COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 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

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BRIEF OF APPELLEE

Respectfully Submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that ten copies of the foregoing were sent via Federal Express to the Kentucky Supreme Court, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601, and a copy was placed in the United States mail, postage prepaid, all on this 14th 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, Kentucky 40601 and Mitchell A. Charney, Goldberg Simpson, LLC, Norton Commons, 9301 Dayflower Street, Prospect, KY 40059. It is further certified that the record on appeal was not withdrawn from the Clerk's office.

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Donna S. Blair, believes that oral argument would not assist the Court in rendering its decision and is not necessary in this action given the issues raised.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellee, Donna S. Blair (hereinafter "Donna"), does not accept the Statement of Facts set out in the Brief filed by Appellant, Michelle L. Walker (hereinafter "Michelle").

Michelle has been steadfast in her continuous misrepresentation of the facts of this case before the trial and appellate courts. Michelle's statement of the case is contrary to the evidence presented at trial. Michelle relies instead upon and cites in support of her version of the relevant facts to her own Motion to Dismiss filed in the trial court. Judge Berry even specifically noted in her Order denying Michelle's Motion to Amend or Alter that "the Court does not agree with [Michelle's] version of the relevant facts as presented at trial or as set out in [Michelle's] Motion. (TR at 279).

Donna is the paternal grandmother of B.B., now age seven and one half (7-1/2) years. B.B. is the son of the late Steve Blair ("Steve") and Michelle. Steve and Michelle were never married. Steve, Donna's son, committed suicide on August 12, 2009, near to the time of B.B.'s fifth birthday. B.B. had spent the night at Donna's and had been with his Dad in Bardstown, Kentucky only a few days before Steve's death. (VR No. 1: 8/18/10; 13:37:38, 13:58:01).

During B.B.'s first year, Steve saw B.B. at least one night per week and Donna babysat and had overnights with B.B.. B.B. lived with his mother at her parent's house and Steve lived part of B.B.'s first year with his parents. Michelle and B.B. lived together with B.B. for over two years thereafter or from

August, 2005, through December, 2007. (VR No. 1: 8/18/10; 13:41:28, 15:21:00-15:25:00, 15:47:38, 15:58:38). Steve and Michelle split up in December, 2007, but Steve continued to see B.B. regularly. (VR No. 1: 8/18/10; 15:21:00-15:25:00, 15:58:38). In early 2008, Steve moved to Bardstown, Kentucky, and he had parenting time with B.B. every other weekend. (VR No. 1: 8/18/10; 15:58:38).

Donna testified at trial that she had a very close relationship with her grandson. Michelle admitted that Donna saw B.B. as much as most grandparents do once she was not together with Steve any more. (VR No. 1: 18/10; 16:04:24, 13:40:24-13:58:01). Donna introduced a family photo album full of photographs of B.B. and special times they had together, including B.B. at many Blair family events. The photographs of B.B. were from B.B.'s birth through age five years or until the time his father died. (VR No. 1: 8/18/10; 13:55:15).

Donna testified that she attended B.B.'s baptism, babysat B.B. during U of L games and at other times, had overnights, had birthday parties for B.B. at her house and attended parties at the maternal grandmother's house. There were Rough River weekends, drop-in visits by Steve and B.B., Friday overnights and Saturday afternoon trips to Bardstown to take B.B. to Steve, and movie, zoo and park outings. Donna made cupcakes with B.B. and gave him bubble baths. B.B. enjoyed Halloween visits, holiday gatherings, and fun with extended family members. (VR No. 1: 8/18/10; 13:48:41, 13:49:08, 13:52:29, 13:53:30, 13:55:42, 13:55:59, 13:56:00, 13:57:19, 13:58:01). Donna

introduced at trial handmade drawings given to her by B.B. and notes and thank you cards from Michelle thanking her for all she does for B.B.. (VR No.1: 8/18/10; 14:05:48, 14:08:33).

Since Steve's death in August, 2009 and through November 13, 2011, Donna was denied all contact with her grandson. She testified that she did go to the ballpark on a couple occasions in the hope that she might get to see B.B., but he was not there. (VR No. 1: 8/18/10; 14:17:36).

Donna had enjoyed a good relationship with Michelle who even sent her flowers on her birthday and Mother's Day. (VR No. 1: 8/18/10; 15:50:34). However, the relationship drastically changed after Steve reported Michelle and her then new husband to Child Protective Services regarding their extreme discipline/spanking of B.B. in early 2009. Michelle acknowledged that this was the "beginning of the end". The report did result in changing how Michelle disciplined B.B. (VR No. 1: 3/18/10; 15:51:46, 15:57:31-15:58:18).

Donna testified that Michelle and her husband were texting Steve all day long on the day of and the day prior to when he committed suicide. Michelle was threatening that they would keep B.B. from Steve. Although Donna believes they contributed to his problems, she does not believe they were responsible for his death. (VR No. 1: 8/18/10; 14:44:06-14:45:18). Donna admitted that she telephoned Michelle immediately after Steve's death and asked "if she was happy now?" (VR No. 1: 8/18/10; 14:12:39).

Martin Blair (hereinafter "Martin") who was at that time Donna's ex-husband and an alcoholic made threatening phone calls to Michelle following

his son's suicide. A domestic violence order was issued against Martin and he was to have no contact with Michelle. He subsequently violated that order by again making threatening phone calls while intoxicated. Soon thereafter, Martin suffered a nervous breakdown and was hospitalized in our Lady of Peace. (VR No. 1: 8/18/10; 15:08:47, 15:11:22, 15:13:40). Donna acknowledged that it was a difficult and stressful time for her and the Blair family.

At trial, Martin testified that he had two-thirds of his colon removed and no longer drinks alcohol. (VR No. 1: 8/18/10; 15:08:23-15:08:47). He has had counseling and no longer holds Michelle responsible. He has "turned it over to God". (VR No. 1: 8/18/10; 15:11:22, 15:14:10). Martin has stayed away from Michelle and regrettably understands as a result of the DVO proceedings between he and Michelle that he cannot have contact with his grandson, B.B.. (VR No. 1: 8/18/10; 15:07:50, 15:14:38).

Donna testified that she had no contact with and was not speaking to Martin prior to Steve's death. (VR No. 1: 8/18/10; 14:13:33). She had no part of and did not participate in the 2009 court proceedings between Martin and Michelle following Steve's suicide. (VR No. 1: 8/18/10; 14:13:10). However, Donna and Martin did babysit B.B.'s half-brother, Steven, who was born in September, 2009, immediately after Steve's death. (VR No. 1: 8/18/10; 14:13:55, 14:14:35-57).

Following Steve's death, Donna was treated by two counselors and a psychiatrist for depression attributed to her 2009 divorce and Steve's suicide

the same year. (VR No. 1: 8/18/10; 14:16:08). She had been first treated for depression in 1998 (VR No. 1: 8/18/10; 14:24:17). Abilify was her only new medication. (VR No. 1: 8/18/10; 14:36:10, 14:43:40). Donna testified that she is feeling much better today and is "back on her feet". (VR No. 1: 8/18/10; 14:16:22, 14:47:11).

Michelle admitted that she had no problem with Donna or her ex-husband, Martin, until the telephone calls immediately after Steve's death. (VR No. 1: 8/18/10; 16:04:37). Following questioning from Judge Berry, Michelle testified that she would follow the visitation recommendations of B.B.'s counselor as to Donna's request for grandparent visitation. (VR No 1: 8/18/10; 16:05:27). She further admitted that a relationship in a way with his grandmother would be good for B.B.. (VR No. 1: 8/18/10; 16:05:03). Michelle would not allow B.B. to receive cards or letters from Donna or allow Donna to attend B.B.'s sporting events unless recommended by the therapist. (VR No. 1: 8/18/10; 15:51:14, 15:52:14).

B.B. had counseling to help him deal with his father's death. He last saw Dr. Carlisle in November, 2009. (VR No. 1: 8/18/10; 15:46:06). In May, 2010, B.B. began seeing Dr. Meaghan Marcum to help him address peer social issues and anxiety. (VR No. 1: 8/18/10; 15:50:49).

Donna filed her *Petition to Establish Grandparent Visitation of B.B.* on October 26, 2009, in Jefferson Family Court. (TR 1-3). A Trial was held on August 18, 2010. The trial court's Order on Grandparent Visitation entered September 10, 2010, determined by clear and convincing evidence that it is in

B.B.'s best interest that he have visitation with his grandmother. Visitation was to be re-initiated through the therapist with the goal being that Donna would have at least bi-weekly visitation for one full weekend day or monthly visitation which includes an overnight. Holiday visitation was also to be agreed upon. (TR 218-225).

Michelle filed her Motion to Amend, Alter or Vacate on September 10, 2010 (TR 226-267). An Order on Michelle's Motion to Amend, Alter or Vacate was entered November 8, 2010, overruling Michelle's Motion. (TR 279-281). Michelle filed her Notice of Appeal on December 8, 2010. The Kentucky Court of Appeals rendered its opinion on September 30, 2011, unanimously affirming the trial court's decision and on December 7, 2011, the Court of Appeals overruled Michelle's Petition for Rehearing. On March 14, 2012, this Court granted discretionary review of the decision of the Kentucky Court of Appeals.

ARGUMENT

I. The Court of Appeals correctly determined that the trial court's decision was supported by substantial evidence and the Vibbert analysis under KRS 405.021 was considered and correctly applied to satisfy the constitutional requirements of Troxel v Granville, 530 U.S. 57 (2000).

KRS 405.021(1) establishes and provides for the enforcement of the right of grandparent visitation when the court determines by clear and convincing evidence that visitation is in the child's best interest. The heightened standard of proof, i.e., clear and convincing evidence, is required in order to satisfy the mandates of Troxel v. Granville, 530 U.S. 57 (2000). Vibbert v. Vibbert, Ky. App., 144 S.W. 3d 292, 294 (2004).

(a) In Troxel, the U.S. Supreme Court determined that the broad scope of the Washington nonparental visitation statute unconstitutionally infringed upon the parent's fundamental right to rear their children.

The U.S. Supreme Court recognized in Troxel the fundamental right of parents to make decisions concerning the care, custody and control of their children as provided by the Due Process Clause of the Fourteenth Amendment. Troxel, 530 U.S. at 57.

In Troxel, like in the subject case, the parents had never married and the children had a substantial and close relationship with the paternal grandparents. The father committed suicide and the mother sometime thereafter marries. The similarities of the two cases end there. Very much unlike the subject case, the mother in Troxel allowed the children to visit with the paternal grandparents after their father's death. The disagreement was

over the amount of visitation sought by the paternal grandparents.[1] Contrary to Michelle's argument, this was not a "fairly typical grant of grandparent visitation" inasmuch as visitation was being allowed.

The Washington visitation statute at issue was also much greater in scope and application than Kentucky's grandparent visitation statute, KRS 405.021. The Washington statute provided:

> "**Any person** may petition the court for visitation rights **at any time**, including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the **best interest of the child** whether there has been any change of circumstances." (emphasis added).
>
> Troxel, 530 U.S. at 61.

The majority opinion in Troxel characterized the Washington statute as "breathtakingly broad" in that it authorized any person at any time to request visitation rights subject only to the judge's determination of the child's best interest. Troxel, 530 U.S. at 57-58. The Justices were concerned that the broad scope of the Washington statute on its face permitted the state court to interfere with the parent's fundamental rights without having to set out any special factors to justify such interference and to protect the parent's rights. Troxel, 530 U.S. at 68.

The shortcomings of the Washington statute were then compared to other state nonparental visitation statutes narrower in scope and application (i.e., special factors). *See, e.g.*, Troxel, 530 U.S. at 70 (*citing* Neb. Rev. Stat. Sections 43-1802(2)(1998)(court must find "by clear and convincing evidence"

[1] In Troxel, the majority noted that many state statutes require that visitation be denied before a court can award visitation. The Troxel parents never cutoff visitation entirely.

that grandparent visitation "will not adversely interfere with the parent –child relationship); R.I. Gen. Laws Sections 15-5-24.3(a)(2)(v)(Supp. 1999)(grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse grandparent visitation was reasonable)). It is noteworthy that these statutes, like the Kentucky statute and case law, have a narrower scope, "grandparent" instead of "any person" and they require a "clear and convincing evidence standard" to rebut the presumption that a fit parent will act in the best interest of his or her child. See Vibbert, 144 S.W.2d at 202, 294-295 (grandparent seeking visitation under a modified best interest standard must prove, by clear and convincing evidence, that the requested visitation is in the best interest of the child).

The constitutionality of Kentucky's grandparent visitation statute was upheld as constitutional in a pre-Troxel decision, King v. King, Ky. App., 828 S.W.2d 630 (1992). Under and pursuant to the holding in Troxel, the King decision and the constitutionality of KRS 454.021 remain good law.

In holding that the Washington nonparental visitation statute was unconstitutional, the U.S. Supreme Court based its decision on the "sweeping breadth" of the applicable statute and the application of the court's "broad, unlimited power". Troxel, 530 U.S. at 73.

(b) In Troxel, the U.S. Supreme Court clearly stated that it was not defining the precise scope of the parental due process right in the visitation context.

As the majority of the U.S. Supreme Court clearly and succinctly stated:

> We do not, and need not, define today the precise scope of the parental due process right in the visitation

> context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and the constitutional protections in this area are best "elaborated with care." *Post* at 101 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter. See, e.g., Fairbanks v. McCarter, 330 Md. 39, 49-50, 622 A.2d 121, 126-127(1993)(interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); Williams v. Williams, 256 Va. 19, 501 S.E.2d 417, 418 (1998)(interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation). Troxel, 530 U.S. at 73-74.

Similarly, the Supreme Court declined to determine whether nonparental visitation statutes must include a showing of harm or potential harm to the child as a condition precedent to granting visitation in order to satisfy the Due Process Clause. Troxel, 530 U.S. at 73. The Kentucky Court of Appeals in Scott v. Scott, Ky. App., 80 S.W.3d 447 (2002), held that the application of Kentucky's statute required a showing of harm if visitation was to be granted over a fit parent's objection. Scott, 80 S.W.3d at 451. However, the Court of Appeals overruled Scott in Vibbert, 14 S.W.3d at 294. The Vibbert court determined after careful consideration that the Scott court misinterpreted Troxel and by requiring a showing of harm "that Scott set an unnecessarily strict and unworkable standard". Vibbert, 144 S.W.3d at 294.

The Vibbert court did not ignore the fact that a fit parent's decision "must be given deference by the courts, and courts considering the issue must

presume that a fit parent's decision is in the child's best interest." Vibbert, 144 S.W.3d at 294. This is in accord with the Troxel majority's determination that there must be "some" special weight given to the parent decision. Troxel, 530 U.S. at 70. However, neither the Vibbert court or the U.S. Supreme Court ignored the important fact that it is not a perfect world. We must take into account that visitation can also be withheld by a fit parent "out of vindictiveness", Vibbert, 144 S.W.3d at 295, and by a fit parent "treating a child like a mere possession". Troxel, 350 U.S. at 86 (Justice Stevens dissenting). Justice Stevens in his dissent concluded that:

> "[i]t seems clear to me that the Due Process Clause of our Fourteenth Amendment leaves room for states to consider the impact on a child of possible arbitrary parental decisions that neither serve nor are motivated by the best interests of the child". Troxel, 530 U.S. at 91 (Justice Stevens dissenting).

The Kentucky Court of Appeals no doubt agrees. In Vibbert, the appellate court determined that the parent's decision may be challenged by not only a showing of harm but also by consideration of other factors under a modified best interest analysis. Vibbert, 144 S.W.3d at 294-295. A modified best interest analysis standard was held to be the appropriate test under KRS 405.021 while still remaining within the constitutional framework of Troxel. Vibbert, 144 S.W.3d at 294-295.

(c) Michelle's parental right must be given some deference but such parental right is not absolute.

Michelle complains that the Court of Appeals failed to take into consideration Michelle's decision as B.B.'s parent to deny visitation. Michelle Brief at p.10. Michelle is in error.

Inherent in any grandparent visitation case is the parent's decision to deny or limit visitation. 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. See Vibbert, 144 S.W. 3d at p. 294.

Being aware of Michelle's **decision** to deny visitation, the Court proceeded to address Donna's challenge of that **decision** under the Vibbert modified "best interest" standard. Clearly, the trial court did not ignore but rather with deference to Michelle's **decision** required Donna to prove by clear and convincing evidence that the requested visitation was in B.B.'s best interest. The "clear and convincing" standard of proof was required in order to overcome the presumption that Michelle's **decision** to deny visitation was in B.B.'s best interest.

Michelle therefore errs in her assertion that "[e]ven if the Court of Appeals 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". Michelle Brief at p. 15. Michelle's opposition, standing alone, under a Vibbert modified "best interest" analysis is not final and controlling and is not sufficient to preclude Donna's grandparent visitation.

Michelle's wishes are not absolute but rather are one factor of a nonexclusive list of factors to be considered. See, e.g., Vibbert, 144 S.W.3d at 292, 294. Interestingly, Michelle admitted at trial that a relationship in a way with his grandmother would be good for B.B. (VR No. 1: 8/18/10, 16:05:03).

(d) B.B. possesses constitutional rights that must be considered in the Vibbert analysis.

B.B., a minor, is also protected by the Constitution and possesses constitutional rights. Nonparental visitation statutes such as KRS 405.021 protect the child and preserve the child's nonparental relationships.

The Troxel majority recognized that these statutes are in part enacted because of the "changing realities of the American family". Troxel, 350 U.S. at 64. The Court further noted:

> Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein protecting the relationships those children form with such third parties. The State's nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons – for example, their grandparents.
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> Troxel, 350 U.S. at 64.

As Justice Stevens so importantly noted and as the majority impliedly noted when addressing the need these statutes serve for the changing American family, "[t]here is at a minimum a third individual, whose interests are

implicated in every case to which the statute applies – the child."[2] Troxel, 530 U.S. at 86. Justice Stevens so aptly noted:

> While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, 491 U.S. at 130 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests., and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. See *ante*, at 64-65 (opinion of O'Connor, J.) (describing States' recognition of "an independent third-party interest in a child"). The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child. Troxel, 350 U.S. at 88-89. (J. Stevens dissenting).

Clearly, Michelle's objection to Donna's request for grandparent visitation with B.B. was not motivated by any interest in B.B.'s welfare. Rather, it was motivated by Michelle's desire to eliminate B.B.'s paternal family from his life altogether following the death of B.B.'s father. The trial court carefully weighed the special Vibbert factors of this case and determined that it would be good and in the child's best interests that grandparent visitation and a relationship with Donna, his paternal grandmother, be allowed. He could also get to know his half brother that was born right after Steve's death. The Vibbert factors are more thoroughly discussed below.

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[2] Donna filed a motion for the appointment of a guardian ad litem to protect the interests of B.B. TR at 29-30. Judge Berry overruled the Motion. Order appointing Guardian ad Litem denied. TR at 25-26.

II. The Court of Appeals decision correctly applies existing case and statutory law and is not in conflict with the Kentucky Court of Appeals decision, Grayson v. Grayson, Ky. App., 319 S.W.2d 426 (2010).

Michelle argues that the Court of Appeals as well as the trial court relied too heavily on the following passage from Dotson v. Rowe, Ky. App., 957 S.W.2d 269 (1997) (quoting King, 828 S.W.2d 630):

> If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. 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.
>
> Dotson, 957 S.W.2d at pp. 270-271.

The Court of Appeals disagreed with Michelle stating that Dotson remains the law of this Commonwealth and then finding that there was no error in the trial court's quotation. Michelle L. Walker v. Donna S. Blair, Case No. 2010-CA-002228-MF, p. 7.

Michelle's reliance upon the Kentucky case, Grayson, 319 S.W.3d at 426, in support of her argument is misplaced. Michelle incorrectly states that the recent Grayson decision does not address the virtues of grandparents as set out in the Dotson and King cases. However, the Grayson court did note the often-quoted passage but determined that the factual evidence in the case exhibited little or no evidence that visitation would be in the children's best interests. Unlike this case, in Grayson, the grandmother had engaged in extraordinary acts of hostility toward the children's parents.

The Grayson court reversed the trial court's apparent endeavor to provide very limited visitation in order to "preserve a thread in the torn fabric of this family". Grayson, 319 S.W.3d at 432. However, still referencing the language in King the Grayson court determined that "the state of discord prevailing [in Grayson] 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.

The Grayson court nor the appeals court in this case applied different standards for grandparent visitation under the existing law and its developments. Rather, and as the courts have long recognized, grandparent visitation issues, like other family law issues, are dependent upon the specific myriad of family relationships and factual variations of each particular case. Certainly, the intact family and the extreme acrimony presented between the parties in the Grayson case are far different from the fragmented family and the factual issues that were present in this case. Thus, the Vibbert analysis may lead to different results based upon the specific facts of each case.

III. The Court of Appeals correctly determined that the trial court had proven by clear and convincing evidence under the Vibbert modified "best interest" analysis that the requested visitation was in B.B.'s best interest.

Michelle's assertion that the Court of Appeals and the trial court failed to apply the "clear and convincing" evidentiary standard mandated by Vibbert is simply erroneous. In its opinion, the Court of Appeals cited to and relied upon the trial court's decision granting visitation and holding that:

> This court finds by clear and convincing evidence that Donna and B.B. had an established, loving relationship prior to Steve's death. The child knew she was his grandmother and spent lots of time with her. Donna saw the child as often as many grandparents do and was present at most of the child's "milestone events," such as baptism, birthdays, etc.
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> Walker v. Blair, Case No. 2010-CA-002228-ME, p. 7.

As a basis for seeking the Court's review, Michelle challenges the trial court's findings claiming those findings do not add up to clear and convincing evidence that visitation is in the child's best interests, especially when [Michelle] presented testimony to the contrary.

The Court of Appeals has already disagreed with this assertion and reminded Michelle that:

> As we have already indicated, the trial court has the discretion to judge the credibility of witnesses and may choose to believe or disbelieve any part of the evidence. See K.R.L. v. P.A.C., Ky. App., 210 S.W.3d 183, 187 (2006).
>
> Walker v. Blair, Case No. 2010-CA-002228-ME, p. 7.

Further, Michelle claims that expert testimony was needed to evidence that visitation was in B.B.'s best interest. Neither parent presented expert testimony at trial. Expert testimony was not required.

Michelle's comparison of the facts of the Troxel case to this one is misplaced. In Troxel, the parent allowed visitation with the parties' dispute being focused only on the amount of visitation. The Supreme Court determined that the Washington statute was unconstitutional without determining the scope of the Due Process Clause in the visitation context.

determined that the Washington statute was unconstitutional without determining the scope of the Due Process Clause in the visitation context.

In determining whether visitation was in B.B.'s best interest, the trial court thoroughly analyzed the Vibbert factors including, but not limited to, the nature and stability of the relationship between B.B. and Donna, the amount of time they spent together, the potential detriments and benefits to the child from granting visitation, the effect granting visitation would have on B.B.'s relationship with Michelle, the physical and emotional health of all the adults involved, the stability of B.B.'s living and schooling arrangements and the wishes and preferences of the child. See Vibbert, 144 S.W.3d at 292,295. The trial court gave some deference to Michelle's objection but also considered Michelle's substantive trial testimony. Michelle admitted that Donna had seen B.B. as much as most grandparents do when the parents are not together. (VR No. 1: 8/18/10; 16:04:24). Michelle testified that she had no problem with the paternal grandparents until after the father's suicide. (VR No. 1: 8/18/10; 16:04:37). Michelle further testified that a relationship in a way with his grandmother would be good for B.B. (VR No. 1: 8/18/10, 16:05:03). Michelle fails to mention these admissions when she erroneously claims that Donna failed to meet her evidentiary burden.

The appellate court found no error with the findings and conclusions of the trial court.[3] The trial court had carefully weighed and considered the

[3] The trial court's award of visitation should not be set aside unless it constituted "a manifest abuse of discretion, or [was] clearly erroneous in light of the facts and circumstances of the case". Grant v. Lynn, Ky. App., 268 S.W.3d 382, 390 (2008)(*citing* Drury v. Drury, Ky. App., 32 S.W.2d 521, 525 (2000)).

celebrations, handmade drawings, etc, as well as the rights of Michelle and the rights and welfare of B.B. and determined that the proof by "clear and convincing" evidence supported the enforcement of Donna's grandparent visitation rights as being in B.B.'s best interest. Further, B.B. would benefit as the relationship would allow him to learn about his late father and paternal relatives and to develop a relationship with his half-brother. Walker v. Blair, Case No. 2010-CA-002228-ME. The Court of Appeals unanimously affirmed the trial court's Judgment and Order.

Michelle's arguments remain unchanged. Michelle's factual allegations are not supported by and are actually contrary to the evidence presented at trial.

Following Michelle's testimony, the trial commented as to how the father's suicide was terrible for all concerned and how the loss of a loved one can make one go "temporarily insane". (VR No. 1: 8/18/10, 16:08:17-16:08:39). Michelle criticizes the trial court's decision encouraging the parties to forgive each other and to think about B.B. and what is best for him. The trial court is appropriately considering and is mindful of the child and his rights and that he should be allowed "to love his mother and stepfather and also love his father and his father's parents. He shouldn't have to hide his feelings to protect the feelings of the adults". TR at 223.

IV. The trial court correctly applied KRS 405.021 and granted reasonable and unsupervised grandparent visitation.

Michelle's allegation that the trial court erred when it granted Donna substantial, unsupervised visitation is without merit. First, Michelle never

requested at trial that visitation be supervised. Instead, she testified that visitation with Donna "in a way may be good for B.B." (VR No. 1: 8/18/10, 16:05:03).

Secondly, as previously discussed, Michelle's argument fails to accurately represent the facts of the case. Moreover, the trail judge concluded that she had no concerns about the mental or physical health of any of the parties. TR at 223. The trial judge determined that Donna and B.B. "had an established, loving relationship prior to Steve's death. The child knew [Donna] was his grandmother and spent lots of time with her". TR at 222. There was no evidence that B.B. was unwilling or afraid to see Donna. Michelle's allegations in her Brief regarding overnights and that he may be too young for and afraid of such separation is totally contrary to the evidence. B.B.'s parents were unmarried and he regularly spent time away from Michelle, including overnights with Donna, from birth and up to the time of his father's death.

The trial court gave special weight to Michelle's decision, carefully considered the best interests of the child, utilized the Vibbert modified best interest analysis and correctly held that Donna had proved by clear and convincing evidence that visitation was in B.B.'s best interest. The issue of unsupervised visitation was never raised by Michelle and was completely unwarranted.

V. Since Donna was seeking grandparent visitation under KRS 405.021(1), KRS 405.021(3) was not applicable and Michelle's Motion to Dismiss was correctly denied by the trial court.

Michelle argued in her Motion to Dismiss that Donna's Petition for Grandparent Visitation must be dismissed because Donna has not assumed the financial obligation of her deceased son under KRS 405.021(3). The trial court correctly denied the Motion to Dismiss.

Donna did not petition and is not now asking the Court for "noncustodial parental visitation rights" under KRS 405.021(3). Further Donna did not seek "*to be a grandparent who steps into the shoes of the deceased parent*" as argued by Michelle. Donna simply seeks to establish grandparent visitation – time with her grandson, B.B, under KRS 405.021(1). The trial and appellate courts agreed. See Grant v Lynn, 268 S.W.3d at 382, 390 (grandparent visitation was awarded under subsection (1) without application or consideration of subsection (3) of the statute).

Although Steve's specific Court-ordered visitation schedule was not relevant and was not introduced at trial, Michelle attempts to describe the visitation time granted Donna "as equal to, or greater than, the amount of time the child's own father spent with him". Michelle Brief, p. 23. This is not accurate and is unsupported by the evidence. Donna testified that on Steve's weekends she would often pick-up B.B. on Friday and that he would spend the night and part of Saturday with her. She would then drive B.B. to Bardstown so he could be with Steve. (VR No. 1: 8/18/10; 15:48:05). The appellate court

determined that the "breadth of visitation sought by the grandparent" triggers KRS 405.021(3) and child support. Donna's visitation "falls short of the more generous visitation expected to be granted a noncustodial parent to trigger child support". Walker v. Blair, Case No. 2010-CA-002228-ME, p. 5.

Donna has never claimed that she assumed Steve's financial obligation of child support. Donna has never claimed that she paid child support.[4] KRS 405.021(3) is not applicable to this case and Donna is not required to pay and Michelle has no right to receive child support. The trial court correctly denied the Motion to Dismiss.

CONCLUSION

WHEREFORE, based upon the foregoing, the Respondent, Donna S. Blair, respectfully requests this Court to affirm the decision of the Kentucky Court of Appeals affirming the trial court's Judgment and Order of grandparent visitation.

Respectfully submitted,

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[4] Child support and the amount paid by Steve were not at issue during trial.