IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2004-CA-00166-COA

J.N.W.E. **APPELLANT**

v.

W.D.W. **APPELLEE**

DATE OF JUDGMENT:	4/8/2004
TRIAL JUDGE:	HON. JANACE H. GOREE
COURT FROM WHICH APPEALED:	YAZOO COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	CEOLA JAMES
ATTORNEYS FOR APPELLEE:	DEREK E. PARKER
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DISMISSED MOTION TO MODIFY CUSTODY
DISPOSITION:	AFFIRMED - 07/26/2005
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

GRIFFIS, J., FOR THE COURT:

PROCEDURAL HISTORY AND FACTS

¶1. On February 21, 2003, J.N.W.E filed a motion for modification of child custody and other relief with the Yazoo County Chancery Court seeking modification from a previously entered divorce decree in which W.D.W.was granted custody of the parties's minor son.[1] On November 10, 2003, J.N.W.E. substituted Ceola James as her attorney of record in place of Shari K. Herring. On November 24, 2003, W.D.W. filed a motion to remove Ceola James as J.N.W.E.'s counsel, alleging

[1] Initials have been substituted for the parties' names to protect the identity of the minor child.

that James, while serving as chancellor for Washington County, heard and decided a civil action involving the parties regarding the modification of child custody.

¶2. On December 15, 2003, the chancellor signed an order disqualifying James as counsel for J.N.W.E. due to James' prior involvement as chancellor in this case. On December 22, 2003, J.N.W.E. filed motions seeking the recusal of the chancellor and the removal of Derek Parker as counsel for W.D.W. J.N.W.E. also filed a motion to vacate the December 15, 2003 order which disqualified James as her attorney. On March 22, 2004, nunc pro tunc, March 18, 2004, the chancery court denied the motion for recusal of the chancellor and continued the motion for the disqualification of W.D.W.'s counsel and the motion to vacate the order disqualifying J.N.W.E.'s counsel. On March 22, 2004, the chancery court refused to set aside its order disqualifying James, finding that James had violated Rule 1.12 of the Rules of Professional Conduct because James, as chancellor, substantially participated in litigation involving the parties for the same issues for which James was representing J.N.W.E.

¶3. Aggrieved, J.N.W.E. now appeals, asserting that the chancellor erred in not granting the recusal motion and in disqualifying her attorney from participating in this matter while refusing to disqualify Appellee's attorney. J.N.W.E. also argues that the chancellor abused her discretionary power in various ways.

STANDARD OR REVIEW

¶4. "[F]indings of a chancellor will not be disturbed when supported by substantial evidence unless the chancellor abused his discretion, applied an erroneous legal standard, was manifestly wrong, or was clearly erroneous." *Hamilton v. Hopkins*, 834 So. 2d 695 (¶12) (Miss. 2003).

ANALYSIS AND DISCUSSION

(1) *Motion for recusal*

¶5. J.N.W.E. argues that the chancellor's impartiality was drawn into question and that the record reflects a manifest abuse of discretion. J.N.W.E. maintains that the chancellor evidenced prejudice against her in comments that the chancellor allegedly made that are not reflected in the record before us. J.N.W.E. suggests that we order the tape duplicated for our review. We decline J.N.W.E.'s suggestion inasmuch as the appellant is required to provide us with a record that is adequate to support his issues. *Burney v. State*, 515 So. 2d 1154, 1160 (Miss. 1987). We are not able to locate anything in the record suggesting that counsel attempted to acquire a copy of the stenographer's tapes and have them made a part of the record on appeal.

¶6. In Mississippi, " a judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss. 1986). After a careful review of the record, we find nothing that would lead a reasonable person to believe that the chancellor had any bias or prejudice towards any of the parties or their attorneys. The Mississippi Code of 1972 as amended and the Mississippi Constitution also contain standards for which a judge may be disqualified.

¶7. The Mississippi Constitution provides:

> No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties . . . .

Miss. Const. art. 6, § 165 (1890).

¶8. The Mississippi Code of 1972 as amended provides:

> The judge of a court shall not preside on the trial of any cause where the parties, or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, or wherein he may have been of counsel, except by consent of the judge and of the parties.

Miss. Code. Section 9-1-11 (Rev. 2002).

¶9. We find that the chancellor in the case *sub judice* is not disqualified under Section 165 of the Mississippi Constitution or under section 9-1-11 of the Mississippi Code. "When a judge is not disqualified under § 165 of the Mississippi Constitution or Section 9-1-11, the propriety of his or her sitting is a question to review only in case of manifest abuse of discretion." *Rutland v. Pridgen*, 493 So.2d 952 (Miss. 1986). We find no manifest abuse of discretion in the chancellor's denial of the motion for recusal.

(2) *Disqualification of the Appellant's attorney*

¶10. On or about November 21, 2001, James, while serving as a chancellor in Washington County, signed a temporary order that stayed the visitation rights of W.D.W. with the parties' son , pending a final hearing. On February 23, 2002, a judgment was signed by James extending the November 21, 2001 temporary order that prohibited unsupervised visitation by W.D.W. with his minor son pending further order of the Chancery Court of Yazoo County, Mississippi.

¶11. J.N.W.E. argues that James should not have been removed because James, while serving as a chancellor in Washington County, never heard the claim of abuse on the merits.

Rule 1.12 of the Mississippi Rules of Professional Conduct states, in pertinent part:

> Except in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person.

Miss. R. Prof. Conduct 1.12

¶12. The trial court found that James's action, as chancellor, in signing the aforementioned orders in the litigation between the same parties and the same subject matter constituted a violation of Rule 1.12 of the Mississippi Rules of Professional Conduct. On the other hand J.N.W.E. does not deny that James signed the orders but argues that the signing of the orders does not constitute substantial participation in the case. Further, J.N.W.E. contends that the proceeding in which James entered

the orders "ended in 2001 and is not related to the merits of this case." J.N.W.E. asserts that James, as chancellor, did not hear any of the evidence. Therefore, James did not substantially participate in the litigation as chancellor.

¶13. The comment to Rule 1.12 states:

> The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits.

Miss. R. Prof. Conduct 1.12, cmt.

¶14. The record reflects that as chancellor, James entered three orders in a case brought in the Chancery Court of Washington County, styled "*J. N. W. v. W. W.*." The first order, entered on November 21, 2001, stayed unsupervised visitation by W.D.W. with the parties' minor child until the matter could be heard on its merits. A supplemental order was entered on November 28, 2001, setting the matter for trial on December 14, 2001. The third and final order was entered on January 23, 2002. This order extended the temporary order of November 21, 2001, "pending further order of the Chancery Court of Yazoo County, Mississippi." The basis for the ban on unsupervised visitation was an allegation that W.D.W. had sexually abused the minor child.

¶15. These orders were entered after W.D.W. filed a complaint for divorce in the Yazoo County Chancery Court but prior to the parties' being divorced on June 20, 2002. The judgment of divorce granted custody of the parties' minor child to W.D.W.[2]

[2] The judgment of divorce is not contained in the record before us. However, we are able to ascertain from other documents in the record that custody was in fact granted to W.D.W. and that the date of the filing of the complaint for divorce was July 30, 2001.

¶16. The present litigation underlying the recusal motion and the motion and counter motion to disqualify the parties' respective counsel revolves out of a pleading filed on January 9, 2004, by J.N.W.E. entitled "Amended Motion for an Emergency Hearing for Temporary Placing of Custody by DHS Pending a Hearing of Modification of Custody." This document states, inter alia, that"[b]ecause of allegations of abuse [the minor child] has been placed in the custody of the Yazoo County Department of Human Services since February 24, 2003."

¶17. It is unclear from the record whether the reference to the allegations of abuse referenced in J.N.W.E.'s January 9, 2004 pleading refers to the allegations of abuse first made in November 2001. However, it is reasonably clear that the allegations refer to abuse by W.D.W. against the parties' minor child.

¶18. Based on these facts, we find that James' participation in the litigation between the parties, as a chancellor, was substantial, and thus she was properly disqualified under Rule 1.12 of the Rules of Professional Conduct from representing J.N.W.E. in her ongoing battle with W.D.W. over the custody of the parties' minor child. Therefore, we affirm the chancellor's decision disqualifying James as J.N.W.E.'s attorney.

(3) *Disqualification of the Appellee's attorney*

¶19. J.N.W.E. argues that Derek Parker, attorney for W.D.W., should have been disqualified from representing W.D.W. because Parker served as a youth court judge during the time in which the alleged abuse of the parties' minor child was before the youth court. J.N.W.E. maintains that because Parker worked as a youth court judge, Parker had access to the parties' record in youth court and that this access put Parker in a more favorable position. J.N.W.E. maintains that the chancellor's refusal to remove Parker was an abuse of discretion inasmuch as the chancellor chose to remove her attorney.

¶20. After listening to the evidence, the chancellor found that there was no evidence presented that Parker ever acted as a judge in the case. The evidence considered by the chancellor included the testimony of Parker and two other witnesses, Charlotte Langley and Patricia Nelson, a supervisor with the Department of Human Services. We discuss Parker's testimony first.[3]

¶21. Parker testified as follows:

> Q. You're like a referee, right?
>
> A. I have been appointed special youth court judge on two occasions, I believe, by order of Judge Thomas in over the past four or five years.
>
> Q. Okay. While you was Mr. W.D.W. attorney [sic], have you sat on the bench for Judge Thomas at any time?
>
> A. I think so, yes.
>
> Q. Okay. So you have access to my son's records to look at if you wanted to?
>
> A. Yes, as would anyone who was involved in that case. Youth court records are confidential, but not as to parties or attorneys who are actually involved in the case.
>
> Q. So you really had access to all of the files about Judge Thomas' custody and abuse and stuff?
>
> A. No, I don't have access to all of the files. The only files I have access to are ones in which I am participating as an attorney.
>
> Q. So you was on the bench for Judge Thomas while you was W.D.W. attorney?
>
> A. You've already asked that and I have answered, yes.
>
> * * * *
>
> THE COURT: Mr. Parker, while you were serving for Judge Thomas, did you have occasion to hear anything as it related to the W.D.W. case?

[3] As a result of the chancellor's disqualifying James, J.N.W.E. represented herself in presenting the motion to disqualify Parker which was filed by James.

THE WITNESS: I do not believe so, Your Honor. I would not knowingly have heard anything regarding this case. I was actively representing Mr. W.D.W. in youth court before Judge Thomas in this matter.

THE COURT: But not sitting as judge in this matter?

THE WITNESS: No. No.

Charlotte Langley gave the following pertinent testimony:

Q. What do you know?

A. I was present back in May when you [J.N.W.E.] approached the DHS worker, Patricia Nelson, to ask for a visit with your son . . . for Mother's Day. She picked up the phone. She made the call, because she said Hudson Thomas was on vacation. She made the call. She got off the phone and she relayed to us that - -

MR. PARKER: Object as to hearsay, Your Honor.

* * * *

Q. Were you present in the room at the time of the phone call?

A. I was there during the phone call as she was relaying back and forth with Mr. Parker.

¶22. Patricia Nelson's testified as follows under direct examination by J.N.W.E.:

Q. Ms. Nelson, do you have knowledge of Derek Parker being on the bench for Judge Thomas while he's out?

A. Yes.

Q. Do you know how many times?

A. No, I don't know how many times.

Q. Do you recall a phone call you made to Derek Parker asking for visitations for Mother's Day?

A. I really don't. I try [sic] to find proof that I had called him. Obviously, if I did, I didn't write it down. I just know that whenever Judge Thomas is out, usually Mr. Parker is the person that we call to ask questions about it, but I just don't really remember that.

¶23. On cross-examination conducted by W.D.W., Nelson gave this testimony:

> Q. Ms. Nelson, you have been involved in this case involving [the minor child] is that right?
>
> A. That's right.
>
> Q. You've been through your file, I take it.
>
> A. Yes, sir. I'm the person that approves all investigations that come through.
>
> Q. Did you find any evidence in your file that I had ever done anything in the matter [involving the minor child] in a judicial capacity?
>
> A. Well, to be honest with you, Mr. Parker, I didn't have but about five minutes notice, because I was coming in from Belzoni at the time. I tried to find something. I didn't see anything.
>
> Q. Do you have any recollection of my doing so?
>
> A. So much has happened in this case, I really don't know. I wish I could come up with the dates and times. The only thing I could come up with is what we have documented, but I am not the worker for the case. I am the supervisor for the case.
>
> MR. PARKER: I don't have anything else, Your Honor. Thank you.
>
> THE COURT: So, Ms. Nelson, you have no recollection of having called Mr. Parker as the judge in this matter? I know he's been the attorney in this case.
>
> THE WITNESS: I wouldn't call him as the attorney. The only thing I would call him would have to be in capacity as sitting in for Judge Thomas. We don't call attorneys and talk to attorneys. So the only way I would have called him would have been in judge capacity [sic]. I couldn't find anything. You know, they said I did, and I tried to remember. It seems like I did. I don't know. I make so many some phone calls [sic]. I really don't know.

¶24. Were we sitting as the trier of fact, we may have made a different finding on the question of whether Parker had had any involvement in this case while sitting as a judge, and consequently, we may have reached a different conclusion as to his disqualification. However, since we are obligated to give deference to findings of fact made by the trial judges, we feel compelled to affirm the

chancellor's decision not to disqualify Parker on the basis of prior judicial involvement in the case.

(4) *Abuse of discretionary power*

¶25. Under this issue, J.N.W.E. argues that the chancellor abused her discretion (1) in refusing to consolidate the two motions for removal of the parties' respective counsel, (2) in giving her only ten days to hire an attorney before dismissing her case with prejudice, and (3) in dismissing her attorney and not also dismissing Wood's attorney even though Wood's attorney was privileged as a judge to all of the confidential information in the youth court files regarding the abuse issue.

¶26. The consolidation of the two motions would have certainly conserved judicial resources. Nevertheless, we do not find that the chancellor abused her discretionary power.

¶27. The dissent contends that this case should be reversed and remanded for further proceedings. The dissent concludes that dismissing J.N.W.E.'s motion for modification and returning custody of the minor child to the custodial father, without determining if there was any merit to the abuse allegations, was not the proper solution to address the delay occasioned by J.N.W.E.'s lack of diligence in pursuing this matter. Certainly, our preference would be that any sexual abuse charges be heard and resolved. However, we look at the appellant's argument and do not see this as an issue to be considered on appeal.

¶28. In her brief, the appellant argues:

> 4. Did the judge of the lower court abuse her discretionary power?
>
> Appellant believes that the judge of the lower court abused her discretionary power in the following manner: (1) The lower court refused to consolidate the two Petitions for Removal. Appellant's attorney was dismissed and the appellant was required to conduct her own hearing. Appellant believed that the Chancellor further abused her discretion when the Appellant was only given ten (10) days to hire an Attorney after which the Appellant's case was dismissed with prejudice. Abuse of the judge's discretionary power was also shown when the Appellant's attorney was dismissed and the Appellee's attorney was not dismissed even though he was privileged as a Judge to all of the confidential information in youth court. A judge in presumed to be qualified and unbiased in the administration of his duties. In order to overcome

> that presumption, the proponent of recusal must present evidence that produces a "reasonable doubt" about the judge's impartiality. *Turner v. State*, 573 So. 2d 657 (Miss. 1990); *Rutland v. Pridgen*, 43 So. 2d 952 (Miss. 1966). The record in this case shows more than a reasonable doubt about the judges impartiality.

This is the entire argument. There is simply no legal argument submitted on any issue other than the disqualification of the attorneys or recusal of the chancellor. The appellant does not argue that the chancellor abused her discretion in dismissing this case.

¶29. The appellant cited two cases. First, the *Turner* case dealt with a question of whether former Chief Justice Ed Pittman should be recused because he was a former Mississippi Attorney General. *Turner*, 573 So. 2d at 676-79. The court rejected the appellant's argument. *Id.* at 678. Second, the appellant incorrectly cited *Rutland v. Pridgen*, 43 So. 2d 952 (Miss. 1966). The correct cite is *Rutland v. Pridgen*, 493 So. 2d 952 (Miss. 1986). In *Rutland*, the issue was whether the judge should have recused himself due to the previous representation of a party. *Id.* at 953-54. Neither *Turner* nor *Rutland* support the issue relied on by the majority.

¶30. At the oral argument, our presiding judge gave counsel the following admonition:

> In looking at the brief, I notice that there were references to some allegations of child abuse in this case. That matter is not before the court today. The only thing that is before the court today is the question of the recusal of the chancellor and the dismissal of the attorneys. So I would caution counsel to limit arguments to those points.

Ms. James, arguing for the appellant, then stated, "That is correct Your Honor. I don't believe that the subject of abuse has ever been before the chancellor. I believe that has been before the other court." Hence, we reject the dissent's conclusion that this Court should reverse and remand for the chancellor to determine the substance of the modification motion, i.e ,whether there was any abuse, which was not before this Court.

¶31. In *Varvaris v. Perreault*, 813 So.2d 750, 753 (¶6) (Miss. Ct. App. 2001), we held that where the appellant

> fails to present any legal authority to support his appeal or the issues of his appeal, if one can decipher exactly what issues if any are presented. Therefore, this Court finds that the issue is waived not only for the failure to cite authority, but the failure to address the issue. The law is well established in Mississippi that this Court is not required to address any issue that is not supported by reasons and authority. *Hoops v. State*, 681 So.2d 521, 535 (Miss.1996) (citing *Pate v. State*, 419 So.2d 1324, 1325- 26 (Miss.1982)).

In *Mitchell v. State*, 2005 (¶22)(Miss. Ct. App. 2005), we held:

> We have held on numerous occasions that an appellant has a duty to make more than mere assertions, and should set forth reasons and cite authority in support of his arguments. *Clark v. State*, 503 So.2d 277, 280 (Miss.1987) (citing *Johnson v. State*, 154 Miss. 512, 122 So. 529 (1929)). If the party fails to provide this support, we are not obligated to consider the assignment of error. *Drennan v. State*, 695 So.2d 581, 585-86 (Miss.1997) (citing *Hoops v. State*, 681 So.2d 521, 526 (Miss.1996)). Thus, Mitchell has waived his argument on this issue.

Here, the appellant did not raise the issue relied upon by the dissent and cited no reasons or authority to support the argument. Accordingly, we find that it is waived and not properly before this Court. The only issues before the Court on this appeal relate to the disqualification of the attorneys and the recusal of the chancellor.

¶32. Certainly, we are concerned about allegations of abuse. The determination of whether abuse has occurred should be reviewed promptly. Here, there was a significant delay of over a year from the date the motion for modification was filed and the chancellor's final order. During this time, the child and his father were denied an opportunity to live together, and the child was in the custody of the Mississippi Department of Human Services. He was repeatedly moved between foster homes and the Baptist Children's Home. The seriousness of these charges notwithstanding, the dissent's conclusion is based entirely on his *sua sponte* review of the entire record and independent research of issues that were neither raised nor briefed by the appellant. In 1929, Justice Griffith concluded:

> It is a strange case upon which, in these days of tens of thousands of law books, no authority can be found, and when none is presented and the proposition is not manifestly well taken, there is the practical presumption that the authorities do not sustain the proposition, else they would have been cited. The courts frequently speak

> of such unsupported propositions as having been waived because of the failure to properly present them. There are several reasons which make it necessary to give weight to the foregoing considerations, one of which is that no Supreme Court could ever keep up with its docket if the judges were put to the tasks of briefing those cases of which the parties themselves have thought too little to brief.

Johnson v. State, 122 So. 529, 529 (Miss. 1929). With the tremendous number of "law books" added to our jurisprudence since Justice Griffith arrived at this insightful conclusion, we believe it remains true today more than seventy-five years later.

¶33. Based on these reasons, we affirm the decision of the chancellor.

¶34. THE JUDGMENT OF THE YAZOO COUNTY CHANCERY COURT IS AFFIRMED. THE COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, P.J., MYERS, CHANDLER AND ISHEE, JJ. CONCUR. IRVING, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J., LEE, P.J. AND BARNES, J.

IRVING, J., CONCURRING IN PART AND DISSENTING IN PART:

¶35. I agree with the majority that the chancellor did not err in disqualifying Ceola James as counsel for J.N.W.E. and in not disqualifying Derek Parker as counsel for W.D.W. However, I cannot agree that this Court should ever affirm a judgment of a chancellor which has the effect of dismissing with prejudice an allegation of sexual abuse of a child in the absence of a finding that the allegation of sexual abuse is without merit. Yet, that is exactly what the majority has done in this case. Therefore, I respectfully dissent from that portion of the majority opinion which finds no abuse of the chancellor's discretion in dismissing J.N.W.E.'s complaint for modification with prejudice even though the chancellor never determined that the claim of sexual abuse undergirding the modification request was without merit.

¶36. In an attempt to justify its action, the majority makes the following statement: "Certainly, our preference would be that any sexual abuse charges be heard and resolved. However, we look at the appellant's argument and do not see this as an issue to be considered on appeal." The majority

then proceeds to try to bolster its view — that the issue of the trial court's abuse of discretion in dismissing J.N.W.E.'s complaint for modification (which is premised on the allegation that the custodial father has sexually abused the child) — is not justiciable in this appeal. In that effort, the majority quotes the following statement made by the presiding judge during oral argument:

> In looking at the brief, I notice that there were references to some allegations of child abuse in this case. That matter is not before the court today. The only thing that is before the court today is the question of the recusal of the chancellor and the dismissal of the attorneys. So I would caution counsel to limit arguments to those points.

¶37. It is elementary that the issues on appeal are determined by the parties as reflected in their briefs. M.R.A.P. Rule 28. Therefore, the only thing that the presiding judge could have been attempting to accomplish by his admonition to the parties was to prevent the parties from publicly delving into the factual allegations of the sexual abuse claim during their argument since those allegations involved a minor child. He may have improvidently used broad language to accomplish that end, but assuming, as apparently does the majority, that the presiding judge was attempting to limit the issues, as opposed to attempting to prevent the parties from stating allegations of fact surrounding the sexual abuse claim, he was without the authority to do so, as Rule 28 of the Rules of Appellate Procedure clearly gives parties the right to define the issues which they desire to be considered on appeal.

¶38. As stated, the majority also finds that J.N.W.E. did not raise and argue in her brief the issue of the dismissal of her complaint. A review of J.N.W.E.'s assigned issues and brief argument negates such a narrow construction of the issues. In her brief, J.N.W.E. lists the following issues which we recite verbatim:

1. Should the Motion for Recusal have been granted?
2. Should the Appellant's Attorney have been removed?
3. Should the Appellee's Attorney have been removed?
4. Did the Judge of the lower Court abuse her discretionary power?

¶39. In a section of J.N.W.E.'s brief entitled, "Summary of Trial Relevant to Issues Presented for Review," J.N.W.E. states, "The Appellant and the Appellee have never been heard on the issue of custody. Appellant wanted to be heard and still desires to be heard. *The Appellee was given custody by default*." It is true, as the majority asserts, that in the argument portion of her brief under issue number four, J.N.W.E. only makes one paragraph of argument. The majority correctly quotes the entire paragraph. However, in that paragraph, J.N.W.E. stated that "Appellant believed [sic] that the Chancellor [sic] further abused her discretion when the Appellant was only given ten (10) days to hire an Attorney [sic] after which Appellant's case was dismissed with prejudice."

¶40. While J.N.W.E. may not have done a good job in briefing the issues, that could be said of many briefs that this Court receives. What is important here is not whether the issue of the dismissal of the motion for modification without a hearing on the abuse allegation was adequately briefed or even raised but whether it is proper for this Court to ignore this issue when the record before us clearly reveals that neither the Youth Court of Yazoo County nor the Chancery Court of Yazoo County ever adjudicated the issue.

¶41. Even assuming (1) that the issue was not properly raised and briefed, and (2) that James could not raise the issue in the brief which she filed on behalf of J.N.W.E. because James had been disqualified from representing J.N.W.E., should we decide that an allegation as serious as sexual child abuse has been waived because of the failure or inability of the appealing attorney to raise the issue? I think not. Rule 28 (a) (3) of the Rules of Appellate Procedure authorizes us to "notice a plain error not identified or distinctly specified" in the briefs. I believe that the dismissal of the motion for modification and the return of the minor child to the father in the absence of an adjudication of the merits of the sexual abuse allegation is a plain error which we should notice here if we truly think that the issue was not raised by J.N.W.E. In that regard, if the majority really prefers that sexual child

abuse claims be heard and resolved, it needs to explain why it refuses to make use of the authority granted it by Rule 28 (a) (3) of the Mississippi Rules of Appellate Procedure.

¶42. J.N.W.E. filed her original motion for modification of custody on February 21, 2003. Before process was served on W.D.W. on the motion for modification, J.N.W.E. charged W.D.W. with sexual abuse of the minor child of the parties, and the Yazoo County Youth Court removed the minor child from W.D.W.'s custody and placed the child with the Department of Human Services pending the outcome of the investigation of the sexual abuse allegations.[4] On October 13, 2003, the Yazoo County Youth Court transferred the case to the chancery court without making a finding on the allegation of sexual abuse. The Yazoo County Youth Court order provided that custody of the minor child would remain with the Department of Human Services pending resolution of the matter in the Chancery Court of Yazoo County.

¶43. In dismissing J.N.W.E.'s motion for modification, the chancellor found that the case had remained on the docket since October 5, 2003, with no attempt by J.N.W.E. to obtain a setting for a hearing. The October 5 date is inexplicable inasmuch as the case was transferred to the chancery court on October 13. In any event, the chancellor noted that the custody of the minor child had been with the Department of Human Services during the interim period and that the child had been shuffled back and forth between foster homes and the Baptist Children's Village during that time. After noting that the child had been separated from his custodial parent during all of this time, the chancellor stated:

> Due to the persistent failure of [J.N.W.E.] to move forward with the prosecution of this matter, or to obtain new counsel as directed by the court, the court is left with no choice, but to dismiss this matter and to return the custody of [the minor child] to W.D.W., his father and custodial parent.

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[4] The order from the Yazoo County Youth Court is not contained in the record before us. The facts concerning what transpired in the youth court, as well as facts regarding the abuse allegation, are taken from the chancellor's order dismissing J.N.W.E.'s motion for modification.

¶44. I appreciate the chancellor's concern for a speedy resolution of the custody issue. However, I cannot agree with the ultimate solution fashioned by the chancellor, and approved by the majority, to accomplish this goal. Dismissing J.N.W.E.'s motion for modification and returning custody of the minor child to the custodial father, without determining if there was any merit to the abuse allegation, was not the proper solution to address the delay occasioned by what the chancellor perceived as a lack of diligence on J.N.W.E.'s part in pursuing the matter.[5] As I understand the facts, the Youth Court of Yazoo County did not determine that the abuse allegations were frivolous. In fact, that court did not determine the merits of the allegations at all; it simply transferred the case to the Chancery Court of Yazoo County for a resolution of the matter. However, after the case was returned to the Chancery Court of Yazoo County, the chancellor did not adjudicate the allegations of the sexual abuse claim.

¶45. In order to bring a speedy resolution to the claim that the minor child had been sexually abused by his father, the chancellor could have appointed a guardian ad litem to protect the interests of the minor child. The chancellor also could have directed the Department of Human Services to conduct an investigation of the abuse allegations, assuming it had not already done so. I note, however, that if such an investigation was done, no reference was made to it in the chancellor's order dismissing the motion for modification, and no such investigative report is contained in the record before us. After receiving these reports, the chancellor then could have determined whether it was in the best interest of the minor child to return his custody to the father.

¶46. I make one additional point. As already pointed out, the chancellor dismissed J.N.W.E's complaint because J.N.W.E. did not acquire an attorney within ten days of James's being disqualified. While it is certainly desirable to always have trained counsel present issues to the court and assist in

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[5] Before being disqualified, James, as counsel for J.N.W.E., insisted that she attempted numerous times without success to get W.D.W's counsel to agree to a trial setting.

the trial of those issues, we must not lose sight of the fact that in our system of justice, a party always has the right to represent himself, subject of course to the same rules and procedures that govern attorneys who represent litigants. Therefore, I would find that the basis given by the chancellor for dismissing J.N.W.E.'s compliant (J.N.W.E.'s failure to hire an attorney within ten days) was not a valid basis for not going forward and considering on the merits the claim that the custodial father had sexually abused the child.

¶47. I would reverse and remand for a hearing on the merits of the allegation that the child has been sexually abused by the father. My view that the case should be reversed and remanded for a hearing should not be construed in any way to suggest that I think there is merit to the allegations. I have no way of knowing; I simply believe that since the best interest of the child is always the polestar consideration in child custody matters, the chancellor at least should have caused an investigation to be made and then based her custodial decision on the child's best interest in light of what the investigative report did or did not reveal concerning the sexual abuse claim.

KING, C.J., LEE, P.J., AND BARNES, J., JOIN THIS SEPARATE WRITTEN OPINION.