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SUPREME COURT
STATE OF OKLAHOMA

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No. [REDACTED]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[REDACTED]
Petitioner/Appellee,

v.

[REDACTED]
Respondent/Appellant.

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APPELLEE'S ANSWER BRIEF

APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY,
STATE OF OKLAHOMA
Honorable John M. Kane, District Judge
Case No. FD-2011-60

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

Ramona A. Jones, OBA#18405
Ramona A. Jones, Attorney at Law
1437 South Boulder, Suite 160
Tulsa, Oklahoma 74119-3638
Telephone (918) 585-2255
Facsimile (539) 777-2517
rjonesok@gmail.com

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Petitioner/Appellee,

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[REDACTED]

Respondent/Appellant.

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) [REDACTED] County District Court
) Case No. [REDACTED]
) Honorable Judge [REDACTED]
)
)
)

APPELLEE’S ANSWER BRIEF

Petitioner/Appellee, Denton James [REDACTED] (“Father”), for his Answer Brief herein, with citations to the official transcripts 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

Father’s motion to modify joint custody filed January 9, 2015, alleged Appellant/Mother, Madison Carolyn [REDACTED] (“Mother”), had subjected the child to at least three moves in two years, making transportation a much more lengthy process and requiring more funds for physical custodial exchanges than anticipated, Mother was again pregnant, expected to give birth in February of 2015, Mother might also be unemployed, preschool was approaching, to be followed soon thereafter by kindergarten, Father had safety concerns about Mother not seat-belted the child, Father felt it important for the child to obtain instruction as to her Osage heritage such as offered with the Osage Headstart program and in the Skiatook, Oklahoma, schools, but the parties did not agree about school, and being 1,0000+ miles apart left the issue of school unworkable, and Father could provide a stable home for the child and should have sole custody.

Father’s March 13, 2015 response to Mother’s counterclaim and motion to modify

seeking sole custody to her denied Mother's allegations, agreed there was a change of conditions such that joint custody should be dissolved, and stated sole custody should be awarded to Father.

SUMMARY OF THE RECORD

Mother states un rebutted testimony was that Father showed no interest in the child until birth. When queried whether sometimes men do not know if a child is theirs or not, Mother's testimony was that--even though the parties were not dating, nor were they in a relationship when the child was conceived--the child was Father's because Mother said so. See, Tr. 02/17/16, Vol. II, P. 224, Lines 9-14.

Father has been a hands-on, nurturing parent since the child's birth. See, Tr. 10/27/15, Vol. I, P. 265, Lines 28-25, and Tr. 10/26/15, Vol. I, P. 166, Lines 1-3.

Mother agreed Father is a good father. See Tr. 10/27/15, Vol. I, P. 29, Lines 16-21. There is nothing in the Record that Mother ever complained of Father's parenting or delegating any duties until after Father filed his motion to modify.

At the time of trial Mother was living at 3 Rainier Lane in Savannah, Georgia. See, Tr. 10/27/15, Vol. I, P. 16, Lines 12-17. Mother moved several times thereafter, admitting to eight (8) moves. See, Tr. 10/27/15, Vol. I, P. 18, Lines 1-10. Father testified he did not know Mother was at one point living in Sperry, and that Mother's testimony she had told him of each and every move was not correct. See, Tr. 10/27/15, Vol. I, P. 53, Lines 8-21.

Mother testified she moved back to Oklahoma about a month after the decree, as well as that she moved back to Skiatook about two months thereafter. See, Tr. 10/27/15, Vol. I, P. 34, Lines 8-10, and Tr. 02/17/16, Vol. II, P. 199, Lines 1-7. Father testified he had no reason to believe Mother would go back to Georgia after she came back to

Oklahoma. See, Tr. 10/27/15, Vol. I, P. 121, Lines 22-25 and Tr. 10/27/15, Vol. I, P. 122, Lines 1-2. Father testified he was upset about Mother moving from Oklahoma but did not ask Mother to stay, as he did not know he could do anything about changing the times of custody so believed nothing was to be done. See, Tr. 10/27/15, Vol. I, P. 51, Lines 8-25, and Tr. 10/27/15, Vol. I, P. 52, Lines 1-5.

Mother never objected to Father going to school when they were sharing time with the child. See, Tr. 10/27/15, Vol. I, P. 81, Lines 6-10. Mother never complained about Father having family help care for the child while Father was in school. See, Tr. 10/27/15, Vol. I, P. 83, Lines 1-13. Before Mother moved back to Oklahoma from Georgia she talked with Father to discuss days on/days off after the decree and a new custodial plan was worked out for each party to have half the week with the child. See, Tr. 10/27/15, Vol. I, P. 35, Lines 1-17.

There is nothing in the record where Mother ever attempted to alter the schedule for the child or complained of Father delegating any duties to the child's paternal grandmother or to the child's stepmother prior to the time Father filed his motion to modify.

Father did file his motion to modify joint custody because the child was coming to the age of kindergarten and the child could not go to school in two states. See, Tr. 10/27/15, Vol. I, P. 53, Lines 22-25, and Tr. 10/27/15, Vol. I, P. 54, Lines 1-3. However, in addition to the issue of school and the parties living more than 1,000 miles apart making the issue of school unworkable, Father's motion to modify the joint custody plan entered March 2, 2012 when the child was not yet two years of age, also set out Mother had subjected the child to at least three moves in two years, making transportation a much more lengthy process and requiring more funds for physical custodial exchanges than anticipated,

Mother was again pregnant, expected to give birth in February of 2015, Father had safety concerns as to Mother not seat-belted the child, Father felt it was important for the child to obtain instruction as to her Osage heritage which was offered with the Osage Headstart program and in the Skiatook, Oklahoma, schools, but the parties were 1,000+ miles apart and did not agree about school, and that Father could provide a stable home and the joint custody should be dissolved and Father granted sole custody. See, Motion to Modify, filed by Father January 9, 2015, P. 3, Paragraph 4.

Father testified he found it was sometimes difficult to talk with the parties' child while she was with Mother, that he was put on speakerphone and it was loud and the child was apparently running around, and although Father had talked to Mother about that, having the child sit down and hold the phone, it did no good. See, Tr. 10/27/15, Vol. I, P. 64, Lines 17-25, and Tr. 10/27/25, Vol. I, P. 65, Lines 1-3. Mother claimed the child was distracted by the world so Mother needed to be there, telling the child what Father was saying while he was on speakerphone. See, Tr. 10/27/15, Vol. I, P. 27, Lines 18-25, and Tr. 10/27/15, P. 28, Lines 1-4. Father did not like having the child on speakerphone, and said the child was able to hold the phone and have a conversation without running around. See, Tr. 10/27/15, Vol. I, Page 50, Lines 11-24.

Father only said the parties work well together for the most part. See Tr. 02/17/16, P. 243, Lines 15-20. It was not a blanket statement. Mother admitted the parties had not always been able to work things out. See, Tr. 02/17/16, Vol. II, P. 193, Lines 14-22. Father testified that while he could not remember back, on serious things the parties did not communicate very well, even though later usually resolving something. See, Tr. 10/27/15, Vol. I, P. 50, Lines 1-10. Father said he had never been invited to anything for the child in

Georgia. Tr. 02/17/16, Vol. II, P. 190, Lines 23-25, and Tr. 02/17/16, Vol. II, P 191, Lines 1-6.

Father was a full-time student until May 2013. See, Tr. 10/27/15, Vol. I, P. 80, Lines 1-9, and testified he had moved only from his parents' home to his own residence, where he and the child's stepmother, Kara [REDACTED] lived. See, Tr. 10/27/15, Vol. I, P. 54, Lines 18-25 and Tr. 10/27/15, Vol. I, P. 55, Line 1.

On the first day of trial Mother was working at her ninth (9th) job since the decree March 2, 2012. She had worked at eight other jobs, and was to be working at a prior job during holiday seasons. See, Tr. 10/27/15, Vol. I, P. 21, Lines 17-25, Tr. 10/27/15, Vol. I, P. 22, Lines 1-25, and Tr. 10/27/15, Vol. I, P. 23, Lines 1-2.

At trial, Mother was 21 and Father was 23. See, TR 02/17/16, Vol. II, P. 47, Lines 22-25. Mother has married and three stepsons, ages 12, 10 and 8, who were with Mother and her husband and child four days a month. See, Tr. 10/27/15, Vol. I, P. 15, Lines 14-24, See, Tr. 02/17/16, Vol. II, P. 219, Lines 19-25, and Tr. 02/17/16, Vol. II, P. 220, Line 1.

The child attended the Free Will Baptist Church in Skiatook, where the child participated in Awanas on Wednesday nights, and Father and stepmother taught the child's preschool class in the morning, like her Sunday school Sunday mornings. See, Tr. 10/27/15, Vol. I, P. 65, Lines 7-17.

Father has 60-70 extended family members in Oklahoma, all but three within thirty minutes of his home, and they interact at many family functions and events. See, Tr. 10/27/15, Vol. I, P. 63, Lines 17-25, and Tr. 10/27/15, Vol. I, P. 64, Lines 1-16. The child's great-grandmother Celie Mayfield testified she saw Father and the child all the time, on

Sunday after church, dinner at the home of Father's parents, that they were often together. See, Tr. 10/27/15, Vol. I, Page 165, Lines 1-9,

Mother admitted the compromise decree was entered into when the child was not of school age, and when the child started kindergarten being 1,000 miles apart would be problematic. See, Tr. 02/17/16, Vol. II, P. 235, Lines 1-15. The parties' homes are 16-17 hours apart by car, being over 1,000 miles. See, Tr. 02/17/16, Vol. II, P. 225, Lines 3-11.

Father also wanted the child to be involved with her culture. See, Tr. 10/27/15, Vol. I, P. 84, Lines 7-13. Father studied Osage cultural history and heritage at Skiatook. See, Tr. 10/27/15, Vol. I, P. 88, Lines 7-9. Father's Indian blood is from his biological father with whom Father had no relations, and Father felt it important for the child to be in Skiatook and be involved and immersed in things Father was not able to do all the time as a child. See, Tr. 10/27/15, Vol. I, P. 89, Lines 3-14. Father said he wanted the child to grow up and be proud in her native culture with several things they could do throughout the school year. See, Tr. 10/27/15, Vol. I, P. 91, Lines 13-16, and Tr. 10/27/15, Vol. I, P. 92, Lines 4-6.

Mother's opinion was Father should have been made the summer custodial parent does not take into account the educational opportunities for the child to have school instruction in Osage heritage classes in Skiatook schools during the school year.

Mother admitted the child was of Osage Indian ancestry. See, Tr. 02/17/16, Vol. II, P. 195, Line 25, and Tr. 02/17/16, Vol. II, P.196, Lines 1-3. Mother admitted that there are no Osage Indian heritage classes or programs in Georgia. See, Tr. 10/27/15, Vol. I, P. 32, Lines 1-6. Mother admitted there was nothing as to Osage language classes in Georgia. See, Tr. 02/17/16, Vol. II, P. 240, Lines 7-17.

The child's stepmother testified she worked at the Wah-Zha-Zhi Learning Academy in Skiatook. See, Tr. 10/27/15, Vol. I, P. 132, Lines 14-23. She worked on the child care side, with zeroes to ones, and the preschool side being Head Start. See, Tr. 10/27/15, Vol I, P. 133, Lines 11-18. The child attended there from 8 a.m. to 2 p.m. and was in the after-school program unless Father was off work, when he got her. See, Tr. 10/27/15, Vol. I, P. 134, Lines 5-11. The child's after-school program lasts until 5:30 p.m., but the child might also only be there for an hour depending on her stepmother's work shift. See, Tr. 10/27/15, Vol. I, P. 153, Lines 15-23. She said she had not taught the minor child's side, but they all went to the same trainings and associate with the same projects, and the minor child learned culture through the Osage, they taught her language, numbers, colors, as well as English and all the basics for preschool. See, Tr. 10/27/15, Vol. I, P. 134, Lines 12-25. She said WELA stands for the Wah-Zha-Zhi Early Learning Academy, the Osage early learning academy. See also, Petitioner's Exhibit No. 5, the WELA brochure as to what the child was provided there.

As of the first day of trial, Father was one class from having an Associate's Degree in Applies Sciences. Tr. 10/27/15, Vol. I, P. 54, Lines 4-8. Father has a career as a paramedic firefighter. Tr. 10/27/15, Vol. I, Page 54, Lines 9-14. As of the first day of trial, he was just off his one-year probation for his job as a paramedic firefighter the month prior, and had been there about 15 months. Tr. 10/27/15, Vol. I, Page 54, Lines 15-17.

Father's job as a paramedic firefighter allows him to have his family there any time they want. See Tr. 10/27/15, Vol. I, P. 203, Lines 4-6. The child's stepmother testified the child and she see Father every time he is on shift. See, Tr. 10/27/15, Vol. I, P. 135, Lines 19-24. Father testified he interacts with the child even while at work, eating dinner, lunch,

going to sporting events and the like, he could attend if the child had something at daycare, that the child and stepmother came by every time Father was at work. See Tr. 10/27/15, Vol. I, P. 55, Lines 12-22. Father said if anything happened with the child, Father would be the one to show up. See, Tr. 10/25/15, Vol. I, P. 102, Lines 11-15. Father could drive the ambulance to activities in the community, and when he was at activities his wife brought the child there. See, Tr. 10/27/15, Vol. I, P. 117, Lines 1-10. Father testified as to various activities he and the child did on a regular basis, and that she was always with him when he went to coach. See, Tr. 10/27/15, Vol. I, P. 122, Lines 8-25. Father testified as to his being the primary caregiver for the child. See, Tr. 10/27/15, Vol. I, P. 116, Lines 9-22. The child's stepmother also testified as to activities Father, the child and she did. See, Tr. 10/27/15, Vol. I, P. 137, Lines 4-11.

Father was working ten 24-hours shifts a month, 240 hours. Tr. 10/27/15, Vol. I, P. 97, Lines 7-24. The 24-hour shifts meant Father then had 48 hours off. Tr. 10/27/15, Vol. I, P. 101, Lines 19-25.

There is nothing in the Record showing that Father was inaccessible to the child at any time other than when he was on a run while performing his job as a paramedic firefighter.

On the twenty days he has off monthly, Father is the one who gets the child up, the one who brushes her hair, the one who puts her to bed, he and his wife read the child stories, and he is the primary caregiver for the child. Tr. 10/27/15, Vol. I, P. 116, Lines 9-22.

The child's stepmother's response about parents instead of stepparents spending time with the child was in answer to a question being prefaced with the phrase "All things being equal," not a blanket question as to all parents vs. all stepparents. See Tr. 10/27/15,

Vol. I, P. 150, Lines 12-18. The child's stepmother testified that she and the child were very close, that she loved the child and had been in the child's life since the day she was born. See, Tr. 10/27/15, Vol. I, P. 140, Lines 24-25, and Tr. 10/27/15, Vol. I, P. 141, Lines 1-5. The child's stepmother testified that if Mother had questions pertaining to the child, she was referred to Father, and if there was a question about her with the child, she would answer it, that there was no problem between stepmother and Mother. See, Tr. 10/27/15, Vol. I, P. 141, Lines 19-25.

Mother admitted possibly having said in discovery that a little girl should be raised by her mother, then admitted she was not saying a little girl cannot be raised by her Father. Tr. 10/27/15, Vol. I, P. 30, Lines 20-25, and Tr. 10/27/15, Vol. I, P. 32, Lines 1-2. Mother admitted she had no issues with the child's stepmother. See, Tr. 02/17/16, Vol. II, P. 195, Lines 17-19.

Father had never met Mother's husband or even seen him before the second day of trial. See, Tr. 02/27/16, Vol. II, P. 243, Lines 10-14. The child's stepmother testified neither Father nor she had ever met Mother's husband, they knew nothing about him, they did not know if he was a good parent, so if the child was left with him, they knew nothing about safety, welfare, nothing at all. See, Tr. 10/27/15, Vol. I, P. 159, Lines 7-16.

As of the time of trial, in testimony as to Father asking for custody during the school year, he said it would be with something to be worked out as to the holidays and summer, and that he said he would be flexible. See, Tr. 10/27/15, Vol. I, P. 65, Lines 18-25, and Tr. 10/27/15, P. 66, Lines 1-6.

When testifying as to her request she have nine months with the child and Father have three months, Mother said if the situations were reversed, it would have to be that

way due to the child's schooling. See, Tr. 02/17/16, Vol. II, Page 239, Lines 17-24.

Mother admitted a stable home for the child was important. See, Tr. Vol. I, P. 21, 10/27/15, Lines 2-4. Mother also thought it stable to move eight times in three years. See, Tr. 10/27/15, Vol. I, P. 21, Lines 5-8.

Father testified he understood the difference between legal custody and physical custody, and that if he had the child nine months he would expect the Court to order he keep Mother apprised of things like school and activities, and would not expect the Court to let either party do just anything simply because they had legal custody. Tr. 10/27/15, Vol. I, P. 127, Lines 23-25, and Tr. 10/27/15, Vol. I, P. 128, Lines 1-18. The child's stepmother also testified she would not expect either of the parties to make all the decisions regarding the child. See, Tr. 10/27/15, Vol. I, P. 160, Lines 4-10.

It was agreed that the Trial Court here had the discretion to maintain or abrogate joint custody. See, Tr. 10/25/15, Vol. I, P.20, Lines 7-15.

In its decision, the Trial Court set out the procedural history of the case, including that there had been an emergency temporary custody situation where Father had the child pending determination of the whereabouts and residency of Mother. See, Tr. 03/03/16, Ruling, Page 4, Lines 9-20.

The Trial Court in its Ruling found a material change in circumstances requiring the Court to modify the existing order, saying school brought things to a head, and because of the geographic disparity of the parents, it was impossible to reasonably continue with month-on month-off. See, Tr. 03/03/16, Ruling, Page 5, Lines 11-16.

The Trial Court said it was rather conflicted on many important points in the case, that both were fit people, but they had convinced the Court there had been issues between

the parties giving the Court concern about their ability to cooperate in raising the child. See, Tr. 03/03/16, Ruling, P. 6, Lines 21-25, and Tr. 03/03/16, Ruling, P. 7, Lines 1-4. The Trial Court found there were numerous incidents on important issues suggesting the parties have had difficulty cooperating, and each had pled joint custody should end and they should be the custodial parent. See, Tr. 03/03/16, Ruling, P. 7, Lines 5-13.

The Trial Court said it would not burden the record going over each and every incident, but set out reasons for its decision for split custody, citing “telephonic communication, attendance at family events, payment of medical expenses, and other things that suggested that the parties have had some difficulty with cooperating with one another.” See, Tr. 03/03/16, Ruling, P. 7, Lines 5-11. The Trial Court said each party specifically pled joint custody should end and that they should be the custodial parent. See, 03/03/16, Ruling, P. 7, Lines 11-13.

The Trial Court said it was distressed by the geography of the parents. See, Tr. 03/03/16, Ruling, P. 9, L. 14-18, In ruling there would be split custody, the Trial Court set out that such sometimes occurs in our evolving society. See, Tr. 03/03/16, Ruling, P. 7, Lines 17-21.

The Trial Court made Father the school year custodial parent and Mother the summer custodial parent, and set over to Mother every Spring Break and Fall Break, as well as every Thanksgiving break, with the parties to alternate Christmas. See, Tr. 03/03/16, Ruling, P. 9, Lines 8-11. The Trial Court explained split custody for the parties. See, Tr., 03/03/16, Ruling, P. 7, Lines 22-25, and Tr. 03/03/16, Ruling, P. 8, Line 1.

In addition, the Trial Court also entered a Judicial Order for Proper Conduct, adding four specific provisions to the regular form. See, Tr. 03/03/16, Ruling, P. 2, Lines 13-25,

The Trial Court found as to hours of time vs. stability for the child, stability was more important, and found Father could provide that for the child. See, Tr.03/03/16, P 8, Lines 9-13, and Tr. 03/03/16, Ruling, P. 8, Lines 16-20.

STANDARD OF REVIEW

Father agrees joint custody proceedings are governed by 43 O.S. § 109, for modifying or terminating joint custody at request of one or both parties or whenever it determines joint custody not in the best interest of the child. Father also agrees 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 227, ¶ 21, 2 P.3d 863, 871.

ARGUMENT AND AUTHORITY

I. THE COURT DID NOT ERR BY ABROGATING JOINT CUSTODY AND AWARDING SPLIT CUSTODY TO THE PARTES.

43 O.S. §109(G)(1) clearly states "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 interest of the child." *Daniel v. Daniel*, 2001 OK 117, 42 P.3d 863, ¶ 18. (Emphasis supplied).

Both parties put the issue before the Court by specifically pleading for sole custody here, and both parties agreed the Trial Court was able to abrogate or maintain joint custody.

Although Mother claims the Trial Court did not determine joint custody was not in the best interests of the child, the Trial Court specifically set out both parties had pled joint custody should end and they should be custodial. Therefore, the issue was within the provisions of 43 O.S. § 109(G)(1) for the Trial Court to terminate the joint custody as it

did

43 O.S. § 109(G)(2) sets out “Upon termination of a joint custody decree, the court shall proceed and issue a modified decree for the care, custody and control of the child *as if no such joint custody decree had been made.*” (Emphasis supplied). Daniel, supra, at ¶ 21.

Mother’s reference to *Daniel v. Daniel*, 2001OK 117, 42 P.3d 863, in which she discusses the opinion of the trial court and Court of Appeals there, does not set out this Court affirmed the trial court’s abrogation of joint custody in that case and set custody over to the father. *Daniel*, supra, at ¶ 1.

This Court’s actual holding in *Daniel*, supra, at ¶ 18 held 43 O.S. § 109 governs joint custody proceedings and allows a court to terminate joint custody upon the request of one or both of the parents or whenever the court determines joint custody not in the child’s best interest. In the case here, both parties sought termination of joint custody and sole to one, putting it within the confines thereof.

In *Kilpatrick v. Kilpatrick*, 2008 OK CIV APP 94, 198 P.3d 406 cited by Mother, the mother there filed a motion to modify joint custody without any specific reason therefor, and the Court of Appeals clearly set out “. . . where there is conflicting evidence on an issue of fact, we defer to the judgment of the trial court, which is in the best position to observe the demeanor of the witnesses and to gauge their credibility.” *Kilpatrick*, supra, at ¶ 20.

43 O.S. ¶ 109(B) authorizes courts to “grant the care, custody and control of a child *to either* parent or to the parents jointly.” (Emphasis supplied). Here, both parties’ motions to modify sought termination of joint custody to sole custody of one, then at trial each

sought to have the child for the school year and give summers to the other party.

Father testified he understood the difference between legal custody and physical custody, and that if he had the child nine months he would expect the Court to order he keep Mother apprised of things like school and activities, and would not expect the Court to let either party do just anything simply because they had legal custody.

Mother's assertion there were no disagreements of any consequence is at odds with not only the testimony at trial, but the Court's specific findings both parties had pled for sole custody and it its Ruling as to numerous incidents on important issues suggesting the parties had had difficulty cooperating and the Trial Court had concerns about the parties' ability to cooperate raising the child.

Mother's citations to *Rice v. Rice*, 1979 OK 161, 603 P.2d 1125, *Gilbert v. Gilbert*, 1969 OK 133, 460 P.2d 929, and *Conrad v. Conrad*, 1968 OK 94, 443 P.2d 110, stating joint custody has been commonly employed to allow school year custody and summer custody schemes simply do not negate the provisions of 43 O.S. § 109B that a trial court may also grant custody to either parent.

In *Rice*, supra, at ¶ 10, this Court said "The question of custody, joint or otherwise, must be decided by reference to the consequences for the particular child in each case. The primary contemplation must always be the welfare and best interests of the child."

Here, a part of Father's Motion to Modify sought to have the child be able to obtain instruction as to her Osage Indian heritage and culture such as offered by the Osage Headstart program and in the Skiatook, Oklahoma, schools. School is nine months of the year. Mother admitted the child's Osage Indian ancestry and that there were no Osage Indian heritage classes, programs or Osage language classes in Georgia. Further, the Trial

Court found stability to be the more important factor for the child.

There is simply nothing to support Mother's assertion school and school age were the only issues presented to the Trial Court, or that the Trial Court was required to modify only physical custody

Gilbert v. Gilbert, 1969 OK 133, 460 P.2d 929, cited by Mother, was not a case where there was modification requested by the parties out of joint custody such as this case.

Trial courts in making custody decisions are tasked with seeing to a child's best interests. The case of *Conrad v. Conrad*, 1968 OK 94, 443 P.2d 110, ¶ 2 and ¶ 3, cited by mother here, also did not deal with modification out of joint custody, nor were the facts the same as here, but the trial court's discretion in ordering divided custody was not found detrimental to the child's best interests.

The case of *Spencer v. Spencer*, 1977 OK CIV APP 23, 567 P.2d 112, cited by Mother, dealt with child support, not modification of custody, and the Court of Appeals stated the arrangement by the court below actually vested legal custody in the father and visitation to the mother. *Spencer, supra*, at ¶ 6. Mother's contention an Oregon case in footnote 1 in *Spencer, supra, McFadden v. McFadden*, 206 Or, 253, 292 P.2d 795 (1956) denounced split custody was in 1956 and not in this Circuit, and is but mere dicta with no bearing on this case, much like Mother's assertion as to scholars criticizing split custody.

Our trial courts are vested with discretion to abrogate joint custody, then to make a custody ruling. 43 O.S. § 109(G)(1), 43 O.S. § 109(G)(2). The Trial Court in the case at bar made specific reference to our evolving society in its decision concerning the split custody awarded. The actual practicality of joint parenting 1,000+ miles apart is certainly problematic. Telephone communication when parties live more than 1,000 miles apart

simply cannot take the place of parties living near each other.

The parties' testimony at trial did not show both being fine with maintaining joint custody. Had they been, there would have been no reason for agreement in open Court that the Trial Court had the ability to maintain or abrogate joint custody.

The Trial Court did have evidence to support an award of sole legal custody to either party. In its Ruling the Court set out concerns about numerous incidents on important issues as to the parties' ability to cooperate in raising the child, the Court was concerned about the geographic location of the two homes, as well as the approach of school, and had the statutory ability to abrogate joint custody and then make a ruling as to custody as if no joint custody had existed. 43 O.S. § 109(G)(1), 43 O.S. § 109(G)(2).

Thus, the Trial Court did not abuse the discretion given to it by 43 O.S. § 109 in abrogating joint custody and awarding split custody.

II. IT WAS NOT AN ABUSE OF DISCRETION OR 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 EMPLOYED 240 HOURS PER MONTH.

Father did work ten 24-hour shifts per month as a paramedic firefighter, but interacted with the child each day Father is at work. See, Tr. 10/27/15, Vol. I, P. 97, Lines 7-24. Father's family was allowed at the fire station where Father works any time they want to go. See, Tr. 10/27/15, Vol. I, P. 103, Lines 4-6. The child and her stepmother saw Father every time he is on shift. See, Tr. 10/27/15, Vol. I, P. 135, Lines 19-24. If anything happened, Father would be the one showing up. See, Tr. 10/27/15, Vol. I, P. 102, Lines 11-15. When Father was at work he and the child could eat dinner, lunch, go to football and softball games and the like, if the child had something at daycare Father got to attend. See, Tr. 10/27/15, Vol. I, P. 55, Lines 12-24. Father could drive the ambulance to activities

in the community, and when he was at activities the child's stepmother brought the child.

See, Tr. 10/27/15, Vol. I, P. 117, Lines 1-10.

There was no testimony that Father was unable to see and spend time with the child while Father was at work other than when Father was on a paramedic firefighter call.

After each 24-hour shift, Father had 48 hours off. See, Tr. 10/27/15, Vol. I, P. 101, Lines 19-25. In addition to the daily time with the child while at work, Father was the primary caregiver for the child when he was off shift. See, Tr. 10/27/15, Vol. I, P. 116, Lines 9-22.

The Record does not show Mother ever complained of Father delegating any duties in this case until after Father filed his Motion to Modify.

Father had been married to the child's stepmother over a year. The child's stepmother had been there since the child's birth, and she and the child were very close. See, Tr. 10/27/15, Vol. I, P. 94, Lines 8-19, See, Tr. 10/27/15, Vol. I, P. 140, Lines 24-25, and Tr. 10/27/15, Vol. I, P. 141, Lines 1-5. The child, Father and the child's stepmother attended and participated in church in Skiatook. See, Tr. 10/27/15, Vol. I, P. 65, Lines 7-17. Father has a very large extended family, all but three within a 30-minute drive from Father's home, with whom Father, the child and her stepmother interact frequently. See, Tr. 10/27/15, Vol. I, P. 63, Lines 17-25, and Tr. 10/27/15, Vol. I, P. 64, Lines 1-16.

Father had never met Mother's husband or even seen him before the second day of this trial. The child's stepmother said neither she nor Father knew anything about Mother's husband, they did not know if he was a good parent, so if the child was left with him, they knew nothing about safety, welfare, nothing at all. See, Tr. 02/27/16, Vol. II, P. 243, Lines 10-14, and Tr. 10/27/15, Vol. I, P. 159, Lines 7-16.

A part of Father's Motion to Modify asked that he have custody of the child for Osage Indian educational opportunities such as Osage Headstart and Skiatook schools, and at trial asked for school year custody for that purpose. Mother admitted there were no such programs in Georgia. The Skiatook schools operate during the school year.

Mother admitted a stable home for the child was important. See, Tr. Vol. I, P. 21. Lines 2-4.

The case of *In Re BTW*, 2008 OK 80, ¶ 20, 195 P.3d 896, 908, cited by Mother, dealt with a child in foster care, not an alleged absent parent dealing with modification out of joint custody. In that case, however, this Court did observe that the trial court was the one who had heard all the witnesses as well as the one who had observed all the witnesses and their demeanors. *In Re BTW*, supra, at ¶ 24.

Father in this case is neither "gone" nor an absent Father as alleged by Mother. Father does not work in an industry such as a traveling salesman or a parent who is gone for long periods of time such as might be required for a military parent, Rather, his profession allows him to be with the child on a daily basis, and the Trial Court here was certainly in the best position to observe the witnesses as it heard testimony and considered the evidence before making its ruling.

43 O.S. ¶ 109(G)(2) sets out the Trial Court has discretion to award custody to either party or both after abrogating joint custody, and the Trial Court here took care in its ruling to state it had considered time Mother said she had vs. the stability Father offered for the child, and that stability was more important for the child. Clearly a rational ruling under the circumstances in this case.

Thus, the Trial Court considered all the evidence in ruling to award Father primary

physical custody in spite of the fact he works, and the Court's decision was neither an abuse of discretion nor against the clear weight of the evidence.

III. IT WAS NOT AN ABUSE OF DISCRETION OR AGAINST THE CLEAR WEIGHT OF THE EVIDENCE FOR THE COURT TO JUSTIFY ITS AWARD OF CUSTODY TO THE FATHER BASED ON "STABILITY."

43 O.S. ¶ 109(G)(1) and 43 O.S. § 109(G)(2) govern trial courts as to modification of joint custody. The Trial Court in this case, once it determined the joint custody should be dissolved after both parties pled they should have sole custody, determined it best for the parties' five-year-old child to have stability, and that Father could provide that. The Trial Court did not punish Mother for her numerous moves and jobs, but clearly took into account the entirety of the circumstances of the case as if no joint custody decision had been made, pursuant its authority under 43 O.S. 43 O.S. § 109(G)(2). *Daniel v. Daniel*, 2001 OK 117, 42 P.3d 863, at ¶ 21.

The cases of *Gilbert v. Gilbert*, 1969 OK 122, 460 P.2d 929, *Boatsman v. Boatsman*, 1984 OK 74, 697 P.2d 516, and *Ness v. Ness*, 1960 OK 259, 357 P.2d 973, cited by Mother, did not deal with modification out of joint custody.

In this case, Mother admitted it was important for the parties' child to be in a stable home. Tr. 10/27/15, Vol. I, P. 21, Lines 2-4.

There is no testimony that Father has ever had any domicile other than with his parents and then in his own home with his wife. There is no testimony that Father has ever had any domicile outside the State of Oklahoma.

As noted earlier, there is testimony Father has a career where he interacts with the child on a daily basis, that the child attends and participates in church with Father, that the child can obtain instruction in her culture and heritage in Skiatook schools, that there is a

lot of interaction with Father's and the child's large extended family in Skiatook, Oklahoma, and that the child's stepmother has been in the child's life since birth.

As set out in *Bilyeu v. Bilyeu*, 2015 OK CIV APP 58, ¶ 12, 352 P.3d 56, "Trial judges are traditionally given wide latitude in custody cases. The Supreme Court has consistently noted that it should 'consider the better position of the trial court who observes first hand the parties and their witnesses as they testify.'" *Hoog v. Hoog*, 1969 OK 174, ¶ 12, 460 P.2d 46. "There are many things which do not appear in the printed record, but which undoubtedly have their impact upon the determination of a question . . ." *Id.* The *Bilyeu, supra*, case dealt with joint custody where the parties did not live far apart, as in this case, but shows our trial courts have great discretion as to custody.

As set out in *Foshee v. Foshee*, 2010 OK 85, 247 P.3d 1162, a case where joint custody was terminated, ". . . joint custody is not proper where the parents are unable to cooperate." *Foshee, supra*, at ¶ 16. In that case, several instances of uncooperativeness between the parents were presented to the trial court, and the trial court's termination of joint custody was found clearly supported by the evidence.

In this case, the Trial Court plainly set out in its Ruling it that while it was not burdening the record with a rehash of each and every incident, there were "numerous incidents on important issues, such as telephonic communication, attendance at family events, payment of medical expenses, and other things" that suggested difficulty cooperating with each other, and the Court was convinced there were issues giving the Court concern about the parties' ability to cooperate in raising the child. and that each had specifically pled joint custody should end. See, Tr. 03/03/16, Ruling, P. 7, Lines 1-13.

In addition, the Trial Court issued not a standard Judicial Order for Proper Conduct,

but one enhanced by additional orders. See, Tr. 03/03/16, Ruling, P. 2, Lines 13-25, and See, Tr. 03/03/16, Ruling, P.20. The Trial Court ordered, clearly because of communication problems the Trial Court saw, that whoever had the child was to keep the other parent advised of important facts. See, Tr. 03/03/16, Ruling, P. 8, Lines 2-5

The Trial Court could have maintained or abrogated joint custody here, agreed by the parties. The Trial Court was the one hearing and observing the witnesses in this case and observing their demeanor. The Trial Court set out in its ruling its concerns and that it had considered the issue of time with the child vs. stability to be offered for the child, and that Father offered the stability, While Mother now complains about Father being awarded custody based on stability, clearly she understood at the time of trial what stability means, since she testified it was important for the child to be in a stable home. See, Tr. 10/27/15, Vol. I, P. 21, Lines 2-4. The Trial Court's decision was neither an abuse of its discretion nor against the clear weight of the evidence to award custody to Father based on stability.

CONCLUSION

It is clear from the evidence below the Trial Court did not err in granting split custody of the child in this case, giving Father school year custody and Mother summer custody.

It is also clear from the evidence below the Trial Court did not err in granting primary physical custody to Father when he is employed.

Finally, it is clear from the evidence below the Trial Court awarded Father primary custody, not his spouse, and the Court did not abuse its discretion in awarding Father primary custody, nor was such decision erroneous or contrary to the child's best interest in this case. See, *Daniel v. Daniel*, 2001 OK 117, 42 P.3d 871, ¶ 21, and See, *Foshee v.*

Respectfully submitted,

Ramona A. Jones, OBA#18405
Ramona A. Jones, Attorney at Law
Attorney for Appellee/Father

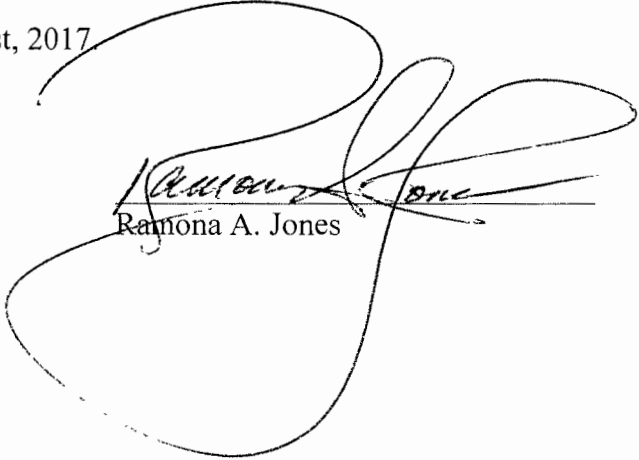


1437 South Boulder, Suite 160
Tulsa, OK 74119-3638
(918) 585-2255 – Telephone
(539) 777-2517 - Facsimile
rjonesok@gmail.com

CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the Appellee's Answer Brief was mailed this 21st day of August, 2017 by depositing it in the U.S. Mail, postage prepaid or by electronic mail to Todd Alexander, Esq., Counsel for Appellant, 2121 South Columbia, Suite 500, Tulsa, Oklahoma, 74114.

I further certify that a copy of the Appellee's Answer Brief was mailed to, or filed in, the Office of Osage County District Court Clerk, 600 Grandview Avenue, Pawhuska, Oklahoma, 74056, on the 21st day of August, 2017.



Ramona A. Jones