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STATEMENT OF CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

The Appellant reincorporates the Statement of facts contained in the Appellant's Brief previously filed with this court and will refrain from rehashing the same facts in this Reply Brief. However, the Appellant will address some of the facts brought into question by the Appellee's brief.

This appeal arises from an order entered on May 31, 2007 and filed on June 1, 2007 in the Chancery Court of Lafayette County, Mississippi awarding, among other things, physical custody to the Appellee, William Wilburn (hereinafter referred to as "Bill"), modifying the Appellant's, Chasity Wilburn (hereinafter referred to as "Chasity"), visitation, and denying and dismissing all remaining requests for relief. (R. 55-57). A Rule 59 Request for Reconsideration was duly filed on June 12, 2007, responded to by counsel for the Appellee on June 29, 2007, and an Order denying the Request for Reconsideration was entered on July 19, 2007. (R. 58-63). Neither Appellee's Response to the Motion for Reconsideration, nor the Order denying the Request for Reconsideration contained any objection or finding in regards to the timeliness of the Appellant's Rule 59 Request for Reconsideration. (R. 61-63).

The Notice of Appeal along with the Designation of Record was filed on August 8, 2007. The Amended Notice of Appeal was filed on

August 10, 2007 by the law firm of Lamar & Hannaford, P.A., which first became involved in this matter upon appeal. (R. 6-11).

B. STATEMENT OF THE FACTS

The only evidence or testimony that exists in the court file or transcripts of any of the hearings on this matter is the direct examination of Julie Davidson by Gregory S. Park, Appellant's solicitor throughout the proceedings at the trial court level. (R. 71-116). In her testimony, Ms. Davidson raised numerous issues about the psychological necessity of the children spending more time with their mother, Chasity. (R. 73-76, 112). Her testimony was based on the depression and suicidal threats expressed by Taylor and the feelings of neglect expressed by Courtney. (R. 73-112). The expert opinion of Wyatt Nichols was apparently considered in this matter, but never placed in the court record or transcripts of the hearings. (R. 58, 117). Additionally, the court did not hear any testimony in regards to the issues before the court other than the aforementioned testimony. (R. 64-123).

The limited record is clear that the parties were not in agreement on the order entered by the court as evidenced by the reaction of Chasity and her family to the court's decision and Chasity's Motion for Reconsideration. (R. 58, 117).

SUMMARY OF ARGUMENT

The Appellee refrained from asserting any timeliness arguments in response to the Appellant's Rule 59 Request for Reconsideration. The Appellant relied upon this representation or omission in

regards to the time available to file an appeal. The principals of justice and the integrity of the legal system as well as a clear procedural bar preclude the Appellee from changing his position to prevent the Appellant from having the opportunity to be heard on appeal.

The limited record is free from any evidence that the Appellant was provided with the opportunity to question any witnesses or continue with the presentation of her evidence. Clearly, any procedural bar asserted by the Appellee would be overcome due to the adverse impact on Chasity's fundamental constitutional rights to a fair proceeding that did not violate her due process rights.

The primary issue in this case is child custody. The totality of the evidence in the record clearly indicates that the children were having an adverse reaction to the custody arrangement and that it was in their best interest to spend more time with their mother. However, the trial court did not address custody and modified visitation even though the schedule that existed immediately prior to the final decree came closest to resembling a working visitation schedule that was in the children's best interests.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review used by the Mississippi Supreme Court in domestic relations cases is limited by the substantial evidence/manifest error rule. *Hensarling v. Hensarling*, 824 So.2d

583, 586 (Miss. 2002). The Court will not disturb the findings of a chancellor when supported by substantial credible evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard. *Sanderson v. Sanderson*, 824 So.2d 623, 625 (Miss. 2002). Legal questions are reviewed de novo. *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 721 (Miss. 2002).

B. ISSUE # 1: WHETHER THE APPELLEE'S ASSERTION THAT THE APPEAL IS UNTIMELY IS PROCEDURALLY BARRED OR JUDICIALLY ESTOPPED.

The Mississippi Supreme Court does not review matters on appeal that were not first raised at the trial level. *Scally v. Scally*, 802 So.2d 128, 132 (Miss. Ct. App. 2001); *citing Shaw v. Shaw*, 603 So.2d 287, 292 (Miss. 1992). Before an issue can be presented to this Court, it must first be presented to the trial court. *Scally*, 802 So.2d at 132. This is done by an objection. *Id.; citing Queen v. Queen*, 551 So.2d 197, 201 (Miss. 1989). A timely objection brings the issue to the court's attention, and gives it the opportunity to address the issue. *Id.; citing Kettle v. State*, 641 So.2d 746, 748 (Miss. 1994).

It is clear from the record that the Appellee responded to the Appellant's Motion for Reconsideration, but did not raise any objection to the timeliness of the Appellant's Motion. The Court's ruling on the Motion for Reconsideration was not entered until July 19, 2007, which based on the Appellee's computation of the appeal period, would be nineteen (19) days after the Appeal period had run. If the Appellee had asserted a time bar in regards to the

Rule 59 Request for Reconsideration, then the Appellant would have had the opportunity to file her appeal in what even the Appellee would define as a timely manner. As a result, the Appellee's assertion that the appeal period under M.R.A.P. 4(a) was not stayed during the pendency of the request for reconsideration is procedurally barred due to the fact that the time bar was asserted for the first time in the Appellee's Brief. This assertion attempts to rob the Appellant of her right to appeal by presenting a time bar when the record clearly indicates that both parties were operating under the belief that a timely Rule 59 Request for Reconsideration was pending and that the time for filing an appeal was stayed. As a result, this assertion is procedurally barred.

Further, the doctrine of judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in litigation. *Estate of Richardson*, 903 So.2d 51, 56 (Miss. 2005); *citing Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003). Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation. *Id.* Judicial estoppel is meant to prevent the misuse of the courts by inconsistent representations, in which litigants choose case by case what representations may do them the most good. *Roberts v. Roberts*, 866 So.2d 474, 483 (Miss. Ct. App. 2003).

Additionally, the doctrine of equitable estoppel is based upon fundamental notions of justice and fair dealing. *O'Neill v.*

O'Neill, 551 So.2d 228, 232 (Miss. 1989). There are two elements of equitable estoppel that must be satisfied: (1) the party has changed his position in reliance upon such conduct of another; and (2) the party has suffered detriment caused by his change of position in reliance upon such conduct. *PMZ Oil Co. v. Lucroy*, 449 So.2d 201, 206 (Miss. 1984). The court in *Lucroy* went on to state that "whenever in equity and good conscience persons ought to behave ethically toward one another the seeds for a successful employment of equitable estoppel have been sown." *Id.*

Clearly, the Appellee lead the Appellant to believe that a timely Rule 59 Request for Reconsideration was pending before the trial court. The Appellant relied upon this representation in regards to the time available to file an appeal. Surely the Appellee cannot now change its position to prevent the Appellant from having the opportunity to be heard on appeal. To allow the Appellee to alter its position in regards to the timeliness of this appeal would encourage the misuse of the courts and a substantial injustice.

C. ISSUE # 2: WHETHER THE APPELLEE'S DUE PROCESS ARGUMENT IS PROCEDURALLY BARRED OR WITHOUT MERIT.

Every party has a right to introduce evidence at a hearing. *Morreale v. Morreale*, 646 So.2d 1264, 1270 (Miss. 1994); *citing Edwards v. James*, 453 So.2d 684, 686 (Miss. 1984). Pursuant to Rule 611 of the Mississippi Rules of Evidence, a trial judge has some measures of control over the operation of trials and the smooth flow of the litigation process. *Moore v. Moore*, 757 So.2d

1043, 1049 (Miss. 2000). These measure of control have been held to include placing a time limit on the testimony before the court. *Id.; Gray v. Pearson*, 797 So.2d 387, 394 (Miss.Ct.App. 2001). However, a procedural bar will not be enforced against a party when that party has a "fundamental constitutional right" that will be affected. *Maston v. State*, 750 So.2d 1234, 1237 (Miss. 1999). Court hearings must be conducted in a fundamentally fair manner so as not to violate the rules of due process. *Public Employees' Retirement System v. Wright*, 949 So.2d 839, 843 (Miss. 2007). When a court accepts new evidence without providing the party the opportunity to rebut the evidence or supplement her records, then the court has violated the party's procedural due process rights and the concept of fundamental fairness. *Id.*

Further, the Court may interrogate witnesses, whether called by itself or a party. *Copeland v. Copeland*, 904 So.2d 1066, 1073 (Miss. 2004). However, it is grounds for reversal if the trial judge abuses the authority to call or question a witness abandoning his impartial position as a judge and assuming an adversarial role. *Id.* at 1074; *citing Powell v. Ayars;* 792 So.2d 240, 248 (Miss. 2001). Trial courts must honor the line between detachment and advocacy. *Layne v. State*, 542 So.2d 237, 242 (Miss. 1989).

The record is crystal clear that the only testimony that the trial court heard throughout the pendency of this action was the direct examination of Julie Davidson. During this examination, the chancellor questioned the witness extensively, stopped the trial,

and ordered a psychological examination by Dr. Wyatt Nichols. The court apparently received a report from Dr. Nichols and entered an order. The record does not contain any evidence that Chasity was given the opportunity to question the witness or continue with presentation of her evidence, but was simply a recitation of the judge's ruling to which Chasity and her family had an adverse reaction.

The Appellee argues that the Appellant had four separate opportunities to present evidence or object to the Chancellor's control of the evidentiary presentation. However, the record is clear that Chasity was not afforded the opportunity to present her argument.

This case is distinguishable from the line of cases cited by the Appellee in regards to complaining on appeal about the chancellor's control of evidentiary presentation. In *Morreale*, *Moore*, *Gray*, and *Hammers*, the Court upheld the trial judge's time limitations placed on the amount of evidence presented to the court. In this case, the trial judge took control of not only the opportunity to present evidence, but also controlled the actual evidence presented to the court. The trial court's refusal to allow testimony alone is sufficient to require a new trial.

D. ISSUE # 3: WHETHER SUBSTANTIAL EVIDENCE IS IN THE RECORD TO SUPPORT A MODIFICATION OF CHASITY'S VISITATION.

The primary issue in this case is child custody, which is governed by the standard that was enunciated in detail in the Appellant's Brief. Further, the only evidence from the extremely limited record indicates that the girls were having major psychological issues with their living arrangements and that they needed more time with their mother. Clearly, this evidence indicates a material change in circumstances which adversely affects the welfare of the children.

Next, the Appellee argues that Chasity was relying on a side agreement in regards to visitation with the minor children. However, the divorce decree indicated that in addition to the clearly enunciated periods of visitation "the Wife shall have such other periods of visitation as may be mutually agreed upon between the parties." (R. 19). Chasity indicated in her pleadings that the Appellee agreed to split weeks with the children and his breach of this agreement had an adverse effect on the minor children which necessitated a change in custody. This was not a "side agreement" along the lines of the agreements in *Traub v. Johnson*, 536 So.2d 25 (Miss. 1988); *Spearman v. Spearman*, 471 So.2d 1204 (Miss. 1985); *Sullivan v. Pouncey*, 469 So.2d 1233 (Miss. 1985); or *McKee v. Flint*, 630 So.2d 44 (Miss. 1993). *Traub, Sullivan,* and *Spearman* dealt with transfers of marital property that were done outside of any separation agreement that was subject to the court's approval.

Further, *McKee* dealt with a post-nuptial agreement that automatically divested custody in the event that the parties separated. The court in *McKee* held that the welfare of the children and their best interest is the primary objective of the law, and the courts must not accord to contractual agreements such importance as to turn the inquiry away from that goal. *McKee*, 630 So.2d at 50.

In this case, the parties had a provision in their divorce decree which granted additional visitation to the wife based on the agreement of the parties. This court has encouraged divorced parents to resolve custody questions among themselves. *Cheek v. Ricker*, 431 So.2d 1139, 1143 (Miss. 1983). The parties to this action apparently attempted to accomplish this goal through their agreement. But the Appellee breached this agreement and caused a material change in circumstances which adversely affected the children. As a result, the chancellor, in child custody matters, must consider the guidelines set forth in *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983). *Hammers v. Hammers*, 890 So.2d 944, 949 (Miss.Ct.App. 2004).

The chancellor must consider the best interests of the children in matters involving visitation and be sensitive to the rights of the non-custodial parent, while at the same time recognizing the need for the non-custodial parent to maintain a

healthy, loving relationship with the children. *Suess v. Suess*, 718 So.2d 1126, 1130 (Miss.Ct.App. 1998); *citing Harrington v. Harrington*, 648 So.2d 543, 545 (Miss. 1994). In order to modify the visitation schedule, it must be shown 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 v. Moulds*, 490 So.2d 866, 869 (Miss. 1986). Based on the limited evidence in this case, Chasity's visitation should have, at the very least, remained as it existed prior to the court's final decree. Of all the visitation schedules in this case, the schedule that existed immediately prior to the final decree came closest to resembling a working visitation schedule.

The Court has held that the material change in circumstances rule is not applicable where the court is not being asked to change the permanent custody of the children. *Sistrunk v. McKenzie*, 455 So.2d 768, 770 (Miss. 1984). However, the primary issue in this case was the issue of child custody. The court cannot simply overlook the primary issue, refuse to hear any testimony on the primary issue, adopt the standard of the secondary issue, and circumvent a parties constitutional rights.

The totality of the evidence in the record indicates that the children were having an adverse reaction to the change in the visitation arrangement and that it was in their best interest to

spend more time with their mother. The Appellant and her family were upset by the court's denial of the Appellant's constitutional rights and allowed their frustration to overflow inside the courtroom. This reaction has no bearing on the best interest of the children. Accordingly, the chancellor's decision is unsupported by any evidence, and should be reversed.

CONCLUSION

The principals of justice and the integrity of the legal system as well as a clear procedural bar preclude the Appellee from changing his position to prevent the Appellant from having the opportunity to be heard on appeal. Further, any procedural bar asserted by the Appellee would be overcome due to the adverse impact on Chasity's fundamental constitutional rights to a fair proceeding that did not violate her due process rights. Finally, the trial court did not address custody and modified visitation even though the schedule that existed immediately prior to the final decree came the closest to resembling a working visitation schedule that was in the children's best interests. For these reasons, the Order of the Court was unsupported by substantial evidence and should be reversed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, John T. Lamar, Jr., attorney for the Appellant, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief to:

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So certified, this the 14th day of March, 2008.

_____
JOHN T. LAMAR, JR.