ORIGINAL

No. [redacted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[redacted]
Plaintiff/Appellee

vs.

[redacted]
Defendant/Appellant.

APPELLANT'S BRIEF-IN-CHIEF

APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY, OKLAHOMA
Honorable John M. Kane, District Judge
Case No. [redacted]

Appeal from Trial Court's Decision filed March 3, 2016 and Journal Entry filed February 9, 2017

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APPELLANT'S BRIEF-IN-CHIEF

Defendant/Appellant, [redacted], ("Mother"), for her Brief-In-Chief to Plaintiff/Appellee, [redacted] ("Father") with citations to the official transcript of the trial on the merits listed by date and Page number, e.g. "Tr. 10/27/2015, Vol. I, Page 1, Lines 1-3", states as follows:

STATEMENT OF THE CASE

[redacted], Appellee, and [redacted], Appellant, were never married. The parties are the parents of one (1) minor child, namely [redacted], born December 2010 in Owasso, Oklahoma.

Plaintiff/Appellee filed his Petition for paternity on April 19, 2011. An Agreed Decree of Paternity, Joint Custody Plan, and Child Support Computation was filed on March 2, 2012 which states that both parties are fit and proper persons to be awarded care, custody, and control of the subject minor child.

On January 8, 2015, Plaintiff/Appellee filed a motion to modify custody alleging that Respondent/Appellant had relocated between Oklahoma and Georgia subjecting the minor child to three (3) residential moves during a two (2) year period of time, that preschool would be starting for the minor child, that the minor child needed instruction on Plaintiff/Appellee's Indian heritage and requested sole custody be awarded to him.

On February 11, 2015, Respondent/Appellant filed her response and counterclaim to the motion to modify requesting sole custody be awarded to her based on allegations that Plaintiff/Appellee was negligent in providing healthcare for the minor child and that he abrogated his custodial obligations and authority to his family members from

August 2011 through May 2014 while he was attending college and living in a dormitory. The minor child lived primarily with Respondent/Appellant from birth to May 2011. After that point the parties shared custody of the child with the child residing with both parties at different times in Oklahoma and at times with Respondent/Appellant in Georgia as reflected in the transcript of the trial proceedings.

The parties' respective motions to modify were heard at a trial before the Honorable Judge M. John Kane IV over a two (2) day period on October 27, 2015 and February 17, 2016. The Court issued its decision on the record on March 3, 2016 and a Journal Entry was drafted, signed by the parties, and filed on February 9, 2017.

SUMMARY OF THE RECORD

Appellant/Mother is 21 years of age, and gave birth to the subject minor child when she was 16 years old. See, Tr. 10/27/2015, Vol. I, Page 47, Lines 18-23. At the time of trial, Mother was married, living in Georgia with her spouse, and their son Noah Lewis. See, Tr. 10/27/2015, Vol. I, Page 15, Lines 14-18. Mother's son with her new spouse was one year's old in March 2017. See, Tr. 02/17/2016, Vol. II, Page 216, Lines 15-16.

Unrebutted testimony of Mother was that Father showed no interest in the child until the child was born. See, Tr. 02/17/2016, Vol. II, Page 195, Lines 1-25.

Father was 18 when Mother gave birth to the child, and was 23 at the time of trial. See, Tr. 10/27/2015, Vol. I, Page 47, Lines 18-25.

The issue of compliance with the relocation statute, (Title 43 O.S. §112.3), was not an issue that was raised at trial. No objections based on the relocation statute were filed by Father in any pleadings.

Mother testified that from the time of the child's birth (when Mother was 16), she lived in Skiatook, Oklahoma, until May 2011, when she moved to Georgia and lived with her parents. In April 2012, Mother moved back to Skiatook, Oklahoma and resided at the Tomco Apartments. In May 2013, Mother stayed briefly with a family in Sperry, Oklahoma. In July 2013, Mother returned to Savannah, Georgia, and resided with her parents until February 2015 when she married and took up residence with her spouse in Savannah, Georgia. See, Tr. 10/27/2015, Vol. I, Page 16, Lines 11-25, Page 17, Lines 1-25, Page 18, Lines 1-25.

Father never objected to Mother's moves, either to her or to the Court. See, Tr. 10/27/2015, Vol. I, Page 51, Lines 8-15. Father admitted that he was notified of each of Mother's moves, with the exception of her move from Skiatook to Sperry. See, Tr. 10/27/2015, Vol. I, Page 53, Lines 12-21.

Father filed for a determination of paternity, joint custody of the minor child, reasonable visitation and to pay child support to Mother on or about April 19, 2011, in Osage County District Court, in [redacted].

On March 2, 2012 an Agreed Decree of Paternity was filed and entered in the District Court, determining that both parents were fit and proper persons to have the care, custody and control of their minor child, and a Joint Child Custody Plan was filed of even date therewith, providing for an equal split of the child's time between the parents, on a month on/month off format. The parties' Joint Child Custody Plan states that both parents are fit and proper persons to have the care, custody and control of the subject minor child. See, Joint Child Custody Plan, filed March 2, 2012, Page 2, paragraph 4.

On January 8, 2015, Father/Plaintiff filed a motion to modify alleging that Mother had moved back and forth between Oklahoma and Georgia ("subjecting the child to at least three residential moves in two years"), and because the child was soon reaching preschool, and because the child needed instruction on its Indian heritage, that Father should be awarded sole custody, with the child primarily residing here in Oklahoma.

On February 11, 2015, Mother filed her response and counterclaim. Mother requested that she be awarded sole custody, based on allegations that Father was negligent in providing health care for the child, that Father abrogated his custodial obligations and authority to his family from August 2011 to May 2014, while he was attending college and living in a dormitory.

The parties' respective motions to modify were tried to the Honorable Judge M. John Kane IV, over two days, October 27, 2015 and February 17, 2016. The Court issued its decision on the record on March 3, 2016, and the order memorializing that decision and modifying the parties' decree of dissolution and joint custody plan was filed and entered on the 9th day of February 2017.

Counsel for Appellant/Mother, prior to the commencement of trial, orally moved the court to allow the pleadings to conform to the evidence, and specifically asked the Court, despite their pleading request for sole custody, to leave open the possibility of continuing joint custody. The Court and counsel all agreed that the Court had the authority to take that issue under advisement, and the discretion to maintain or abrogate joint custody. See, Tr. 10/27/2015, Vol. I, Page 10, Lines 7-13.

The child lived with Mother/Appellant from birth to May 2011 in Skiatook, Oklahoma. From and after that point, the parents shared custody of the child, with the child residing at times with Mother and with Father in Oklahoma, and at times with Mother in Georgia. See, Tr. 10/27/2015, Vol. I, Pages 15 to 20.

Mother, at the time of the first day of trial, was living in Georgia, married, with an 8 month old baby, and she was working 10 a.m. to 2 p.m., five days a week. See, Tr. 10/27/2015, Vol. I, Page 24, Lines 1-12.

All of Mother's family, parents, brothers and sisters, and their spouses live in Savannah, Georgia. See, Tr. 10/27/2015, Vol. I, Page 25, Lines 12-24.

Both parents put the child on speaker phone to talk to the other parent. See, Tr. 10/27/2015, Vol. I, Page 27, Lines 18-25, Page 28, Lines 1-12 and Page 152, Lines 9-20.

Mother testified that the parties were able to cooperate with regard to shared parenting. See, Tr. 10/27/2015, Vol. I, Page 42, Lines 4-7.

Father testified that his only reason for filing the motion to modify was because the child was getting to school age and should go to school in one area. See, Tr. 10/27/2015, Vol. I, Page 53, Lines 24-25, and Page 54, Lines 1-3. Father's request of the Court was that he have the child for the school year. See, Tr. 10/27/2015, Vol. I, Page 65, Lines 18 -25.

Father works a 24-hour shift every third day. He works Sundays, Wednesdays, and Saturdays. See, Tr. 10/27/2015, Vol. I, Page 55, Lines 1-4. Father works 240 hours per month and 120 hours every two weeks. See, Tr. 10/27/2015, Vol. I, Page 92, Lines 17-25, and Page 93, Lines 1-2. See, also, Tr. 10/27/2015, Vol. I, Page 96, Lines 10-17.

Father admits that during his 24-hour shifts he is not in a position to care for the subject minor child. See, Tr. 10/27/2015, Vol. I, Page 102, Lines 10-15. Father admitted that there are at least eleven 24-hour periods that he is not responsible directly for the care of his daughter during his periods of physical custody each month. See, Tr. 10/27/2015, Vol. I, Page 103, Lines 21-25. Father admits that for a third of the time in every month, this child is not with Father. See, Tr. 10/27/2015, Vol. I, Page 105, Lines 13-15. Father admits that while he is at work, he would be delegating his custodial responsibilities to his present wife. See, Tr. 10/27/2015, Vol. I, Page 104, Lines 3-8.

Father admits that Mother has the opportunity to be with the child three times more than he can be during each month. See, Tr. 10/27/2015, Vol. I, Page 107, Lines 19-22.

Father was a full time student from March 2012 until May 2013, living in a school dormitory. See, Tr. 10/27/2015, Vol. I, Page 80, Lines 4-9. For that time period, Father's family watched the subject child during his periods of physical custody. See, Tr. 10/27/2015, Vol. I, Page 82, Lines 14-25 and Page 83, Lines 1-7.

Father does not really oppose joint custody. See, Tr. 10/27/2015, Vol. I, Page 108, Lines 18-25 and Page 109, Lines 1-21. See, also Tr. 10/27/2015, Vol. I, Page 124, Lines 10-25, Page 125, Lines 1-25, Page 126, Lines 1-17. See, also, Tr. 10/27/2015, Vol. I, Page 187, Lines 1-25, Page 188, Lines 1-25, Page 189, Lines 1-13. Father admits that he and Mother work well together. See, Tr. 10/27/2015, Vol. I, Page 243, Lines 15-23.

Even Father's spouse admits that it is better for a parent to have the care, custody and control of a minor than a step-parent. See, Tr. 10/27/2015, Vol. I, Page 150, Lines 12-18.

Mother says that she can work together with Father and co-parent the subject child and maintain joint custody. See, Tr. 10/27/2015, Vol. I, Page 200, Lines 1-25.

As of the last day of trial, Mother was no longer employed, and was able to stay at home and raise her children as a result of her spouse's employment. See, Tr. 02/17/2016, Vol. II, Page 203, Lines 1-24. Mother's present residence is a home owned by her and her spouse in Georgia. See, Tr. 10/27/2015, Vol. I, Page 46, Lines 20-21.

Mother's trial request was that she have the child every school year, that Father have the majority of the summer, and the larger holidays. See, Tr. 02/17/2016, Vol. II, Page 220, Lines 7-20. Mother's reasoning for Father having summers with the child is that he will have more time to spend with the child because the child will be home all day, every day. See, Tr. 02/17/2016, Vol. II, Page 232, Lines 9-25.

The Court, in its decision, makes the following findings: 1) from birth in December 2010 until May 2011, the child was with either Mother or Father, both in Skiatook; 2) from May 9, 2011 until January 2012 the parties went to a three days on/three days off visitation plan; 3) in March 2012, the order now being sought to be modified was entered with a one month on / one month off plan, with dad in Oklahoma and mom in Georgia. See, Tr. 03/03/2016, Page 4, Lines 9-23. "School brought this to a head. Because of the geographic disparity of the parents, it is impossible to reasonably continue forward with month on and month off. And based upon that finding, I do find that a material change in circumstances requires that the Court modify the existing order." See, Tr. 03/03/2016, Page 5, Lines 5-16.

The Court found that there "was certainly testimony and argument at trial that the Court would be entitled under the facts here to continue with joint custody and perhaps

simply modify the joint custody plan, but I'm going to do something that I have rarely done, if ever; and that is, I am going to order split custody in this case." See, Tr. 03/03/2016, Page 7, Lines 14-20. The Court found that "both parents are fit and proper persons to have custody of this child." See, Tr. 03/03/2016, Page 6, Lines 21-25.

The Court ordered "split custody", which the court said "means that whichever parent has the child during their time of custody is the custodial parent." See, Tr. 03/03/2016, Page 7, Lines 18-24. Without specifying the "reasons", the Court says testimony of the parties gave him concern about the parties' ability to cooperate in the raising of this child. See, Tr. 03/03/2016, Page 7, Lines 1-11.

The Court ordered that Mother have summers and Father have school years based custody, despite Mother's ability to spend more time with the child, and in part based on the Father could, without evidence cited, provide more residential stability for the child. See, Tr. 03/03/2016, Page 8, Lines 9-20.

STANDARD OF REVIEW

Joint Custody proceedings are governed by 43 O.S. 2001 § 109, which provides that the Court may modify or terminate joint custody upon the request of one or both parents or whenever it determines that joint custody is not in the best interest of the child. An Appellate Court will not disturb the Trial Court's judgment regarding custody absent an abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence. *Daniel v. Daniel,* 2001 OK 117, ¶ 21, 42 P.3d 863, 871.

ARGUMENT AND AUTHORITY

I. THE COURT ERRED IN ABROGATING JOINT CUSTODY AND AWARDING "SPLIT" CUSTODY TO THE PARTIES.

Pursuant to Title 43 O.S. § 109, "the Court may terminate a joint custody decree upon the request of one or both parents or whenever the Court determines said decree is not in the best interests of the child." The Trial Court did not determine that joint custody was not in the best interests of this child, and found that both parents are fit and proper persons to have the care, custody and control of this child.

In *Daniel v. Daniel, 2001 OK 117, 42 P.3d 863*, the parents were awarded joint custody, with the child residing with Mother during the school year, and with Father during the summers. Both parents filed for sole custody, arguing a lack of cooperation and antagonism, and a failure to abide by the joint custody plan. The trial court found that the parties could not get along, and that joint custody was no longer working. It awarded custody to the Father. Mother appealed, and the court of civil appeals reversed the trial court. It determined that a change in the physical custody arrangement should not have been ordered, because no material change in circumstances was shown that would warrant modifying physical custody.

The Court in *Daniel* holds that Title 43 O.S. § 109 governs joint custody proceedings, and that 109 allows the court to terminate a joint custody arrangement whenever the court determines that it is no longer in the best interests of the child. *Daniel, supra @¶ 18.*

"When it becomes apparent to the court that joint custody is not working and it is not serving the child's best interests, then a material and substantial change of circumstance has occurred and the joint custody arrangement must be vacated." *Daniel, supra @ ¶ 20.*

It should be noted that while *Daniel* allows the court to terminate the joint custody plan if the parents cannot cooperate in making decisions on raising the child, it does not require the trial court to do so. If the parent's disagreements have no effect on the child, the court may continue the joint custody arrangement. *See, Kilpatrick v. Kilpatrick,* 2008 OK CIV APP 94, 198 P.3d 406.

The parents in this case had no disagreements of any consequence, despite both parents requesting in pleadings that the Court terminate joint custody. Testimony showed the parties, once they understood the meaning of joint custody, and that it had nothing to do with physical custody, were fine in maintaining joint custody.

School and school age required the parties and the Trial Court to decide whether the child went to school in Georgia or Oklahoma. That is a circumstance that required a modification of physical custody from a month on/month off format to a school year and summer format.

There was no evidence supporting an award of sole legal custody to either party. Title 43 O.S. § 109 B. authorizes the Court to "grant the care, custody and control of a child to either parent or to the parents jointly." It does not authorize the court to award "split" custody as was done in this case. There is no statutory authority for a split custody order in Oklahoma. Joint custody has been commonly employed in Oklahoma and other jurisdictions, to permit a child to be placed under the care and control of one parent during

the school year and with the other parent during summer vacation. *See, Rice v. Rice,* 1979 OK 161, 603 P.2d 1125(Okl. 1979); *Gilbert v. Gilbert,* 460 P.2d 929 (Okl.1969) and *Conrad v. Conrad,* 443 P.2d 110 (Okl.1968).

Spencer v. Spencer, 1977 OK CIV APP 23, in Footnote 1, the Court of Appeals, while finding that case law has approved "split custody" in situations like the one before this Court, states that "grave doubt exists as to whether it is in the child's best interest. It has been denounced as deplorable by at least one state high court. *McFadden v. McFadden*, 206 Or. 253, 292 P.2d 795 (1956). And scholars in the field of psychology and psychiatry have likewise criticized the "split custody" arrangement as often favoring the interest of a parent rather than that of the child."

II. IT WAS AN ABUSE OF DISCRETION AND AGAINST THE CLEAR WEIGHT OF THE EVIDENCE FOR THE COURT TO AWARD FATHER PRIMARY PHYSICAL CUSTODY OF THE CHILD DURING THE SCHOOL YEAR, WHEN HE IS GONE 240 HOURS PER MONTH.

Father admits that during his 24-hour shifts that he is not in a position to care for the subject minor child. See, Tr. 10/27/2015, Vol. I, Page 102, Lines 10-15. Father admitted that there are at least eleven 24-hour periods that he is not responsible directly for the care of his daughter during his periods of physical custody. See, Tr. 10/27/2015, Vol. I, Page 103, Lines 21-25. Father admits that for a third of the time in every month, this child is not with Father. See, Tr. 10/27/2015, Vol. I, Page 105, Lines 13-15. Father admits that Mother has the opportunity to be with the child three times more than he can be present with the child. See, Tr. 10/27/2015, Vol. I, Page 107, Lines 19-22.

Mother is now a stay at home Mother. See, Tr. 02/17/2016, Vol. II, Page 203, Lines 1-24.

There is no rational basis for an absent Father to be awarded custody of a minor child. "An abuse of discretion occurs where a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *See, In Re BTW,* 2008 OK 80 ¶ 20, 195 P.3d, 896, 908.

III. IT WAS AN ABUSE OF DISCRETION AND AGAINST THE CLEAR WEIGHT OF THE EVIDENCE FOR THE COURT TO JUSTIFY ITS AWARD OF CUSTODY TO THE FATHER BASED ON "STABILITY".

The Mother's moves between the ages of 16 to 20 were not shown to harmfully affect the child and they were not objected to by Father or raised prior to trial. Father did not allege that Mother's moves harmfully affected the child. The Trial Court did not find that the Mother's moves harmfully affected the child.

In *Gilbert v. Gilbert,* 1969 OK 122, 460 P.2d 929, the Mother moved to modify custody. Her evidence showed that the Father had remarried twice since the divorce and that he had moved four times in six years. The trial court found that these moves constituted a sufficient change of condition to justify a modification of custody. The Supreme Court affirmed the decision as within the trial court's discretion.

However, in *Boatsman v. Boatsman,* 1984 OK 74, 697 P.2d 516, the Mother moved three times in six years. The trial court found that the moves were for legitimate reasons and did not reveal some "newly developed character defect." The trial court refused to change custody and the Supreme Court affirmed.

As noted earlier, the Court found both parents fit and proper persons to have custody. There is no record, whatsoever, of Mother's moves harmfully affecting the child. Mother is now a stay at home Mother in Savannah, Georgia. Mother is able to provide a

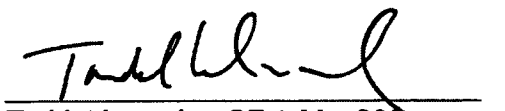
suitable home and atmosphere in which to rear this child. *See, Ness v. Ness, Okl.*, 357 P.2d 973, 975, 976.

CONCLUSION

It is clear from the evidence below that the Trial Court erred in awarding split custody of the parties' minor child. It is likewise clear that the Trial Court erred in awarding primary physical custody of the subject minor child to Father when he is not available to provide care during one-third (1/3) of his time with the child.

It is finally an abuse of discretion for the Court to award Father's spouse primary physical custody when Mother is a fit and proper person to have the care, custody, and control of the child. The Trial Court's decision was erroneous and contrary to the child's best interests. *See, Daniel v. Daniel,* 2001 OK 117 ¶ 21, 42 P.3d 863, 871.

Respectfully Submitted,



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CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the Appellant's Brief-In-Chief was mailed this 13th day of July 2017 by depositing it in the U.S. Mail, postage prepaid or by electronic mail to Ramona A. Jones, Esq., 1437 South Boulder, Suite 160, Tulsa, Oklahoma 74119-3638.

I further certify that a copy of the Appellant's Brief-In-Chief was mailed to, or filed in, the Office of the Osage County Courthouse, 600 Grandview Avenue, Pawhuska, Oklahoma 74056 on the 13th day of July 2017.

Todd Alexander