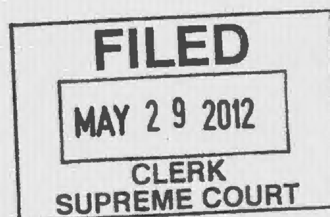


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2012-SC-000004-DE

MICHELLE L. WALKER — APPELLANT

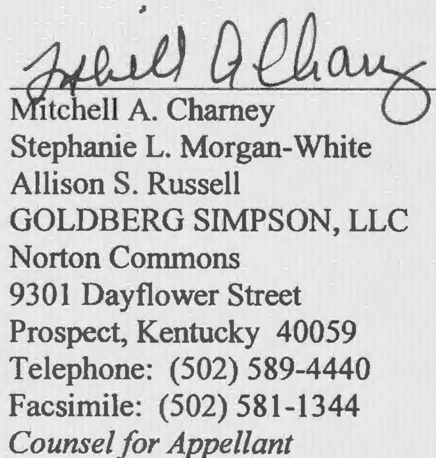
v.

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

REPLY BRIEF FOR APPELLANT

Respectfully Submitted,



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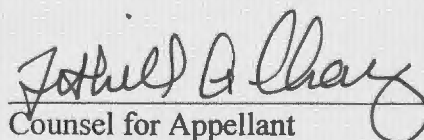
CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was placed in the United States mail, postage prepaid, on this the 29 day of May, 2012 to: Judge Dolly Wisman Berry, Jefferson Family Court, Division 4, 700 W. Seventh Street, Louisville, KY 40202, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 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 It is further certified that the record on appeal was not withdrawn from the Clerk's Office.



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STATEMENT OF POINTS AND AUTHORITIES

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I. **DONNA'S COUNTERSTATEMENT OF THE CASE CONTAINS IRRELEVANT INFORMATION UNHELPFUL TO THE COURT IN DECIDING THE IMPORTANT CONSTITUTIONAL ISSUES AT STAKE IN THIS CASE.**

Troxel v. Granville, 530 U.S. 57 (2000)...............................5, *passim*

Grant v. Lynn, 268 S.W.3d 382 (Ky. App. 2008) 5

II. **DONNA'S ARGUMENT THAT B.B. POSSESSES CONSTITUTIONAL RIGHTS THAT MUST BE CONSIDERED WITHIN THE CONTEXT OF GRANDPARENT VISITATION MATTERS IS ERRONEOUS AND CONTRARY TO PRECEDENT SET BY THE UNITED STATES SUPREME COURT.**

Vibbert v. Vibbert, 144 S.W.3d 292 (Ky. 2004) ....5, *passim*

Santosky v. Kramer, 455 U.S. 745 (1982)............................5

Parham, et al. v. J.R., et al., 442 U.S. 584 (1979)..................5

III. **DONNA'S ARGUMENT THAT COURTS DO NOT HAVE TO UNDERTAKE ANY CONSTITUTIONAL ANALYSIS FAILS, BECAUSE VIBBERT REQUIRES COURTS TO ENGAGE IN SOME DEGREE OF CONSTITUTIONAL ANALYSIS WHEN DECIDING GRANDPARENT VISITATION MATTERS.**

King v. King, 828 S.W.3d 630 (Ky. 1992)............................7

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V. **CONTRARY TO DONNA'S ASSERTION, TROXEL'S HOLDING IS NOT LIMITED TO THE BROAD SCOPE OF THE WASHINGTON STATUTE.**

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ARGUMENT

The purpose of this brief is to address all of the factual and legal errors contained in the Brief for Appellee.

I. DONNA'S COUNTERSTATEMENT OF THE CASE CONTAINS IRRELEVANT INFORMATION UNHELPFUL TO THE COURT IN DECIDING THE IMPORTANT CONSTITUTIONAL ISSUES AT STAKE IN THIS CASE.

Donna is correct that the trial court rejected all of Michelle's arguments and granted visitation over her objections after only a half-day hearing. Notably, the parties actually do agree on the majority of the salient facts.

Michelle and Steven Blair (hereinafter "Steve") had a child out of wedlock, B.B., who is now seven (7) years old. Steve exercised parenting time with B.B. every other weekend. It was during this visitation time that Donna saw B.B., provided that Steve allowed her to see B.B. during that time. Ultimately, Steve killed himself, and Donna concedes that her ex-husband, Martin Blair, threatened to kill Michelle. Donna also concedes that she called Michelle in a fit of anger, that she asked Michelle if she was "happy now" that Steve was dead, and that she believes that Michelle somehow contributed to Steve's death.

However, Michelle disagrees with Donna's interpretation of the incident where Steve reported Michelle and her husband to Child Protective Services in 2009. Contrary to Donna's suggestion, the actual testimony presented at the hearing was that Steven noticed B.B. had a small bruise on his rear end one day and contacted the Cabinet for Health and Family Services (CHFS) to report Michelle as having abused the child. (CD 3-F4-10VR-129 15:51:55; 15:57:45). A CHFS worker interviewed Michelle, who

simply agreed to avoid spanking B.B. when he misbehaved, and no further action was taken. (CD 3-F4-10VR-129 15:51:55; 15:57:45).

Donna seems to be attempting to paint Michelle as an abusive mother for purposes of gaining visitation with B.B. This tactic is troubling in light of the testimony and exhibits presented at the hearing. In her own brief, she states that her alcoholic ex-husband, who she was married to for decades and to whom she exposed the child repeatedly, threatened to kill Michelle and subsequently violated a Domestic Violence Order, which resulted in his incarceration. (Brief for Appellee, pgs. 3-4). Donna's own medical records evidence that she is prone to screaming fits, has been in treatment for mental health issues for over a decade, has one son who has estranged himself from her completely and had another son with drug problems who eventually killed himself. (TR 32-33, 45-51 53, 58-60, 65-67, 92-198). Despite the arguments contained in Donna's brief, Michelle has never been found to be an unfit parent, and thus, under Troxel v. Granville, 530 U.S. 57 (2000), her decision regarding visitation with B.B. must be given *special weight*.

Again, Donna is correct that both lower courts ignored the medical records and the majority of the testimony presented at the hearing, and instead relied on a photo album showing pictures of Donna during religious holidays and bubble baths. On pages eleven (11) and fourteen (14) of her brief, Donna accuses Michelle of withholding visitation out of vindictiveness. The Court can easily glean from the facts that the parties distrust each other. This severe acrimony is just one (1) reason to keep the child as far removed from the tension as possible. Nevertheless, both lower courts erroneously found that visitation would be in the child's best interests.

Michelle's decision, as B.B.'s mother, was not given any weight whatsoever in violation of the clear mandates of Troxel. Donna failed to prove that visitation is in B.B.'s best interests by clear and convincing evidence in accordance with Grant v. Lynn, 268 S.W.3d 382, 384 (Ky. App. 2008). Therefore, this Honorable Court should exercise its discretionary powers and REVERSE the decisions of the lower courts.

II. DONNA'S ARGUMENT THAT B.B. POSSESSES CONSTITUTIONAL RIGHTS THAT MUST BE CONSIDERED WITHIN THE CONTEXT OF GRANDPARENT VISITATION MATTERS IS ERRONEOUS AND CONTRARY TO PRECEDENT SET BY THE UNITED STATES SUPREME COURT.

As stated above, Donna's factual arguments fail on numerous grounds. For the reasons stated herein, Donna's legal arguments fail as well. Significantly, Donna acknowledges in her brief that she was required to meet the heightened burden of proof of "clear and convincing evidence" to satisfy the constitutional requirements of Troxel. She further acknowledges that a parent's fundamental right to make decisions concerning the care, custody and control of his or her children is protected by the Due Process Clause and the Fourteenth Amendment.

In subsection (d) on page thirteen (13) of Donna's brief, she argues that "B.B. possesses constitutional rights that must be considered in the Vibbert[1] analysis." She does not cite any binding authority to support this argument, which is, in fact, contrary to the precedent of the United States Supreme Court as it treats the parent's position and child's position as adversarial. Santosky v. Kramer, 405 U.S. 745, 760 (1982), specifically states: "[T]he State cannot presume that a child and his parents are adversaries." In fact, in Parham, et al. v. J.R., et al., 442 U.S. 584, 602-602 (1979), the

[1] Vibbert v. Vibbert, 144 S.W.3d 292 (Ky. App. 2004).

U.S. Supreme Court held that parents are *presumed* to act in their children's best interests. In Troxel, a majority of the U.S. Supreme Court reiterated this sentiment and held that state courts considering visitation petitions must apply "a presumption that fit parents act in the best interests of their children." 530 U.S. at 69. In this case, the Court of the Appeals did not even address the pro-parent presumption in its Opinion. For this reason alone, the Opinion of the Court of Appeals must be REVERSED.

III. DONNA'S ARGUMENT THAT COURTS DO NOT HAVE TO UNDERTAKE ANY CONSTITUTIONAL ANALYSIS FAILS, BECAUSE VIBBERT REQUIRES COURTS TO ENGAGE IN SOME DEGREE OF CONSTITUTIONAL ANALYSIS WHEN DECIDING GRANDPARENT VISITATION MATTERS.

On page twelve (12) of Donna's brief, she argues that "Courts are certainly not required to undertake a constitutional analysis in each and every case when Kentucky case law has already determined that our grandparent visitation statute, KRS 405.021, as interpreted complies with the constitutional requirements of Troxel." This statement is flat wrong. She cites Vibbert v. Vibbert, 144 S.W.3d 292, 294 (Ky. App. 2004) in support of this statement. Vibbert actually holds the opposite to be true. Vibbert was the first Kentucky case to actually cite and interpret Troxel. The Vibbert Court 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.

Id. at 294. Accordingly, Vibbert *requires* courts to recognize that a fit parent has a superior *constitutional* right to all others. The fact that Vibbert requires a constitutional analysis could not be clearer.

On page sixteen (16) in Section III, Donna argues: "The Court of Appeals correctly determined that the trial court had proven by clear and convincing evidence that under the Vibbert modified 'best interest' analysis that the requested visitation was in B.B.'s best interest." This statement is also flat wrong. The Court of Appeals never mentioned Vibbert in its Opinion Affirming. It never even cited to it.

In fact, both of the cases cited by the Court of Appeals pre-date Troxel; King v. King, 828 S.W.2d 630 (Ky. 1992) and Dotson v. Rowe, 957 S.W.2d 269, 271 (Ky. App. 1997). Both of those cases also unconstitutionally and erroneously favored grandparent rights over parental rights as was more thoroughly discussed in Michelle's primary brief. Simply put, the Court of Appeals' decision was erroneous and not supported by sound legal principles. Because the Opinion is designated "To Be Published," it is this Court's duty to REVERSE the Opinion and clarify the governing law of this Commonwealth.

IV. DONNA'S ATTEMPT TO DISTINGUISH GRAYSON v. GRAYSON, 319 S.W.3d 426 (Ky. App. 2010), FAILS ON SEVERAL GROUNDS.

Donna first tries to distinguish the Grayson case on the facts by arguing that the grandmother in that case engaged in "extreme acts of hostility" towards the children's mother whereas Donna has not when, in fact, such hostility does exist in this case. In the present case, Donna's ex-husband threatened to kill Michelle *twice* and the simple truth of the matter is that Donna has never, to date, stepped forward to condemn, apologize for, or otherwise separate herself from this conduct. Rather, she called him as a witness to

testify on her behalf on the issue of why she believes visitation to be in B.B.'s best interests and she subsequently reconciled with him. She babysits other children with him. Her silent condoning of her ex-husband's behavior evidences extreme hostility. Donna heavily relies on the trial court's suggestion that losing a loved one can make a person temporarily go insane as an excuse for the majority of her behavior.

Donna also states that the "fragmented family" in this case pales in comparison to the acrimony between the parties in Grayson. However, after hearing all of the evidence, the trial court, in its Order on Grandparent Visitation, court pointed out the acrimony between the parties and how it might harm B.B.:

> 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.

See Tab C to Appendix of Michelle's brief. Donna further argues that "the Vibbert analysis may lead to different results based upon the specific facts of each case." This sentiment has proven false time and time again as seen by the published case law in this area. There has been no consistency in the Court of Appeals' decisions. That is why this Honorable Court must clarify the governing law.

V. CONTRARY TO DONNA'S ASSERTION, TROXEL'S HOLDING IS NOT LIMITED TO THE BROAD SCOPE OF THE WASHINGTON STATUTE.

Donna incorrectly argues that the holding in Troxel is narrow as it only commented on Washington's "breathtakingly broad" statute, § 26.10.160(3). However, a simple reading of the case reveals Troxel's true, far-reaching effects. The plurality

opinion, written by Justices O'Connor and joined by Justices Rehnquist, Ginsburg and Breyer, states as follows:

> [W]e have recognized the fundamental right of parents to make decisions concerning the care, custody and control of their children [...] In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children.

Id. at 65. The High Court made it clear that this fundamental right is implicated in all grandparent visitation cases. Id. at 68. The Washington statute was broad, but the Supreme Court made it clear that it was most concerned about protecting the constitutional liberties of fit parents to the care, custody and control of their children. Id.

The issue in this case is not whether KRS 405.021 is overly broad. The issue in this case is whether the Court of Appeals complied with Troxel when it unanimously affirmed the decision of the trial court, granting substantial visitation rights to a grandparent over the fit parent's objection.

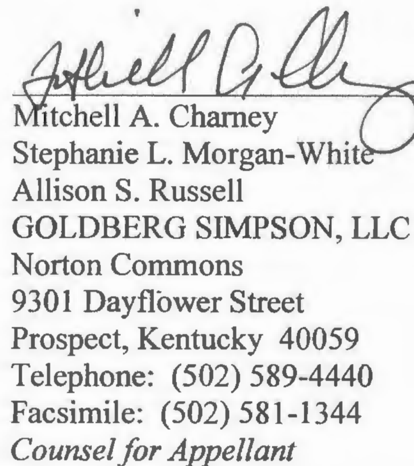
Michelle agrees with Donna that this Court must also "define the precise scope of the parental due process right within the visitation context" per Troxel. Michelle refers the Court to the arguments set forth in her primary brief in support of her position that the Vibbert factors are an inadequate means of affording parents their constitutional rights under Troxel. Trial courts are in need of guidance as to what constitutes clear and convincing evidence of the child's best interests. Without mandatory, expert, medical testimony, this standard has a tendency to become too subjective. The case at bar serves as a prime example.

The holding in Troxel was far-reaching. The constitutional principles outlined by the Troxel Court, when applied to the instant case, should result in a REVERSAL of the lower court's Opinion.

CONCLUSION

For all of the reasons stated above, this Court should REVERSE the Court of Appeals Opinion issued on September 30, 2011.

Respectfully Submitted,



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