

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHASITY NICOLE SMITH WILBURN,

APPELLANT

VS.

NO. 2007-CA-01385

WILLIAM HAYWOOD WILBURN,

APPELLEE

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BRIEF FOR APPELLANT

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APPEAL FROM THE DECISION OF THE  
CHANCERY COURT OF LAFAYETTE COUNTY, MISSISSIPPI

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**ORAL ARGUMENT REQUESTED**

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APPELLANT

VS.

NO. 2007-CA-01385

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APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Chasity Nicole Smith Wilburn

Appellant

William Haywood Wilburn

Appellee

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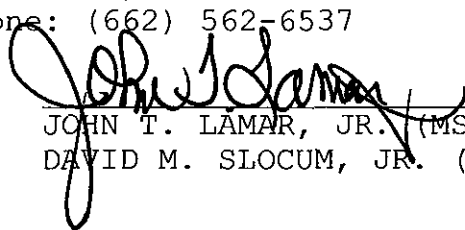


Honorable V. Glenn Alderson

Chancellor

Respectfully submitted,

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STATEMENT OF ISSUES

The issues presented by the Appellant in this Appeal are:

- ISSUE # 1:       WHETHER THE TRIAL COURT ERRED IN NOT  
                  ALLOWING THE APPELLANT A HEARING ON HER  
                  AMENDED PETITION FOR MODIFICATION OF THE  
                  DIVORCE DECREE.
- ISSUE # 2:       WHETHER THE TRIAL COURT ERRED IN FAILING  
                  TO     FIND     A     MATERIAL     CHANGE     IN  
                  CIRCUMSTANCES OR SUBSTANTIAL EVIDENCE TO  
                  SUPPORT A MODIFICATION OF CUSTODY.

## STATEMENT OF CASE

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

This appeal arises from an order entered on May 31, 2007 in the Chancery Court of Lafayette County, Mississippi awarding, among other thing, 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). Request for Reconsideration was duly filed, answered by counsel for the Appellee, and an Order denying the Request for Reconsideration was entered on July 19, 2007. (R. 58-63). The Notice of Appeal along with the Designation of Record was filed on August 8, 2007 and 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).

The original Judgment of Divorce and Property Settlement Agreement was entered on June 16, 2004 and contained the following provisions for Child Custody, Support and Visitation:

1. CUSTODY: The parties shall have joint legal custody of the minor children, with Husband having primary physical custody and Wife having reasonable periods of visitation with the children.

2. CHILD SUPPORT: Neither party shall pay child support to the other as Husband shall have primary physical custody of the children and Wife is attending college and not working full-time. The parties shall each pay one-half ( $\frac{1}{2}$ ) of all regular school expenses for the minor children while through 12<sup>th</sup> grade. The parties shall divide equally all school fees, school supplies,

school lunches, school pictures, activity fees and clothing for the children. If the children attend college, each party will be responsible to pay one-half of tuition and the necessary expenses after scholarships, grants, or other means of support or payments. The parties shall divide equally the cost of the children's weddings.

3. VISITATION

A. Weekends

The Wife shall have visitation with the minor children every other weekend from Friday evening at 6:00 p.m. through Sunday evening at 6:00 p.m. If Wife is more than thirty (30) minutes late picking up or dropping off the children for visitation then she forfeits her visitation period.

B. Holidays

The Wife shall have visitation with the minor child on alternating years as follows:

<u>Holiday</u>	<u>Odd Year</u>	<u>Even Year</u>
New Year's Day	Father	Mother
Easter	Mother	Father
Memorial Day	Father	Mother
July 4 <sup>th</sup>	Mother	Father
Labor Day	Father	Mother
Thanksgiving	Mother	Father
Christmas	Father	Mother

Custody shall commence at 7:00 a.m. and end at 7:00 p.m., with the exception of Christmas Day.

On the Even Years, Husband shall have visitation with the minor children from 6:00 p.m. on Christmas Eve until 10:00 a.m. on Christmas day. Wife shall have visitation with the children from 10:00 a.m. until 6:00 p.m. on Christmas Eve and from 10:00 a.m. until 6:00 p.m. on Christmas Day. On the Odd Years, the schedule will be reversed.

C. Special Days:

(1) Father's Day - The Father shall have visitation with the minor children on each Father's Day, regardless of whose weekend on which it may fall, commencing at 7:00 a.m. and ending at 7:00 p.m.

(2) Mother's Day - The Mother shall have visitation with the minor children on each Mother's Day, regardless of whose weekend on which it may fall, commencing at 7:00

a.m. and ending at 7:00 p.m.

(3) Parent's Birthdays and Children's Birthdays - Each parent shall have visitation with the minor children for at least three (3) hours on each of their respective birthdays, regardless of the weekend visitation set forth above.

D. Summer

The Wife shall have visitation with the minor children for six (6) weeks during the summer months of June, July and August, taking into consideration the summer vacations of the parents. The six (6) weeks of visitation shall be in two week intervals, not consecutive, in order for the Husband to have one weekend (Friday evening at 6:00 p.m. until Sunday at 6:00 p.m.) in between the Wife's summertime visitation periods. The parents shall communicate with one another to work out the summer custody at least two weeks prior to that occasion.

E. Other

The Wife shall have such other periods of visitation as may be mutually agreed upon between the parties. (R. 17-19)

The Judgment of Divorce was granted on the agreement of Irreconcilable Difference and was entered based upon the agreement of the parties. (R. 16). Chasity was unrepresented by counsel prior to and through the execution of the Property Settlement Agreement and entry of the Judgment for Divorce. (R. 23).

Feeling aggrieved, defrauded, and mislead in regards to the execution of the Property Settlement Agreement, Chasity, by and through counsel, filed a Petition for Modification of Visitation Rights and for Citation for Contempt on December 2, 2004. (R. 28). In the Petition for Modification of Visitation Rights and for Citation for Contempt, Chasity alleged that the parties had agreed to visitation on an alternating weekly basis, that the Decree of

Divorce was based on fraud, misrepresentation, accident or mistake, and she sought a modification in the Decree of Divorce. (R. 28-32).

On April 25, 2005, Bill, by and through counsel, filed an Answer to the Petition for Modification of Visitation Rights and for Citation for Contempt and Countercomplaint. (R. 33). Bill sought to have Chasity held in contempt for failure to pay her portion of expenses on behalf of the parties' minor children. (R. 34-35).

The record indicates that the parties resolved some of the issues in regards to visitation based on their stipulations on May 2, 2005. (R. 66). On May 2, 2005, the parties agreed to modify the original decree of divorce and increased Chasity's visitation as follows: (1) Every Wednesday night while the girls are in school, (2) increased visitation during the Christmas holidays, and (3) visitation every Spring Break. (R. 66).

The parties apparently continued to experience issues in regards to visitation, communication between the children and Chasity, payment of orthodontic expenses as related to the minor children, and reimbursement for medical and other expenses. (R. 41-42). As a result, the parties filed a Joint Motion on February 23, 2006, requesting the Court to hear testimony and evidence in order to resolve these issues. (R. 41-42).

Subsequently, on May 19, 2006, Chasity filed an Amended Petition for Modification of Divorce Decree in which she sought

modification of custody in regards to the minor children based on a material change in circumstances which adversely affects the children and alternatively on the basis that the Decree of Divorce was based upon fraud, misrepresentation, accident or mistake. (R. 43-47). Bill responded with an Answer to Amended Petition for Modification of Divorce Decree and Countercomplaint which was filed on May 31, 2006. (R. 48-52). In his Answer to the Amended Petition for Modification of Divorce Decree and Countercomplaint, Bill requested that Chasity be held in contempt for failure to pay expenses that allegedly related to the minor children, held in contempt for violation of the visitation agreement, and requested modification of Chasity's visitation. (R. 49-52).

On October 24, 2006, the Court entered an Order appointing Dr. Wyatt Nichols to interview the parties and minor children in order to complete a psychological evaluation. (R. 53). Additionally, the Order continued the matter until receipt of the report of Dr. Nichols and increased Chasity's visitation from the modification agreement of parties as stipulated into the record on May 2, 2005 to include: (1) every Wednesday night and (2) extended the weekend visitations to Monday morning. (R. 53-54). Additionally, the minor children would have telephone access to their mother when in the custody of their Father and telephone access to their father when in the custody of their Mother. (R. 54).

On May 31, 2007, the Court entered the Order from which this appeal is being taken. (R. 55). No transcript of any hearing in

relation to this matter held on or about May 31, 2007 exists. (R. 64-123). In that Order, the Court restricted Chasity's visitation as follows:

- a. Every other weekend from 5:00 p.m. on Friday until 5:00 p.m. on Sunday.
- b. Six (6) weeks of visitation during the summer being the first two full weeks in June, the last full week of June, the first full week of July, and the last two weeks of July.
- c. The parties shall alternate the Thanksgiving holiday with the mother having the odd years. The holiday is defined as beginning the day the minor children get out of school until the day before the minor children return to school.
- d. Christmas visitation - The mother shall have Christmas visitation on the even years beginning the day school is out for Christmas vacation until 2:00 p.m. on Christmas day. The mother shall have Christmas visitation on the odd years beginning at 2:00 p.m. on Christmas Day until 2:00 p.m. on New Years Day.
- e. The mother shall have visitation each and every Spring Break.
- f. Father's Day - The father shall have visitation with the minor children on each Father's Day, regardless of whose weekend on which it may fall, commencing at 7:00 a.m. and ending at 7:00 p.m.
- g. Mother's Day - The mother shall have visitation with the minor children on each Mother's Day, regardless of whose weekend on which it may fall, commencing at 7:00 a.m. and ending at 7:00 p.m.
- h. Parent's Birthdays and Children's Birthdays - Each parent shall have visitation with the minor children for at least three (3) hours on each of their respective birthdays, regardless of the weekend visitation set out above.
- i. Chasity shall have telephone visitation with the minor children each Tuesday and Thursday night at

7:00 p.m. The children may have additional telephone visitation with Chasity and be allowed to call her when they desire. The aforementioned order was entered without a hearing on the merits as no hearing transcript exists. (R. 55-57).

B. STATEMENT OF THE FACTS

The only evidence or testimony that exists in the court file or transcripts 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 threats of suicide 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

Due process is implicated if a full and complete hearing is not allowed. By refusing a party his opportunity to present

evidence, then the party is thereby deprived of due process. The Appellant was not allowed to present any evidence in support of her Amended Petition for Modification of Divorce Decree. Accordingly, she was deprived of her due process rights and the Order of the Court should be reversed and remanded for a full hearing on the pleadings.

Moreover, the prerequisites for modification of child custody are (1) proving a material change in circumstances which adversely affects the welfare of the child and (2) finding that the best interests of the child requires the change of custody. 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.

#### 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 TRIAL COURT ERRED IN NOT ALLOWING THE APPELLANT A HEARING ON HER AMENDED PETITION FOR MODIFICATION OF THE DIVORCE DECREE.

Article 3, Section 14 of the Mississippi Constitution states as follows:

"No person shall be deprived of life, liberty, or property except by due process of law."

Further, Article 3, Section 25 of the Mississippi Constitution states as follows:

"No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both."

The Mississippi Supreme Court has held that due process is implicated if a full and complete hearing is not allowed by refusing the party his opportunity to present evidence, then the party is thereby deprived of due process. *Weeks v. Weeks*, 556 So.2D 348, 349-50 (Miss. 1990); citing *Fortenberry v. Fortenberry*, 338 So.2d 806 (Miss. 1976). The Court recently held that it is a denial of a party's due process right to deny a motion without holding a hearing where the party is given the opportunity to provide factual support for the allegations in the pleadings that

there has been a material change in circumstances. *Childers v. Childers*, 717 So.2d 1279, 1281 (Miss. 1998).

In the case at bar, the Appellant, who was represented by Gregory S. Park at the trial court level, was denied the opportunity to present factual support for her Amended Petition for Modification of Divorce Decree. In fact, her visitation was modified in a manner to reduce her visitation even though the only evidence in the record is the direct examination of Julie Davidson, which encouraged the court to increase the Appellant's visitation with the minor children. Clearly, the Appellant was denied her due process rights. As a result, this matter should be reversed and remanded for a hearing on the merits on the issues of child custody and visitation.

C. ISSUE # 2: WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND A MATERIAL CHANGE IN CIRCUMSTANCES OR SUBSTANTIAL EVIDENCE TO SUPPORT A MODIFICATION OF CUSTODY.

In proceedings to modify custody, the prerequisites are (1) proving a material change in circumstances which adversely affects the welfare of the child and (2) finding that the best interests of the child requires the change of custody. *Robison v. Lanford*, 841 So.2d 1119, 1124 (Miss. 2003). In considering such changes, the chancery court should view the evidence within the totality of the circumstances. *Spain v. Holland*, 483 So.2d 318, 320 (Miss. 1986).

Once a material change is found, a modification of custody is warranted only if it would be in the best interest of the child. *Weigand v. Houghton*, 730 So.2d 581, 585 (Miss. 1999). In order for the Court to find that a chancellor has not abused his discretion in these matters, there must be sufficient evidence to support his conclusions. *Id.*; *Floyd v. Floyd*, 949 So.2d 26, 29 (Miss. 2007). The decision is a multi-step process. Even if a chancellor finds that a material change in circumstance adversely affects the children, the chancellor must "then go forward and determine whether the best interests of the child justify a change of custody. *Ash v. Ash*, 622 So.2d 1264, 1266 (Miss. 1993). Additionally, a court cannot draft a contract between two parties where they have not manifested a mutual assent to be bound. *Palmere v. Curtis*, 789 So.2d 126, 132 (Miss.Ct.App. 2001).

As previously mentioned, there must be sufficient evidence to support a chancellor's decision that (1) a material change in circumstances which adversely affects the welfare of the child has occurred and (2) that the best interests of the child requires a modification of custody. In the case at bar, the chancellor modified the Appellant's visitation without a hearing and without any evidentiary support. In fact, the only evidence of record in this matter indicates that there should be an increase in Chasity's time with the children. 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 circumstances. Additionally, it is equally clear that the parties did not reach an agreement in regards to custody and visitation as evidenced by the reaction of the Appellant and her family, the Request for Reconsideration, and subsequently this appeal. As a result the chancellor's modification of Chasity's visitation should be reversed.

#### CONCLUSION

If a trial court refuses a party her opportunity to present evidence to support her allegations, then that party is thereby deprived of due process. The Appellant was not allowed to introduce evidence and testimony in support of her allegations contained in the Amended Petition for Modification of Divorce Decree. As a result, the Appellant was deprived of her due process rights and the Order of the Court should be reversed and remanded to the trial court for a full hearing on the merits of the pleadings.


Further, the initial determination when modification of child custody is at issue is whether a material change in circumstances has occurred which adversely affects the welfare of the child. The lower Court did not make any determination in regards to whether

a material change in circumstances had occurred or hear any testimony or evidence in regards to a material change in circumstances. 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

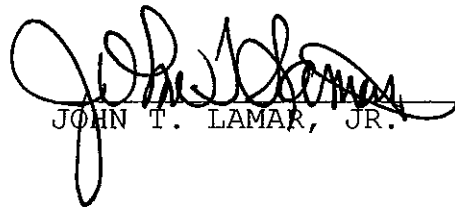
I, John T. Lamar, Jr., attorney for the Appellant, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Record

Excerpt to:

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So certified, this the 20<sup>th</sup> day of December, 2007.

  
JOHN T. LAMAR, JR.