COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2012-SC-000004-DE

MICHELLE L. WALKER — APPELLANT

v.

ON APPEAL FROM KENTUCKY COURT OF APPEALS
ACTION NO. 2010-CA-002228-ME
AND JEFFERSON CIRCUIT COURT
ACTION NO. 09-CI-503800

DONNA S. BLAIR — APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was placed in the United States mail, postage prepaid, on this the 12th day of April, 2012 to: Judge Dolly Wisman Berry, Jefferson Family Court, Division 4, 700 W. Seventh Street, Louisville, KY 40202 and Denise Helline, 455 S. Fourth Street, Suite 930, Louisville, KY 40202. It is further certified that the record on appeal was not withdrawn from the Clerk's Office.

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INTRODUCTION

This is a grandparent visitation rights case where the Court of Appeals affirmed the trial court's grant of substantial, unsupervised visitation to Appellee over the Appellant's objection.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant desires oral argument and believes it would be helpful to the Court in deciding the issues presented.

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STATEMENT OF THE CASE

Donna S. Blair (hereinafter "Donna") is the paternal grandmother of B.B. (TR 1-3). On October 26, 2009, she filed a Petition to Establish Grandparent Visitation in Jefferson Family Court. (TR 1-3). Michelle L. Walker (hereinafter "Michelle"), as the child's mother, objects to any mandatory visitation taking place and responded accordingly. (TR 6-8, CD 3-F4-10VR-129 14:16:05-:35:45).

The child's natural father, Steven Blair (hereinafter "Steven"), was Donna's son. (TR 1-3). He had a long history of substance abuse and a criminal record. (TR 92-198). The child primarily resided with Michelle and only saw Steven every other weekend from Saturday evening to Sunday morning. (TR 92-198). When Steven exercised parenting time, he occasionally allowed Donna to visit with the child. (TR 92-198). Michelle grew concerned about Steven's inability to care for B.B. when she learned that he was on probation again, had firearms in his house and had left the child with his girlfriend while he went out all night. (CD 3-F4-10VR-129 15:32:35). When she raised these concerns, the relationship between Michelle and Donna became strained. (TR 92-198).

Tragically, Steven committed suicide in August 2009. (TR 92-198). Several months prior to Steven's death, Donna and he had a falling out, and Steven completely estranged himself from her. (TR 92-198, CD 3-F4-10VR-129 14:38:50). Donna also has another son, Scott, who also estranged himself from her eight (8) years ago. (TR 92-198, CD 3-F4-10VR-129 14:29:20-:31:00, 14:43:53-:45:16).

Donna was married to Martin Blair (hereinafter "Martin"), an admitted alcoholic, for decades. (TR 92-198, CD 3-F4-10VR-129 14: 23:19). According to her medical records, Donna blames Martin, who is also B.B.'s paternal grandfather, for many of her problems. (TR 92-198,

CD 3-F4-10VR-129 14:15:47-:23:57). She blames him for her son, Scott, estranging himself from her. She blames him for the depression from which she has suffered for many, many years. (TR 92-198, CD 3-F4-10VR-129 14:15:47-:23:57). Her depression pre-dates Steven's death, which understandably exacerbated the condition. (TR 92-198, CD 3-F4-10VR-129 14:15:47-:23:57). She has, over the years, taken various combinations of prescription drugs to help with her mental health issues. She has also had a very hard time holding down a job for unknown reasons. (TR 92-198, CD 3-F4-10VR-129 14:25:48-:26:50, 14:33:35-:35:27, 14:36:40-:37:40, 14:43:53-:45:16, 14:46:10-:49:20). Regardless, Donna continued to see Martin on a regular basis and has recently reconciled with him. (TR 92-198, CD 3-F4-10VR-129 14: 23:19).

After Steven's death, Donna called Michelle in a fit of anger and blamed her for Steven's death. (TR 92-198, CD 3-F4-10VR-129 14:25:48-:26:50, 14:33:35-:35:27, 14:36:40-:37:40, 14:43:53-:45:16, 14:46:10-:49:20). At the visitation hearing, Donna testified that she continues to believe that Michelle is somehow responsible for Steven's death. (TR 92-198, CD 3-F4-10VR-129 14:25:48-:26:50, 14:33:35-:35:27, 14:36:40-:37:40, 14:43:53-:45:16, 14:46:10-:49:20). Martin called Michelle and her husband multiple times while drunk and threatened to kill both of them. (CD 3-F4-10VR-129 14:11:39, 14:44:38-:44:41). As a result, Jefferson Family Court entered a Domestic Violence Order ("DVO") against Martin to protect Michelle and her husband. (TR 92-198). Martin subsequently violated the DVO and, as a result, was incarcerated for a short period of time. (TR 92-198).

After that, fearing for her son's safety and emotional well-being, Michelle decided to limit B.B.'s contact with the Blairs. (TR 92-198). Thereafter, Donna initiated an action in Jefferson Family Court seeking visitation with B.B. (TR 1-3). A hearing was held on August 18, 2010. (TR 218-225). Prior to the hearing, Michelle filed a Motion to Dismiss on the grounds

that Donna had not stated a claim upon which relief could be granted. (TR 92-198). The trial court denied Michelle's Motion to Dismiss on August 16, 2010. (TR 201-202).

Over Michelle's objection, the trial court granted Donna substantial, unsupervised visitation with B.B. (TR 218-225, *See* Tab C). Michelle appealed the decision of the trial court to the Kentucky Court of Appeals which affirmed the decision by Opinion issued on September 30, 2011. *See* Tab A.

This Court granted discretionary review on March 14, 2012.

ARGUMENT

At common law, grandparents did not have the legal right to visit a grandchild over the objection of the child's parent. In 1984, the General Assembly enacted a statutory scheme whereby grandparents in Kentucky could petition the court for visitation with their grandchildren. Ky. Rev. Stat. (KRS) 405.021(1) reads as follows:

> The Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.

In 2000, in Troxel v. Granville, 530 U.S. 57 (2000), the Supreme Court of the United States held that imposing grandparent visitation over the objection of a fit custodial parent's objection infringes on the parent's constitutional rights. The case at bar is the first time the Kentucky Supreme Court will address KRS 405.021 post-Troxel.

As outlined below, the existing case law in this Commonwealth establishes that, in order to gain visitation, a grandparent must show by clear and convincing evidence that forced visitation is in the child's best interests. *See* Grant v. Lynn, 268 S.W.3d 382, 384 (Ky. App. 2008). Troxel unequivocally states that a fit parent's decision to withhold visitation with a grandparent must be given deference. *See* Troxel, 530 U.S. at 70. However, Kentucky courts have diminished parents' rights by establishing several other factors courts must consider when granting or denying grandparent visitation. *See* Vibbert v. Vibbert, 144 S.W.3d 292 (Ky. App. 2004).

Here, neither the trial court nor the Court of Appeals gave Michelle's decision any deference as required by both Troxel and Vibbert. Moreover, Donna completely failed to meet her burden. She did not prove by clear and convincing evidence that visitation is in B.B.'s best interests. Despite the foregoing, the trial court awarded Donna substantial visitation, including

overnights, full days and holiday visits over Michelle's objection. The Court of Appeals erroneously affirmed the decision and must be reversed to protect the rights of parents throughout this Commonwealth.

I. THE OPINION OF THE COURT OF APPEALS SHOULD BE REVERSED, BECAUSE IT DID NOT GIVE THE REQUIRED SPECIAL WEIGHT TO MICHELLE'S DECISION TO LIMIT B.B.'S CONTACT WITH DONNA.

Michelle is a fit custodial parent, who should have all the fundamental rights and responsibilities of such a parent. Under long-standing constitutional law, she is entitled to decide how best to raise, guide, care for, and protect her son. Troxel, 530 U.S. at 65. Yet, the Court of Appeals did not even mention this right in its Opinion, and therefore, committed clear error.

a. In Troxel v. Granville, 530 U.S. 57 (2000), the Supreme Court of the United States held that a parent's right to make decisions concerning the care and control of their children is a fundamental constitutional right.

In 2000, the U.S. Supreme Court issued its decision in Troxel v. Granville, 530 U.S. 57 (2000). By a 6-3 vote, the Court affirmed the judgment of the Supreme Court of Washington, which had reversed a fairly typical grant of grandparent visitation. The case involved parents who had never married. After the separation, the father had lived with the paternal grandparents, and the two (2) children had spent much time at the paternal grandparents' house. The father committed suicide, and some time thereafter, the mother married. She began limiting the amount and nature of the children's visits with the paternal grandparents. The grandparents sued, won in the trial court, and lost in two (2) successive appeals in state court.

The procedural aspects of the case were highly complex, resulting in a correspondingly complex response by the U.S. Supreme Court. A plurality of four (4) Justices issued separate opinions, none joined by any other Justice. However, the Justices' disagreements concerned the technical and procedural issues more than the substance of the case. The majority opinion found

that "[t]he Court of Appeals' overriding of the mother's objection constituted 'interference with [the mother's] fundamental right to make decisions concerning the rearing of her two daughters.'" Troxel, 530 U.S. at 65, 67-68.

Kentucky courts have traditionally protected the superior rights of parents to the custody, care and control of their children as well. "Kentucky's appellate courts have recognized that not only the parents of a child have a statutorily granted superior right to its care and custody, but also that parents have fundamental, basic and constitutionally protected rights to raise their own children." Moore v. Asente, 110 S.W.3d 336, 358 (Ky. 2003)(*citing* Davis v. Collinsworth, 771 S.W.2d 329, 330 (Ky. 1989)(internal quotations omitted). As a result, Michelle has a basic, fundamental and constitutional right to make decisions pertaining to the rearing and upbringing of B.B. The Court of Appeals completely ignored Michelle's rights, and for that reason, its decision should be reversed.

b. Under Troxel, grandparent visitation cases place parents' fundamental rights at stake, and therefore, the parents' decisions must be given "special weight."

The facts presented in this case are similar to the facts of Troxel v. Granville, 520 U.S. 57 (2000). In Troxel, the father committed suicide, and the mother made the decision to limit the child's exposure to the paternal grandparents. A majority of the U.S. Supreme Court established a crucial presumption to be applied whenever grandparents seek visitation with grandchildren over a parent's objection. As a matter of binding constitutional law, trial courts must start by presuming that a fit custodial parent's decision to deny requested visitation is in the child's best interest:

> [S]o 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.

Troxel, plurality opinion (by O'Connor, J.), 530 U.S. at 68-69.

The U.S. Supreme Court held that state courts considering visitation petitions must apply "a presumption that fit parents act in the best interests of their children." This ruling is set forth in the plurality opinion of four Justices, which also stated that trial courts must "g[i]ve special weight . . . to [a parent's] determination of her child's best interests." 530 U.S. at 69.

Moreover, in Troxel, the High Court further explained that the desirability of any grandparent-grandchild contact is for the parent to judge. Id. Specifically, the Court explained:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit 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.*

530 U.S. at 70 (emphasis added). Justice Stevens supported the plurality's view in Troxel and stated:

> [O]ur cases...have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that 'natural bonds of affection lead parents to act in the best interests of their children.'.... Because our substantive due process law includes a strong presumption that a parent will act in the best interest of her child, it would be necessary, were the state appellate courts...to confront a challenge to the statute as applied, to consider whether the trial court's assessment of the 'best interest of the child' incorporated that presumption.

530 U.S. at 87, 89-90.

In Parham, et al. v. J.R., et al., 442 U.S. 584, 602-602 (1979), the U.S. Supreme Court summarized in the clearest terms the bedrock legal principle that parents are presumed to act in the children's best interests:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children...That some parents 'may at times be acting against the interest of the children'...creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests...The statist notion that governmental power should superseded parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

Because of this presumption, trial courts must give "special weight" to the parent's decision. "Choices [parents make] about the upbringing of children...are among associational rights...sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996). This principle must inform our understanding of the "special weight" Troxel requires courts to give to parents' decisions concerning whether, when and how grandparents will associate with their children.

The special weight standard requires extreme deference to parental decisions. This requirement must be interpreted in some enforceable way or it becomes meaningless. "Special weight" does not merely mean politely listening to the parents' concerns and then dismissing them because the grandparent does not admit their validity.

Like the mother in Troxel, Michelle has never been held to be anything but a fit parent. Her fitness has not been challenged. By dismissing Michelle's concerns, the lower courts gave no special weight to her parental rights. There is no language in the Court of Appeals' opinion indicating it even considered Michelle's superior rights, much less afforded them the special weight mandated by Troxel and Vibbert. Similarly, the trial court also minimized the requirement by merely citing to the issue in a footnote, and thus, it cannot be reasonably argued

that the trial court gave anything close to the required deference to Michelle's decisions regarding grandparent visitation.

It is not enough for a trial court to merely reiterate the sentiment that fit parents are presumed to make decisions that are in their children's best interests without applying the rule. To effect meaning behind the presumption, the trial court must, at the outset, actually give special weight to the parents' wishes. A close examination of the relevant case law in Kentucky shows that courts have not provided any clear and concise guidance as to how to define "special weight." Many decisions simply recite the fact that it should give deference and then proceed to analyze the case using a myriad of other, often inapplicable and irrelevant, factors.

For example, in Grant v. Lynn, 268 S.W.3d 382 (Ky. App. 2008), the Court of Appeals stated: "[T]he court must give appropriate deference to the parent's wishes. However, *the parent's wishes are only one factor* that the Court must consider in determining what is in the child's best interest." (emphasis added). In Grant, the father vehemently opposed any grandparent visitation. Initially, the father successfully defended against the grandmother's petition for grandparent visitation because the Court of Appeals determined that the grandmother failed to prove the children would be harmed if they could not visit with her. Id. However, the Court of Appeals later reversed itself and stated: "Remand was necessary because an *en banc* panel of this Court had since replaced the 'harm' standard mandated by Scott with the 'best interest' standard adopted in Vibbert. Id.

In Scott v. Scott, 80 S.W.3d 447, 451 (Ky. App. 2002), the Court of Appeals held: "[G]randparent visitation may only be granted over the objection of an otherwise fit custodial parent if it is shown by clear and convincing evidence that harm to the child will result from a deprivation of visitation with the grandparent." Two years later, in Vibbert v. Vibbert, 144

S.W.3d 292 (Ky. App. 2004), the Court of Appeals overruled Scott stating "that Scott set an unnecessarily strict and unworkable standard." Id. at 294. Vibbert is more thoroughly discussed in subsection (d) below.

In Baker v. Perkins, 774 S.W.2d 129 (Ky. App 1989), the Court of Appeals marginalized the importance of the parent's wishes by stating: "[T]he court should, of course, take into consideration the custodial parent's attitude and the possibility of conflict. However, the evaluation cannot stop there. There are other considerations, including the nature of the relationship between the child and her grandmother, the preferences of the child, and the mental and physical health of the parties." Id. at 129-130.

Simply put, the lower courts seem to be unclear as to how to apply the pro-parent Troxel presumption. In this case, Michelle reasonably did not feel that B.B. would be safe while in Donna's care for many reasons. Specifically, Donna still associates with and visits Martin Blair, the man who threatened to kill Michelle. (TR 92-198, CD 3-F4-10VR-129 14: 23:19). Donna has also stated on numerous occasions that she has had screaming fits since Steven died and blames Michelle for his death. (TR 92-198, CD 3-F4-10VR-129 14:25:48-:26:50, 14:33:35-:35:27, 14:36:40-:37:40, 14:43:53-:45:16, 14:46:10-:49:20). Yet, her decision and fears were completely ignored. For this reason, the decision of the Court of Appeals should be reversed.

c. This Court has only ever addressed the constitutionality of KRS 405.021 in King v. King, 828 S.W.2d 630 (Ky. 1992), which pre-dates Troxel.

Troxel is immediately binding on all state courts. Once the U.S. Supreme Court has spoken on a matter of U.S. constitutional law, all state courts, at all levels, are bound to follow the U.S. Supreme Court's dictates. "It [is] the duty of [the trial court] to administer the law prescribed by the Constitution of the United States, as construed by [the U.S. Supreme Court]."

South Carolina v. Bailey, 289 U.S. 412, 420 (1933). In sum, rulings of the United States Supreme Court "trump" previous Kentucky court rulings to the extent there is any inconsistency. Accordingly, this Court is duty-bound to follow and apply the constitutional guidelines set forth in Troxel.

In King v. King, 828 S.W.2d 630 (Ky. 1992), a divided Supreme Court of Kentucky upheld the constitutionality of KRS 405.021. In that case, the trial court granted visitation rights to the paternal grandfather over the parents' objection. There were two hearings and a psychological evaluation of all the parties before the trial court entered the decree. Id. at 632-633.

In assessing the constitutionality of the statute, the majority stated: "[I]t is not unreasonable for the state to say that the development of a loving relationship between family members is desirable and the arbitrariness of the statute is obviated by the requirement that visitation be granted by a court only after finding that it is in the best interest of the child." Id. at 632. KRS 405.021 does not foster the development of loving relationships. Rather, it is a statutorily-imposed intrusion into a parent's life. Whatever the standard of scrutiny applied, Troxel explains that legislative motives such as the desire to promote extended family bonding, or to maintain existing relationships with grandparents, do not constitute a state interest sufficient to justify court-ordered grandparent visitation over the parent's objection.

Justice Lambert's dissent in King succinctly captures the essence of the dispute:

> The issue here is not as the majority presents it. The issue is not whether visitation with a grandparent is desirable and in the best interest of the grandchild. Rather, the issue is whether the state, by enactment of a statute which has as its only standard the subjective requirement of 'best interest,' may invade an intact nuclear family and require that family to deliver its minor child to another person for visitation. The opinion of the majority makes little pretense of constitutional analysis but depends entirely on the sentimental notion of an inherent value in

> visitation between grandparent and grandchild, regardless of the wishes of the parents. The fatal flaw in the majority opinion is its conclusion that a grandparent has a 'fundamental right' to visitation with a grandchild. No authority is cited for this proposition as there is no such right.

Id. at 633. Justice Wintersheimer joined in this dissent. Justice Lambert further stated:

> The majority opinion and the statute seem to rely on the idea, in addition to the erroneous belief of a fundamental right in the grandparent, that the lives of the grandchild and grandparent are enriched by their association. While such may be true in many cases, while in others it is not, mere improvement in quality of life is not a compelling state interest and is insufficient to justify invasion of constitutional rights. So long as a family satisfies certain minimum standards with respect to the care of its children, the state has no interest in attempting to 'make things better.'

Id. at 634.

The King majority also incorrectly emphasized the benefits that grandparent visitation has on the grandparents. The established case law in this area clearly provides that the applicable standard is whether visitation is in the *child's* best interests. *See* Vibbert, 144 S.W.3d at 294. Yet both the trial court and the Court of Appeals cited the following passage from Dotson v. Rowe, 957 S.W.2d 269, 271 (Ky. App. 1997)(*quoting* King v. King, 828 S.W.2d 630 (Ky. 1992), a case that pre-dates both Troxel and Vibbert):

> That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life.

On appeal, Michelle argued that the trial court's reliance on the above-quoted passage was misplaced since it no longer reflects the current state of the law in Kentucky. The Court of Appeals rejected that argument by stating: "Although there have been subsequent cases which function to further develop Dotson, it has not been overturned and, thus, remains the law of this Commonwealth. Accordingly, we find no error in the trial court's quotation." Michelle L.

Walker v. Donna S. Blair, Case No. 2010-CA-002228-ME, pg. 7. This Honorable Court must clarify the effect of Troxel on the Dotson ruling for the lower courts of this state.

In Justice Lambert's terms, the King decision is fatally flawed. The Court of Appeals relied on the portion of it that focuses on the benefits to the grandparent and not the child. For this reason, the Opinion Affirming should be reversed.

d. Application of the seven factors enumerated in Vibbert v. Vibbert, 144 S.W.3d 292 (Ky. App. 2004) is an insufficient method of giving the parent's decision special weight.

After King and Scott, the Court of Appeals attempted to comply with the mandates of Troxel by establishing a "modified best interest standard" in Vibbert v. Vibbert, 144 S.W.3d 292 (Ky. App. 2004). Specifically, the Court of Appeals explained:

> We believe that a modified "best interest" standard can be used in cases where grandparent visitation is sought within the constitutional framework of Troxel. What Troxel requires us to recognize is that a fit parent has a superior right, constitutionally, to all others in making decisions regarding the raising of his or her children, including who may and may not visit them. A fit parent's decision must be given deference by the courts, and courts considering this issue must presume that a fit parent's decision is in the child's best interest.

Then, the Vibbert Court set forth a broad array of factors that the Court must take into consideration. Vibbert, 144 S.W.3d at 295. Those factors are: (1) the nature and stability of the relationship between the child and the grandparent seeking visitation; (2) the amount of time spent together; (3) the potential detriments and benefits to the child from granting visitation; (4) the effect granting visitation would have on the child's relationship with the parents; (5) the physical and emotional health of all the adults involved, parents and grandparents alike; (6) the stability of the child's living and schooling arrangements; and (7) the wishes and preferences of the child. Id.

The fact that a parent has a superior right gets lost in all of the other factors Vibbert requires trial courts to consider. As such, Vibbert minimizes the "special weight" required by Troxel. One extremely important factor, of particular relevance to this case, is whether the animosity the parties harbor against each other is so grave that it would be detrimental to the child to grant visitation. On that point, the trial court stated:

> Steve's suicide impacted the entire family deeply. Donna needs to forgive Michelle for whatever role she believes she played in Steve's death. Michelle needs to forgive Donna for blaming her and lashing out. Everyone needs to think about [B.B.] and what is best for him. The only concern the court has with allowing grandparent visitation is the potential harm to the child if the parties do not move forward but allow their animosity toward each other to be conveyed to the child.

After hearing all of the evidence, the trial court evidently acknowledged that the parties have extreme animosity towards each other. The court even stated that the animosity could harm the child. Yet instead of holding that this fact weighs in Michelle's favor, the court simply ordered the parties to forgive each other. This paragraph alone is so contrary to the prevailing case law that the Court of Appeals should have found that the trial court committed clear error.

The Court of Appeals evidently determined that only one of the factors was relevant to the instant case. The amount of time the children and grandparent spent together is only one factor, but both lower courts hinged their decision on it. The Court of Appeals stated:

> Donna testified that she had maintained a relationship with B.B. since birth. Donna babysat B.B., kept him overnight, took him to the zoo and park, and spent time with him during the holidays. Donna presented photographs taken during her visits with B.B., as well as handmade drawings given to her by B.B. Overall, the evidence provided by Donna during the hearing was sufficient for the trial court to conclude that B.B. had and would continue to benefit from a relationship with Donna.

Michelle L. Walker v. Donna S. Blair, Case No. 2010-CA-002228-ME, pg. 6. Michelle disputes the lower court's interpretation of the extent of Donna's contact with B.B. Nevertheless, the

amount of time the child spent with the grandparent was but one factor to be considered. The Court of Appeals did not examine the effect granting visitation would have on the child's relationship with the parents, the physical and emotional health of all the adults involved, parents and grandparents alike, the stability of the child's living and schooling arrangements, or the wishes and preferences of the child. Even if the Court of Appeals had correctly applied all of the factors enumerated in Vibbert, it still would have violated Michelle's constitutionally protected rights as her decision was not given any special weight.

II. THE COURT OF APPEALS' OPINION IS IN DIRECT CONFLICT WITH GRAYSON v. GRAYSON, 319 S.W.3d 426 (Ky. App. 2010), A RECENT OPINION BY A DIFFERENT PANEL.

Approximately two (2) months prior to the Court of Appeals rendering its Opinion Affirming in the instant case, a different panel in Grayson v. Grayson, 319 S.W.3d 426 (Ky. App. 2010), distinguished King:

> In King v. King, *supra*, a divided Supreme Court upheld the constitutionality of KRS 405.021 and provided guidance for its application. The King Court held that the statute did not unduly intrude on the fundamental rights of the parents and that the evidence supported the conclusion that paternal grandparent visitation was appropriate. In reaching its conclusion, the King majority expressed an idealized view of the inherent value of the relationship between grandparents and grandchildren.

Grayson, 319 S.W.3d at 431. That a parent might deny grandparent visitation for no good reason in the court's view are not the kind of compelling circumstances contemplated by the Constitution.

Significantly, the Grayson Court acknowledged at the outset that "[b]y all testimony Mother and Father are fit parents." Id. at 428. The Grayson Court then proceeded to apply the factors enumerated in Vibbert and concluded that visitation was not in the child's best interests.

Unlike Dotson and King, the Grayson Court appropriately did not expound on the virtues of the grandparent and how it would most benefit the grandparent to have visitation.

In the case at hand, the Court of Appeals relied on, and upheld, both Dotson and King in rendering its Opinion Affirming. It ignored recent developments in the law and, since the decision is designated "To Be Published," the Opinion will only convolute this area of law even more if it is allowed to stand. This Honorable Court must exercise its authority and duty to clarify the law on this issue.

The extreme acrimony between the parties in Grayson is comparable to the acrimony between the parties in this case. "The evidence in this case reveals extreme vitriol by the paternal grandmother [...] toward her daughter-in-law and, perhaps to a lesser degree, toward her son." Grayson, 319 S.W.3d at 427. In Grayson, the grandmother also babysat for the grandchildren. That fact was not enough to persuade the Grayson Court to permit grandparent visitation. In the lower court's findings of facts, it stated: "Petitioner June Grayson, hereinafter Grandmother, babysat often for the children and had significant contact with them in their early lives." Id. at 428. The Grayson Court appointed a *guardian ad litem* to represent the children, who also determined that visitation would not be in the children's best interests. Id. at 430.

The Grayson Court complimented the lower court on its thorough review of the facts but still felt that even the slightest amount of visitation with the grandmother was not in the children's best interests.

> We respect the views of the distinguished trial court. If this case were governed by an abuse of discretion standard, we might be inclined to uphold the judgment of the very limited visitation between [Grandmother] and her grandchildren. We discern an endeavor by the trial court to preserve a thread in the torn fabric of this family. But this was not a discretionary ruling by the trial court. The court was required to apply KRS 405.021 and determine whether visitation was affirmatively proven by clear and convincing evidence to be in the children's best

> interests. Applying this standard, we can reach no conclusion other than that the trial court erred as a matter of law in its conclusions and judgment upon the evidence.

Grayson, 319 S.W.3d at 432.

Prior to Grayson, it appeared that the majority of reviewing Courts in Kentucky were basing their decisions on their own personal beliefs and experiences that all grandparents are good. In King, the majority stated: "There is no reason that a petty dispute between a father and son should be allowed to deprive a grandparent and grandchild of the unique relationship that *ordinarily* exists between those individuals." King, 828 S.W.2d at 632 (emphasis added). Unfortunately, like some parents, grandparents are also capable of neglecting and abusing children. Not all children are fortunate enough to have two (2) sets of grandparents who are loving, mentally sound and respectful towards the child's parents.

The Grayson Court separated the general, idealistic assumption that all grandparents are good, and applied the law to facts at hand. In the present case, the Court of Appeals determined that photographs and trips to the zoo constituted sufficient proof to force visitation on Michelle and B.B. The reasoning and holdings of both opinions are so disparate that lower courts will have a very difficult time reconciling them without guidance from this Honorable Court and a reversal of the Opinion Affirming.

III. THE COURT OF APPEALS ERRED WHEN IT FOUND THAT DONNA HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT VISITATION IS IN B.B.'S BEST INTERESTS.

Trial courts may only grant a grandparent visitation rights if he or she has proven by clear and convincing evidence that visitation is in the child's best interests. Grant v. Lynn, 268 S.W.3d 382, 384 (Ky. App. 2008)(*quoting* Santosky v. Kramer, 455 U.S. 745, 756 (1982)). "Given that these cases involve the fundamental right of parents to raise their children as they see

fit without undue interference from the state, the use of this heightened standard of proof is required." Vibbert, 144 S.W.3d at 295. "Preponderance of the evidence" is the evidentiary "default" in civil cases, and gives maximum discretion and flexibility to the trial court, since a hair's breadth of evidence one way or the other is sufficient basis for the decision, and it is very difficult for an appellate court to second-guess such decisions. This test is most appropriate in financial and similar disputes between two individuals where no constitutional rights are involved and society has no particular interest in who prevails.

However, where a nonparent is asking the state to override a constitutionally protected decision that comes within a parent's fundamental area of responsibility – namely who shall associate with, care for, supervise and influence his/her child – such a standard is woefully inadequate. A "clear and convincing evidence" standard offers substantially better protection, and signals trial courts that more than lip service is needed to the constitutionally required presumption favoring the parent's decision.

For this reason, the requisite standard of review is whether the trial court erred as a matter of law in its conclusions and judgment upon the evidence. Grayson v. Grayson, 319 S.W.3d 426, 432 (Ky. App. 2010). Accordingly, the reviewing court may set aside a trial court's order if the trial court's findings of fact are clearly erroneous. Moore, 110 S.W.3d at 354.

Donna had the burden of proving that visitation with her would be in the child's best interests. A grandparent may rebut the presumption by providing clear and convincing evidence compelling enough to justify judicial interference with parent's visitation decision. That a child might benefit from contact with another relative on the paternal grandparent's side or that a parent might deny grandparent visitation for no good reason in the court's view are not the kind of compelling circumstances contemplated by the Constitution. To overcome a parent's decision

on grandparent visitation, a grandparent must show circumstances like parental unfitness. Troxel, 530 U.S. at 68-69. This construction of the statute minimizes the risk that a court will substitute its judgment for that of the parent simply because the court disagrees with the parent's decision.

The burden was not on Michelle to present expert testimony pertaining to the effects that visitation would have on the child. Donna should have presented her own expert to prove by clear and convincing evidence that visitation is in B.B.'s best interests. Instead, she chose only to present a photo album of pictures she had taken of the child. If presenting a photo album is all a grandparent has to do to meet their burden, then the parent is automatically and inappropriately put on the defense to present actual, credible evidence (such as the testimony and report of a child psychologist or custodial evaluator) to show that visitation is not actually in the child's best interests.

The "best interest of the child" standard, applied in the context of grandparent visitation, suffers from a fundamental and fatal flaw. It is essentially impossible for the trial court to distinguish "best interest of the child" from "better for the child." This is the crux of the problem with KRS 405.021, because, as Troxel stated: "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." 530 U.S. at 72-23. Furthermore, in evaluating the evidence, a fit parent's estimation of her child's best interests is entitled to deference, and a judge may not disregard or reject a fit parent's views on continued visitation simply because he disagrees with them or thinks himself more enlightened than the parent. *See generally* King v. King, *supra*.

Again, the facts of Troxel and the case at hand are very similar. Donna's son, B.B's biological father, is dead. So was the biological father whose parents sought visitation in Troxel. The lower court and Court of Appeals seem to have presumed that Donna had a warm relationship with her grandson simply because she had photographs of her with the child and had taken him to the park in the past. So did the grandparents in Troxel. 530 U.S. at 61-62. Further, in Troxel, there was no indication of any problems in the relationship of grandparents and grandchildren and the grandparents had had extensive contact with the grandchildren before their son's death. Id. All of these facts were insufficient to overcome the presumption favoring the mother's decision in Troxel. Id. at 72. Likewise, the facts in this case are insufficient to overcome the presumption favoring Michelle's decisions here. In fact, the facts in the case at hand prove a much less favorable relationship between the Blair family and B.B. than the facts of Troxel.

Given this binding constitutional law, as well as the Kentucky courts' traditional concern for protecting parental rights, there is no valid basis for imposing any visitation scheme in this case that conflicts with Michelle's parental judgment about what is best for her son. The Court of Appeals erred when it failed to address Michelle's superior right as a parent and reverse the trial court's finding that Donna had proven by clear and convincing evidence that visitation is in B.B.'s best interests.

IV. THE COURT OF APPEALS ERRED WHEN IT GRANTED DONNA SUBSTANTIAL, UNSUPERVISED VISITATION.

Forced, extensive, unsupervised visitation should not be ordered absent compelling circumstances which suggests unfitness of the custodial parent. Troxel, 530 U.S. at 70. In this

case, the nature and amount of visitation imposed on the child is, in reality, detrimental to his health as opposed to beneficial.

"Borrowing from the language of the King majority, the state of discord prevailing here is far more than a 'trivial disagreement' and exceeds the bounds of a 'family quarrel of little significance." Grayson, 319 S.W.3d at 432. Quite simply, like in King, both the Court of Appeals and trial court expressed an idealized view of extended familial relationships in this case. Donna blames Michelle for Steve's suicide. (TR 92-198, CD 3-F4-10VR-129 14:25:48-:26:50, 14:33:35-:35:27, 14:36:40-:37:40, 14:43:53-:45:16, 14:46:10-:49:20). Donna's ex-husband, Martin Blair, threatened to kill Michelle. (TR 92-198). One of Donna's sons completely estranged himself from her years ago, and Donna has never petitioned the court for visitation with her other grandchildren. (TR 92-198, CD 3-F4-10VR-129 14:29:20-:31:00, 14:43:53-:45:16). The relationship between the parties in this case is anything but ideal. Furthermore, Donna testified that she was married to Martin Blair, an alcoholic, for decades. (TR 92-198, CD 3-F4-10VR-129 14: 23:19). She testified that she still sees Martin on a regular basis. (TR 92-198, CD 3-F4-10VR-129 14: 23:19). Instead of causing the lower court any concern, the lower courts just told Donna not to let the child be around Martin during her extensive overnight and weekend visitation. The trial court has no mechanism, outside of supervised visitation, for monitoring whether Donna has or will bring the child around Martin. The trial court correctly found that it would not be in the child's best interests to be in the presence of Martin Blair, but it utterly failed to protect B.B. from exposure to him and removed his mother's constitutional right to protect B.B. from such harm.

The visitation order here is in essence a temporary form of custody, displacing for a time the custody of the parent. Michelle, though her fitness is unquestioned, is forced under threat of

fine or imprisonment to send her child outside her protection and supervision. The child may be unwilling or even afraid to go, and yet Michelle is forced to reject his heartfelt, and possibly reasonable, objections. For those reasons, Michelle can no longer exercise her parental function; the parent-child relationship is invaded and disrupted. Michelle must entrust her child where there is no trust. This is interference of a most fundamental and distressing kind.

Moreover, Michelle is required to send a young child on overnight visits even if she firmly believes the child is too young for overnight separations from her, and the child is terrified of such separation. The effects of a grandparent visitation order like the one in this case are broad and profound. Working parents, or parents attending school to improve the family's economic opportunities, lose their best opportunity to spend time with their children. The child may miss opportunities to be with other extended family – often other grandparents with whom he has a closer and more beneficial relationship.

A grandparent who is already treating the parent as a courtroom adversary is unlikely to accept parental dictates on such subjects as what presents may be given or what travel destinations may be offered. If Michelle follows her own judgment about her child's needs instead of the judge's order, she can be held in contempt. Contempt of a grandparent visitation order can be, and has been, enforced by imprisoning the custodial parent. The devastating effect of such enforcement on the child is obvious. In sum, these orders are pervasively and destructively invasive.

Even if this Court finds that both lower courts adequately gave special weight to Michelle's decision and correctly determined that Donna had met her burden of proof, it still erred when it granted such extensive unsupervised visitation.

V. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF MICHELLE'S MOTION TO DISMISS.

Michelle argued at both the trial court and Court of Appeals level that, if Donna wanted such substantial visitation, she should be ordered to pay child support in accordance with KRS 405.021(3). In her petition, Donna sought overnight visits, birthdays, holidays, weekends, etc. The child's father, Steven Blair, exercised parenting time with B.B. overnight every other Saturday. Michelle and Steven's parenting schedule also included holidays, birthdays and vacations. KRS 405.021(3) reads as follows:

> The Circuit Court may grant noncustodial parental visitation rights to the grandparent of a child *if the parent of the child who is the son or daughter of the grandparent is deceased* and the grandparent has assumed the financial obligation of the child support owed by the deceased parent, unless the court determines that the visitation is not in the best interest of the child. If visitation is not granted, the grandparent shall not be responsible for child support.

B.B.'s father is deceased, and the paternal grandparent sought and was granted substantial visitation. If this Honorable Court upholds the award of visitation, then Donna should be ordered to resume the financial obligation of her deceased son.

With regard to this issue, the Court of Appeals stated: "Visitation pursuant to KRS 405.021(3) is available to a grandparent when a parent is deceased and the grandparent desires to substantially assume the breadth of visitation *normally given to a non-custodial parent.* A party must actually be pursuing and receive that visitation normally awarded to a noncustodial parent before [she or he] is ordered to pay child support." Michelle L. Walker v. Donna S. Blair, Case No. 2010-CA-002228-ME, pg. 4. Donna sought, and was granted, timesharing with the child equal to, or greater than, the amount of time the child's own father spent with him. In her Petition, Donna stated that, "prior to the death on August 11, 2009, of Petitioner's son and father of the minor child, Petitioner enjoyed since his birth a substantial, continuing and loving

relationship, including babysitting, overnight visits, holidays and weekend outings with her grandson, [B.B.]." In her Petition to Establish Grandparent Visitation, Donna specifically asked the trial court to award her "reasonable *and liberal* visitation with her grandson[.]" (emphasis supplied).

The lower court granted Donna's petition, and the Court of Appeals stated: "The trial court's order awarded visitation to Donna and stated the goal would be to eventually establish one bi-weekly full day visit or one overnight visit per month. This visitation falls short of the more generous visitation expected to be granted to a noncustodial parent." Michelle L. Walker v. Donna S. Blair, Case No. 2010-CA-002228-ME, pg. 5. The Court of Appeals failed to acknowledge that, on top of receiving bi-weekly visitation, Donna also received visitation on holidays and birthdays.

In addition, the Court of Appeals presumes that non-custodial parents receive a certain amount of visitation. However, in Drury v. Drury, 32 S.W.3d 521, 524-525 (Ky. App. 2000), the Court of Appeals stated: "We further emphasize that trial courts should not give undue weight to the terms of a 'standard' visitation order. [...] The terms of a standard visitation schedule may be considered among all other options. *However, the trial court should not make any presumption in favor of a standard visitation schedule.*" Id. at 25.

Clearly, Donna received visitation similar to what her son exercised with B.B. Her petition averred that she should receive liberal visitation with her grandson, yet she had not been paying and was never ordered to pay child support. Therefore, Michelle's Motion to Dismiss should have been granted, or in the alternative, Donna should be ordered to pay child support.

In short, the Court of Appeals should be reversed because it failed to take into consideration Michelle's superior right, relied on outdated case law, incorrectly found that

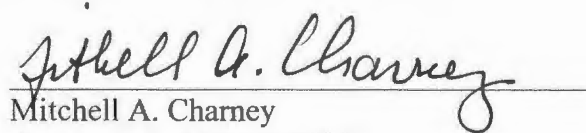
Donna had met her burden, awarded an excessive amount of visitation and failed to award child support. For all of the foregoing reasons, the Opinion Affirming should be reversed.

CONCLUSION

In conclusion, after Troxel, Kentucky courts may no longer order visitation over parental objection, especially prolonged or unsupervised visitation, in circumstances like those in the case at bar. Under the current visitation order, Michelle bears the burden of visitation ordered without regard for the presumption that her decisions are in B.B.'s best interests.

The trial court's award of visitation constitutes a manifest abuse of discretion and was clearly erroneous in light of the facts and circumstances of the case. For those reasons, this Honorable Court should REVERSE the Opinion Affirming of the Court of Appeals and remand the matter to the trial court with direction.

Respectfully submitted,



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APPENDIX

September 30, 2011 Opinion Affirming of the Court of Appeals .... Tab A

November 8, 2010 Order on Motion to Alter, Amend or Vacate (TR 279-281)......... Tab B

September 10, 2010 Order on Grandparent Visitation (TR 218-225) .... Tab C

August 16, 2010 Order on Motion to Dismiss (TR 201-202)...................................... Tab D