CHRISTIE SHONDELLE ELDER BOONE VANDERPOOL, Respondent/Appellant, VS. DOUGLAS CLINTON BOONE, Defendant, VS. ANN SEAT, Petitioner/Appellee.	)	Appeal No. 01-A-01-9508-CH-00358 Cheatham Chancery No. 5583

FILED

March 27, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF CHEATHAM COUNTY
AT ASHLAND CITY, TENNESSEE

THE HONORABLE ALLEN W. WALLACE, CHANCELLOR

JAMES L. CURTIS
Washington Square, Suite 204
214 Second Avenue North
Nashville, Tennessee 37201
Attorney for Respondent/Appellant

JERRY W. HAMLIN
110 Frey Street
Ashland City, Tennessee 37015
Attorney for Petitioner/Appellee

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
LEWIS, J.

O P I N I O N

The paternal grandmother of an eight year old girl filed a petition against the girl's mother for enforcement of her visitation rights and for contempt. The mother counter-petitioned to terminate the grandmother's visitation rights. The proof showed that the mother had agreed to include regular visitation by the grandmother in the final decree of divorce, that the grandmother had exercised her visitation for about four years, without objection by the mother, but that some time after the mother remarried, she refused to allow further visitation in the grandmother's home.

The trial court found that there had been no material change of circumstance adequate to justify a change in the visitation provisions of the original decree, and that the mother was in willful contempt of its orders. The court penalized the mother for her contempt by ordering her to pay the grandmother's attorney fees, in the amount of $500. We affirm the trial court, but reverse the award of attorney fees, having found no precedent for such an award under these circumstances.

I.

On December 14, 1989, the Chancery Court of Cheatham County granted Christie Boone an absolute divorce from Douglas Boone on the ground of cruel and inhuman treatment. Mr. Boone did not contest the divorce, and did not appear at trial. Christie Boone was granted custody of the couple's 18 month old daughter, Jessica, and the father was ordered to pay $40/week child support. No visitation was granted to Mr. Boone.

Christie Boone had enjoyed a good relationship throughout the marriage with the appellee Ann Seat, Mr. Boone's mother. They had discussed the Boone's

marital problems during the marriage. During the divorce proceedings, Christie Boone suggested that Mrs. Seat be granted visitation privileges, in lieu of those that Douglas Boone might have enjoyed. The final decree granted Mrs. Seat the right to visit with Jessica and take the child into her home every other weekend.

Mrs. Seat was frequently unable to exercise full visitation with her granddaughter, as she was obligated to work on many weekends. Because Mrs. Seat felt it was important for Jessica to know her cousins, many of the child's visits to her grandmother were also passed in the company of Mrs. Seat's grandchildren by her other four children. Jessica's mother was going to school at the time of the divorce, and on some occasions Mrs. Seat accommodated the needs of her schedule by babysitting Jessica during the week rather than exercising weekend visitation.

Mrs. Seat had acceded to her former daughter-in-law's request that there be no contact between Jessica and her father. On one occasion in 1993, Douglas Boone dropped by his mother's house when Jessica was present. Mrs. Seat sent him away, telling him that he could not be on the premises at the same time as Jessica. Mrs. Seat promptly informed Jessica's mother of what had transpired.

By that time, Christie Boone had remarried, and taken the name Christie Vanderpool. After the incident described above, Christie Vanderpool decided she did not want her daughter visiting her grandmother any more, and told Mrs. Seat that if she wanted to see Jessica, she had to visit her in the Vanderpool home. Mrs. Seat did not feel comfortable with that situation, and the two women reached an impasse, with Christie Vanderpool insisting that if Mrs. Seat wanted any contact with her granddaughter, it could only be in accordance with the mother's conditions, and Ann Seat insisting on her right to exercise visitation in accordance with the provisions of the divorce decree.

On April 19, 1995, Ann Seat filed a Petition for Contempt, and for enforcement of the previously ordered visitation. Christie Vanderpool's counter-petition claimed that Mrs. Seat was herself in contempt for failing to exercise her visitation every weekend, and asked the court to terminate the earlier visitation order. After a hearing on August 7, 1995, the trial court granted Mrs. Seat's petition, and denied the counter-petition. Mrs. Vanderpool was ordered to pay $500 to Mrs. Seat's attorney for reasonable attorney fees. No further punishment was imposed for the contempt.

II.

Although the common law did not recognize the right of grandparents to visit their grandchildren over the objections of the child's parents, the Tennessee Legislature acknowledged its belief in the importance of the role of grandparents in child-rearing by enacting, in 1971, the Grandparents' Visitation Act. The scope of the Act was expanded by amendments enacted in 1975 and 1985. See *Clark v. Evans*, 778 S.W.2d 446 (Tenn.App. 1989), for a history of the statute. The relevant portion of the current version of the Act reads as follows:

> **36-6-302. Grandparents' visitation rights. --** (a) The natural or legal grandparents of an unmarried minor child may be granted reasonable visitation rights to the child during such child's minority by a court of competent jurisdiction upon a finding that such visitation rights would be in the best interests of the minor child. . . . *(Tenn. Code Ann. 1995 Supplement)*

In a series of recent cases, our Supreme Court has examined the constitutionality of Tenn. Code Ann. § 36-6-302, and determined that court-ordered imposition of grandparent visitation in accordance with the statute may in some cases violate the parents' right, derived by implication from Article I, Section 8 of the Tennessee Constitution, to raise their children as they see fit.

In the seminal case of *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993), the Court reversed court-ordered visitation by the grandparents, who had sought and were granted such visitation over the strenuous objections of the parents:

> "In this case, the paternal grandparents directly challenge this fundamental privacy interest by seeking court-ordered visitation . . . . They insist that a judicially determined finding that visitation is in the best interests of the children is a sufficiently compelling justification to override the parents' united opposition, regardless of the fact that the parents' fitness is not challenged and that the parents' domestic situation has never been the subject of judicial concern. We find, however, that without a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the 'best interests of the child' when an intact, nuclear family with fit, married parents is involved." 855 S.W.2d at 579.

In subsequent cases, the Court broadened its ruling in *Hawk*, to extend the same constitutional protections to parents in other types of families. *Simmons v. Simmons*, 900 S.W.2d 682 (1995), was a case similar in many respects to the present one. In *Simmons*, the father's parental rights were terminated on the ground of abandonment, in the same proceeding in which the paternal grandparents petitioned for and were granted visitation privileges. The mother remarried, and her new husband adopted the child. She subsequently refused to allow visitation by the grandparents. They filed a contempt petition against the mother and the adoptive father. The parents responded with a petition that the visitation privileges be terminated. The trial court entered judgment for the grandparents, which the Eastern Section of this court affirmed in a Memorandum Opinion.

The Supreme Court reversed, restating its earlier ruling in the *Hawk* case that the intervention of the court into the constitutionally protected child-rearing rights of the parents was only permitted if such intervention was required to protect the child from a substantial danger of harm. The Court also ruled that the

constitutional protection of parental rights applied with the same force whether the rights involved were those of natural parents or of adoptive parents.

The appellant has also directed our attention to an unreported case from the Western Section of this court, *Floyd v. Neely*, 20 TAM 30-15, to further bolster her position. In that case, the original family unit had been broken by the divorce of the parents and the subsequent death of the father. The court held that the breakup of the nuclear family did not, in and of itself, amount to the sort of substantial harm to the child that would justify state interference with the mother's child-rearing decision to cut off all contact between the child and his paternal grandparents.

III.

By its opinions in the above-cited cases, the Supreme Court has set constitutional limits on the authority of trial courts to order grandparent visitation, even where the court may believe that such visitation is in the best interest of the child. But we note that the Court has not declared Tenn. Code Ann. § 36-6-302 to be unconstitutional, and it thus follows that the trial courts may still issue and enforce grandparent visitation orders under appropriate circumstances.

The present case does not involve the one situation discussed by the Supreme Court (significant danger of harm to the child) where the courts are specifically authorized to ignore the preferences of the parents and issue a visitation order deemed to be in the best interests of the child. However, the order Mrs. Vanderpool now objects to differs from those reversed by the Supreme Court in the above-cited cases, in that she herself suggested that visitation be granted to Mrs. Seat, while the visitation orders granted by the trial courts in the *Hawk* and *Simmons* cases were issued over the objections of the parents.

Though the Supreme Court may not have specifically said so, it follows from their analysis that the visitation orders they reversed were invalid when issued, because they violated the constitutional rights of the objecting parents. The visitation order in the present case suffered no such constitutional infirmity, and thus Mrs. Vanderpool could only ignore it at peril of being found in contempt of the issuing court. We thus find that the trial court did not err in finding Mrs. Vanderpool in contempt. However we believe that the trial court erred in awarding attorney fees to Mrs. Seat, as the statute which authorizes punishment for contempt does not mention such a sanction. Tenn Code Ann. § 39-9-103 reads:

> **Punishment.--**(a) The punishment for contempt may be by fine or by imprisonment or both.
>
> (b) Where not otherwise specially provided, the circuit, chancery and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and all other courts are limited to a fine of ten dollars ($10.00).

IV.

Like custody and child support orders in divorce cases, visitation orders remain within the control of the court, and are subject to modification upon an appropriate showing of change of circumstances. See *Sutton v. Sutton*, 220 Tenn. 410, 417 S.W.2d 786 (1967), *Dillow v. Dillow*, 575 S.W.2d 289 (Tenn.Ct. App. 1978). Despite the considerable constitutional protection afforded parental rights, parents do not have the right to ignore lawful orders of the court, or to change those orders unilaterally; to permit them to do so would damage the authority of the courts and turn enforceable orders into mere suggestions.

The trial court found that Mrs. Vanderpool did not prove such a change of circumstances as would warrant a termination of the visitation privileges of Mrs.

Seat. We do not believe that the evidence preponderates against this finding. See Rule 13(d), Tenn. R. App. P.

We feel, however, that we would be remiss if we did not note with approval the way in which Mrs. Vanderpool and Mrs. Seat had been able to maintain their friendly relationship after the divorce, and our regret that that they ultimately found it necessary to resort to the courts to resolve their differences. The strains and bitterness that almost inevitably embroil the family members of divorcing parties tend to deepen the pain of the divorce for the children, and it is to the credit of both of these women that they were able to avoid subjecting Jessica to much unnecessary strife. Despite their adversarial positions, both women continued to express at trial their high regard for each other. It is our hope that for the sake of the child they both love, they repair whatever damage to their relationship that their roles in these proceedings may have caused.

V.

The judgment of the trial court is affirmed, except that the order for payment of attorney fees is reversed. Remand this cause to the Circuit Court of Cheatham County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant.

_____
BEN H. CANTRELL, JUDGE

CONCUR:

_____
HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

_____
SAMUEL L. LEWIS, JUDGE