

**IN THE COURT OF APPEALS 03/12/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00830 COA**

**IN THE INTEREST OF C.C., A MINOR: J.C. AND B.C.**

**APPELLANT**

**v.**

**D.C.**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MICHAEL WARD

COURT FROM WHICH APPEALED: HARRISON COUNTY FAMILY COURT

ATTORNEY FOR APPELLANT:

THOMAS WRIGHT TEEL

ATTORNEYS FOR APPELLEE:

MARGARET ALFONSO AND HERBERT WILSON

NATURE OF THE CASE: GRANDPARENT VISITATION

TRIAL COURT DISPOSITION: DENIED VISITATION TO GRANDPARENTS AND  
ORDERED GRANDPARENTS TO PAY ATTORNEY'S FEES TO APPELLEE

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

BRIDGES, P.J., FOR THE COURT:

In the interest of protecting the child's anonymity, this Court has resolved not to use the names of the child or the other individuals involved. The child will be referred to by the initial C. In this case, the child's father, who we will refer to as John Jones, was adjudicated to have abused C. The paternal grandparents referred to in this opinion as Mary and Joe Doe, sought to have visitation rights established with the child. The lower court found that the paternal grandparents were not allowed visitation with the child on the grounds that visitation with the paternal grandparents was not in the child's best interest. The lower court also awarded attorney's fees to the child's mother in defending the action. On appeal, the paternal grandparents claim the lower court erred in denying grandparents' visitation and in awarding attorney's fees. We affirm the lower court's judgment denying grandparent visitation, but reverse on the issue of attorney's fees.

## FACTS

The parents of child C., referred to in this opinion as Jane and John Jones, separated when C. was six months old. The divorce became final when C. was sixteen months old. Jane and C. moved to Gulfport, and John was allowed visitation with his daughter every other weekend and also allowed to see her for a week during the Christmas holidays. When C. was three, an employee at the child's day care center filed an abuse petition with the family court in Harrison County alleging that John had sexually abused his daughter. The court ordered C. to be placed in the custody of her mother but under the supervision of the Harrison County Department of Human Services. The court continued to allow John to visit with his daughter. A couple of months later, the child's psychologist filed another motion to suspend John's visitation privileges because of abuse allegations reported by the child to her. A hearing was conducted, and John was allowed supervised visitation pending an adjudicatory hearing on the issue of abuse. Later, the court found that C. was in fact an abused child. The court also ordered that the child be placed in the custody of her mother, attend counseling, and ordered the parents to attend a child sex abuse treatment program. Moreover, the court denied John visitation, but reserved ruling on the issue of paternal grandparent visitation.

About four months later, in December of 1991, the paternal grandparents filed a petition for grandparents' visitation in the family court. The court heard the petition and allowed the paternal grandparents to have visitation with the child for one hour each month, but ordered that C.'s therapist, Dr. Susannah Smith, be present at the first visit and the Department of Human Services supervise the remainder of the visits. The court further ordered that the paternal grandparents were to make no mention of the abuse or of C.'s father to her during their visits. However, before an actual visit took place, the family court rendered an order suspending the grandparents' visits until the father paid a \$2,563.23 outstanding bill owed to Dr. Susannah Smith for previous work done with C. during the course of litigation.

In December of 1993, the Does filed a new complaint with the family court requesting visitation, phone, and mail access. The petition asked the court to order visitation under a new order or a modification of the prior order. In response, the child's mother filed a pleading against John Jones, the father of the child, to compel him to pay the outstanding therapy bill. The trial took place over a three-day period and ended on May 31, 1994. On June 28, 1994, Jane's attorney filed an affidavit concerning attorney's fees.

While Mary Doe indicated that she loved her granddaughter, she remained resolute in her belief that

John, her son, had not abused C. At the conclusion of the hearing, the family court judge denied Mary and Joe Doe's motion to establish visitation rights in their favor. The family court judge also ordered the Does to pay attorney's fees to Jane Jones pursuant to the affidavit filed by her after trial. The Does have appealed the denial of their visitation rights and the award of attorney's fees.

## STANDARD OF REVIEW

In *Parker v. Parker*, 641 So. 2d 1133, 1137 (Miss. 1994), the Mississippi Supreme Court enumerated the applicable standard of review in matters of this kind:

Our scope of review in domestic relations matters is limited by our familiar substantial evidence/manifest error rule.

"This Court will not disturb the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied."

"In other words, "[o]n appeal [we are] required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong." "If we find substantial evidence supporting the chancellor's fact findings, they are beyond our power to disturb."

The chancellor is in the best position to determine the credibility of the witnesses and view their demeanor. *Murphy v. Murphy*, 631 So. 2d 812, 815 (Miss. 1994). Furthermore, the issue of visitation and the restrictions placed upon visitation are left to the discretion of the chancery court, or in this case the family court. *White v. Thompson*, 569 So. 2d 1181, 1185 (Miss. 1990). The family court serves as a branch of the chancery court and is therefore subject to the same standard of review on appeal. *DLD v. Wilkinson County*, 606 So. 2d 1125, 1127 (Miss. 1992).

## ARGUMENT AND DISCUSSION OF LAW

### GRANDPARENTS' VISITATION

The basis of the Does' argument on appeal is that the lower court was manifestly wrong in denying grandparent visitation. They believe that they met the requirements under section 93-16-3 of the Mississippi Code of 1972. The Does argue that the lower court should not have based its decision on the fact that they did not have a viable relationship with C. They claim that there is no requirement that they have a viable relationship with C. under the statute.

There is no common law right to grandparent visitation and, therefore, "[s]uch right, if any, must come from a legislative enactment." *Matter of Adoption of a Minor v. Smith*, 558 So. 2d 854, 856 (Miss. 1990) (citing *Olson v. Flinn*, 484 So. 2d 1015, 1017 (Miss. 1986)). The legislature has

enacted a specific statute which deals with grandparent visitation. The statute reads in pertinent part as follows:

(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 who was not awarded custody or whose parental rights have been terminated or who has died 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 such 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 (3) 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 part for a period of not less than six (6) months before filing any petition for visitation rights with the child or the grandparents have had frequent visitation including occasional overnight visitation with said child for a period of not less than one (1) year.

Miss. Code Ann. § 93-16-3 (1972).

At the hearing, C.'s mother Jane testified that she opposed her daughter's visitation with the Does because she did not see any way that C. would benefit from visiting the Does at this time. Jones testified that in the past, the child's behavior deteriorated after visits with the Does. She also said she hoped that C. could visit with her paternal grandparents once the child regained her emotional health. She also stated that the Does had seen C. on only two or three occasions from the child's birth in 1986 to 1988, and then only two times since 1988 to Christmas of 1991.

Elizabeth Carter, a licensed professional counselor, testified she worked with C. on a weekly basis beginning in October of 1993, and has read reports concerning the child prepared by Dr. Susannah Smith, the child's previous doctor. She testified that it was not in the best interest of the child to visit her grandparents, because she was not emotionally stable. She expressed a concern about C.'s emotional and mental health if the visits continued. Dr. Carter expressed her concern that the child be allowed visitation only with those individuals who understood the importance of the child not being allowed to see her father. Dr. Carter went on to state that "it would bother her to no end" if the child were allowed to visit with her paternal grandmother who did not believe that the abuse had occurred and openly expressed this view to others.

Mary Doe, C.'s paternal grandmother, testified she did not believe her son committed the abuse. She also testified that she has not been on good terms with C.'s mother since the divorce. In its opinion and order dated July 11, 1994, the family court found that it was not in the best interest of the child to have visitation with her paternal grandparents. Factoring into the court's opinion was the lack of frequent visitation and most important, Mary Doe's continued denial of the abuse. The judge also stated that another reason to deny the visitation was the testimony of Dr. Elizabeth Carter who testified that, in her opinion, C.'s grandparents should not be allowed to visit her.

The family court judge found that even before the first allegations of abuse, the grandparents did not have a viable relationship with C. The court found that the grandparents had not had frequent visitation with C. for a period of less than one year, nor had they supported her financially. The court also relied on the testimony of C.'s therapist who stated that, in her opinion, she should not be exposed to her grandparents because of their belief that C.'s father was innocent of abusing her. The opinion and order of the family court expressly states that the best interest of the child is the primary concern in visitation matters. The judge did not rely solely on the lack of a viable relationship between the grandparents and the child but merely considered this factor as one of the factors in deciding what was in the best interest of the child.

The Does' argument that the lower court inappropriately applied the statute is without merit. The family court correctly applied the law and denied visitation privileges based on the child's best interest.

#### ATTORNEY'S FEES

The Does also claim that the award of attorney's fees by the lower court was manifest error. They argued that although attorney's fees are allowable under section 93-16-3, Jane Jones failed to file a written pleading seeking attorney's fees and failed to present substantial evidence at trial concerning attorney's fees. In response, Jane Jones argues that the award of attorney's fees was proper because there is no requirement that a pleading be filed requesting attorney's fees.

The statute in question reads in pertinent part as follows:

(4) *The court shall on motion of the parent or parents* direct the grandparents to pay reasonable attorney's fees to the parent or parents in advance and prior to any hearing, except in cases in which the court finds that no financial hardship will be imposed upon the parents. The court may also direct the grandparents to pay reasonable attorney's fees to the parent or parents of the child and court costs regardless of the outcome of the petition.

Miss. Code Ann. § 93-16-3 (1972) (emphasis added).

Obviously, counsel for Jane Jones reads the statute to mean that the court may, without a pleading, motion, petition or evidence, be allowed to award attorney's fees in its own discretion. We must disagree. The only evidence regarding attorney's fees was an affidavit filed by Jane Jones, after trial, signed by her attorney stating that "the flat fee of \$750.00 is a reasonable rate for the legal service provided in the above-referenced matter." Because of prior case law and precedent on the issue of attorney's fees, we believe that the statute must be read as a whole. In other words, the lower court can direct the grandparents to pay attorney's fees only when a motion or pleading is filed by the parent, and evidence is presented at trial relating to the reasonableness of the fees requested. We will discuss the case law which applies to the interpretation of this statute below.

Although the decision to award attorney's fees is largely within the discretion of the chancellor, or in this case the family court judge, this Court will not uphold the lower court's decision where there is an abuse of discretion. *Armstrong v. Armstrong*, 618 So. 2d 1278, 1282 (Miss. 1993) (citations omitted).

The factors considered in the awarding of attorney's fees include 1) the relative financial condition of the parties, 2) the skill and standing of the attorney, 3) the nature of the case, 4) the novelty and difficulty of the issues raised, 5) the time and the labor involved, 6) the usual and customary charges for such services prevailing in the community and 7) the extent that the attorney's representation of the litigant has precluded acceptance of other cases by that attorney. *Creekmore, v. Creekmore*, 651 So. 2d 513, 520 (Miss. 1995) (citing *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982)). Moreover, the supreme court has stated, "[t]he fee should be fair and should only compensate for services actually rendered after it has been determined that the legal work charged for was reasonably required and necessary." *Dunn v. Dunn*, 609 So. 2d 1277, 1286 (Miss. 1992). When our supreme court has examined issues concerning the awarding of attorney's fees in the past, the court has required that there be substantiating evidence upon which to award attorney's fees. In the case of *Griffin v. Griffin*, 579 So. 2d 1266, 1268 (Miss. 1991), the court refused to uphold the lower court's award of attorney's fees in favor of the appellee. The facts of the *Griffin* case are similar to the case at bar. In *Griffin*, an affidavit was filed after the close of proceedings setting out the hours worked, and the hourly rate charged by the attorney. *Id.* at 1267. Similar to the case sub judice, in *Griffin*, there was no explanation for the fee, and no testimony as to the usual charge in the community for the same services, or testimony of counsel's preclusion from other employment as a result of taking the case. *Id.* The court in *Griffin* refused to uphold the award of attorney's fees based on these facts, and we must do the same. In this case, there was no motion filed requesting attorney's fees, and no evidence was presented at trial concerning the factors involved in a decision to award attorney's fees.

For the foregoing reasons, we reverse the award of attorney's fees in the amount of \$750.00 awarded to the Appellee Jane Jones.

**THE JUDGMENT OF THE HARRISON COUNTY FAMILY COURT IS AFFIRMED AS TO THE DENIAL OF GRANDPARENT VISITATION BUT REVERSED ON THE ISSUE**

**OF ATTORNEY'S FEES. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

**FRAISER, C.J., THOMAS, P.J., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., NOT PARTICIPATING.**