IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01187 COA

LARRY E. FRASIER

APPELLANT

v.

JACQUELIN FRASIER ALLEN

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. GEORGE D. WARNER, JR.

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

PRO SE

ATTORNEY FOR APPELLEE:

IRVIN L. MARTIN, JR.

NATURE OF THE CASE: MODIFICATION OF DIVORCE DECREE - CHANGE CUSTODY OF CHILD FROM MOTHER TO FATHER

TRIAL COURT DISPOSITION: DENIED MODIFICATION

BEFORE THOMAS, P.J., COLEMAN, DIAZ, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

Larry E. Frasier (Frasier) filed a Complaint to Modify Judgment in the Lauderdale County Chancery Court by which he sought to obtain custody of his then six-year-old son, Jack Edward Frasier, from

his former wife, Jacquelin Frasier Allen (Allen). That same court had awarded her custody of Jack when it awarded her a divorce from her husband by its Judgment of Divorce rendered on July 5, 1989. After a two-day trial on the merit of Frasier's complaint, the chancellor granted Allen's motion for a directed verdict after Frasier had rested his case. Frasier filed a Motion for New Trial, or in the Alternative, Amendment of Judgment, but the chancellor denied that motion by a Judgment Overruling Motion for New Trial. Frasier has appealed *pro se* from the judgment which overruled his post-trial motion; but for the reasons which this Court subsequently relates in this opinion, it affirms the judgment of the chancery court.

I. Facts

A. Prior to the present litigation

Jack Edward Frasier was born on December 6, 1986, to the marriage of Larry E. Frasier and Jacquelin Frasier. On July 5, 1989, the Lauderdale County Chancery Court rendered its Judgment of Divorce by which it awarded Jacquelin Frasier as Plaintiff a divorce of and from her marriage to Frasier on the ground of irreconcilable differences. In its Judgment of Divorce, the chancery court approved and ratified the Frasiers' property settlement agreement, which it incorporated into the judgment of divorce. In their property settlement agreement, the Frasiers agreed that Jacquelin Frasier should "have the permanent care, custody, control, and tuition of [their son Jack], subject to the right of Frasier to visit and see [Jack] at any and all reasonable times, to include the specific visitation rights of the part of [Frasier] as set forth [in the agreement]." The Frasiers further agreed that Frasier would pay Jacquelin Frasier child support for their son Jack at the rate of $150.00 per month.

Jacquelin Frasier married Bland Allen on March 31, 1990; and to their marriage their daughter, Josie Elaine Allen, was born on May 15, 1991.

Although Frasier graduated from Mississippi State University with a Bachelor of Science in entomology, his entire work experience had been with insurance companies as a loss control and safety specialist, the duties of which job were to assist commercial companies to avoid accidents or personal injuries. He had begun his career working for Unites States Fidelity and Guaranty Insurance Company in its offices in Meridian; but when that company closed its Meridian offices, Frasier moved to Jacksonville, Florida, where he worked for Associated Business and Commerce Insurance Company. However, as of May 16, 1994, he returned to Meridian where he began working for Great River Insurance in the same occupation as he had earlier worked in Jacksonville, Florida. While he was in Jacksonville, Frasier married his second wife, Kathy, in March of 1993, but his marriage to her ended in divorce in Jacksonville on April 20, 1994. Kathy had a son when she married Frasier.

On June 3, 1993, the chancery court rendered an Agreed Order Modifying Former Judgment of Divorce by which it increased the amount of Frasier's child support from $150.00 per month to $255.00 per month, beginning with the monthly payment that became due on June 5, 1993. Within little more than one month's time after the entry of that order, the chancellor entered an opinion and judgment on July 15, the primary purpose of which was to modify and clarify Frasier's periods of visitation with his son Jack. Finally, on December 23, 1993, the chancery court entered a Judgment Specifying Christmas Visitation by which the chancellor further explicated both parents' periods of visitation with their son during the Christmas holidays.

B. Current litigation

On October 26, 1993, Frasier filed a Complaint to Modify Judgment in which Frasier alleged that "since the chancery court's granting of the Judgment of Divorce on [July 5, 1989, which granted Allen] custody of [Jack], there has been a material and substantial change in circumstances [which merit] modification of said prior judgments . . . ." He charged that Allen and her husband Bland had been "mentally and\or physically abusing [Jack] to the extent that [he] ha[d] been adversely affected, meriting a change in his custody." Frasier prayed of the chancery court that it would grant him custody of his son Jack. After both Frasier and Allen had engaged in discovery procedures, the chancellor spent two days conducting a hearing on the merit of Frasier's complaint.

When Frasier rested near the end of the second day, Allen's counsel requested "that the Court grant a 50(a) Motion, which is commonly referred to as a directed verdict." The intent of Allen's counsel's motion was to test the sufficiency of Frasier's proof to establish that there had been a material change of circumstances in Allen's custody of Jack that warranted the chancery court's change of his custody to Frasier. The chancellor granted Allen's motion for "directed verdict." Frasier's counsel filed a Motion for New Trial, or in the Alternative, Amendment of Judgment pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. Included in this motion was the request that the chancellor grant relief form the judgment pursuant to Rule 60 of the Mississippi Rules of Civil Procedure. This latter reference to Rule 60 became moot because Frasier moved for no relief from the judgment, but only moved for a new trial. The chancellor denied Frasier's motion by a Judgment Overruling Motion for New Trial which he rendered on November 16, 1994, and Fraser has accordingly appealed. We reserve our review of the testimony and evidence which Frasier and Allen adduced at the hearing for our consideration of the issues which Frasier assigns in his appeal. However, before we begin our consideration of this issue, we think it appropriate to comment on Frasier's *pro se* representation in his appeal.

II. Frasier's representation *pro se*

Frasier's counsel during the hearing was the Honorable Sarah P. Springer. Because Ms. Springer had been elected Chancellor for the Twelfth Chancery Court District of which Lauderdale County is a part, which office she assumed on January 3, 1995, she filed in the supreme court on May 23, 1995, a motion to withdraw as Frasier's counsel in this appeal. On that same day, May 23, 1995, the Honorable Susanne A. Merchant, also a member of the Meridian Bar, filed a motion to withdraw as Frasier's counsel because Frasier had written a letter to her dated May 5, 1995, in which he advised Ms. Merchant that he had decided to terminate her services after his conversation with her on April 28, 1995. Ms. Merchant attached a copy of Frasier's letter dated May 5, 1993, to her motion to withdraw. We quote the following excerpts from his letter to Ms. Merchant.

> At this point in time, I feel that my money would be better spent on attorney fees in courtroom rather than writing a brief on appeal. . . . Please understand that I have already spent several thousand on my case and money saved is money saved. I plan to write my own brief and hope for the best. No one knows more about the situation than myself.

On July 13, 1995, the Mississippi Supreme Court entered an order by which it granted Ms. Springer's motion to withdraw and allowed Frasier to proceed *pro se.* Two days later on July 17, 1995, the Mississippi Supreme Court entered a second order by which it granted Ms. Merchant's motion to withdraw and allowed Frasier to proceed *pro se.* We recite all of the foregoing because of the following comments which Frasier made in his reply brief:

> This appellant filed a letter with the Supreme Court to proceed *pro se.* I did not quote any cases in my brief because I am not an attorney and find myself at a disadvantage in regard to legal expertise and resources. . . . If this appellant could afford the cost of additional attorney fees, I would not have filed a letter with the Supreme Court to proceed *pro se.* In fact, the only reason I do not have an attorney at the moment is because of all the previous fees that were necessary to bring this case to court and help my son get some relief . . . .

In *Bullard v. Morris*, 547 So. 2d 789 (Miss. 1989), the Mississippi Supreme Court granted a petition for writ of mandamus against a chancellor and directed him to re-evaluate his policy regarding the pending divorce action of Jerry and Lanita Bullard, who had represented themselves *pro se* both before the chancellor and before the supreme court. *Id.* at 790-91. The first issue which our supreme court addressed in *Bullard* was whether Bullard and his wife might proceed *pro se* in this civil case. *Id.* at 790. The supreme court determined that they could and opined as follows:

> The Mississippi Constitution Art. 3, Sec. 25 states that "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." Likewise, Miss. Const. Art. 3, Sec. 24 provides that "all courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of the law, and justice shall be administered without sale, denial, or delay."
>
> Considering all of these provisions, it is without question that the Mississippi Constitution permits a person to represent himself, pro se, in a civil proceeding. It is not necessary that an attorney be employed. *However, having elected to proceed without an attorney, a person is bound by the same rules of practice and procedure as an attorney.* Needless to say, it is sometimes that a person acts at his peril to proceed in this fashion. Constitutionally speaking, it is permissible for a party to proceed *pro se.*

Id. (emphasis added). As Frasier proceeds *pro se,* he remains bound by the same rules of practice and procedure as Allen's attorney even though he finds that he is at a "disadvantage in regard to legal expertise and resources" because he is not a lawyer.

III. Issues and the law

In his brief, Frasier presents this Court with the following two issues for our review and resolution:

1. Whether the court erred in granting a MRCP Rule 50 motion.

2. Whether the court erred in citing facts not in evidence.

We consider these issues in the order in which Frasier has presented them in his brief.

Issue 1. Whether the court erred in granting a MRCP Rule 50 motion.

A. Frasier's failure to cite authority to support his arguments on his issues

In his brief Frasier cites not one case, statute, or other authority to support his position on this issue. Allen in her brief is therefore quick "to suggest and request that [this] Court not consider the brief filed by Mr. Frasier as he did not cite to this Court one case from Mississippi or one case from another jurisdiction or any hornbook law or any statutory law or any authority whatsoever to support any of his positions." Allen cites several cases to support her request that we not consider Frasier's two issues, among which are *Devereaux v. Devereaux*, 493 So. 2d 1310, 1314 (Miss. 1986) ("No authority is cited in support of this assignment on cross-appeal by John Devereaux and under the authority of *Ramseur v. State*, 368 So. 2d 842 (Miss. 1979), it is not necessary that this Court address this assignment [of whether the chancellor erred when he failed to award Devereaux his equitable interest in the real property located in the state of Tennessee."); *R. C. Petroleum, Inc. v. Hernandez*, 555 So. 2d 1017, 1023 (Miss. 1990) (Petroleum had an affirmative duty to specifically address the issue of whether treatment of Hernandez was "reasonable as required by the Act" and to provide authoritative support for its position; but in light of its failure to do so, the supreme court is "under no obligation to consider th[e issue].").

Were this not a case in which the custody of a child were at issue, this Court would readily accede to Allen's request that we not consider either of Frasier's two issues because he failed to cite any authority whatsoever to support his position on the two issues. However, in *Barber v. Barber*, 608 So. 2d 1338, 1340 (Miss. 1992), the Mississippi Supreme Court explained:

> Ordinarily, where a party fails to file a brief on appeal, we take the issues raised by the opposing party as confessed. *Price v. Price*, 430 So. 2d 848 (Miss. 1983). In matters of child custody and support, however, in the absence of an appellee's brief, our practice is to make a special effort to review the record for support for affirmance. *Sparkman v. Sparkman*, 441 So. 2d 161 (Miss. 1983); *Garceau v. Roberts*, 363 So. 2d 249 (Miss. 1979)

In the case *sub judice* this Court elects to adopt the practice of the Mississippi Supreme Court "to make a special effort to review the record for support for affirmance." Thus, we proceed to review

the record to determine whether the chancellor's refusal to modify Allen's custody of Jack was error even though Frasier cites no cases nor other authority in his brief to support his position on this issue.

B. Standards of review

(1). Rule 50(a) Motion for directed verdict versus Rule 41(b) motion to dismiss

While Allen predicated her motion which she made after Frasier rested his case on Rule 50(a) of the Mississippi Rules of Civil Procedure, *Mitchell v. Rawls*, 493 So. 2d 361 (Miss. 1986), instructs this Court that Rule 41(b) of the Mississippi Rules of Civil Procedure was the actual basis for Allen's motion. In *Mitchell* a broker sued sellers on a listing agreement for his commission after the seller sold the house. *Id.* at 363. As in the case *sub judice*, the chancellor sustained the defendant-sellers' "motion for directed verdict under Rule 50," and the realtor appealed. The Mississippi Supreme Court explained why Rule 41(b) rather than Rule 50(a) was the actual basis for the defendant-sellers' motion in the following language:

> The chancellor inadvertently cited Rule 50. Actually the Rule applicable is Rule 41(b), Miss. R. Civ. P., the pertinent part of which reads as follows:
>
> > After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court may make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Mitchell, 493 So. 2d at 362.

The distinction between the basis of Rule 50 for a motion for directed verdict in a jury trial and the basis for Rule 41(b) motion to dismiss for a bench trial is significant because a motion pursuant to Rule 41(b) entails a different standard of review than does a motion pursuant to Rule 50(a). In *Davis v. Clement*, 468 So. 2d 58, 61-62 (Miss. 1985), the supreme court explicated this distinction as follows:

> We emphasize that this motion was presented to a trial judge sitting without a jury. In such a setting, the trial court is not required to look at the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable favorable

> inferences. Notions emanating from *Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652 (Miss.1975), and many other similar cases--whether arising in the context of a motion for a directed verdict, a request for a peremptory instruction or a motion for judgment notwithstanding the verdict--have no application here. . . . If, considering the evidence fairly, as distinguished from in the light most favorable to the plaintiff, the trial judge would find for the defendant -- because plaintiff has failed to prove one or more essential elements of his claim, because the quality of the proof offered is insufficient to sustain the burden of proof cast upon the plaintiff, or for whatever reason--the proceeding should be halted at that time and final judgment should be rendered in favor of the defendant.

The standard of review for a motion for directed verdict made pursuant to Rule 50(a) requires the appellate court to "look at the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable favorable inferences." In contrast to that standard, the standard of review for a motion to dismiss after the plaintiff has presented his case in a non-jury, or bench, trial pursuant to Rule 41(b) is "considering the evidence fairly, . . . [should] the trial judge find for the defendant -- because plaintiff has failed to prove one or more essential elements of his claim, because the quality of the proof offered is insufficient to sustain the burden of proof cast upon the plaintiff, or for whatever reason--and thus halt the proceeding . . at that time and [render] final judgment . . . in favor of the defendant."

The Mississippi Supreme Court again honored this distinction between a Rule 50(a) motion and a Rule 41(b) motion in its opinion in *Mississippi Real Estate Commission v. Geico Financial Services, Inc.*, 602 So. 2d 1155, 1156 n.1 (Miss. 1992), in which the Mississippi Supreme Court again opined:

> Technically and procedurally, the court granted a dismissal on the merits pursuant to Miss. R. Civ. P. 41(b) since this was a non-jury trial. A directed verdict under Miss. R. Civ. P. 50 is limited in use to "cases tried to a jury with a power to return a binding verdict." Comment, Miss. R. Civ. P. 50; *Mitchell v. Rawls*, 493 So. 2d 361, 362 (Miss. 1986).

(2). Issues of Child Custody

We must also repeat the Mississippi Supreme Court's familiar standard of review in matters involving the custody of children because we must comply with both standards of review in cases like this one where the chancellor has granted the defendant-parent's motion to dismiss after the plaintiff-parent has rested. In *Williams v. Williams*, 656 So. 2d 325, 330 (Miss. 1995), the Mississippi Supreme Court recited the standard of review to be utilized in issues of child custody:

> The standard of review in child custody cases is quite limited. A chancellor must be manifestly wrong, clearly erroneous, or applying an erroneous legal standard in order for this Court to reverse. *See, e.g., Chamblee v. Chamblee*, 637 So.2d 850, 860 (Miss.1994). This Court will affirm decisions of the chancellor, whenever based on credible evidence.

Id.

C. The law of child custody

In *Westbrook v. Oglesbee*, 606 So. 2d 1142 (Miss. 1992), the father sought to modify the original divorce decree which had awarded custody of his daughter to his former wife by way of his counterclaim against his former wife, who had filed a motion to modify the final judgment of divorce to require the father to increase his child support payments from $135.00 per month to $650.00 per month. The chancellor had found neither parent to be fit and had placed the daughter in the custody of the Pearl River County Department of Human Services. The only issue was whether the father might be fit to be awarded the custody of his daughter. In its consideration of this issue, the supreme court stated the two prerequisites to modify a child custody order:

> In *Phillips v. Phillips*, 555 So. 2d 698 (Miss. 1989), this Court set out the prerequisites to modify a child custody order:
>
> > There are two prerequisites to a modification of child custody. First, the moving party must prove by a preponderance of the evidence that, after the entry of the judgment sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child. Second, if such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody. *Pace v. Owens*, 511 So. 2d 489 (Miss. 1987); *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss.1984).

Westbrook, 606 So. 2d at 1144.

1. Evidence, testimony, and the chancellor's findings in the case *sub judice*

Frasier identifies his first wife's second marriage to Bland Allen as the material change in her circumstances which warrants the chancellor's modifying the original Judgment of Divorce to award him custody of his son, Jack. In his brief, Frasier states:

> I submit to the Court that since his mother was awarded custody [of Jack], there has been a material and substantial change in circumstances. That occurred when Bland Allen became and continues to be the administrator of the child's discipline.

Allen identifies the following acts of discipline for which he holds Bland Allen, Jack's stepfather responsible. First, either in 1991 or 1993, when Jack was four or six years old, Bland Allen and his wife passed a rope through the belt loops in Jack's pants and tied it to secure it around Jack's waist and forced Jack to descend into a drainage ditch which ran along the back line of their residential lot

in Meridian so that he could remove some bricks from the ditch which he had earlier thrown into the ditch against his mother's and stepfather's directions. Allen testified that Bland Allen used the rope to prevent her son from falling into the water in the ditch or getting into the mud that was on the bottom of the ditch. She further testified that the water was several inches deep when this episode occurred.

Neal Carson, a civil engineer employed by Lauderdale County as its county engineer, testified that he had inspected the ditch behind the Allen' house and that he measured the bank on the Allen' side to be eight feet high, the bank on the opposite side to be five feet high, and that it was sixteen feet wide across the top. When he examined the ditch, the water in it was about one foot deep. Bland Allen testified that Jack made four or five trips into the ditch and brought out four or five bricks. Frasier testified that he had not learned of this discipline episode in the ditch until Dr. Jan Boggs, a psychologist engaged in private practice in Meridian, to whom Frasier had taken Jack for counseling, told him that Jack had told him about it during one of his visits for counseling.

Bland Allen testified that during the four years he had been married to Jacquelin Allen, he had spanked Jack four or five times, but that Jack's mother had always approved and had always been present when he did so. In addition to the testimony and evidence about Bland Allen's discipline of Jack, the chancellor heard testimony from George Metrolis, a Lauderdale County Deputy Sheriff, who told about going with Sergeant Tommy Anderson, also of the Lauderdale County Sheriff's Department, to the Allens' home to investigate a report to the sheriff's office that Jack had been abused. Sergeant Anderson inspected Jack while Metrolis talked with Bland Allen. Metrolis testified that Anderson found no evidence of abuse about Jack's body. Neither officer prepared any report about their investigation.

Jane Mize, an employee of the Mississippi Department of Human Services with its child abuse and neglect division, testified that she and Ms. Velma Roberts, another social worker employed by the Mississippi Department of Human Services, twice visited the Allens' home to investigate a report that Jack had been abused. They could find no evidence of Jack's abuse and reported accordingly.

Dr. Jan Boggs testified extensively about the several sessions he had with Jack, the first of which was on June 21, 1993, and the last of which occurred in the month of July 1994. Dr. Boggs diagnosed Jack as suffering from "an adjustment disorder" and that there were also elements of "post-traumatic stress disorder." It is not within the purview of this opinion to relate in detail all of Dr. Boggs' testimony. This Court does take note, however, of Dr. Boggs' opinion that Jack was capable of telling lies. The following question and answer during Frasier's direct examination of Dr. Boggs appears to this Court to be an apt summary of Dr. Boggs' opinion about Jack's condition and circumstances:

Q. Do you feel that [Jack] needs to continue in therapy at this point?

> A. I, you know, Jack's doing a good bit better. I wouldn't necessarily say he has to continue in therapy. I would hope that his -- the improvement in his relationship with his stepdad, and everybody really, would continue. If it didn't, then therapy might be indicated down the line. But I think he would do okay as it sits now without therapy. Jack is a very nice kid. He is a good kid.

After the chancellor heard argument on Allen's motion, he first rejected Frasier's prayer that the chancery court award joint custody of Jack to Allen and to him. The chancellor opined:

> I have come to the conclusion . . . that joint custody only works with people who get along. If they were, they wouldn't be in court in the first place. [Frasier and Allen are] not ever going to stop having their differences and, therefore, any request for any form of joint cooperative custody would be foolhardy and stupid and certainly not in the best interest of the child. So that request is denied.

The chancellor then addressed the issue of whether he should modify the Judgment of Divorce to transfer custody of Jack from his mother to his father. Among the chancellor's ruminations on this issue were his following findings:

> Let's quote what Dr. Boggs said. He tried to be as nice as he could. "The best thing that could happen to Jack in the next year or two is to have an uneventful life." This was after he said, "Stay out of counseling, cut this out."
>
> Well, Dr. Boggs comes and says, on behalf of the father, your son tells me he doesn't like you. He can't get along with you. He doesn't like his stepmom who is your wife. He also says that the young boy is happy with his mother and stepfather. That he doesn't like the fact that his daddy and his grand daddy tell him to say bad things. That his momma has told him only to say the truth. Dr. Boggs says that Jack says positive things about his momma and his stepfather. He says he hates his father. This is testimony that [Frasier] brought to court to tell me about.
>
> There has been absolutely no proof of any material change in circumstances, not a preponderance, not by clear and convincing evidence, not by the furtherest stretch of the imagination, not even by uneducated grasping at straws. The only thing that is shown to the Court is what this mother and this father should have known when they got a divorce and that is that your son is going to have a real adjustment in his life.
>
> One big thing that was harped on in the trial is the stepfather paddled the boy, according to the testimony four times, and his father does not believe in paddling. If you have never been paddled, it's quite an adjustment when the belt hits the butt. The father thinks that's child abuse, and there are countless millions who think it's proper administration of discipline.
>
> There is not one word in this record that this child was disciplined in a sadistic manner or

injured by being spanked or anything of that nature.

About the ditch incident, the chancellor found the following:

> The child, I find from the evidence, was instructed by his mother and stepfather to not throw bricks in a ditch at the rear of their property. [Jack] threw bricks in the ditch at the rear of their property. [Jack] was made to get three or four bricks out of the ditch that he threw in, in the presence of his mother and stepfather. . . . The child had a rope tied around his belt loops to keep him from falling in some mud and water in a portion of the ditch while he was retrieving the bricks that he threw in as punishment for his disobedience.
>
> [I adopt the testimony of Neal Carson, the Lauderdale County Engineer, about the dimensions of the ditch.] I do not find that having this young man retrieve bricks that he threw in a ditch was in any way, manner, or form abusive, improper, or should not be done . . . . I find that [this punishment] was a judgment call on the part of the mother and the stepfather.
>
> I don't find that there has been any adverse affects on the child by anything that anybody has done except the overindulgence and hauling of a child to a therapist.
>
> [T]hank goodness, Dr. Boggs said keep [Jack] out of the shrink's office. Keep the child away, he doesn't need to be there. All he needs is to get through his adjustment period.
>
> For the reasons stated and for the law cited, the motion to exclude the evidence will be sustained.

2. General Discussion of the law on modifying a judgment of divorce to change the custodial parent relevant to the issues in this case

In *Duran v. Weaver*, 495 So. 2d 1355, 1357 (Miss. 1986), the Mississippi Supreme Court wrote that it "ha[d] made it clear that a change of circumstances in the out of custody parent is not sufficient to authorize modification." Hence we are concerned with whether a material change in the circumstances of Allen has occurred since the chancery court entered its judgment of divorce on July

5, 1989. The only change in her circumstance that this Court can perceive from the evidence in the record in this case is Allen's second marriage to Bland Allen on March 31, 1990. However, the Mississippi Supreme Court has held that the custodial parent's subsequent marriage alone does not constitute a change of circumstance sufficiently material to warrant a transfer of custody of the custodial parent's child from the custodial to the non-custodial parent. *See Mitchell v. Powell,* 253 Miss. 867, 879, 179 So. 2d 811, 816 (1965) (second marriage alone insufficient to warrant the mother's loss of the custody of her daughter); *Allen v. Allen,* 243 Miss. 23, 33, 136 So. 2d 627, 632 (1962) (remarriage of either party generally an insufficient reason to change an order of custody; but remarriage combined with other circumstances which reflect a material change in conditions affecting the welfare of the child may warrant modifying decree to change custody of child).

Combining the standard of review for the chancellor's granting of a Rule 41(b) motion to dismiss with the general principle that a subsequent marriage of the custodial parent without more does not constitute a material change in the circumstances of the custodial parent confirms that the chancellor did not err when he found that "[t]here has been absolutely no proof of any material change in [Allen's] circumstances." The effect of the chancellor's finding was that Frasier had failed to prove that there had been a material change in Allen's circumstances, an "essential element of his claim" for the change of Jack's custody from Allen to Frasier.

Our determination that Frasier had failed to prove by any standard of proof that there had been a material change in Allen's circumstances logically should end our consideration of this issue and result in resolving this issue adversely to Frasier. However, had we found that Allen's marriage to Bland Allen was a material change in her circumstances as the custodial parent of Jack, we would yet be required to consider whether that material change adversely affected Jack's welfare. Frasier argues that his former wife's second marriage did adversely affect Jack's welfare because Bland Allen's forms of discipline, *i. e.*, spankings and the ditch incident, adversely affected his son's welfare. However, the chancellor found that "[t]here is not one word in this record that this child was disciplined in a sadistic manner or injured by being spanked or anything of that nature."

In *Newsom v. Newsom*, 557 So. 2d 511, 514 (Miss. 1990), the Mississippi Supreme Court repeated the instruction to the bench and bar that "[o]n appeal the Supreme Court is required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong." This Court hopes its synopsis of the testimony and evidence in this case, which it has recited in the light most favorable to Frasier's position on this issue, renders it apparent that we are required to respect the chancellor's finding of fact that Jack "was [not] disciplined in a sadistic manner or injured by being spanked or anything of that nature." We conclude that the chancellor erred not when he sustained Allen's motion which she made after Frasier rested his case even though her counsel gave it the misnomer of a Rule 50 motion. Therefore, we resolve Frasier's first issue against him and affirm the chancellor's granting Allen's motion for dismissal pursuant to Mississippi Rule of Civil Procedure 41(b) which her counsel made after Frasier had rested.

Issue 2. Whether the court erred in citing facts not in evidence.

Frasier includes within his second issue four findings of fact which the chancellor made that were erroneous. They were:

First, "the requested counseling and/or therapy for [Jack] was based on an 'I'll get even

with you' basis."

Second, the court stated in its opinion in which it sustained Allen's motion that "[i]f the father really believed that the child was being disciplined in a sadistic manner, he would have done something about it."

Third, "[w]ith regard to the incident of the ditch, the Court found that the Welfare Department and the Sheriff's Department investigated this incident."

Fourthly, "[t]he Court found that taking the child to the "shrink's" office constituted cruelty and further found that Dr. Boggs said to keep [Jack] out of the shrink's office.

We again note that Frasier cites no cases nor other authorities to establish that these findings of the chancellor were relevant to his ultimate decision to grant Allen's Rule 41(b) motion to dismiss. Nevertheless, we briefly address each one of these four findings of fact which Frasier claims the chancellor erroneously made.

The first finding that "the requested counseling and/or therapy for [Jack] was based on an 'I'll get even with you' basis," was not erroneous in light of the contents of the record. Allen had taken Jack to a psychiatrist, Dr. Wood Hiatt of Jackson, and to a counselor, Brenda Chance; and Frasier had employed Dr. Boggs to counsel Jack because of his understandable concern at that time for his son's well-being. Within a sentence or two after the chancellor made this first finding about which Frasier complains, he further opined, "I think the child was carried for counseling to be sure that somebody had an expert on their side, in their corner of the ring, in case we got squared off in the courtroom." Thus, this Court interprets the chancellor's first finding to refer to each parent's desire to get even with the other parent in terms of being prepared to present her and his side of the issue in this case. We do not believe that the chancellor intended to infer that Frasier and Allen were trying to get even with each other on a personal basis.

With regard to the chancellor's second finding, "[i]f the father really believed that the child was being disciplined in a sadistic manner, he would have done something about it," we find that the evidence in the record is equally susceptible to an interpretation that Frasier was trying to do something in response to his concern that Allen and her husband were unnecessarily disciplining Jack. Frasier's initially taking Jack to Dr. Boggs is consistent with his protest that he did do something as the result of his belief that his son was being disciplined in what appeared to Frasier to be an overly-strict fashion. However, this finding was not directly related to the issues of whether there had been a material change of circumstance in Allen's situation or whether such a material change in circumstance adversely affected Jack's welfare. That finding was relevant to Frasier's credibility as a witness. The Mississippi Supreme Court has repeatedly stated that "[t]he weight and worth of [a] witness' testimony is solely for the chancellor to determine." *Doe v. Doe*, 644 So. 2d 1199, 1207

(Miss. 1994) (citing *Mullins v. Ratcliff*, 515 So. 2d 1183, 1189 (Miss. 1987)).

The third finding of the chancellor which Frasier asserts is not supported by the evidence is: "[w]ith regard to the incident of the ditch, the Court found that the Welfare Department and the Sheriff's Department investigated this incident." Frasier is correct that the evidence did not support this finding in the form that the chancellor made it. The evidence was that the ditch discipline occurred either in 1990 or 1992. However, the investigations made by the Department of Human Services and the Lauderdale County Sheriff's Department revealed no evidence that Jack had been abused in any manner whatsoever. Thus, the chancellor correctly found that neither the representatives of the Department of Human Services nor the deputy sheriffs found any evidence of Jack's abuse by Allen or her husband, Bland. It is this correct finding by the chancellor that was relevant to the issues of whether he should transfer custody of Jack from his mother to his father.

Frasier is wrong about his allegation that the chancellor's fourth finding was not supported by the evidence. The fourth finding was that the "taking the child to the 'shrink's' office constituted cruelty and that Dr. Boggs said to keep [Jack] out of the shrink's office" is supported by Dr. Boggs' testimony, to which we previously alluded in this opinion.

In *Drew v. Drew*, 249 Miss. 26, 162 So. 2d 652, 654 (1964), the Mississippi Supreme Court observed that "[t]he findings of the chancellor will not be disturbed on appeal unless manifestly wrong, since he is better able to determine the truth of the matter than the appellate court." In *Kavanaugh v. Carraway*, 435 So. 2d 697, 700 (Miss. 1983), the Mississippi Supreme Court, as though to admonish itself, observed that it "should not sit as reviewing chancellors." Neither should this Court. Thus, while we have addressed Frasier's Issue 2., and have concurred in part with some of his arguments, we again elect to affirm the chancellor's granting of Allen's motion which she made after Frasier rested because we conclude that his findings were not manifestly wrong and that he was in a better position to "determine the truth of the matter" than are we, especially in the absence of cases or other authorities on which we might base any other resolution of this issue. We resolve Frasier's Issue 2. against him.

IV. Summary

Frasier need not hire a lawyer to represent him in this appeal; he may proceed *pro se*. However, he is entitled to no dispensation from the rules and practice of appellate procedure and matters of substantive law. He must comply as fully with them as would his lawyer who represented him. Nonetheless, this Court "must abide patience, tolerance and humanity in dealing with child custody cases." *Kavanaugh*, 435 So. 2d at 700.

The only change in Allen's circumstance which Frasier's evidence established was her subsequent marriage to Bland Allen on March 31, 1990. The Mississippi Supreme Court has held that a subsequent marriage alone is not a material change in the custodial parent's circumstances on which to rest a change in custody of the child. Frasier's evidence, especially the testimony of Dr. Boggs, established that his son Jack had experienced "an adjustment disorder" and that there were also elements of "post-traumatic stress disorder" present in Jack's case. However, Dr. Boggs also testified that Jack had improved and that he saw no further need for therapy in Jack's case as the circumstances existed in August 1994, when he testified. Investigations of Jack's abuse by both representatives of the Mississippi Department of Human Services and deputy sheriffs from the

Lauderdale County Sheriff's Department revealed no evidence that Jack had been abused.

The "Rule 50" motion "for directed verdict" was misnamed by Allen's counsel. This motion which her counsel made after Frasier rested was instead a motion to dismiss pursuant to Rule 41(b) of the Mississippi Rules of Civil Procedure. Rule 41(b) provides that a defendant, "may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." The Mississippi Supreme Court has explained that "If, considering the evidence fairly, as distinguished from in the light most favorable to the plaintiff, the trial judge would find for the defendant -- because plaintiff has failed to prove one or more essential elements of his claim, because the quality of the proof offered is insufficient to sustain the burden of proof cast upon the plaintiff, ...," then he may sustain the defendant's Rule 41(b) motion to dismiss.

The only change of circumstance in Allen's situation after the Judgment of Divorce rendered on July 5, 1989, was her second marriage to Bland Allen. Without more, a subsequent marriage by a custodial parent is not a sufficient material change in circumstance to justify the chancery court's modification of a Judgment of Divorce to transfer custody of a child to the non-custodial parent. Bland Allen's methods of discipline of Jack, in which Jack's mother joined and of which she testified she approved, were insufficient reason to determine that this change in circumstance was adverse to Jack's welfare, especially since the chancellor found that Jack "was [not] disciplined in a sadistic manner or injured by being spanked or anything of that nature."

We interpret the chancellor's opinion to mean that Frasier had failed to prove any material change in Allen's circumstances since the Judgment of Divorce rendered on July 5, 1989, and that the quality of Frasier's proof of Jack's abuse was "insufficient to sustain the burden of proof cast upon" Frasier to establish that Allen's subsequent marriage to Bland Allen had adversely affected Jack's welfare. The findings of the chancellor will not be disturbed on appeal unless manifestly wrong, since he is better able to determine the truth of the matter than are we. From our analysis of the testimony and evidence in this case as it pertains to the two prerequisites for the modification of a judgment of a divorce decree to change the custody of a child, we resolve that the chancellor correctly analyzed and weighed the evidence when he granted Allen's Rule 41(b) motion. We

therefore decide both of Frasier's issues against him and affirm the judgment of the Lauderdale County Chancery Court.

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

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.