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Cover Page Footnote

I would like to thank Professor Cooley Howarth for his guidance. This Note is dedicated to my husband, Jeff, and my son, Jacob, for all their love and sacrifices.

SIBLING RELATIONSHIPS SHOULD NOT BE DENIED BY FORMALISTIC JUDGES: *Scruggs v. Saterfiel*, 693 So. 2d 294 (Miss. 1997)

Susan Solle[*]

TABLE OF CONTENTS

I. INTRODUCTION

Stacey Scruggs and Tony Saterfiel are half-brother and half-sister.[1] They lived together with their mother all their lives until she passed away in 1995.[2] As most siblings do, they depended on each other for support while they were growing up.[3] When their mother died, the court ordered Stacey to live with her aunt, while Tony was sent to live with his father.[4] The children were not able to live together during this most difficult period in their lives.[5] To make matters worse, Tony's father did not allow Tony to

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1 Scruggs v. Saterfiel, 693 So. 2d 924, 925 (Miss. 1997).

2 *Id.*

3 *See id.*

4 *Id.*

5 *Id.*

visit his sister because of problems the father had with his ex-wife's family.[6]

Many courts recognize that fostering sibling relationships is in the best interest of the children.[7] As such, many states award sibling visitation.[8] The Mississippi Supreme Court could have done this as well. While it had very broad discretion to award sibling visitation under the custody statute of Mississippi,[9] the court chose not to do so on grounds that there was no statute specifically stating that it could award such visitation.[10] This judicial reluctance to act in the best interest of a child, absent specific statutory authority, is unwarranted in domestic relations law and represents a judicial abdication of its legal duty to ensure the best interests of Mississippi children.

In domestic relations law, courts are faced with a myriad of situations that a legislature could never foresee. Domestic relations statutes are designed to allow courts to use discretion in dealing with these situations as they arise. Mississippi statutes are no different.[11] However, the court in *Scruggs v. Saterfiel*[12] took a formalistic approach by denying its authority to award sibling visitation without a statute. The court, in fact, did have the authority,[13] and by refusing to exercise its discretion, it denied Stacey and Tony the necessary support of a sibling relationship during a terribly disruptive period in their lives. The court's formalistic approach was unjustified in light of Mississippi's domestic relations law and misplaced in the diverse and emotional area of family law.

Part II of this Note describes the factual and procedural background of the *Scruggs* case, along with the majority's reasoning for its opinion.[14] Part III first discusses the concept of formalism and demonstrates that it has no place in domestic relations law, particularly in the area of custody and visitation.[15] Part III further argues that the domestic relations law of Mississippi grants the courts discretion to award sibling visitation and that

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[6] *Id.*

[7] L. v. G., 497 A.2d 215, 218 (N.J. Super. Ct. Ch. Div. 1985); *In re* Daniel W., 529 N.W.2d 548, 555 (Neb. 1995) *rev'd*, 542 N.W.2d 407 (Neb. 1996); *In re* Wemark, 525 N.W.2d 7, 10 (Iowa Ct. App. 1994).

[8] *See supra* note 7.

[9] MISS. CODE ANN. § 93-5-23 (1972 & Supp. 1997).

[10] *Scruggs*, 693 So. 2d at 926.

[11] *See infra* notes 99-134 and accompanying text.

[12] 693 So. 2d 924, 925 (Miss. 1997).

[13] *See* MISS. CODE ANN. § 93-5-23; *see infra* notes 99-134 and accompanying text.

[14] *See infra* notes 17-41 and accompanying text.

[15] *See infra* notes 42-98 and accompanying text.

such discretion should have been exercised in this case.[16] Part IV concludes that the approach taken by the court in this case was inappropriate considering the options available to it.

II. BACKGROUND

Stacey Scruggs and Tony Saterfiel are the children of Donna Sue Bowman.[17] Tony's father is William Saterfiel.[18] The whereabouts of Stacey's father are unknown.[19] Both children resided with their mother until her death in September of 1995.[20] While Ms. Bowman was sick in the hospital before her death, both children stayed with their mother's sister, Sandra Friend.[21] After Ms. Bowman's death, Ms. Friend attempted to retain custody of both children, but Mr. Saterfiel obtained custody of his son, Tony.[22]

At first, Stacey and Tony were allowed to visit each other briefly.[23] Just one month after their mother's death, Tony's father would only permit visitation at a Wal-Mart, a location chosen because of its neutrality.[24] Later that year, Mr. Saterfiel refused to allow Tony to visit his sister and his aunt at their home due to personal conflicts with his ex-wife's family.[25] Since Stacey was unable to see her brother, she cried frequently and her grades fell significantly.[26] Stacey filed a Motion for Visitation in November of 1995, while Saterfiel alleged such claim was frivolous, requesting costs and attorney's fees under the Mississippi Accountability Act.[27]

In addressing Saterfiel's counter-claim for litigation accountability,[28] the chancellor determined that Scruggs' motion for sibling visitation was

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[16] *See infra* notes 99-134 and accompanying text.

[17] Scruggs v. Saterfiel, 693 So. 2d 924, 925 (Miss. 1997).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] The Litigation Accountability Act of 1933 provides that a court shall award reasonable attorney's fees and costs against any party or attorney if the court finds the action was "without substantial justification" or was asserted for "delay or harassment." MISS. CODE ANN. § 11-55-5(1) (1972 & Supp. 1997). Further, the Act defines "without substantial justification" to mean "frivolous, groundless in fact or in law, or vexatious as determined by the court." *Id.* § 11-55-3(a).

not filed in bad faith because it was to "promote the healthy relationship between siblings."[29] Despite this statement, the chancellor still found against Scruggs on her claim and further granted costs and attorney's fees to Saterfiel. However, the chancellor specifically noted that Mr. Saterfiel should consider the best interests of the children and allow Tony to visit his sister.[30] Scruggs and Friend appealed the chancellor's decision.[31]

The Mississippi Supreme Court agreed with Scruggs' and Friend's position that in the past, the court supported the need to preserve family unity wherever possible.[32] In doing so, the court cited a few cases where sibling relationships were taken into consideration when custody was awarded.[33] The court also recognized that other jurisdictions have awarded sibling visitation without express authorization from a statute.[34] However, the court focused on the existence of the Mississippi Grandparent Visitation Statute,[35] concluding that because the legislature expressly gave it the authority to award grandparent visitation, the court must have express authority in other circumstances.[36] Thus, the Mississippi Supreme Court chose not to award sibling visitation without an express statute.[37]

The court, however, overturned the chancellor's ruling on Saterfiel's counterclaim because the lawsuit was not frivolous.[38] The term frivolous was determined to suggest "without hope of success."[39] The court concluded that Scruggs' and Friend's action was a case of first impression, but not without hope of success.[40] Thus, the court overturned the

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[29] *Id.* (quoting Chancellor's Memorandum and Op. (Feb. 5, 1996)).

[30] *Id.* at 925-26.

[31] *Id.* at 925.

[32] *Id.* at 926.

[33] *Id.* (citing Sellers v. Sellers, 638 So. 2d 481 (Miss. 1994); Mixon v. Bullard, 217 So. 2d 28 (Miss. 1968)).

[34] *Id.* (citing *In re* Daniel W., 529 N.W.2d 548 (Neb. 1995)).

[35] The Mississippi Code states that:

> Whenever a court of this state enters a decree or order awarding custody of a minor child to one (1) of the parents of the child or terminating the parental rights of one (1) of the parents of a minor child, or whenever one (1) of the parents of a minor child dies, either parent of the child's parents who was not awarded custody or whose parental rights have been terminated or who has died may petition the court in which the decree or order was rendered or, in the case of the death of a parent, petition the chancery court in the county in which the child resides, and seek visitation rights with such child.

MISS. CODE ANN. § 93-16-3 (1972 & Supp. 1997).

[36] *Scruggs*, 693 So. 2d at 926.

[37] *Id.*

[38] *Id.* at 927.

[39] *Id.*

[40] *Id.*

chancellor's ruling which awarded attorney's fees and costs to Mr. Saterfiel.[41]

III. ANALYSIS

The court in *Scruggs* erred by not awarding visitation between Stacey and Tony simply because there was no statute specifically allowing sibling visitation. This approach is too rigid for the practice of family law, particularly for custody and visitation issues. Mississippi's custody statutes provide broad discretion to the courts in handling all issues of custody and visitation.[42] Both the chancery court and the Mississippi Supreme Court expressed their feelings that the siblings should be allowed regular visitation.[43] However, the formalistic approach taken by the *Scruggs* court was inappropriate for visitation questions, especially when the custody statutes are designed to give the courts ample discretion.

A. A Formalistic Approach to Judicial Decisionmaking Is Inappropriate in Domestic Relations

Formalism is a school of thought that promotes strict adherence to the statute or rule of law without allowing judicial discretion.[44] Although this concept has been present in American jurisprudence for over a century, it has been severely criticized since the early 1900s.[45] In particular, formalism is especially inappropriate in domestic relations law. Domestic relations courts must make decisions every day which affect the hearts and lives of children and adults.[46] Legislatures could not possibly predict all of the potential circumstances that could arise in this area. As a result, state domestic relations statutes generally allow courts to have broad discretion when deciding most issues, particularly custody and visitation.[47] If courts

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[41] *Id.*

[42] MISS. CODE ANN. § 93-5-23; *see infra* notes 99-107 and accompanying text.

[43] *Scruggs*, 693 So. 2d at 925-26.

[44] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646 (1990) (examining the history of textualism and Justice Scalia's "new textualism" which posits that once a court has established plain meaning, legislative history is irrelevant).

[45] GRANT GILMORE, THE AGES OF AMERICAN LAW 86-87 (1977).

[46] *E.g.*, Harris v. Harris, 293 N.Y.S.2d 592 (1968) (continuing custody with the mother when she moved out of state against the wishes of the children); *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995) (granting unmarried partners standing to adopt children); *In re* Carney, 598 P.2d 36 (Cal. 1979) (reversing custody award to the mother after an accident rendered the father a quadriplegic).

[47] *See, e.g.*, DEL. CODE ANN. tit. 13, § 728(a) (1996) ("The Court shall determine . . . with which parent the child shall primarily reside and a schedule of visitation with the other parent, consistent with

ignore this discretion, the best interests of the child may suffer. However, before analyzing the courts' misuse of formalism, its history and foundation must be examined.

1. Formalism Defined

Formalism first arose in the post-Civil War period.[48] The opinions during this time revealed the assumption that "the law is a closed, logical system."[49] Judges were not supposed to make law, they were simply supposed to report the law that already existed.[50] Further, they were not expected to adapt the law to changing conditions, just to find out exactly what the law in this particular area always had been and apply it.[51] Judges were bound by the precise language of the statute,[52] and thus de-emphasized the facts of each case.[53]

Formalism virtually eliminates discretion of judges.[54] It requires a search for a theoretical formula that can and must be universally applied.[55] Deviation from this strict application is disallowed, regardless of change and regardless of whether the origin of the theoretical formula was conservative or radical.[56] This theory transforms judges into robots who simply regurgitate the written law, with no regard to the specific set of

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the child's best interests and maturity . . . ."); GA. CODE ANN. § 19-9-3(a)(2) (1997) ("The court . . . in exercise of its sound discretion, may take into consideration all the circumstances . . . . The duty of the court . . . shall be to exercise its discretion . . . and determine solely what is for the best interest of the child . . . ."); N.H. REV. STAT. ANN. § 458:17(I) (1995) ("In all cases where there shall be a decree of divorce or nullity, the court shall make such further decree in relation to the support, education, and custody of the children as shall be most conducive to their benefit . . . ."); TENN. CODE ANN. § 36-6-101(a)(1) (1997) ("In a suit for annulment, divorce or separate maintenance, . . . [the court may] award the care, custody and control of such [minor] child or children to either of the parties . . . as the welfare and interest of the child or children may demand . . . ."); VA. CODE ANN. § 20-103(A) (Michie 1997) ("In suits for divorce, . . . the court . . . may, . . . in the discretion of such court, make any order that may be proper . . . (iv) to provide for the custody and maintenance of the minor children of the parties . . . .").

[48] The time period following the Civil War, during which formalism reigned supreme, was a period of little change. GILMORE, *supra* note 45, at 62. Perhaps the American people were looking for peace and dependability following the horrible disruption of the war and liked the idea of a never-changing body of law that they could depend on during this rehabilitation period.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 62-63.

[52] Eskridge, *supra* note 44, at 646.

[53] GILMORE, *supra* note 45, at 63.

[54] MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 9-10 (Paul J. Kollmer & Joanne M. Olson eds., 1989).

[55] GILMORE, *supra* note 45, at 108.

[56] *Id.* at 108-09.

facts before them.[57] Formalists purport that judges can use deductive logic to ascertain the law without any personal thought process.[58] "Decision becomes a mechanistic process in which it is forbidden to look beyond the letter of the statute and the holding of the last case."[59] The result is that the law prohibits society from changing from "predetermined patterns of behavior."[60]

Justice Scalia pointed out the advantages of this approach to judicial decisionmaking in his article *The Rule of Law as a Law of Rules*.[61] If each case is decided strictly by the language of the statute or the prior decision, then uniformity, predictability, and equal treatment in the law results.[62] Conversely, when courts are allowed substantial discretion, then there will be no uniform application of the laws among courts faced with similar issues.[63] The same argument holds true for predictability, argues Justice Scalia.[64] Without uniform application of the laws, the public will not be able to predict what the law actually is.[65] Finally, this approach purports to provide equal treatment.[66] "When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*."[67]

Despite this justification for its use, formalism is not always a desirable approach to judicial decisionmaking. For example, the area of criminal sentencing was highly discretionary.[68] Judges were required to decide each case individually, similar to decisions in domestic relations

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[57] CAPPELLETTI, *supra* note 54, at 9-10.

[58] *Id.*

[59] GILMORE, *supra* note 45, at 109.

[60] *Id.*

[61] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176, 1178-79 (1989) (exploring the "dichotomy between 'general rule of law' and 'personal discretion to do justice'").

[62] In many areas of the law, there are numerous courts, sometimes both federal and state, deciding the same issues. *Id.*

[63] *Id.* at 1179.

[64] *Id.*

[65] "As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean." *Id.*

[66] *Id.* at 1178.

[67] *Id.*

[68] For a description of common law sentencing, see Marsha Garrison, *How Do Judges Decide Divorce Cases?: An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 416 n.48 (1996) (citing STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS (1988)).

law.[69] Legislation was then introduced to reform criminal sentencing because it was believed that discretion was leading to inconsistent results.[70] The reform reduced judicial discretion to create a more predictable system of punishments with required sentences for certain crimes. However, a survey of federal and state judges reveals much criticism regarding the results of the reform.[71] More than half of the individuals surveyed felt that the entire reform should be discarded due to its rigidity.[72]

2. Formalism Is Inappropriate in Domestic Relations Law

The situations that arise in family law are not only diverse, but also too sensitive to blindly adhere to only what is written down.[73] "When the judicial system becomes involved in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided."[74] Furthermore, legislatures did not intend for courts to react in a formalistic manner, evidenced by the broad discretion that is currently afforded in domestic relations.[75]

Discretion in family law originated in the courts of equity, which were founded essentially to circumvent the rigidity of the courts of law in

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[69] *Id.* at 416.

[70] Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-59 (1994 & Supp. 1998) (outlining what sentences are available for particular classes of crimes and specific factors to be considered when deciding on a sentence); *Id.* §§ 3561-66 (outlining the guidelines for sentence of probation); *Id.* §§ 3571-74 (outlining the guidelines for sentence of fines); *Id.* §§ 3581-86 (outlining the guidelines for sentence of imprisonment); 28 U.S.C. §§ 991-98 (1988 & Supp. 1993).

[71] *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) (arguing the move from individualized to aggregated sentences is a step backward in the search for criminal justice); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992) (examining the new guidelines and considering why they are not working); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991) (arguing that many of Congress' objectives in passing these guidelines have been, at most, only superficially achieved); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (analyzing Judge Heaney's criticisms and proposed solutions to sentencing reform in Heaney, *supra*); *see also* Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 171-72 (1995) (describing level and sources of dissatisfaction with guidelines).

[72] Garrison, *supra* note 68, at 417 n.51.

[73] FAMILY LAW AND PRACTICE § 32.06[1], at 32-241 (Arnold H. Rutkin ed., 1997).

[74] Collins v. Gilbreath, 403 N.E.2d 921, 923 (Ind. Ct. App. 1980) (upholding custody award to the father and allowing visitation to the stepfather following suicide of mother).

[75] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 493, 495 (2d ed. 1987); *see supra* note 47.

certain areas.[76] Over time, the use of discretion has grown and replaced the application of strict rules in domestic relations.[77] In the past few decades, there has been an attempt at consistency in the consideration and eventual adoption of uniform laws.[78] However, this increase in the adoption of statutes has *not* decreased the amount of judicial discretion.[79] These new statutes still contain ambiguous standards so that the court simply has a starting point in exercising its discretion.[80]

For example, marriage law began to transform from a very specifically defined concept into many different entities.[81] There has been an emergence of common law marriage,[82] plus social changes such as group "marriage," and "open-ended marriage."[83] Additionally, courts began to recognize more unconventional family arrangements, such as extended families and interracial marriages.[84] This coincided with other marital freedoms[85] and more mild consequences when marriage laws were violated.[86]

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[76] Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 212 (1991).

[77] *Id.*

[78] *E.g.*, Uniform Marriage and Divorce Act, 9A U.L.A. 147 (1988) (providing uniform procedures for solemnization and registration of marriage, makes irretrievable breakdown the sole basis for dissolution, and makes reasonable provisions for spouses and minor children); Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115 (1988) (avoiding jurisdictional conflicts with courts of other states concerning child custody issues and provides that such disputes are resolved in the court which can best decide the case in the best interest of the child); Uniform Parentage Act, 9B U.L.A. 287 (1988) (providing uniform procedures for establishing paternity and defining rights and duties of parents).

[79] Murphy, *supra* note 76, at 212-14.

[80] *Id.*

[81] CLARK, *supra* note 75, at 24-25.

[82] *See* Walter O. Weyrauch, *Informal and Formal Marriage—An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88 (1960). Common law marriage is currently on a decline. CLARK, *supra* note 75, at 45. Only thirteen states still recognize common law marriage. *Id.* at 46; *see, e.g.*, ALA. CODE § 30-1-9, tit. 34 (1997); OKL. STAT. tit. 43, §§ 1, 4 (1997).

[83] Group marriages involve three or more people who consider themselves to be married. CLARK, *supra* note 75, at 25. Open-ended marriages are marriages where the couple agrees that each can have sexual relations outside the marriage. *Id.*

[84] *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (holding zoning requirements disallowing a grandmother and her two grandsons to live together since the two grandsons were cousins to be unconstitutional); Loving v. Virginia, 388 U.S. 1 (1966) (finding laws that forbid interracial marriage to be unconstitutional).

[85] Zablocki v. Redhail, 434 U.S. 374 (1978) (finding unconstitutional a law requiring child support obligors to get permission from the court before entering into a marriage). Also, more states began to recognize cohabitation as a recognizable union without marriage through the common law marriage statutes. *See supra* note 82.

[86] Many of the marriage laws on the books were being held as directory; violations usually do not result in void marriages as they had in the past. Michael Grossberg, *Balancing Acts: Crisis, Change,*

Second, there was a reformation of the divorce law with the introduction of no-fault divorce in 1970.[87] Early divorce law required a showing of fault before divorce would be granted.[88] No-fault allowed couples to obtain a divorce without having to prove a marital wrong from the list in their state statute.[89] The new no-fault statutes contained ambiguous standards such as "incompatibility" or "irretrievable breakdown," bestowing much discretion on the courts to ascertain their meaning.[90] Currently, some form of no-fault divorce is available in all states, making divorce "a right rather than a remedy."[91] This was a huge shift from strict regulation to judicial discretion.

Third, child support is an area where the federal government has attempted to curtail discretion, and yet courts still must exercise it to a certain extent. In 1989, the federal government passed an amendment requiring state statutes to establish specific guidelines for child support as a rebuttable presumption.[92] Note that this is a *rebuttable* presumption. Although courts must follow the guidelines in establishing the amount of support, either party may rebut this figure as unsuitable.[93] Therefore, even in one of the strictest areas of domestic relations law, the court still retains a great deal of discretion.

Finally, and most significant to this Note, the area of custody and visitation has also recognized a major change toward individual choice. From the late nineteenth century to the present, custody law has gone from strict preference of the father to strict preference of the mother to the

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and Continuity in American Family Law 1890-1990, 28 IND. L. REV. 273, 293 (1995) (citing WALTER O. WEYRAUCH & SANFORD N. KATZ, AMERICAN FAMILY LAW IN TRANSITION 352 (1983)).

[87] *Id.* at 293.

[88] Garrison, *supra* note 68, at 419-20.

[89] *Id.* at 420.

[90] Grossberg, *supra* note 86, at 296. "The Court shall enter a decree of divorce whenever it finds that the marriage is irretrievably broken and that reconciliation is improbable." DEL. CODE ANN. tit. 13, § 1505(a) (1997). "Divorce from the bonds of matrimony may be obtained for: . . . 3. Incompatibility." NEV. REV. STAT. ANN. § 125.010 (Michie 1997).

[91] Garrison, *supra* note 68, at 420.

[92] Family Support Act of 1988, 42 U.S.C. § 667 (Supp. 1990). For further discussion of child support guidelines, see Garrison, *supra* note 68, at 421 n.72 (citing Irwin Garfinkel & Marygold S. Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157, 162-68 (1990); Claire B. Grimm & Janice T. Munsterman, National Center for State Courts, *A Summary of Child Support Guidelines* (National Center for State Courts 1991)). For examples of state guidelines, see, e.g., COLO. REV. STAT. § 14-10-115(10)(b) (1987); MD. CODE ANN., [FAM. LAW] § 12-204(e) (1989); OHIO REV. CODE ANN. § 3113.215 (Baldwin 1997).

[93] For example, the Ohio Code lists many factors that may be considered by the court to cause the presumed amount to be "unjust or inappropriate and would not be in the best interest of the child." OHIO REV. CODE ANN. § 3113.215(B)(3). The list includes a final umbrella factor stating "(p) Any other relevant factor." *Id.*

standard of what is best for the child.[94] This discretion is generally afforded in the statutes by the language "[in the] best interests of the child."[95] This new standard inherently confers complete judicial discretion.

The judicial discretion allowed in domestic relations, however, is not unlimited. Courts are still limited by appellate courts' power of reversal, acknowledged precedent, and recognized norms in society.[96] Additionally, there has been no evidence that development of rigid rules would produce better results than discretion.[97] The price of certainty may well be inequity.[98]

Domestic relations has always been a highly emotional and individualized area of the law. However, with the changes in focus over the past century, family law has become much more dependent on judicial discretion in deciding cases. This is particularly true in situations where judges must apply the "best interests" test. Judges are given total authority to make custody and visitation arrangements within the guidelines of the custody statute as long as it is in the best interest of the child.

B. Mississippi Court Had Broad Discretion and Should Have Awarded Sibling Visitation

The court in *Scruggs* concluded that it could not award sibling visitation because there was no statute that specifically gave it such power, despite its belief it would be in the children's best interest.[99] However, there is no specific statute defining parental visitation in Mississippi either. The chancery courts in Mississippi have used their broad discretionary powers under the custody statute[100] to allow various custody and visitation scenarios in many situations.[101] Several other states derive their power to

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[94] CLARK, *supra* note 75, at 476-80; *see generally* Grossberg, *supra* note 86.

[95] This standard is used to decide custody and visitation issues in every jurisdiction. FAMILY LAW AND PRACTICE, *supra* note 73, § 32.06[1], at 32-119. Visitation rights are primarily the right of the child, and secondarily the right of the parent. *Id.* Children's interests need to be the more protected for two principal reasons. *Id.* First, they are the only ones involved in the adjudication who are not capable of protecting their own interests. *Id.* Second, they are less responsible for bringing this situation to a court; essentially they are victims of the entire process. *Id.* With this in mind, a court must always keep the best interests of the child in focus when making any rulings regarding their welfare. *Id.*

[96] Garrison, *supra* note 68, at 413 & n.35.

[97] *Id.* at 416-19.

[98] *Id.* at 417.

[99] Scruggs v. Saterfiel, 693 So. 2d 924, 926 (Miss. 1997).

[100] MISS. CODE ANN. § 93-5-23.

[101] *See* Cheek v. Ricker, 431 So. 2d 1139, 1142, 1145 (Miss. 1983) (court correctly used its discretion in modifying visitation to two-day periods despite distance separating parties); Clark v.

award visitation from the language of the custody statute.[102] Some states have taken the extra step of using discretion from custody or visitation statutes to allow parties to bring actions for visitation between siblings and other third parties when it is in the best interest of the children.[103] The *Scruggs* court also should have used its discretion and ordered visitation between Stacey and Tony.

Although Mississippi has a custody statute that outlines the different types of state recognized custody,[104] there is no specific statute setting out directives on parental visitation. The courts derive their power to grant all visitation from the broad language of the custody statute: "[T]he court may, *in its discretion*, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, *make all orders touching the care, custody and maintenance of the children. . . .*"[105] The next section of the Mississippi Code states that custody decisions are to be made in the best interest of the child.[106] The Mississippi Supreme Court has repeatedly acknowledged the discretion of the chancery court in granting visitation.[107]

The Mississippi Supreme Court has also acknowledged the significance of sibling relationships.[108] "[T]he love and affection of a

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Myrick, 523 So. 2d 79, 83 (Miss. 1988) (court did not modify visitation decree, as no findings existed that the original decree was not still in the best interest of the child); Roach v. Lang, 396 So. 2d 11, 14-15 (Miss. 1981) (court modified custody and visitation after recognizing another state's decree through full faith and credit).

[102] MO. ANN. STAT. § 452.375 (Vernon 1997); NEV. REV. STAT. § 125.480 (Michie 1997); OKLA. STAT. ANN. tit. 43, § 112 (West 1997); TENN. CODE ANN. § 36-6-106 (1997).

[103] *In re* Daniel W., 529 N.W.2d 548 (Neb. 1995) (ordering visitation between uncontrollable juvenile and his two-year-old sister over parents' objections); *In re* D.M.M., 404 N.W.2d 530 (Wis. 1987) (awarding visitation between child and great aunt in the absence of a statute); L. v. G., 497 A.2d 215 (N.J. Super. Ct. Ch. Div. 1985) (holding visitation between siblings to be a right subject to best interests); *In re* Wemark, 525 N.W.2d 7 (Iowa Ct. App. 1994) (holding that absence of statutory or common law right of visitation between siblings did not prevent half-sister from seeking visitation); Rogers v. Trent, 594 A.2d 32 (Del. 1991) (awarding visitation to great aunt and uncle because it was in the child's best interest).

[104] MISS. CODE ANN. § 93-5-24 (1972 & Supp. 1997).

[105] *Id.* § 93-5-23 (emphasis added).

[106] "Types of custody awarded by court; joint custody; access to information pertaining to child by noncustodial parent. (1) Custody may be awarded as follows according to the best interests of the child . . . ." *Id.* § 93-5-24. The statute goes on to list several different alternative custody arrangements. *Id.*

[107] Martin v. Coop, 693 So. 2d 912, 915 (Miss. 1997) ("Visitation and restrictions placed upon it are within the discretion of the chancery court.") (quoting White v. Thompson, 569 So. 2d 1181, 1189 (Miss. 1990)); Clark v. Myrick, 523 So. 2d 79, 83 (Miss. 1988) (holding the chancery court enjoys a large amount of discretion on visitation and other issues involving children).

[108] Sellers v. Sellers, 638 So. 2d 481, 484 (Miss. 1994). In discussing the proper role of the court, the *Sellers* court stated:

> The court shall in all cases attempt insofar as possible, to keep the children together in a family unit. It is well recognized that the love and affection of a brother and sister at the

brother and sister at the ages of these children is important in the lives of both of them and to deprive them of the association ordinarily would not be in their best interests."[109] The *Scruggs* court cited this very language.[110] The court further stated in these prior cases that the children should be kept together, absent "unusual and compelling circumstance[s]."[111] The children in the *Scruggs* case may not have been able to live together, but the court certainly did not have an unusual or compelling circumstance that prevented it from awarding visitation.

The *Scruggs* court relied on the existence of the Mississippi Grandparent Visitation Statute[112] to alleviate its ability to award visitation between siblings.[113] The grandparent visitation statute has nothing to do with the court's exercise of discretion intended under the custody statute. The Grandparent Visitation Statute provides grandparents with standing to seek visitation rights.[114] This is simply a codification of common law ensuring that grandparents are provided with this right, but not excluding other parties. A similar situation was addressed by the Wisconsin Supreme Court in *In re D.M.M.*[115] This court awarded visitation to the great-aunt of a child without any statute authorizing such visitation.[116] The Wisconsin domestic relations statutes are similar to Mississippi in that they do not specifically provide for parental visitation.[117] The court determined that if the legislature intended these statutes to be exclusive as to who could seek visitation, natural parents would be prohibited from doing so.[118] The Wisconsin Supreme Court held that its grandparent statute was simply a codification of common law to guarantee this right to grandparents and not subject them to changing common law.[119] The court specified that codifying the grandparents' right to seek visitation did not preclude other parties from obtaining visitation.[120] Although this same concept has not

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> ages of these children is important in the lives of both of them and to deprive them of the association ordinarily would not be in their best interests.

Id. (quoting Mixon v. Bullard, 217 So. 2d 28, 30-31 (Miss. 1968)).

[109] *Sellers*, 638 So. 2d at 484; *Mixon*, 217 So. 2d at 30-31.

[110] Scruggs v. Saterfiel, 693 So. 2d 924, 926 (Miss. 1997).

[111] *Sellers*, 638 So. 2d at 484; *Mixon*, 217 So. 2d at 30-31.

[112] MISS. CODE ANN. § 93-16-5 (1972 & Supp. 1997).

[113] *Scruggs*, 693 So. 2d at 926.

[114] MISS. CODE ANN. § 93-16-5.

[115] 404 N.W.2d 530 (Wis. 1987).

[116] *Id.*

[117] WIS. STAT. ANN. § 247.24 (West 1997).

[118] *D.M.M.*, 404 N.W.2d at 536.

[119] *Id.*

[120] *Id.*

been verbalized by the Mississippi courts, due to the similarity in the domestic relations statutes of the two states, it is a reasonable assumption that the Mississippi legislature had the same intention.

Sibling and other third-party visitation actions have arisen in several other jurisdictions.[121] In all of these situations, the state did not have a third-party visitation statute. The courts used their discretionary power to award visitation because it was in the children's best interests.[122] Some of these courts actually declared that "siblings possess the natural, inherent and inalienable right to visit with each other."[123] If courts would recognize that siblings do have an inherent right to association, they would not need a statute to grant the visitation.[124]

In *L. v. G.*, the New Jersey Supreme Court found that children possessed the "natural, inherent and inalienable right to visit with each other."[125] The adult children in this case sought visitation with their minor siblings; their father and stepmother contested the visitation rights.[126] The court held that parents' opposition should never be the reason sibling visitation is denied.[127] The statutory language relied on in *L. v. G.* was strikingly similar to the language of the Mississippi custody statute.[128] Any decisions regarding visitation should be based on the best interests of the children, not the best interests of the parents.[129] The Colorado Court of Appeals in *Bernick v. Bernick* also recognized that visitation with family members is an inherent equitable right of the child.[130] If these children possess a natural right to visit, there is no need for a statute.[131]

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[121] *In re* Daniel W., 529 N.W.2d 548 (Neb. 1995); *D.M.M.*, 404 N.W.2d at 530; L. v. G., 497 A.2d 215 (N.J. Super. Ct. Ch. Div. 1985).

[122] *Daniel W.*, 529 N.W.2d at 556; *D.M.M.*, 404 N.W.2d at 534; *L.*, 497 A.2d at 222.

[123] *Daniel W.*, 529 N.W.2d at 555; *L.*, 497 A.2d at 222.

[124] Joel V. Williams, *Sibling Rights to Visitation: A Relationship Too Valuable to Be Denied*, 27 U. TOL. L. REV. 259, 269-70 (1995) (arguing the importance for each state to pass a sibling visitation statute).

[125] *L.*, 497 A.2d at 222.

[126] *Id.* at 216.

[127] *Id.* at 221.

[128] The *L v. G.* court relied on the following language:

> [T]he court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just....

Id. at 217.

[129] Bernick v. Bernick, 505 P.2d 14, 15 (Colo. Ct. App. 1972) (holding that the custodial parent was allowed to move out of state with the children as it was in their best interest, despite the effect on noncustodial parent).

[130] *Id.* at 15; *see* Williams, *supra* note 124, at 278.

[131] *In re* Daniel W., 529 N.W.2d 548, 555 (Neb. 1995); *L.*, 497 A.2d at 222.

The decision in *L. v. G.* was based on the uniqueness and significance of the sibling relationship.[132] Siblings provide emotional support for each other throughout their entire lives, a relationship that usually surpasses those with parents or spouses. This relationship is particularly necessary during stressful life events, such as divorce or the death of a parent.[133] It would be absurd to deny this natural support system to children during the most difficult periods in their lives.[134] The court in *Scruggs v. Saterfiel* should not have taken such a formalistic approach by disallowing these children to visit when they had the authority to award the visitation.

IV. CONCLUSION

The court in *Scruggs v. Saterfiel* denied visitation between Stacey and Tony because it did not have an explicit statute.[135] This formalistic approach was entirely inappropriate and unwarranted. The court failed to recognize that there is also no specific statute for parental visitation in Mississippi, but judges continue to issue such visitation orders daily. As other jurisdictions have already recognized, the court may use its broad discretion to order visitation whenever it is in the best interest of the children. Mississippi courts have acknowledged that maintaining sibling relationships is in the best interest of the children.[136] The court should have applied this knowledge and used its discretion to allow Stacey and Tony to preserve the relationship they have had all their lives.

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[132] The *L. v. G.* court stated:

> Surely, nothing can equal or replace either the emotional and biological bonds which exist between siblings, or the memories of trials and tribulations endured together, brotherly or sisterly quarrels and reconciliations, and the sharing of secrets, fears and dreams. To be able to establish and nurture such a relationship is, without question, a natural, inalienable right which is bestowed upon one merely by virtue of birth into the same family.

L., 497 A.2d at 218.

[133] Lori Kaplan et al., *Splitting Custody of Children Between Parents: Impact on the Sibling System*, 74(3) FAMILIES IN SOC'Y 131, 133 (1993).

[134] *Id.*

[135] Scruggs v. Saterfiel, 693 So. 2d 924, 926 (Miss. 1997).

[136] Sellers v. Sellers, 638 So. 2d 481, 484 (Miss. 1994); Sparkman v. Sparkman, 441 So. 2d 1361, 1362 (Miss. 1983); Mixon v. Bullard, 217 So. 2d 28, 30-31 (Miss. 1968).