IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KIM LASHAN GILLILAND — **APPELLANT**

V.

CASE NUMBER 2006-TS-02110
OKTIBBEHA COUNTY CHANCERY COURT
FIRST DISTRICT CAUSE NO. 02-0014-B

ROGER NEAL GILLILAND — **APPELLEE**

APPEAL FROM THE
CHANCERY COURT OF OKTIBBEHA COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

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*Oral Argument is not requested.

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III. ISSUES RAISED BY CROSS-APPEAL

The issue raised by Roger in his Cross-Appeal can succinctly be stated as follows:

DID THE CHANCELLOR ERR IN MODIFYING KIM'S VISITATION SCHEDULE DESPITE HAVING GRANTED ROGER'S *MOTION TO DISMISS* ORE TENUS AT THE CONCLUSION OF KIM'S CASE IN CHIEF?

IV. ARGUMENT

The issue raised by Roger on his Cross-Appeal can succinctly be stated as follows:

Did the Chancellor err in modifying Kim's visitation schedule despite having granted *Roger's Motion to Dismiss* ore tenus at the conclusion of Kim's case in chief?

This issue can be easily addressed and resolved in Kim's favor. In the *Opinion and Judgment* which was entered by the Chancellor on June 26, 2006, the Chancellor stated, "Court does not believe that the facts as found above or all the evidence supports a finding that a material change in circumstances adversely affects Shawn and Brandon.(sic)" [C.P. 44-46]. It is clear from reading the *Opinion and Judgment,* as well as the bench opinion from the Court, that the Court granted Roger's *Motion to Dismiss* based upon a finding that the requirements for a modification of custody had not been proven. Kim, in her *Appellant's Brief,* strongly suggests that the finding of the Chancellor was in error as to that regard. However, Roger's belief that the Chancellor had no authority to modify visitation is misplaced. The fact that the Chancellor failed to find that the evidence was sufficient to justify a modification of custody does not limit or impair the Chancellor's ability to modify visitation.

> In *Cox v. Moulds,* 490 So. 2d 866, 869 (Miss. 1986), the Mississippi Supreme Court set the standard for a trial court to follow when confronted with a request to alter a parent's visitation schedule with the minor child. In *Cox*, our Supreme Court stated that in order to modify the visitation schedule "[A]ll that need[s] [to] be shown is that there is a prior decree providing for reasonable visitation rights which isn't working and that it is in the best interest of the children." (Id.)
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> . . . .
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> In cases such as this, our familiar change in circumstances rule, see, e.g. *Cheek v. Ricker*, 431 So. 2d 1139, 1144 (Miss. 1983), has no application. This is because the court is not being asked to change the permanent custody of the children. (*Sistrunk v. McKenzie*, 455 So. 2d 768, 770 (Miss. 1984). All that need be shown is that there is a prior decree providing for reasonable visitation rights which isn't working and that it is in the best interest of the children as faltering a positive and harmonious relationship between them and their divorced parents to have custody provisions made specific rather than flexible and attendantly vague." (citing *Cox*, 490 So. 2d at 869). *Suess v. Suess*, 718 So 2d 1126, 1130 at ¶16.

In *McCracking v. McCracking,* the father filed a complaint seeking to modify custody. *McCracking v. McCracking*, 776 So. 2d 691, 693 (Miss. Ct. App. 2000). The mother, who had custody, filed a response denying that a modification of custody was appropriate, and requested an increase of child support and a restraining order. *Id.* At the conclusion of the trial, the Chancellor refused to modify custody, but did modify the visitation schedule by eliminating the father's mid-week visitation. The Chancellor found that Mr. McCracking failed "to prove a change in circumstances detrimental to the children's best interest. . ." yet the Chancellor still exercised his authority and discretion to modify visitation. *Id* at 694. "The Chancellor's discretion to amend visitation schedules to advance the best interest of the children is broader than the discretion to change custody. The Chancellor must only determine that there is an existing visitation schedule that is not presently working" *McCracking v. McCracking*, 776 So. 2d 691, at 694,695, (citing Suess v. Suess, 718 So. 2d 1126).

The Chancellor has broad discretion with respect to the visitation rights of non-custodial parents. *Newsom v. Newsom*, 557 So. 2d 511, 517 (Miss. 1990); *Clark v. Myrick*, 523 So. 2d 79, 83 (Miss. 1988). As is readily apparent from the above cases and numerous others which could be cited, Roger's position that the Chancellor lacks the authority to modify the visitation schedule is simply misplaced and is not well-founded, in fact or law. The Chancellor clearly had sufficient evidence from which to find that the visitation schedule previously set forth by the Court was not working, and that a modification of that visitation schedule was in the best interest of the children. *Suess v. Suess*, 718 So. 2d at 1130. There can be no genuine argument that there was no evidence presented to the Chancellor that the visitation schedule was not working and not in the best interest of the children. To the contrary, the record establishes a colossal amount of evidence to support such a finding. The Court specifically found that, "Kim and Roger continue to have a volatile

relationship and let their feelings for one another adversely affect their sons." [C.P. 46]. The Court further stated that, "Roger clearly lets his hatred for Kim interfere with his judgment." [C.P. 47]. It is clear from the Chancellor's order and bench ruling that his intent in modifying visitation was to minimize the amount of personal contact between Kim and Roger in exchanging the minor children. Allowing Kim to pick up the children from school and to return the children to school eliminates the need for that direct contact, and therefore, eliminates the exposure of the children to the type of angry, bitter, and emotionally harmful activity which has in the past existed between these parties.

Given the broad discretion afforded to the Court in these matters, and given the gross amount of evidence available to the Court in hearing the trial of this case, together with his familiarity with the parties and these issues from the previous hearings, Roger's argument that the Chancellor was without authority to modify visitation is yet another example of his controlling personality and his inability to make concessions that would be beneficial to the well-being of the minor children.

In Roger's brief, he states, "The visitation ordered by Judge Burns had no relationship to the visitation dispute described at trial. It simply provided Kim with additional time with the children – without addressing any of the conflict between the parties." *Appellee's Brief*, page 12. To the contrary, the Court did address the conflict between these parties. By eliminating the requirement of direct contact with one another, the Court eliminated the opportunity for conflict between the parties. Roger argues in his brief that he had "no notice that the issue was under consideration by the Court, and no evidence was presented on the issue by either party." *Appellee's Brief*, page 36. In making that allegation, Roger certainly cannot be suggesting that no evidence was presented to the Chancellor concerning the animosity and activities of these parties during the

exchange of visitation. Again, the record is replete with such evidence. With respect to Roger's argument that he was not allowed to present evidence, one must wonder exactly what evidence Roger would want to offer which could refute the fact that minimizing the amount of direct contact these parties have in the presence of the minor children is in the best interest of the minor children. If the multiple trials and multiple appeals that have arisen from the issues surrounding custody and visitation of these children do not support the Chancellor's rational conclusion that minimizes the direct contact between the parties is in the best interest of the minor children, one cannot imagine a case where such can be proven. What Roger is really upset about, is the fact that he no longer has the venue which he so enjoys of displaying his hatred and animosity toward Kim in the presence of the children. His opposition to the reasonable concession made by the Chancellor concerning the change in visitation is yet further evidence to support Kim's primary argument in her appeal; to-wit, the best interest of these minor children will never be fostered while in the physical custody of Roger, and that custody should be modified.

V. CONCLUSION

In conclusion, the case law is abundantly clear that the Chancellor had the authority to modify visitation where the existing visitation schedule was not working and was not in the best interest of children. The record contains substantial evidence to support the Chancellor's modification of visitation. Accordingly, with the discretion that is afforded to the Chancellor in these matters, the provision of modification of visitation ordered by the Chancellor should be affirmed.

RESPECTFULLY SUBMITTED this the 19th day of October, 2007.

KIM LASHAN GILLILAND, Appellant

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CERTIFICATE OF SERVICE

I, J. Mark Shelton, attorney for Appellant, do hereby certify that I have on this date served via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing *Appellant's Reply Brief* to the following:

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SO CERTIFIED, this the 19th day of October, 2007.

J. MARK SHELTON [redacted]