of visitation should not have been granted because the Wilsons could not show by clear and convincing evidence that visitation is in the best interests of the children.

In *Santosky v. Cramer*, 455 U.S. 745 (1982), the Supreme Court applied the Due Process Clause of the Fourteenth Amendment when it held that parental rights could not be terminated unless the grounds for termination were proven by clear and convincing evidence. Although

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care; (4) the employment responsibilities of the parents; (5) the physical and mental health and age of the parents; (6) the moral fitness of the parents; (7) the emotional ties of the parents and child; (8) the home, school, and community records of the child; (9) the preference of a child at the age sufficient to express a preference by law; (10) the stability of the home environment and employment of each parent; and (11) the other relevant factors in the parent-child relationship. *Albright*, 437 So. 2d at 1005.

the Smiths will concede that the level of state interference in a case of grandparent visitation does not rise to that level of a case for the termination of parental rights, they will contend that the two actions are otherwise very similar because both involve the state's infringement upon the fundamental constitutional rights of natural parents under the Fourteenth Amendment. The two are also quite comparable because they involve a constitutionally protected natural parent adverse to a party not receiving the same constitutional protection. The distinction between the two cases is merely one of scope, and the burden that the petitioning party must bear should properly reflect the substantial similarity between the two actions and the increased protection afforded by the Constitution when the state attempts to inject itself into the traditional parent-child relationship.

The trial court, in applying §§ 93-16-3(1) and 93-16-5 and the *Martin* factors, unconstitutionally interfered with the Smiths' fundamental parental rights when it failed to require the Wilsons to satisfy a heightened burden of proof in its award of visitation rights. The trial court's approach had the effect of treating the parties as equals, rather than as one who had a paramount right to the other. The Wilsons' statutory right pales in comparison to that of Stephen's fundamental due process rights as a parent. The court's decision was clearly in error, and as such, it should be reversed.

The application of §§ 93-16-3(1) and 93-16-5 and the *Martin* factors by the trial court in this case resulted in the unconstitutional infringement of the Smiths' fundamental parental rights to make decisions concerning the care, custody and control of their children. The trial court failed to consider the Smiths' preference, and the trial court did not take into consideration the fact that Stephen is a fit parent and that he is presumed to make decisions that are in his children's best interests. Conversely, the trial court appears to have applied the

opposite presumption in reaching its conclusion in this case. The trial court also failed to properly consider the fact that Stephen never intended to permanently terminate visitation in this case. Finally, the trial court violated the Smiths' parental rights when it failed to require the Wilsons to meet a heightened showing of proof – clear and convincing evidence – in accordance with the substantial protection afforded to parents by the Fourteenth Amendment.

The present case is very similar to the case in *Troxel*. In this case, as in *Troxel*, the trial court substituted its own judgment of what is in the children's best interests for the judgment of a fit natural parent. This is the exact type of situation that the *Troxel* court warned of and is the exact type of judgment that the *Troxel* opinion was intended to prevent. In reviewing a trial court's award of visitation, the constitutionality of that award "turns on the specific manner in which that standard is applied." *Troxel*, 530 U.S. at 73. Therefore, grandparent visitation cases must be evaluated on a case-by-case basis with respect to the specific set of relevant facts presented at trial. In the present case, the trial court's ruling is the clear result of the unconstitutional application of §§ 93-16-3(1) and 93-16-5 and *Martin*; therefore, the Smiths' respectfully request that this Court reverse the trial court's decision and render a judgment in favor of the Smiths or, in the alternative, remand for further proceedings consistent with this Court's opinion.

**II. WHETHER SECTIONS 93-16-1 THROUGH 93-16-7 OF THE MISSISSIPPI CODE ANNOTATED AND THE FACTORS ENUMERATED IN *MARTIN V. COOP* ARE UNCONSTITUTIONAL ON THEIR FACE, WHEN CONSIDERED WITH RESPECT TO THE UNITED STATES SUPREME COURT'S HOLDING IN *TROXEL V. GRANVILLE*, BECAUSE THEY VIOLATE PETITIONERS' FUNDAMENTAL PARENTAL RIGHTS PURSUANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 3, SECTION 14 OF THE CONSTITUTION OF THE STATE OF MISSISSIPPI.**

The trial court committed reversible error when it denied the Smiths' Motion to Dismiss.<sup>11 12</sup> Said Motion to Dismiss argued that the applicable Mississippi statutes, Miss. Code Ann. §§ 93-16-1 through 93-16-7, violate U.S. Const. amend. XIV, § 1 and Miss. Const. art. 3, § 14 and asked the trial court to dismiss the Wilsons' petition for grandparent visitation or to alternatively apply a presumption that the parent's decision is entitled to deference and that the presumption yields only to proof that the child will suffer physical, mental, or emotional harm if visitation is not accorded to the grandparent.<sup>13</sup> The Mississippi statutes and the *Martin* factors are unconstitutional on their face as they are patently inconsistent with the holding in *Troxel v. Granville*. The Smiths incorporate all of the arguments discussed in Issue (I); however, they feel that further discussion of these arguments with respect to Issue (II) would be beneficial to the Court.

Sections 93-16-1 through 93-16-7 and the factors in *Martin v. Coop*<sup>14</sup> are overly broad on their face. The Mississippi statutes, in substantial similarity to the Washington statute held unconstitutional in *Troxel*, allow the state court to unconstitutionally infringe on the fundamental parental rights of a fit natural parent and award visitation rights to grandparents based solely on a judge's determination that visitation is in the child's best interests. As discussed above in Issue (I), there are a number of threshold elements that a court must consider when analyzing a petition for grandparent visitation; however, Mississippi law does not direct its courts to consider these elements.

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<sup>11</sup> See the Smiths' Motion to Dismiss, R. 34-35, and Brief in Support of Motion to Dismiss, R. 132-48.

<sup>12</sup> The trial court denied the Smiths' Motion to Dismiss on constitutional grounds. See R. 151.

<sup>13</sup> Pursuant to Miss. R. Civ. P. 24(d), the Appellants have notified the Attorney General of the State of Mississippi so as to afford him an opportunity to intervene and argue the question of constitutionality.

<sup>14</sup> See *Martin*, *supra* at 17.

As previously noted, §§ 93-16-1 through 93-16-7 and the *Martin* factors are constitutionally deficient on their face in that they fail to require Mississippi courts to accord any deference to a fit natural parent's determination of whether visitation is in his children's best interests. Rather, Mississippi law, like the Washington statute in *Troxel*, effectively "places the best-interest determination solely in the hands of the judge." *Troxel*, 530 U.S. at 67. The flaw with this approach is "[s]hould the judge disagree with the parent's determination of the child's best interests, the judge's view necessarily prevails." *Id.* As the *Troxel* court has clearly indicated, court orders awarding grandparent visitation that are the result of a disagreement between a fit natural parent and a trial court judge with respect to the best interests of the children deprive the parent of their fundamental constitutional right to make decisions concerning the care, custody and control of their children.

Sections 93-16-1 through 93-16-7 and the *Martin* factors also fail to consider the fitness of the natural parent. As the Supreme Court stated in *Troxel*, "[t]hat aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68. The Court further stated, "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. *Id.* at 68-69. In the present case, as in *Troxel*, the problem is that when the court intervened, "it gave no special weight at all to the [Smiths'] determination of [their children's] best interests." *Id.* at 69. In a case for grandparent visitation where the natural parent has not been found to be unfit, it is clear that the fit natural parent must be cloaked with the presumption that he makes decisions that are in his children's best interests. Sections 93-16-1 through 93-16-7 and the *Martin* factors contain

no such provision, and due to the omission of this presumption, they cannot survive a Due Process challenge.

Sections 93-16-1 through 93-16-7 and the *Martin* factors are deficient in that they fail to consistently consider whether the parents unreasonably denied visitation to the grandparents. The *Troxel* court noted, “there is no allegation that Granville ever sought to cut off visitation entirely.” *Troxel*, 530 U.S. at 71. As previously discussed, § 93-16-3(2) requires a showing that the custodial parent unreasonably denied visitation with the grandparents before an award of visitation can be granted, a protection not accorded to the parent under § 93-16-3(1). Because §§ 93-16-1 through 93-16-7 and *Martin* do not require a finding of unreasonable denial in all cases of grandparent visitation, they are in violation of Due Process, and they should be struck down as such.

Mississippi law also allows the state’s courts to unconstitutionally interfere with the fundamental rights of parents due to the fact that it does not require grandparents in a case of grandparent visitation to meet a heightened burden of proof and prove each element by clear and convincing evidence. As discussed above in Issue (I),<sup>15</sup> an analysis regarding grandparent visitation is more akin to that of a termination for parental rights than a child custody case between natural parents; however, §§ 93-16-1 through 93-16-7 and the *Martin* factors direct Mississippi courts to approach a grandparent visitation case in a fashion quite similar to that of a case of child custody. The effect of §§ 93-16-1 through 93-16-7 and the *Martin* factors is that fit natural parents are placed on equal footing with the petitioning grandparents, resulting in the unconstitutional deprivation of the parents’ due process protections. This result is in direct conflict with *Troxel*, and it should accordingly be struck down as unconstitutional.

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<sup>15</sup> See discussion, *supra* at 20-23.

In reaching its conclusion that §§ 93-16-3(1) through 93-16-7 were constitutional on their face, the trial court relied on a number of post *Troxel* Mississippi cases. These cases include *Woodell v. Parker*, 860 So. 2d 781 (Miss. 2003), *Zeman v. Stanford*, 789 So. 2d 798 (Miss. 2001), and *Stacy v. Ross*, 798 So. 2d 1275 (Miss. 2001). R. 151. The trial court's conclusion is in error for a number of reasons. Both *Woodell* and *Stacy* challenge the constitutionality Type 2 visitation pursuant to § 93-16-3(2) and do not address the specific issue raised by the Smiths in this appeal. Further, the Mississippi Supreme Court, in *Stacy* and *Zeman*, relied on the fact that the Mississippi statute was narrower in scope than that of the Washington statute in *Troxel*. *Zeman*, 789 So. 2d at 803; *Stacy*, 798 So. 2d at 1279. While § 93-16-3(1) provides that visitation may only be sought by grandparents when (1) a court awards custody of a minor to one of the minor's parents other than the grandparent's child, (2) the parental rights of their child has been terminated or (3) when their child has died, the Washington statute allowed visitation to be sought by "any person" at "any time." On its face, this appears to be a significant distinction; however, it becomes immaterial when one considers that the Washington statute, as applied in *Troxel*, was applied to grandparents seeking visitation after the death of their child. The *Troxel* Court found that, even in a situation where grandparents were seeking visitation after the death of their child, it was unconstitutional to award visitation to grandparents based solely on the court's determination of a child's best interests.

It is also important to note that *Stacy* relies on the fact that the *Troxel* Court cited § 93-16-3(2) in its opinion. *Stacy*, 798 So. 2d at 1279. As discussed above, however, the *Troxel* Court cited this provision with approval only with respect to the fact that it required a finding of unreasonable denial of visitation by the custodial parent before an award of visitation could

be granted, a requirement that the Wilsons did not have to satisfy in the present case. This reference was not one of wholesale approval by the Court on the issue of the constitutionality of Mississippi's grandparent visitation statutes, and to construe it as such would be improper.

Additionally, in *Zeman*, the Mississippi Supreme Court acknowledged that the *Troxel* Court struck down the Washington statute because it only required a finding that visitation was in the best interests of the child, and it concluded that the deficiency in § 93-16-3(1), which requires the same best interests analysis as the Washington statute, was cured by the factors enumerated in *Martin*. The Smiths respectfully contend that the error in this conclusion lies in the fact that *Martin* was decided three years before *Troxel*, and, although the *Martin* factors were a significant step in the right direction by this Court without the benefit of *Troxel* guidance, they are merely a means of determining the child's best interests and do not require the satisfaction of any of the threshold elements contemplated by the United States Supreme Court. The promulgation of these factors did not cure the constitutional deficiency of §§ 93-16-1 through 93-16-7 and *Martin*; therefore, these provisions should be ruled unconstitutional.

Miss. Code Ann. §§ 93-16-3(1) through 93-16-7 and the *Martin* factors are unconstitutional on their face due to the fact that they are overly broad and they fail to accord fit natural parents with substantive due process protection by their omission of the threshold elements considered by the Supreme Court in *Troxel*. They accord no deference to the fit natural parent's determination as to whether visitation is in the children's best interests, and they do not consider the fitness of the parent or apply the presumption that a fit natural parent acts in their child's best interests. They are also constitutionally deficient due to the disparity between §§ 93-16-3(1) and 93-16-3(2), and they cannot survive a due process challenge due

to the fact that they do not prescribe a heightened burden of proof commensurate with the enhanced level of protection accorded to fit natural parents in making decisions concerning the care, custody, and control of their children. Due to the fact that these provisions are unconstitutional on their face, they should be struck down as such, and this Court, as it has done before, should guide the legislature in amending the statute such that it will comply with the constitutional requirements of Due Process.

**III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, OR APPLIED AN INCORRECT LEGAL STANDARD WHEN IT FAILED TO PROPERLY CONSIDER CERTAIN KEY FACTORS PURSUANT TO *MARTIN V. COOP*.**

The trial court abused its discretion, was manifestly wrong, or applied an incorrect legal standard when it failed to properly consider certain key factors pursuant to *Martin v. Coop*.<sup>16</sup> As discussed below, the trial court improperly imposed the burden of proof on the Smiths rather than the Wilsons in its consideration of these factors. The trial court also failed to apply the proper presumptions and protections afforded to natural parents under the Fourteenth Amendment. The court finally reached a number of flawed factual conclusions that it applied in analyzing the *Martin* factors. These errors on the part of the trial court constitute reversible error for which its decision should be reversed.

**A. THE POTENTIAL DISRUPTION TO THE CHILDREN'S LIVES**

The trial court abused its discretion, was manifestly wrong or applied an incorrect legal standard when it determined that court-ordered grandparent visitation would not disrupt the lives of the Smiths' children. As discussed above, the trial court erred by requiring the Smiths to prove that visitation would not disrupt the children's lives, rather than requiring the Wilsons to bear the burden of proving that visitation would not be disruptive. The trial court

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<sup>16</sup> See *Martin*, *supra* at 17.

stated, “[t]here was no proof presented to show how visiting with Grandparents would disrupt the children’s lives.” R. 160. In the trial court’s analysis of this factor, there is no mention of any evidence presented by the Wilsons that court-ordered visitation would not disrupt the children’s lives other than the “Grandparents have withdrawn their request for weekend visitation...” *Id.* In a case of grandparent visitation, a fit natural parent is presumed to make decisions that are in his children’s best interests and the petitioning grandparent must bear the burden of proof rather than the parent; therefore, the trial court was in error when it imposed this burden on the Smiths rather than the Wilsons.

The trial court seemed to base its opinion on the fact that Stephen did not give specific examples of how visitation would disrupt the children’s lives. Although the Smiths are not required to bear that burden, sufficient evidence was presented at trial to show that visitation would be disruptive. Breely and Banks currently live with Stephen and Luann in St. Clair County, Illinois, which is about an eight-hour drive from the Wilsons’ home in Hamilton, MS. T. 56, 120, 187, 230. According to Stephen, the children’s behavior had greatly improved since they stopped visiting the Wilsons. T. 227-28. His testimony showed that Breely was happier and that she was no longer worried or withdrawn like she was before. *Id.* He further testified that Breely was in school and Banks was enrolled in an early education program and that both were well adjusted and happy. *Id.*

Stephen also testified that court-ordered visitation would be disruptive to the children because it would disrupt family activities. T. 45. Although he did not elaborate on this statement, one can easily contemplate a number of ways in which court-ordered visitation could be disruptive to the family unit. First, family vacations would have to be scheduled around the requirements of a court’s visitation order. This can become increasingly difficult

when parents' free time is limited by work and the children's free time is limited by school. Visitation could further be disruptive because it could limit the time that the children get to spend with other grandparents. The trial court failed to consider the fact that Stephen's parents also enjoy visitation with the children and that Luann's parents have assumed a grandparental role much like Luann has assumed the role of the children's mother. When all the grandparents live a great distance from the children, visitation may necessarily be limited and a court order in favor of one set of grandparents may have the effect of severely limiting or completely eliminating others from the lives of the children. One could also easily determine that the children's extracurricular schedules will likely become more demanding as they grow older and become more settled in their new home in Illinois.

In a situation that is specific to the present case, the trial court also failed to consider the new addition to the Smith family. Stephen's testimony showed that he and Luann were expecting another child at the time of trial. T. 233. In a case of grandparent visitation, the trial court is required to consider the best interests of the children. Miss. Code Ann. § 93-16-5. The Smiths assert that this means a court must consider the best interests of all the children involved, not just those who are named in the complaint. In this case the trial court erred by failing to consider the future relationship that Breely and Banks would have with their new brother or sister and the disruption that court-ordered visitation of his or her siblings would have on the new child. The Wilsons have no statutory right to visitation with the Smiths' new child, and this child would not be subject to any visitation order by the trial court. If Breely and Banks were required to spend certain times with the Wilsons while the new child was left behind it could be confusing and emotionally damaging to all three of the children. Breely and Banks may be forced to visit with the Wilsons when they prefer to stay and bond with their

new sibling, and as the new child gets older he or she will likely be led to wonder why his or her brother and sister are forced to leave and go visit the Wilsons while he or she is left behind. One can easily see how such a situation could be confusing, disruptive, and emotionally harmful to all of the children involved.

The trial court abused its discretion, was manifestly wrong or applied an incorrect legal standard when it determined that court-ordered grandparent visitation would not disrupt the lives of the Smiths' children. The trial court erroneously placed the burden of proof on the Smiths to show that visitation would be disruptive rather than on the Wilsons to prove that it would not be. The trial court also erred by not properly considering Stephen's testimony that visitation would be disruptive merely because he did not elaborate on this statement. Finally, the trial court erred by failing to consider the Smiths' new child and the effect that court-ordered visitation would have on all three children involved. Due to the errors committed by the trial court, the Smiths request that its decision be reversed and this factor be found in their favor.

#### B. UNDERMINING OF PARENT'S DISCIPLINE

The trial court also abused its discretion, was manifestly wrong or applied an incorrect legal standard when it determined that the Wilsons did not undermine the Smiths' discipline of the children. In its analysis of this factor, the trial court also erred by requiring the Smiths to prove that the Wilsons undermined their discipline rather than imposing the burden on the Wilsons to show that they did not. According to the trial court, "Stephen could point to no specific occurrence that he witnessed wherein Grandparents interfered with his disciplining of the children..." R. 162. The court makes no mention of any evidence presented by the

Wilsons that they did not undermine Stephen's discipline of the children, and its failure to properly consider this factor constituted reversible error on the part of the trial court.

The trial court reasoned, "[w]ith the exception of the Easter weekend (DHS) incident, it is clear to the Court that Grandparents accept their non-parental role and respected Stephen's wishes." *Id.* The Smiths respectfully contend that this reasoning is in error, however, due to the fact that they presented a great deal of evidence at trial that contradicts the trial court's conclusion. Although he did not go into great detail, Stephen testified that the Wilsons undermined his discipline and did not respect his wishes about how the children were supposed to behave and conduct themselves. T. 24. Stephen did provide some examples of this behavior, however. He testified that the Wilsons allowed the children to carry food into the bedroom, they did not require the children to brush their teeth at certain times, they allowed the children to scream and run wild, and they allowed the children to misbehave when adults were talking. *Id.* He further testified that Charlotte had interfered with his discipline of the children in his own home and that she told him that he needed to "let some of his rules go" and that he had "too many rules for the children." T. 49, 210. The Smiths would also contend that the DHS event that Easter weekend was not the "exception" as the court has concluded. R. 162. Rather, it was the "final straw" that severed ties between the Wilsons and the Smiths in their already deteriorating relationship. T. 24-25, 27.

The trial court erred when it concluded that this factor was in favor of the Wilsons. In its analysis of this factor, the trial court also improperly placed the burden of proof on the Smiths rather than the Wilsons and erroneously failed to require the Wilsons to present any evidence that they did not undermine the Smiths' discipline of the children. The trial court further erred by failing to properly consider and weigh the evidence presented by the Smiths that the

Wilson's had engaged in a pattern of undermining their discipline of the children. Due to the trial court's error, the Smiths request that its decision be reversed and this factor be found in favor of the Smiths.

C. GRANDPARENTS WILLINGNESS NOT TO INTERFERE WITH THE PARENT'S REARING OF THE CHILDREN

The trial court finally abused its discretion, was manifestly wrong or applied an incorrect legal standard when it found that the Wilsons were willing to not interfere with the Smiths' rearing of the children. In its analysis of this factor, as with the previous two, the trial court improperly placed the burden of proof on the Smiths rather than the Wilsons. In its opinion the trial court stated, "Stephen offered no proof that Grandparents objected when Stephen finally came to get the children in July of 2009." R. 162. The court further stated, "[h]e offered no proof that Grandparents interfered in his decision as to where to send Breely to school in the Fall of 2009." *Id.* Not only do these statements indicate the trial court's erroneous imposition of the burden of proof on the Smiths, but they also demonstrate the trial court's improper consideration of the evidence presented at trial.

The trial court is correct that Stephen did not prove that the Wilsons objected to his taking of the children in July of 2009, but the trial court's error lies in that Stephen was not attempting to prove this fact. Stephen testified at trial that he had numerous discussions with Charlotte Wilson prior to July of 2009 about bringing the children to live with him and Luann at his home in Columbus, Mississippi. T. 63, 200-05. He also testified that, each time he broached the subject, Charlotte objected to the idea and became emotional, so he came and got the children without notice so that the Wilsons would not have time to object. T. 200-05. Stephen also did not intend to show that the Wilsons interfered with his decision as to where to send Breely to school in the fall of 2009. Rather, the Smiths successfully proved through

Stephen's mother, Linda, that Charlotte *attempted* to influence Stephen's decision by contacting Linda rather than speaking with Stephen directly. T. 163, 208.

Aside from the incidents discussed in the previous paragraph and those in subsection (B) above, the Smiths also argue that the DHS event is the direct manifestation of the Wilsons' interference and refusal to accept a grandparental role. After Stephen and Luann got the children in July of 2009, there were discussions about the possibility of the Smiths moving away again so that Stephen could seek employment in his field of choice, and at some point, Breely relayed to Charlotte that there was a chance that the Smiths might be moving to Virginia. T. 221. Soon thereafter, Larry caused the report to be made to the DHS that initiated the abuse investigation against the Smiths. *Id.* Larry's only justification for taking this drastic course of action was that he did not want to be blamed for the bruise that he had found on Banks even though no one had ever accused him of abuse before. T. 101. At the conclusion of the investigation, all involved parties, even Charlotte Wilson, agreed that there was no indication of abuse and that the bruise was merely incidental to Banks being "all boy." T. 31-32, 103, 124. The Smiths contend that Larry Wilson was well aware of Banks's rowdy nature and his tendency to fall and sometimes experience minor bruising as a result of his physical play. The DHS incident, therefore, was the direct result of the Wilsons learning that their visitation would be reduced, and it was an attempt by the Wilsons to gain leverage in any future dispute over visitation. This is an indication not only of the Wilsons refusal to accept their role as grandparents, but also their willingness to do anything necessary to maintain their control over the children, even when their actions are not in the best interests of the children.

While it is clear that the Wilsons were unwilling to relinquish their control of the children, the trial court took issue with Stephen for his contention that he should be the sole

decision maker with respect to visitation between the Wilsons and the children. In the "Facts" section of its opinion, the trial court stated:

Stephen's position is clear. He and he alone wants to determine if and when any visitation shall occur between the children and Grandparents. Stephen even went so far as to say that he would ignore a court order if "he" thought it was not in the children's best interests. Stephen stated that he would consider telephone contact between Grandparents and children, but ultimately, he wanted to be the sole decision-maker regarding any visitation between Grandparents and the children.

R. 158. First, it should be noted that Stephen's statement that he would ignore a court order was taken out of context. The following colloquy took place between Stephen Smith and the Wilsons' attorney, Mr. Starks:

MR. STARKS: And this court, nobody else will tell you what to do?

Mr. Smith: Yes, this court can.

MR. STARKS: But you won't follow it, will you?

Mr. Smith: I can't say that.

MR. STARKS: Well, it's either yes or not. You will follow it, or you won't?

Mr. Smith: Everything is not a yes or no question.

MR. STARKS: Will you follow the order of this court?

Mr. Smith: I might. It depends on what it is.

MR. STARKS: What are the factors you use to determine whether you want to follow the order of this court or not?

Mr. Smith: My number one factor is whether or not I think it will, in fact, be healthy or not for my children.

MR. STARKS: So when you give a rule to your children and you tell them that they've got to do these rules, you're very legalistic. You decide that they should follow these rules, and they've got to follow these rules whether they're right or wrong, because you're the father?

Mr. Smith: Yes, but if –

MR. STARKS: Well, when this Court does that, you don't respect that, do you?

Mr. Smith: That's not true.

MR. STARKS: Well, that's what you just said?

Mr. Smith: No.

MR. STARKS: You just said you'll make the decision?

Mr. Smith: No. That's not what I'm saying. I'm not –

MR. STARKS: That's not what you're saying?

Mr. Smith: I'm not saying – I'm not talking absolutes.

MR. STARKS: If you don't think it's good for your children, you're not going to follow it, are you?

Mr. Smith: If I think it would be detrimental to my children, I would have to consider it.

T. 237-39. A cursory review of the Trial Court Transcript indicates that Stephen did not testify that he would absolutely ignore a court order, and his response, while not ideal, is one that is reasonable and understandable from a parent who feels his relationship with his children is being threatened.

The trial court's negative characterization of Stephen merely because he felt that he should be the sole decision maker with regard to the children's visitation with the Wilsons is clearly improper because Stephen has a constitutionally protected right to feel that he is the best person to make decisions regarding his children. As previously discussed, there is a presumption that fit natural parents make decisions that are in their children's best interests, and Stephen obviously felt that the evidence reflected that he was in a much better position to make decisions regarding visitation than the trial court. The above-referenced statement by the trial court is actually illustrative of the exact situation that the *Troxel* court addressed where the trial court's decision regarding the best interests of children was improperly substituted for

that of a fit natural parent. The trial court was in error; therefore, its decision as such should be reversed.

The trial court also erred by failing to consider that the Wilsons may become emboldened in their dealings with Stephen and the children. In a dispute between parents and grandparents over concerns with discipline, a parent has a right to expect that the grandparents will respect his wishes and rules with respect to the rearing of the children and their discipline. If grandparents fail to respect these wishes, however, the parent only has one option to ensure that his discipline is enforced in the grandparents' home and that is to reduce or deny visitation with the grandparents. If the parent is deprived of this option, there is nothing to require the grandparents to respect the wishes of the parent, and they are free to do what they wish with regard to the discipline of the children. This is likely to be the case here given the history of disagreements between the Smiths and Wilsons concerning the children's discipline and the Wilsons' failure to accept their role as grandparents. The trial court failed to consider this, however, and this failure resulted in reversible error on the part of the trial court.

The trial court abused its discretion, was manifestly wrong or applied an incorrect legal standard when found that the Wilsons were willing to not interfere with the Smiths' rearing of the children. Similar to its application of the two previously discussed factors, the trial court improperly imposed the burden of proof on the Smiths rather than the Wilsons, and the reasoning of the trial court illustrates that it reached mistaken factual conclusions. The trial court also erred by failing to recognize the DHS event as the Wilsons' refusal to accept their role as grandparents and an attempt to interfere with the Smiths' rearing of the children. Finally, the trial court was in error when it took issue with Stephen merely because he believed that he should be the sole decision maker with respect to decisions regarding

visitation and when it failed to properly consider the fact that its order would likely cause the Wilsons to become emboldened in their dealings with the Smiths and their children. Due to the errors discussed above, the Smiths request that the trial court's decision be reversed.

The trial court abused its discretion, was manifestly wrong, or applied an incorrect legal standard when it failed to properly consider certain key factors pursuant to *Martin v. Coop*. The trial court erred by failing to require the Wilsons to provide sufficient evidence to support their action for grandparent visitation and by imposing the burden of proof on the Smiths rather than the Wilsons. The trial court also erred by failing to properly consider the Smiths constitutional protections under the Fourteenth Amendment and further erred by applying a number of erroneous factual conclusions in its consideration of these key factors. If the trial court had properly considered and weighed these key factors, it would not have awarded visitation to the Wilsons. The Smiths therefore request that this Court reverse the trial court's decision and render the judgment, or alternatively remand for further proceedings consistent with the opinion of this Court.

**IV. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, OR APPLIED AN INCORRECT LEGAL STANDARD WHEN IT GRANTED EXCESSIVE GRANDPARENT VISITATION RIGHTS TO THE WILSONS IN THIS CASE.**

The trial court erred in granting excessive grandparent visitation rights to the Wilsons in the instant case.<sup>17</sup> In determining the amount of visitation to be awarded, the trial court will consider the factors in *Martin v. Coop*. 693 So. 2d at 916. The trial court's errors in its consideration of these factors have been discussed previously in Issue (III), and in the interests of judicial economy, those issues will not be revisited here. The Smiths do contend, however, that the trial court's improper consideration of the key factors discussed above directly

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<sup>17</sup> See visitation schedule, *supra* at 4-5

resulted in excessive grandparent visitation rights being awarded to the Wilsons; therefore, its decision should be reversed.

### CONCLUSION

Due to the trial court's numerous errors, the Smiths hereby request that this Court grant them the following relief: (1) find that the trial court unconstitutionally applied §§ 93-16-3(1) and 93-16-5, the *Martin* factors, and the *Troxel* elements in the present case; (2) strike down §§ 93-16-1 through 93-16-7 and *Martin* as being unconstitutional on their face; (3) find that the trial court committed reversible error due to its improper consideration of the *Martin* factors resulting in the improper and excessive award of grandparent visitation to the Wilsons; and (4) reverse the trial court's decision and render the decision, or in the alternative, remand for further proceedings consistent with the opinion of this Court.

The trial court's decision caused the Smiths to be unconstitutionally deprived of their fundamental right to make decisions concerning the care, custody, and control of their children. The trial court unconstitutionally applied §§ 93-16-3(1) and 93-16-5, the *Martin* factors, and the *Troxel* elements due to the fact that it failed to even consider the *Troxel* elements in its analysis of the case. As a result, the Smith's decision regarding grandparent visitation was not accorded the deference required by *Troxel*. The trial court also failed to consider the fact that the Wilsons admitted that Stephen was a good father, and it failed to apply the presumption that Stephen makes decisions that are in Breely and Bank's best interests. The trial court further erred by failing to consider the fact that Stephen never intended to permanently terminate visitation and that he only wanted to suspend visitation so that his young family could have time to gel as a family unit without the Wilsons' interference. The trial court also committed reversible error by not requiring the Wilsons to

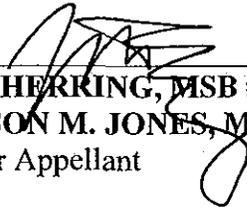
disprove these elements and prove that the *Martin* factors were in their favor by clear and convincing evidence. The record clearly indicates that the trial court's decision was the direct result of its unconstitutional application of §§ 93-16-3(1) and 93-16-5, the *Martin* factors, and the *Troxel* elements; therefore, its decision should be overruled in favor of the Smiths.

The trial court's decision should also be overruled due to the fact that §§ 93-16-1 through 93-16-7 and the *Martin* factors are unconstitutional on their face. They are constitutionally deficient in that they do not direct Mississippi courts to consider the preference of the natural parent, and they further fail to direct Mississippi courts to consider the fitness of the natural parent and accord the natural parent with the presumption that they make decisions that are in their children's best interests. The disparity between §§ 93-16-3(1) and 93-16-3(2) that fails to require a showing of unreasonable denial of grandparent visitation rights by the natural parent in *all* cases of grandparent visitation and the failure of §§ 93-16-1 through 93-16-7 and the *Martin* factors to prescribe a heightened burden of proof for grandparents to meet when seeking visitation render these provisions unable to survive a Due Process challenge. Sections 93-16-1 through 93-16-7 and the *Martin* factors should therefore be struck down as unconstitutional.

The trial court committed reversible error by failing to properly consider a number of key factors pursuant to *Martin v. Coop*, which directly resulted in the improper and excessive award of grandparent visitation rights to the Wilsons in this case. The trial court erred by failing to properly consider that the children's lives could potentially be disrupted by improperly shifting the burden of proof to Smiths rather than the Wilsons, not properly considering Stephen's testimony that visitation would be disruptive, and failing to consider the Smiths' new child and the effect that court-ordered visitation would have on all of the

Smiths' children. The trial court's decision was also in error due to the fact that it failed to properly consider the Wilsons' undermining of the Smiths' discipline. In its consideration of this factor, the trial court also improperly shifted the burden to Stephen, and it also failed to properly consider and weigh the evidence that the Wilsons had engaged in a pattern of undermining Stephen's discipline of the children. The trial court finally erred in its finding that the Wilsons were willing to not interfere with the Smiths' rearing of the children due to the fact that the trial court again shifted the burden to the Smiths, by reaching mistaken factual conclusions, and by failing to recognize the DHS event as the Wilsons' attempt to interfere with Stephen's raising of the children. The trial court also committed error when it took issue with Stephen merely because he held the proper belief that he was in a better position than the trial court to make decisions regarding his children's visitation with the Wilsons. It is clear from the record that the trial court committed reversible error by failing to properly consider these key *Martin* factors; therefore, the trial court's decision should be reversed, and this Court should find that the children's best interests are served by allowing the Smiths to make all decisions concerning visitation with the Wilsons. The Smiths therefore respectfully request that this Court grant them the requested relief and rehabilitate their right to make any and all decisions concerning the care, custody, and control of their children.

**RESPECTFULLY SUBMITTED**, this the 22 day of July, 2011.

  
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**CERTIFICATE OF SERVICE**

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

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This the 22 day of July, 2011

  
\_\_\_\_\_  
JASON D. HERRING