IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00382 COA

SANDRA LIN KENNEDY McCARTY (LEWIS)

APPELLANT

v.

RANDALL DEAN McCARTY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. DENNIS M. BAKER

COURT FROM WHICH APPEALED: PANOLA COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

DAVID L. WALKER

ATTORNEY FOR APPELLEE:

JOE VAN DYKE

NATURE OF THE CASE: CIVIL - MODIFICATION OF PARENTAL CUSTODY ORDER

TRIAL COURT DISPOSITION: ORIGINAL ORDER GRANTING MOTHER CUSTODY AND FATHER VISITATION RIGHTS MODIFIED TO GRANT FATHER CUSTODY AND MOTHER VISITATION RIGHTS

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

Appellant Sandra Lin McCarty Lewis appeals from a March 23, 1995 decree from the Chancery Court of Panola County that modified the original divorce decree dissolving the marriage of Sandra Lin to her first husband, Randall Dean McCarty. The initial divorce decree awarded custody of the former couple's three minor children to Sandra Lin and granted visitation rights to Randall. The decree of the chancellor modifying the initial divorce decree essentially reversed the roles by granting Randall legal custody and making provision for Sandra Lin to have visitation rights. On appeal, Sandra Lin contends that the chancellor's second decree was against the overwhelming weight of the evidence and against the best interests of the children. After reviewing the arguments of the parties and the record of the chancery court proceedings, we find no merit in Sandra Lin's contentions and we therefore affirm.

I. BACKGROUND

Randall Dean McCarty and Sandra Lin McCarty were husband and wife. In May of 1992, the couple divorced. Pursuant to the divorce decree, Sandra Lin was awarded legal custody of the couple's three minor children and Randall was given visitation rights. Randall was also required to pay child support in the sum of $210 per month.

On June 8, 1992, Sandra Lin married Robert Lewis and moved to Louisiana. Subsequently, Sandra Lin and Lewis relocated to Elaine, Arkansas.

Not long after the divorce was finalized, Sandra Lin allowed Randall to have actual physical custody of the children. Indeed, the record shows that for the majority of the time since the divorce, and with the exception of a few relatively brief periods when Sandra Lin has exercised her custodial rights or engaged in what amounted to weekend visitations, the children have lived with Randall in Sardis, Mississippi and Randall has provided for their food, shelter and clothing and has made sure that they were enrolled in school. Although there was some conflict in the testimony at trial as to the "whys" and "wherefores" of this arrangement -- in Sandra Lin's version, this arrangement resulted from her capitulation to various intimidating tactics allegedly used by Randall, while, in Randall's' version, this arrangement resulted from Sandra Lin's essential disinterest in exercising the responsibilities of parenthood and her willingness that Randall be saddled with these responsibilities -- the chancellor found that during the time that this arrangement was in place, Sandra Lin could have taken legal steps to exercise her custody rights but instead did nothing. The chancellor further found that in setting up or allowing a situation in which Randall had actual physical custody of the children, Sandra Lin had effectively turned the children over to Randall, the parties had effectively modified the terms of the original divorce decree, and Sandra Lin, by her failure to exercise her custodial rights, had ratified this state of affairs. In making these findings, the chancellor found particularly persuasive the fact that Sandra Lin had voluntarily delivered custody of her oldest child to her mother in Water Valley, Mississippi, a location not far from Randall's Sardis residence, so that the oldest child could attend school there.

On October 3, 1994, Randall filed his Petition for Modification of Decree in the Chancery Court of Panola County. In this petition, Randall asserted that since the time of the divorce, Sandra Lin had dropped off the children at Randall's home, that he had had physical custody of the children since that date, that Sandra Lin had shown that she was either not capable or not willing to exercise her custodial rights and that Randall had provided for the needs of the children without the benefit of any

type of child support from Sandra Lin. Accordingly, Randall prayed that legal custody of the children be placed with him and that Sandra Lin be required to pay him child support. After a two-day evidentiary hearing on the matter, which was held on March 22 and 23, 1995, the chancellor entered a second decree modifying the original custody decree that was entered at the time the couple divorced. The chancellor ordered that, for the months when the children were in school, Randall was to have legal custody and Sandra Lin was to have visitation rights. For the months when the children were not in school, Sandra Lin was to have legal custody. The chancellor also decreed that neither parent was obligated to pay child support to the other parent at any time.

Sandra Lin now appeals, asserting that the chancellor's modified decree was against the overwhelming weight of the evidence and that the best interests and welfare of the children were served by the original custody decree.

II. DISCUSSION

The Mississippi Supreme Court has stated:

> There are in our law two prerequisites to a modification of child custody. First, the moving party must prove by a preponderance of the evidence that, since entry of the judgment or decree 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, 490 (Miss. 1987). "Also, findings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong." *Smith v. Todd*, 464 So. 2d 1155, 1157 (Miss. 1985).

In his bench opinion (a copy of which is appended to this Opinion), the chancellor found that in spite of the conflicting explanations as to how Randall had succeeded in obtaining actual physical custody of the children, Randall's version of the events -- i.e., that Sandra Lin had voluntarily placed the care of the children with Randall -- was more believable than Sandra Lin's version. In view of this finding, the chancellor held that the parents had effectively modified the custodial situation and that Sandra Lin had ratified this arrangement by her actions and inactions. He further stated that this was a material change in circumstances and that "it would be detrimental to the children, if I were to change that change." Finally, in deciding that the children's best interests would be served if the arrangement wherein the children lived with Randall remained undisturbed, the chancellor stated:

> I think that . . . [Sandra Lin] is in better circumstances, now, than she has ever been; more settled, now, than . . . [her and her second husband] have ever been. But it's been a long time coming. And children are not things, like books, that you can put on a shelf and just lay there, and come back, three or five years later, or two years or three years later, and pick it up, and go forward with it. I think . . . [Randall] has done all that he can do. I think he will continue to do all he can do.

After reviewing the record, we are of the opinion that there was sufficient evidence presented at trial to support the chancellor's findings, that his findings were not against the overwhelming weight of

the evidence, that his findings were not "manifestly wrong," and that his findings and rulings were in line with the legal standards set forth in *Pace v. Owens*. While there may have been conflicting evidence presented pertaining to various factual issues, the chancellor, as the finder of fact, was ultimately charged with the responsibility of resolving these conflicts by making the appropriate findings. We cannot say that the evidence weighed so overwhelmingly in favor of Sandra Lin as to render the chancellor's conclusions wrong. Accordingly, we find that the contentions that Sandra Lin raises on appeal are without merit and we affirm the chancellor's decree.

THE DECREE OF THE CHANCERY COURT OF PANOLA COUNTY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

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