IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2007-CA-01385

CHASITY NICOLE SMITH WILBURN, **APPELLANT**

V.

WILLIAM HAYWOOD WILBURN **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1) Chasity Nicole Smith Wilburn, Appellant

2) William Haywood Wilburn, Appellee

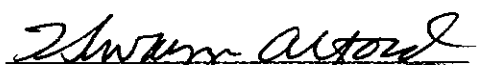
3) John T. Lamar, Jr., David M. Slocum, Jr., Lamar & Hannaford, P.A., Attorneys for Appellant

4) Gregory S. Park, Attorney for Appellant before appeal

5) T. Swayze Alford, Hollie Miller, Holcomb Dunbar, P.A. Attorneys for Appellee

6) Hon. V. Glenn Alderson, Chancery Judge

Respectfully submitted,



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I. STATEMENT OF THE ISSUES

1. The appeal of the Mother Chasity is untimely Chasity's Rule 59(e) Motion to Alter or Amend was not filed within 10 days after the entry of the of the Chancellor's final order of visitation entered on June 1, 2007. The 30-day time period for filing her appeal, therefore, ran from June 1, 2007. Chasity's Notice of Appeal was not filed until August 8, 2007, – 68 days after June 1, 2007. This appeal should not be heard.

2. The due process argument of the Mother Chasity is procedurally barred, and alternatively has no merit. For the first time on appeal, the Mother Chasity argues that she was not given "an opportunity to present any evidence in support of her Amended Petition for Modification" and that the absence of a hearing was a violation of her due process rights. Chasity did not present this due process argument to the Chancellor --- neither at trial nor in her post-trial motion -- and this due process argument is procedurally barred on appeal. Furthermore, Chasity's due process rights were not violated. In four separate instances before the Chancellor – the October 18, 2006, trial; the May 30, 2007, status hearing; in her June 12, 2007, post-trial motion; and at the July 2, 2007, hearing on the post-trial motion – Chasity did not move the Court for more time to present evidence, she made no objection to the Chancellor's handling of the evidentiary presentation, and she made no proffer as to the evidence she was allegedly prevented from presenting. Chasity's due process argument is without merit.

3. There is substantial evidence in the record supporting the changes in the Mother Chasity's visitation rights as in the best interest of the minor children. The Chancellor found that

the Mother continues to discuss inappropriate details of the divorce proceedings with the minor children despite previous admonishment from the Chancellor and despite the emotional detriment these discussions have on the children.

The Appellant, Chasity, indicates that she requests oral argument on this appeal. The Appellee, Bill, respectfully disagrees. The appeal is untimely, the Appellant's due process argument is procedurally barred, and the record contains substantial evidence to support the Chancellor's modification of visitation as in the best interest of the minor children. The facts of this case do not warrant oral discussion of the law controlling this case.

II. STATEMENT OF THE CASE

A. Nature of the Case

The Mother Chasity appeals modification of her visitation rights by the Chancellor's June 1, 2007, Order. The June 1, 2007, Order changed the Mother's visitation in three ways: (1) it revoked her Wednesday night visitation with the minor children; (2) it changed her alternating-weekend visitation to end on Sunday night instead of Monday morning; and (3) it granted her telephone visitation every Tuesday and Thursday night and additionally, whenever the minor children desire. (R. 144-146). As admitted by her counsel, the Mother continues to enjoy "very liberal [visitation] – in excess of what is called for by the Farese Schedule." (T. 55).

B. Procedural History.

On April 15, 2004, Bill and Chasity Wilburn jointly filed for divorce citing irreconcilable differences. (R.1). By agreement, the parties settled all property, debt allocation, child support, custody and visitation issues. (R. 9). Bill and Chasity filed a Property Settlement Agreement with the Court on June 8, 2004. (R. 9).

On June 16, 2004, a Final Decree of Divorce was entered. The Decree awarded the parties "joint legal and physical custody of the minor children, with Husband having primary physical custody and Wife having reasonable visitation periods with the children as set forth in the Property Settlement Agreement . . . ." (R. 22). The Court reviewed the Separation Agreement, found it to be complete, fair, and equitable, and incorporated it into the Decree of Divorce. (R. 22).

On December 2, 2004, Chasity filed a Petition pursuant to M.R.C.P 60 to modify her visitation rights. (R. 38). As grounds, Chasity argued that Bill 's "strict adherence to the visitation schedule set forth in the Decree "operated" as a material change in circumstances adverse to the

children warranting modification of the custody Decree." (R. 39). Chasity stated that prior to the Decree, she and Bill shared physical custody on an alternating weekly basis and that Bill led her to believe that this arrangement would continue. (R. 38). Alternatively, Chastity argued that Bill's assurances that the alternating-weekly visitation would continue despite the Court-ordered visitation schedule was "fraud, misrepresentation, and/or misconduct . . . or accident or mistake" justifying modification of the Decree under Rule 60. (R. 40). Chasity was unrepresented by counsel prior to the entry of the Divorce Decree. (R. 23). Her Petition states: "Had there not been sufficient assurances from [the Father] that visitation would remain as it had been prior to the finalization of the divorce she would not have executed the Property Settlement Agreement and proceeded forward without seeking advice of counsel." (R. 41).

C. Facts.

A trial was set for May 2, 2005, and witnesses were subpoenaed. (R. 63-73). The trial was continued because the parties were able to reach an agreement that the Mother would be allowed additional visitation. (T. 2-3, R.109). Before the Chancellor, Chasity's counsel read the agreement into the record, which increased the Mother's visitation to include every Wednesday night during the school year, and more visitation during Christmas and Spring Break. *Id.*

Disputes between the parties regarding visitation and the children's contact with their Mother continued, and on February 23, 2006, the parties filed a joint motion for a hearing. (R. 82). On May 19, 2006, the Mother filed an Amended Petition "seeking to modify custody and/or visitation rights," again arguing that the Father's compliance with the court-ordered visitation schedule had caused a material change in circumstances for the minor children, or alternatively was fraud, misconduct, accident or mistake. (R.86).

Trial commenced October 18, 2006. (T. 4). Again, witnesses were subpoenaed. (R.111-31). Chasity's counsel called Julie Davidson, a graduate student therapist in the Psychological Services Center at Ole Miss to testify regarding her evaluation of the parties and their minor children. (T. 7). When Chasity's counsel asked Ms. Davidson if Chasity had done anything that in her opinion was detrimental to the minor children, Ms. Davidson responded:

> A. Yes, sir. There were – there was an incident when after meeting with the girls and I – walked out and Taylor had been made aware of what had gone on between Mr. and Ms. Wilburn in the therapy session when they were in with me alone, and she was very upset by that.

(T. 36). The Chancellor questioned Ms. Davidson regarding this matter:

> THE COURT: Okay. All right. So who told Taylor what happened?
>
> WITNESS: I have to assume that Chasity, her mother, told Taylor, and I found her in the parking lot upset. They were getting ready to leave.
>
> THE COURT: Was that the proper thing for the mother to do?
>
> THE WITNESS: I would say, no, sir.
>
> THE COURT: Why would you say "no"?
>
> THE WITNESS: I'm not an expert, but I would just assume that it would not be – it would not be a good idea to talk to the 12 year old about –
>
> THE COURT: Doesn't it appear to you – doesn't it appear to you that the mother is using the counseling sessions to try and get her way?
>
> THE WITNESS: I don't know about that.
>
> THE COURT: Well, why else would she tell the child?
>
> THE WITNESS: I don't –
>
> THE COURT: Grown ups normally don't go to a child once they had arguments and disagreements, and say, Come here honey let me tell you what daddy said blah, blah, blah, blah. They don't – they don't do that unless they have got an

ulterior motive

(T. 39-40). The Chancellor stated to Ms. Davidson:

> Ms. Wilburn is complaining about a visitation schedule that she agreed to and signed to it. And, evidently, she's been discussing it in front of the children. That's what is troubling me. I've listened to you very patiently, and it appears that these children are being manipulated by a mother that wants to set the visitation the way she wants to set it . . . ."

(T. 34-35).

Chasity's attorney fully questioned Ms. Davidson and tendered her as a witness to Bill's attorney. (T. 7-48). Before Bill's attorney cross-examined Ms. Davidson, the court recessed for lunch. (T. 48-49). After the break, the Chancellor addressed the parties. (T. 49). He expressed that he was not satisfied with the counseling the parties and minor children had received, and he ordered that it not continue. (T. 49). Instead, he appointed a licensed psychologist, Dr. Wyatt Nichols, to evaluate the parties and the minor children, and to provide input in relation to resolving the parties' issues. (T. 50). The Chancellor continued the trial until such time as Dr. Nichols's report was received. (R.132). In the interim, the Chancellor allowed the Mother additional visitation "to include, in addition to every Wednesday night visitation, that her every other weekend visits will conclude when the children resume school on Monday mornings rather than terminating on Sunday evenings." (T. 50, R. 132-33). After making these determinations, the Chancellor asked counsel if there were any questions. (T. 52). Counsel for both parties replied that they had no questions. (T. 52). The Chancellor asked counsel to confer with their clients to make sure that the clients had no questions. (T. 52). Counsel for both parties stated that their clients had no questions. (T. 52). Neither party objected to the Court's order appointing Dr. Nichols, and neither party objected to the continuance of trial.

After the Court received Dr. Nichols's report, a status hearing was held on May 30, 2007, to "determine resumption of the trial already in progress and any applicable supplemental matters." (R.139). The Chancellor "having received a Report from the Psychologist" made specific decisions regarding minimum visitation for the Mother which he reduced to an order. (R.144). Though the Chancellor considered Dr. Wyatt Nichols's report before issuing the visitation order, Dr. Nichols's report was not placed in the record. At the time that the Chancellor resumed the hearing on May 30, 2007, neither Chasity nor her attorney objected to the Chancellor's consideration of Dr. Nichols's report nor did they offer any additional evidence or indicate in any manner that they desired to offer additional evidence in their case.

The Chancellor's Order did not continue the Mother's Wednesday night visitation, and her alternating weekend visitation was ordered to conclude on Sunday evenings instead of Monday mornings. (R.144). The Mother was, however, granted telephone visitation with the children each Tuesday and Thursday at 7 p.m. and additional telephone visitation whenever the minor children desire. (R .145). The Order on visitation was approved as to form by counsel for both parties, signed by the Chancellor on May 31, 2007, and entered on June 1, 2007. (R.143-46).

On June 12, 2007, Chasity filed a Motion to Alter or Amend Judgment pursuant to M.R.C.P. 59(e). (R.147). As grounds, Chasity argued that the Chancellor reduced her visitation, despite Dr. Nichols's recommendations. (R.147). Bill's counsel answered that any additional conduct with the Mother was disruptive to the minor children because the Mother continues to discuss the court proceedings with the children. (R.151). Chasity failed to make any allegation in her Motion that she had evidence to submit or that she was not allowed to finish her case at trial. (R. 147-48).

A hearing was held on Chasity's post-trial motion on July 2, 2007. (R. 150). To begin the

hearing, the Chancellor made a record regarding the Mother Chasity and her father's disruption after the May 30, 2007, status hearing where the Chancellor decreased the Mother's physical visitation but granted her telephone visitation. (T. 52-53). The Chancellor stated:

> At the conclusion of the matter, Chasity Wilburn became very loud and boisterous in the Courtroom. I directed her counsel, Mr. Park, to get her out of the courtroom before I jailed her. She left the courtroom talking back to the Court, and as about to exit the courtroom, her father cursed the Court. So I issued a capias for her father and he went to the Lafayette County Detention Center as a result of that. And Ms. Wilburn has gone to the Lafayette County Detention Center cursing the Court and everybody else, and has continued to do it. So, I want this in the record as to what happened at the last hearing.

(T. 53).

The hearing then continued, and Chasity's counsel asked the Chancellor to increase Chasity's visitation based on the report of Dr. Wyatt Nichols, or alternatively, to reinstate Chasity's Wednesday night visitation and extended weekend visitation to end on Monday morning instead of Sunday evenings. (T. 54-55). Again, Dr. Nichols's report was not placed in the record.

The Chancellor countered that he was still concerned that the Mother was discussing the legal proceedings with the children. (T. 55). Bill's counsel possessed a tape recording of the Mother Chasity telling the minor children that she would let them listen to a tape recording of the May 30, 2007, status hearing. (T. 57-58). The Mother admitted, after questioning by the Chancellor, that she had told the minor children that she would allow them to listen to a recording of the Court's proceeding on May 30, 2007. (T. 57-58). The Chancellor denied the Mother's Motion to Alter or Amend Judgment and stated to the Mother:

> You are going to learn some day to do what the Court has told you to do, but you go against the Court Order all of the time. I was prepared to give you extended or additional visitation until this happened. I am sorry. The disruption that you and your family caused in the courtroom, and you continue to discuss these legal

proceedings with your children, and the Court has admonished you time and time again not to. I'm denying the motion.

(T. 58).

Chasity filed a Notice of Appeal on August 8, 2007, arguing that she was denied due process because she "was not allowed to present any evidence in support of her Amended Petition for Modification of the Divorce Decree." *Appellant's Brief*, 8. She also argues on appeal that the Chancellor erred by reducing her visitation when Bill "did not prove a material change of circumstances which adversely affects the welfare of the children." *Appellant's Brief*, 11, 12.

III. SUMMARY OF ARGUMENT

The appeal of the Mother Chasity is untimely, her due process argument is procedurally barred and alternatively, without merit; and the record contains substantial evidence to support the Chancellor's modification of visitation as in the best interest of the minor children.

IV. ARGUMENT

A. Standard of Review

The State vests its original power to hear all matters touching the custody and welfare of children in its chancery courts. Miss. Const. (1980) Art. 6 § 159; Miss. Code Ann. § 93-5-23 (1972). The chancellor "may make all orders touching the care, custody and maintenance of the children of the marriage, and . . . afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. Miss. Code Ann. § 93-5-23 (Supp.1982).

Review of a chancellor's decision in domestic relations cases is limited. *Phillips v. Phillips*, 904 So. 2d 999,1001(Miss. 2004). The chancellor's findings will not be reversed "unless the chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Id.* (citing *Owen v. Owen*, 798 So. 2d 394, 398 (Miss.2001); *Turpin v. Turpin*, 699 So. 2d 560, 564 (Miss.1997)).

The chancellor is the primary judge of the weight and value of the testimony. *Dubois v. Dubois*, 275 So. 2d 100, 101 (Miss.1973). The chancellor is vested with the responsibility to hear the evidence, assess the credibility of the witnesses, and determine ultimately what weight and worth to afford any particular aspect of the proof. *Brewer v. Brewer*, 919 So. 2d 135, 139 (Miss.App.2005). The chancellor's findings of fact so made are entitled to deference, and the Court's duty on appeal is to see if the chancellor's ruling is supported by substantial evidence. *Lee v. Lee*, 798 So. 2d 1284, 1288 (Miss. 2001). This is so, whether the finding relates to an evidentiary fact, (e.g. did Chasity discuss the court proceedings with the minor children despite previous admonishment), or ultimate fact, (e.g. is modification of visitation in the best interest of the minor children). *See Cheek v. Ricker*, 431 So. 2d 1139, 1144 (Miss.1983). The chancellor's decision

should be affirmed "if the record shows any ground upon which the decision may be justified." *Yates v. Yates*, 284 So. 2d 46, 47 (Miss.1973).

B. The Appeal of the Mother Chasity is Untimely

Chasity's appeal is untimely and should not be heard.

A motion to alter or amend must be filed within ten days after the entry of judgment. M.R.C.P. 59(e). The court is not permitted to extend this time period. *Comments* to Rule 59. If a Rule 59(e) motion is filed within ten days after the entry of judgment, "the time for appeal for all parties runs from entry of the order disposing of the last such motion outstanding." M.R.A.P. 4(d).

The Chancellor's final Order on visitation was entered on June 1, 2007. Ten days after the entry of the Order was June 11, 2007. Chasity's Rule 59(e) motion was not filed until June 12, 2007, eleven days after entry of the Order. Because Chasity's Rule 59(e) motion was not timely, the period for filing an appeal began on June 1, 2007, and not on July 19, 2007, when the Chancellor's Order was entered denying the post-trial motion. M.R.A.P. 4(d); *Bruce v. Bruce*, 587 So. 2d 898, 904 (Miss. 1991). Chasity did not file a Notice of Appeal until August 8, 2007, – 68 days after the Chancellor's June 1, 2007, Order. Because the appeal was not filed "within 30 days after the date of the entry of judgment or order appealed from," the appeal is untimely and cannot be heard. M.R.A.P. 4(a). The time period for filing an appeal is "mandatory and jurisdictional," and the Court has no authority to extend the time for filing an appeal. *See* M.R.A.P. 2(c) & 26(b).

C. The Due Process Argument of the Mother Chasity is Procedurally Barred and Alternatively, Without Merit

For the first time on appeal, Chasity argues that she was not given "an opportunity to present any evidence in support of her Amended Petition for Modification" and that the absence of a hearing

was a violation of her due process rights *Appellant's Brief*, 8. Chasity did not present this due process argument to the Chancellor --- neither at trial nor in her post-trial motion -- and this argument should not be considered on appeal. *In re Adoption of Minor Child*, 931 So. 2d 566, 578 -79 (Miss. 2006).

The Mississippi Supreme Court has repeatedly held that no new issues may be raised on appeal, "especially where constitutional questions are concerned." *Powers v. Tiebauer,* 939 So. 2d 749, 752 (Miss. 2005). Before an issue may be argued on appeal, it must first be presented to the trial court. *In re Hampton*, 919 So. 2d 949, 957 (Miss. 2006). Failure to object or argue an issue in the trial court procedurally bars the issue from consideration on appeal. *Id.; see State Indus., Inc. v. Hodges*, 919 So. 2d 943, 947 (Miss.2006) (issues raised for first time on appeal will not be addressed); *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So. 2d 60, 66 (Miss.2005) (issue not preserved in motion to amend is barred on appeal); *Copeland v. Copeland*, 904 So. 2d 1066, 1073 (Miss. 2004) (failure to make contemporaneous objection constitutes waiver of objection and cannot be raised for first time on appeal because trial court is denied opportunity to consider issue and possibly remedy situation); *Crowe v. Smith*, 603 So. 2d 301, 305 (Miss.1992) (appellant is not entitled to raise new issue on appeal); *Parker v. Game & Fish Comm'n*, 555 So. 2d 725, 730 (Miss.1989) (trial judge will not be put in error on matter which has not been presented to him); *Mills v. Nichols*, 467 So. 2d 924, 931 (Miss.1985) (trial court will not be put in error on appeal for matter not presented to it for decision); *CIG Contractors, Inc. v. Miss. State Bldg. Comm'n*, 510 So. 2d 510, 514 (Miss.1987) (appeal on new theory of unconstitutionality will not be entertained on appeal which could have been raised, but was not advanced, before trial court until post-judgment motion).

A review of the chancery court proceedings, furthermore, show that Chasity's due process claim is without merit. On October 18, 2006, after Chasity's first witness was fully questioned by her counsel, the Chancellor stopped trial, conferred with the parties, and determined that he would appoint Dr. Nichols to evaluate the parties and provide input to resolve the visitation issues because he was not satisfied with the counseling that the parties previously received. (T. 49-50). The Chancellor specifically asked whether the parties understood or had any questions, and the parties assured the Chancellor that there were no questions and no problems. (T. 51-52). Chasity did not object to the appointment of Dr. Nichols, and she did not object to the continuance of trial.

Seven months later, at the status hearing on May 30, 2007, where Dr. Nichols's findings were discussed, Chasity made no objection on the record that she was being denied due process because she was unable to present more witnesses. Likewise, in her June 12, 2007, motion to alter or amend, Chasity made no argument to the Chancellor that her due process had been violated. (R. 147-48). In four separate instances before the chancellor – the October 18, 2006, trial; the May 30, 2007, status hearing; in her June 12, 2007, post-trial motion; and at the July 2, 2007, hearing on the post-trial motion – Chasity made no argument that she wished to present more evidence on her petition. She did not object to the Chancellor's control of the evidentiary presentation. She did not move the court for more time to present evidence, and she did not make an offer of proof as to what evidence she was allegedly prevented from presenting.

If Chasity's presentation of evidence or trial strategy was adversely affected by the Chancellor's handling of the trial, then Chasity should have made a record outlining that effect and preserved it for appellate review. *Hammers v. Hammers*, 890 So. 2d 944, 957 -958 (Miss.App. 2004). If there is no evidence offered as to what a litigant would have presented but for the trial

court's restriction, "there is no legitimate basis for complaining on appeal about the chancellor's control of evidentiary presentation." *Morreale v. Morreale*, 646 So. 2d 1264, 1270 (Miss.1994). *See Martin v. Wadlington*, 337 So. 2d 706, 708 (Miss.1976) (proffer of excluded evidence necessary for appellate court to determine relevance and materiality of such evidence or whether its exclusion constituted prejudicial error); *Moore v. Moore*, 757 So. 2d 1043, 1046 (Miss.Ct.App.2000) (no legitimate basis for appeal "about the chancellor's control of evidentiary presentations" without proffer); *Gray v. Pearson*, 797 So. 2d 387, 394 (Miss.App. 2001) (the chancellor's ruling on issue stands where no timely objection to evidentiary limitation nor proffer).

Chasity supports her due process argument by relying on *Weeks v. Weeks*, 556 So. 2d 348 (Miss. 1990), a divorce matter where the Mississippi Supreme Court determined that a chancellor violated a husband's due process rights by refusing to allow his witnesses to testify. The obvious distinction between *Weeks* and this case, is that in *Weeks*, the husband made an offer of proof of several witnesses. *Id.* at 349. The Supreme Court found that the chancellor erred by taking judicial notice that the witnesses would testify favorably for the husband instead of allowing the witnesses to testify. *Id.* Unlike the husband in *Weeks,* there is nothing in the record showing Chasity offered witnesses to the Chancellor that he refused to let testify. Chasity, instead, agreed or at least, did not object, to the Chancellor's decision to let Dr. Wyatt Nichols counsel the parties and make the recommendations regarding the parties' issues.

Chasity's also supports her due process argument by relying on *Childers v. Childers*, 717 So. 2d 1279, 1281 (Miss. 1983). In *Childers,* the Chancellor disposed of the husband's motion to modify custody on the pleadings without a hearing. The Mississippi Supreme Court found "[i]t was a denial of James' rights to due process for the Chancellor to deny his motion without holding a

hearing." *Id.* at 1281. Clearly, *Childers* is not on point because the Chancellor did hold a hearing on Chasity's Petition. There was a trial on October 18, 2006. Then, there was a status hearing on May 30, 2007. It was Chasity's burden to put on her proof. If she felt that she was not allowed to put on evidence in support of her Petition, then she should have moved the court for an opportunity to put those witnesses on, and if the Chancellor did not allow her to do so, then she should have made an offer of proof as to the testimony she was not allowed to present. Chasity's due process arguments have no merit.

D. Substantial Evidence in the Record Supports the Chancellor's Decision to Modify Visitation as in the Best Interest of the Minor Children

Appellant Chasity's December 2, 2004, Petition sought modification of her visitation rights. (R. 38). Her May 19, 2006, Amended Petition sought " to modify custody and/or visitation rights." (R.86).

The Chancellor made no custody change and made no specific findings on the record that there was a material change in circumstances necessitating a modification of the custody decree. Because the Chancellor made no specific findings that a material change of circumstances occurred, this Court is required to assume that the Chancellor resolved the custody issue in favor of the Appellee Bill and found that there was no material change in circumstance adversely affecting the minor children. "With respect to issues of fact where the chancellor made no specific finding, we are required by our prior decisions and by sound institutional considerations to assume that the chancellor resolved all such fact issues in favor of appellee." *Cheek v. Ricker,* 431 So. 2d 1139, 1143-44 (Miss. 1983).

The Chancellor correctly found in favor of the Appellee Bill that a custody change was not

warranted. Chasity's only grounds for modifying custody and visitation were that the Appellee Bill's "strict adherence to the visitation schedule set forth in the Decree" was a material change in circumstances (R.38-41, 86-88), or "fraud, misrepresentation, and/or misconduct . . . or accident or mistake" because Bill led the Mother Chasity to believe that alternating weekly visitation would continue after entree of the Decree. (R. 41, 88). Chasity argues "[h]ad there not been sufficient assurances from [the Father] that visitation would remain as it had been prior to the finalization of the divorce she would not have executed the Property Settlement Agreement and proceeded forward without seeking advice of counsel." (R. 41).

Chasity's lack of representation of counsel prior to the entry of the Decree has no bearing on the custody and visitation she agreed to in the Decree. The law is clear that "having elected to proceed without an attorney, a person is bound by the same rules of practice and procedure as an attorney." *Bullard v. Morris,* 547 So. 2d 789, 790 (Miss.1989).

Chasity's argument that the Chancellor should enforce a "side agreement" of alternating weekly visitation that the parties practiced prior to the entry of the Decree is equally without merit. The law is equally clear that no agreement is final or enforceable until approved by the court. *Traub v. Johnson*, 536 So. 2d 25 (Miss. 1988), and the agreement approved by the court must be the one honored by the parties to the litigation. *Spearman v. Spearman*, 471 So. 2d 1204 (Miss. 1985). In *Sullivan v. Pouncey*, the Mississippi Supreme Court stated:

> A prior agreement entered into by the parties is not enforceable, if not approved by the court. It would be tantamount to defrauding the court for parties to present to the court a property settlement agreement, which is subsequently incorporated into the final decree, while actually intending to abide by a contradictory, private contract. This is clearly against public policy.

469 So. 2d 1233, 1234 (Miss 1985). Parents are not free to enter into private agreements as a part

of any proceedings where custody of minor children is at stake, relative to either initial grants of custody or modifications of custody. *McKee v. Flynt*, 630 So. 2d 44 (Miss. 1993).

The Chancellor was also correct to decrease Chasity's visitation rights based on testimony that she continued to discuss the legal proceedings with the minor children, despite the Chancellor's orders for her not to do so, and based generally on her disruption in the courtroom and general disrespect of the Chancellor's orders. (T. 58).

Visitation and the restrictions placed upon them are committed to the broad discretion of the chancellor. *Harrell v. Harrell*, 231 So. 2d 793, 797 (Miss.1970); *Cheek v. Ricker*, 431 So. 2d 1139, 1146 (Miss. 1983); *Clark v. Myrick*, 523 So. 2d 79, 83 (Miss.1988); *Harrington v. Harrington*, 648 So. 2d 543, 545 (Miss.1994); *Mixon v. Mixon*, 724 So. 2d 956, 961 (Miss.Ct.App.1998); *Newsom v. Newsom*, 557 So. 2d 511, 517 (Miss.1990); *McCracking v. Champaigne*, 805 So. 2d 586, 590 (Miss.App. 2001). The chancellor has broad discretion in determining appropriate visitation between a parent and child, as well as any limitation on such visitation. *Suess v. Suess,* 718 So. 2d 1126, 1130 (Miss.App.1998)

The chancellor's discretion to amend visitation schedules to advance the best interest of the children is broader than the discretion to change custody. *McCracking*, 776 So. 2d at 695. The visitation decisions of the chancellor should be afforded great deference. *Mixon*, 724 So. 2d at 960.

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 a minor child. The Court stated in Cox 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 interests of the children." *Cox*, 490 So. 2d at 869.

While the Chancellor modified visitation, not custody, the Appellant Chasity cites the wrong legal standard throughout her brief in arguing that the Chancellor's modification of visitation was error. Chasity argues:

> In this case, the Court did not make any determination that a material change in circumstances had occurred or hear any testimony in regards to a material change in circumstances. However, the Court decreased the Appellant's periods of visitation with the minor children. Consequently, the Order of the Court should be reversed."
>
> *Appellant Brief*, p.8.
>
> Clearly, the Appellee did not prove a material change in circumstances which adversely affects the welfare of the children due to the fact that no evidence was presented and no hearing held in regards to a material change in circumstance.
>
> *Appellant Brief*, p. 12.

The Chancellor was not required to determine that there was a material change in circumstance in order to modify Chasity's visitation rights. The material change in circumstances rule has no application when the issue is modification of visitation. *Sistrunk v. McKenzie,* 455 So. 2d 768, *770* (Miss.1984)*; Suess v. Suess,* 718 So. 2d 1126, 1130-1131 (Miss.App.1998); *Shepherd v. Shepherd*, 769 So. 2d 242, 245 (Miss. Ct. App. 2000); *Olson v. Olson*, 799 So. 2d 927, 929 (Miss. Ct. App. 2001). The Chancellor was only required to find that a modification of visitation was in the best interest of the minor children. *Id.*

While Chasity argues that the Chancellor modified visitation "without any evidentiary support," *Appellant Brief*, p. 11, the record is clear that this is not the case. The Chancellor harbored great concern about Chasity's discussion of the court proceedings with the minor children. (T. 58).

At trial on October 18, 2006, Chasity's own witness, Counselor Julie Davidson, testified that one of the minor children, Taylor "was observed . . . in the parking lot after the last session, crying because of her awareness of what her father had said in therapy that upset her mother." (T. 22). Ms. Davidson testified that Chasity had told the child Taylor what had been said between the parents during the parents' counseling session. (T. 36). The Chancellor concluded that it appeared the Mother was using the counseling sessions to manipulate the children in order to get her way with the visitation schedule. (T. 35, 40, 51). Even after the Chancellor's admonishment not to discuss the proceedings with the children, Chasity continued to do so. During the July 2, 2007, hearing on Chasity's post-trial motion, the Chancellor asked Chasity if she, in fact, had told the minor children that she would let them listen to a tape recording of the May 31, 2007, status hearing, as the Husband Bill alleged. (T. 57). Chasity admitted that she had done so, and on this admission, her Motion to Reinstate Wednesday night visitation and lengthier weekend visitation was denied. (T. 58).

The Mother offered to let the children listen to a recording of the court proceedings, even after the Court's admonishment for discussing the parents' therapy session with daughter Taylor, and even after the Chancellor threatened to jail her for disrupting the Courtroom on May 30, 2007, and, even after her father was, in fact, jailed for cursing the Court.

The Chancellor was persuaded that more liberal visitation with the Mother Chasity was disruptive to the children. The Mother — despite the evidence of the minor children's emotional difficulties of being caught in the middle of their parents' divorce (T. 33, 35, 38) — continued to fuel the pressure on the children by discussing the court proceedings with them. (T. 34, 35, 51). Restrictions on visitation can be placed if they are necessary to avoid harm to the child. *Porter v. Porter,* 766 So. 2d 55, 58 (Miss.App.2000). The evidence of the Mother's volatility and disruption

to the children is substantial and supports the Chancellor's decision to modify the Mother's visitation. The visitation order is a proper exercise of the Chancellor's on-going supervision of visitation schedules and is justified as being in the best interest of the minor children. *Weigand v. Houghton*, 730 So. 2d 581 (Miss.1999). *See Horn v. Horn*, 909 So. 2d 1151, 1162 (Miss.Ct.App.2005) ("the chancellor is vested with the discretion to determine whether the best interests of the children mandate liberal visitation or instead a more limited visitation provision.").

The visitation order is, furthermore, mindful of Chasity's right to maintain a healthy, loving relationship with the minor children. *See Harrington v. Harrington*, 648 So. 2d 543, 545 (Miss. 1994). Chasity's own counsel admitted at the July 2, 2007, hearing that Chasity's current visitation rights with the minor children are "very liberal and in – in excess of what is called for by the Farese Schedule." (T. 55). The Chancellor, however, could not ignore the Mother's continued disobedience of the Court's decisions regarding the best interest of the children. The Chancellor's decision must be affirmed, as there is substantial evidence to support it.

Conclusion

The Mother Chasity's appeal is procedurally barred for two reasons: First, she did not file her appeal within 30 days of the entry of the Court's June 1, 2007, order. Second, here due process arguments are procedurally barred from being heard on appeal because Appellant did not raise a due process issue to the Chancellor.

The Mother Chasity's appeal is substantively barred, as well for two reasons: First, there is no evidence in the record that Chasity was prevented from putting on evidence. To the contrary, in four separate instances before the Chancellor – the October 18, 2006, trial; the May 30, 2007, status hearing; in her June 12, 2007, post-trial motion; and at the July 2, 2007, hearing on the post-trial

CERTIFICATE OF FILING AND SERVICE

I, T. SWAYZE ALFORD, of Holcomb Dunbar, P.A., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee, WILLIAM HAYWOOD WILBURN, to:

John T. Lamar, Jr.
David M. Slocum, Jr.
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214 S. Ward St.
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And, the original and three (3) copies of the same to:

Betty W. Sephton
Mississippi Supreme Court Clerk
Carroll Gartin Justice Building
450 High Street
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, the 19th day of February, 2008.

T. SWAYZE ALFORD

CERTIFICATE OF SERVICE

I, T. SWAYZE ALFORD, of Holcomb Dunbar, Oxford, Mississippi, do hereby certify that I have this date mailed via first-class mail, postage prepaid, the above Appellee's Brief to:

Honorable Glenn Alderson, Chancellor
Post Office Drawer 70
Oxford, Mississippi 38655

This the 22nd day of February, 2008.

T. SWAYZE ALFORD