



This is a grandparents' visitation case. Earnest and Linda Newman, the maternal grandparents of Chelsea N. Sneed, a minor, filed a petition seeking visitation with her. The Newmans' daughter, Julie Phillips, who is the child's mother and custodian, opposed the petition. Ms. Phillips had been awarded full custody in her divorce suit against Chelsea's father.<sup>1</sup> She subsequently married James Phillips Jr., who is not a party to this action. The petition does not allege that Ms. Phillips is an unfit parent or that she has engaged in any parental misconduct. The trial court, after a non-jury hearing, found visitation to be in the child's best interests, and, acting pursuant to the Grandparents' Visitation Act, T.C.A. § 36-6-302, awarded visitation. Ms. Phillips appeals, raising the issue of whether the grant of visitation rights to her parents, made over her objection and with no showing of injury to the child or parental unfitness, violates her right to privacy under the Tennessee Constitution. We find that it does and consequently reverse the trial court's judgment.

## I

There are no disputed material facts. Chelsea was born approximately two months after Ms. Phillips separated from the child's natural father. Ms. Phillips subsequently obtained a divorce and full custody of her daughter. The evidence reflects

---

<sup>1</sup>Chelsea's natural father is presently incarcerated in a Florida penitentiary and is not involved in this action.

that early in Chelsea's life, the relationship between M. Phillips and her parents was fairly close and cordial. However, relations became strained, apparently after an unfortunate incident in April, 1994, when M. Newman attempted to discipline Chelsea, then about 2½ years old, by whipping her with a belt. After that incident, the parties engaged in a number of discordant and heated exchanges which ultimately resulted in M. Phillips' decision to discontinue contact with her parents.

On June 26, 1994, M. Phillips married James Phillips, Jr. M. Phillips has not taken legal action to adopt Chelsea, and is not a party to this case.

The Newmans filed their petition for child visitation on January 31, 1995. As noted above, the petition does not allege parental misconduct or that Chelsea is subject to any harm by remaining in M. Phillips' custody and care. The trial court concluded that it could constitutionally order grandparents' visitation under these circumstances; in so doing, it distinguished the Supreme Court case of *Hawk v. Hawk*, 855 S.W2d 573 (Tenn. 1993), the seminal case in this area of constitutional and domestic law. We find that *Hawk* and its progeny mandate reversal of the trial court's judgment. In so finding, we join the Middle and Western Sections of this court, both of which have recently addressed a functionally identical issue and resolved it in favor of a parent's right to privacy in raising his or her child.

## II

In awarding visitation, the trial court acted pursuant to the Grandparents' Visitation Act (GVA), which provides in relevant part as follows:

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.

T. C. A. § 36-6-302(a). As noted above, the trial court found the seminal *Hawk* case factually distinguishable.

In *Hawk*, the Supreme Court dealt with the issue of whether the GVA could constitutionally be applied so as to allow a court to order grandparents' visitation over the objection of the married, natural parents of the children. *Hawk*, 855 S.W2d at 575. The Supreme Court noted that in Tennessee, the parental right to raise one's child "has long been protected from state interference, except where the child's welfare is 'materially' jeopardized," *id.* at 578, and reached the following conclusion:

Tennessee's historically strong protection of parental rights and the reasoning of federal constitutional cases convince us that parental rights constitute a fundamental liberty interest under Article I, Section 8 of the Tennessee Constitution.

*Id.* at 579. The Court found that the literal language of the GVA, as applied under certain circumstances, violated the parental right to privacy:

In light of this right to privacy, we believe that when no substantial harm threatens a child's welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit. Thus, we find the statute to be unconstitutional. . . as applied to this married couple, whose fitness as parents is unchallenged.

*Id.* at 577. As the trial court in the instant case correctly pointed out, the Supreme Court in *Hawk* did not reach the question of the constitutionality of the GVA "as it applies to situations involving unmarried parents," *Id.* at 580, n.10.

A year after *Hawk*, the Supreme Court was presented with an issue regarding the parental rights of a father in attempting to legitimate his child. *Nale v. Robertson*, 871 S.W2d 674 (Tenn. 1994). The *Nale* Court rejected an argument that *Hawk* was limited to its own factual pattern:

Parents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their children under both the United States and Tennessee Constitutions.

\* \* \* \*

The Nales' position that this Court in *Hawk* limited the protection of parental rights to

“an intact, nuclear family with fit parents”  
is untenable.

*Nale*, 871 S.W2d at 678, 680.

In *Simmons v. Simmons*, the Supreme Court was faced with a situation identical to *Hawk* except that there was a new family unit composed of the natural mother and an adoptive stepfather, rather than two natural parents, who opposed grandparents’ visitation. The grandparents attempted to distinguish *Hawk* as follows:

They [the grandparents] insist that the decision in *Hawk* does not preclude a best interest of the child analysis because the divorce of the child’s natural parents justifies the state’s interference with parenting decisions by the mother and adoptive father. They insist that the constitutional protection is limited to married, natural parents who have maintained continuous custody of their children and whose fitness as parents has not been challenged.

*Simmons v. Simmons*, 900 S.W2d 682, 684 (Tenn. 1995). The Supreme Court in *Simmons* summarily rejected this contention, stating,

[T]he legal principles upon which *Hawk* is based are applicable to this case also . . . . Adoptive parents are entitled to the same constitutional protection of parenting decisions as natural parents.

*Id.* at 684. Because there was no threshold showing of substantial danger of harm to the child, the Supreme Court reversed a visitation award on the same constitutional ground as in *Hawk*.

The recent unreported case of *Floyd v. McNeely*, C/A No. 02A01-9408-CH-00187, 1995 WL 390954 (Tenn. App., W.S., filed July 5, 1995, Farmer, J.), presented another visitation battle between a grandparent and a parent. In *Floyd*, the child's mother had remarried after the natural father's death, but her new husband had not adopted the children. The paternal grandmother was seeking visitation. *Id.* The grandmother sought to distinguish *Hawk* and *Simmons*, and the court stated the following in response:

The record indicates that McNeely [the natural mother] had remarried at the time of trial. There is no indication that her current husband has taken steps to adopt the children. Thus, this case is distinguishable from *Simmons* in this respect. We, however, do not view the husband's failure to adopt the children as a means to lessen the fundamental privacy interest afforded McNeely in parenting her children. In view of the reasonings extended by our supreme court in *Simmons* and *Hawk*, we are convinced that McNeely's right to parent her children as she sees fit, including a decision regarding a relationship between them and their grandmother, is no less greater than the right afforded to the married natural parents under *Hawk*. We conclude that the rights afforded to the parents in *Hawk* extend equally to McNeely despite the death of her children's father and her subsequent remarriage. To this end, we do not view the breakup of the nuclear family, in and of itself, to constitute a substantial harm to a child sufficient to justify state

interference with a fit parent's decision to preclude a relationship between that child and his/her grandparents.

*Id.* at \*4. (Emphasis added).

In *Smith v. Smith*, C/A No. 01A01-9508-CH-00354, 1996 WL 17188 (Tenn. App., MS., filed Jan. 19, 1996, Todd, P.J. (MS.)), the Middle Section addressed a similar factual pattern. The natural mother had remarried and her new husband had adopted the children. It is significant to note that the court in *Smith* stressed that the adoptive father "is not a party to this proceeding." *Id.* at \*1. The *Smith* court made the following apposite statement:

No reason occurs to this Court why the rights of the surviving parent should not be enforced without the joinder of the adoptive father. Custody and control of children by a surviving parent should never be denied or interfered with except for the most cogent reasons.

*Id.* at \*5. We, like the *Smith* and *Floyd* courts, see no reason why the existence or exercise of a parent's constitutional right to privacy in making child-rearing decisions, absent a "substantial harm" finding, should depend upon whether the parent's new spouse has decided to adopt the children, or, if an adoption has occurred, whether the adoptive parent is a party to the proceeding.



The *Floyd* case is on “all fours” with the facts of the present case. In addition, we agree with the reasoning of the *Floyd* and *Smith* cases, and join the Middle and Western Sections of this court in holding that absent a finding of substantial harm to the child, the state may not constitutionally interfere with a parent’s right to make child-rearing decisions by ordering grandparents’ visitation against the parent’s wishes. No allegations of harm to the child were made in the present case, and thus the court erred in ordering grandparents’ visitation over the objection of M. Phillips.

No appellate court in Tennessee has declared the GVA unconstitutional on its face; nor do we. It is clear, however, that before a court can apply that statute it must make a threshold finding of “substantial danger of harm to the [minor] child.” *Hawk*, 855 S.W2d at 579.

For the aforementioned reasons, the judgment of the trial court is reversed, and the original complaint is dismissed with costs below being assessed to the appellees. Costs on appeal are also taxed and assessed to the appellees. This case is remanded to the trial court for the collection of costs below, pursuant to applicable law.

---

Charles D. Susano, Jr., J.

CONCUR:

-----  
Houston M Goddard, P. J.

-----  
Herschel P. Franks, J.