



ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

IN RE THE MARRIAGE OF:)

KAYLA DAWN DAUZART,)

Petitioner/Appellant,)

vs.)

KENNETH LEE DAUZART,)

Respondent/Appellee.)

JUL 28 2022

JOHN D. HADDEN
CLERK

Case No. 119,426

Rec'd (date))	7-28-22
Posted)	<input checked="" type="checkbox"/>
Mailed)	<input checked="" type="checkbox"/>
Distrib)	<input checked="" type="checkbox"/>
Publish)	yes <input checked="" type="checkbox"/> no

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BARRY L. HAFAR, TRIAL JUDGE

AFFIRMED

John P. Cannon
Thomas A. Stone
CANNON & ASSOCIATES, PLLC
Edmond, Oklahoma

For Petitioner/Appellant

Hayley V. Potts
THE POTTS LAW OFFICE, PLLC
Oklahoma City, Oklahoma

For Respondent/Appellee

OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

Kayla Dawn Dauzart, now Carpenter, (Mother) appeals an order of the trial court granting Kenneth Lee Dauzart's (Father) motion to modify custody, support,

and visitation. The trial court also considered during trial Father's objection to Mother's notice to relocate and his application for a contempt citation. After review of the relevant facts and law, we affirm the trial court's decision.¹

FACTS AND PROCEDURAL BACKGROUND

In November 2014, a decree of dissolution of marriage was filed in Grady County granting sole custody of the parties' child to Mother and awarding Father visitation. The case was subsequently transferred post-decree to Oklahoma County on June 11, 2018.

On November 21, 2018, Father filed a motion to modify child custody, support, and visitation in which he urged a permanent, substantial and material change of conditions had occurred directly affecting the child's best interests and resulting in the child being better off with Father. Father argued Mother had purposefully withheld information and was dishonest about the child's medical conditions and prescribed medications, and he provided several examples

¹ Father filed a motion to strike three exhibits attached to Mother's appellate brief. Oklahoma Supreme Court Rule 1.11(i), 12 O.S. Supp. 2020 ch. 15, app. 1, prohibits filing an appendix to a brief except under certain circumstances. Although Exhibit 1, the notice of relocation, is not one of those circumstances, it is contained in the record on appeal and was considered by the trial court in its decision. Exhibit 2, the military order of relocation, is also not one of those circumstances and was not presented to the trial court during trial. We strike this exhibit pursuant to Supreme Court Rule 1.11(i) and decline to consider it for the first time on appeal. "In short, there can be no post-decisional amendment of the record to include material that was not timely admitted or pressed for incorporation at the trial level." *Hadnot v. Shaw*, 1992 OK 21, ¶ 11, 826 P.2d 978. Mother's Exhibit 3, the journal entry being appealed, is a permissible attachment in an appendix pursuant to Supreme Court Rule 1.11(i). We thus grant in part and deny in part the motion to strike.

supporting this argument. He stated that Mother failed to list him on the child's medical or school records but listed her husband, Michael Carpenter, instead. Father argued that during a parent-teacher conference, he was informed the child was "suffering from outbursts of anger and that [Father] would not be allowed to see the child's report card due to an approximately \$1,700.00 balance on the school's account for tuition and other fees." Father cites instances where the police have been called for a visitation exchange and that Mother sent the police to Father's house for an unnecessary welfare check, "only to awaken and frighten the minor child, who was asleep when the police arrived." Father contended that Mother withheld the child from school so she could visit a museum with her husband. Father provided instances of Mother withholding visitation, forcing him to file motions to enforce visitation.

He asked the trial court to award him sole custody with Mother receiving standard visitation and to recalculate child support according to the Oklahoma Child Support Guidelines. Mother never responded to this motion.

On December 11, 2019, Mother's counsel sent Father's counsel a notice of relocation as required by 43 O.S. § 112.3 informing Father that Mother's husband, Michael Carpenter, had been ordered by the United States Air Force to relocate to North Dakota by January 29, 2020. The notice also contained a proposed visitation schedule.

On December 31, 2019, Father filed a combined objection to the notice of intent to relocate and motion for order prohibiting Mother from relocating the child, asserting he had already been forced to file many motions to enforce visitation because Mother “has previously attempted, without approval, to reduce [his] Court Ordered time with the minor child.” Father advised the trial court of the pending motion to modify custody “which should be heard prior to any relocation being ordered.” He argued the move is not in the best interests of the child nor is the proposed visitation. Father also mentioned that DHS had “substantiated a claim against [Mother] and given recommendations to [step-father, Michael Carpenter] to be corrected in this action.” Father asked the trial court to prohibit Mother from relocating the child.

On February 19, 2020, the trial court heard Father’s objection to Mother’s notice of relocation. The trial court found the child was to remain in Oklahoma and denied “relocation on [a] temporary basis.”

On September 10, 2020, Mother and the Guardian Ad Litem, Miranda J. Long, filed a joint motion to allow relocation. They argued that although temporary relocation was denied in February 2020, the “goal was to hold a [t]rial on the [m]erits in time for the minor child to enroll in school and relocate to North Dakota by the end of summer.” However, the trial was delayed until September 2020 due to COVID-19. The trial court then struck that trial date because counsel

contracted COVID-19. As a result of this delay in the trial, Mother and GAL asked the trial court to allow temporary relocation of the child until trial on the merits could be held.

On September 15, 2020, Father filed an application for an indirect contempt citation because Mother relocated the child to North Dakota in violation of the trial court's February 2020 order denying temporary relocation. Father also filed that day a motion for enforcement of visitation rights because Mother denied him the visitation established by the court order. He asked for make-up visitation, temporary custody, and an order prohibiting the child from leaving Oklahoma. On September 30, 2020, the trial court denied Father's motion to enforce visitation rights finding that it would not be in the child's best interest to order her immediate return to Oklahoma.

On October 21, 2020, the trial court heard the joint motion to allow temporary relocation and concluded that although the child could remain in school in North Dakota where she is enrolled, Mother must facilitate Father's visitation and the final ruling on relocation and contempt would be reserved for trial.

After a four-day trial ending on February 4, 2021, the trial court granted Father's motion to modify custody, sustained his objection to Mother's notice to relocate the child and cited Mother for indirect contempt. The trial court granted Father sole custody and found Mother guilty of indirect contempt on the

September 2020 citation. The trial court allowed her to purge her contempt by returning the child to Father in Oklahoma within 14 days of February 4, 2021. The trial court also entered the “standard long distance visitation schedule.”

Mother appeals.

STANDARD OF REVIEW

We review a decision of the trial court on a motion to modify custody to determine if the “court’s decision is clearly against the weight of the evidence so as to constitute an abuse of discretion.” *Williamson v. Williamson*, 2005 OK 6, ¶ 5, 107 P.3d 589. “An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling.” *In re BTW*, 2008 OK 80, ¶ 20, 195 P.3d 896.

ANALYSIS

Mother almost exclusively emphasizes on appeal that the trial court erred in denying her request to relocate in violation of 43 O.S. § 112.3, but she does not address the substantive basis for the court’s change in custody. Father counters that because the trial court granted his motion to modify custody, which he had filed a year *before* Mother’s requested relocation, it became unnecessary for the trial court to consider the statutory relocation factors.

Motion to Modify Custody

“A parent seeking to change custody based on a material change of

circumstances must demonstrate ‘that, since the making of the order sought to be modified, there has been a permanent, substantial and material change of conditions which directly affect the best interests of the minor child.’” *White v. White*, 2007 OK 86, ¶ 8, 173 P.3d 78 (quoting *Gibbons v. Gibbons*, 1968 OK 77, ¶ 12, 442 P.2d 482). “That parent must also demonstrate ‘that, as a result of such change in conditions, the minor child would be substantially better off, with respect to [the child’s] mental and moral welfare, if the requested change in custody be ordered.’” *Id.* “These requirements were summarized as a three-prong test in *Daniel v. Daniel*, 2001 OK 117, 42 P.3d 863.” *White*, 2007 OK 86, ¶ 8.

There, this Court held that under no circumstances may a modification in custody based on a change of circumstances be effected unless the requesting parent demonstrates:

- 1) a permanent, substantial and material change in circumstances;
- 2) the change in circumstances must adversely affect the best interests of the child; and
- 3) the temporal, moral and mental welfare of the child would be better off if custody is changed to the other parent as requested.

Id. “In applying the three-prong test ‘the best interests of the child must be a paramount consideration of the trial court when determining custody and visitation.’” *Id.* ¶ 9 (quoting *Daniel*, 2001 OK 117, ¶ 21). “Determinations of the three-pronged test are to be based on evidence presented, rather than on the allegations of one party to a child custody dispute.” *Id.* ¶ 10. “This is true whether

or not those allegations are disputed in a response to the motion to modify custody.” *Id.*

It cannot be disputed that Father filed his motion to modify custody on November 21, 2018, more than a year before Mother’s December 2019 notification letter of intent to relocate. Mother did not respond to Father’s motion to modify custody. Father did, however, file a combined objection to the relocation and a motion to prohibit Mother from relocating the child. On the first day of trial, the court clearly stated the merits pertained to Father’s motion to modify custody, his objection to the notice of intent to relocate, and his contempt application.

At the end of the trial, the court sustained “the motion to modify and grant[ed] sole custody to [Father].” In doing so, the trial court stated:

There is no doubt in my mind that if this child relocates to North Dakota, [Father] will never visit that child. Because if you’ll thumb your nose at the Court for relocation, you sure think that once you get up there, you don’t have to grant visitation. And, I, there’s no doubt in my mind that’s what’s going to happen.

....

There is a specific pattern of [Mother] interfering in the relationship between [minor child] and her dad.

....

So what’s—what’s my option here? [Mother] lives in North Dakota. [Father] lives in Oklahoma. Looks like I’ve got to grant a change of custody, because [Mother] lives in North Dakota. She relocated to North Dakota despite this Court saying she could not do it.

....

I’m going to find that [Mother] is guilty of willful and intentional violation of a Court Order. We’ll set this

matter off for sentencing and a Motion to Settle on March 12th.

The purge, I will accept the offer of [Father's] counsel, in saying that the purge will be returning [the child] to [Father] within 14 days.

In ruling from the bench at the trial's conclusion, the court stated that he is "going to sustain the motion to modify and grant sole custody to [Father]."

Without question, the trial on the merits concerned Father's motion to modify custody and his objection to relocating the child. The motion to modify custody was filed more than a year before Mother gave notice of intent to relocate the child. The motion to modify does not, and based on its timing could not, relate to relocation. Good policy would dictate that a trial court address the motion to modify custody first, in this instance not just for temporal reasons because it was filed first. As a general proposition, a decision to change custody will obviate any previous relocation. We see no error in the trial court's refusal to allow the child's relocation or in its decision to change custody from Mother to Father as outlined below.

At trial, Father raised a number of issues on the merits of his motion to modify custody. Arguing Mother had purposefully withheld information and was dishonest about the child's medical conditions and medications, he bolsters his argument with several examples. He believes Mother failed to list him on the child's medical and school records, instead listing her husband, Michael Carpenter.

Father further maintains that during a parent-teacher conference, he was informed the child was “suffering from outbursts of anger and that [Father] would not be allowed to see the child’s report card due to an approximately \$1,700.00 balance on the school’s account for tuition and other fees.” Father cited instances when the police were called for a visitation exchange and Mother sent the police to Father’s house for an unnecessary welfare check “only to awaken and frighten the minor child, who was asleep when the police arrived.” Father said Mother withheld the child from school so she could visit a museum with her husband. Father provided examples of Mother withholding visitation thus forcing him to file motions to enforce visitation. Mother never responded to this motion.

Most of the trial evidence focused on these issues, particularly Mother’s withholding of visitation forcing Father to file several motions to enforce visitation. The testimony also focused on the parties’ increasing hostility during visitation exchanges and on issues regarding Mother withholding the child’s medical and medication information and her interference with doctors and/or dental visits. The evidence also included a substantiated DHS child abuse investigation against Mother involving an incident in which she struck the child across the face causing a nose bleed.

Stepfather Michael Carpenter testified that he saw the child with a bloody nose and picked her up to stop the bleeding, but he did not ask her what had

happened. Carpenter testified that DHS recommended that he and Mother complete services after this incident, but he did not complete them because “they were a recommendation, not a court mandate.” Carpenter also testified that he carries a firearm on his person “[w]hen legally allowed” and admitted having his firearm during visitation exchanges. He states that if the trial court asked him not to wear a firearm during visitation exchanges, he would not follow it because it infringes on his “Second Amendment right.” He testified that if Mother refused to give Father his court-ordered visitation, he would not interfere because it is not his place to enforce visitation on Father’s behalf.

Mother admitted that when she moved the child to North Dakota in the summer of 2020, she did not have a relocation order from the court. She admitted that from August 2020 to February 2021, she facilitated visitation only twice with Father although he was supposed to have visitation every other weekend. She admits Father is not receiving visitation pursuant to the court order. She denied giving the child a bloody nose when she slapped her and said that came later in the day likely due to the child’s nasal medications. Mother testified she called the police on the child’s dentist because he was going to give her nitrous oxide before performing dental work. She was then asked to leave the dentist’s office. Mother testified Father needed to let her know ahead of time if he needed to use stepfather’s insurance for the child.

Mother said she has been married to Carpenter since 2015 and the child starting calling him “dad” on her own. They have no family in North Dakota. She has always given Father the child’s medication during visitation if they were needed as she would never put her child in harm’s way. Mother states that after the slapping incident, she apologized and had a discussion with her daughter and then noticed her nose bleeding. Mother completed her anger management and child parenting classes after this.

Father explained during trial what he believed to be medical abuse by Mother. He received copies of medical records saying the child was supposed to be on Claritin and Singulair but testified that Mother was not sending those with the child to visitation and would then blame him if the child’s asthma got worse during visitation because of his smoking. He explained he also became very upset when Mother concocted a story about the child injecting herself with her EpiPen at his house without his knowledge. Father states Mother never presented documents of her visits to the emergency room and believes Mother was trying to make it appear that he was medically abusing his child. He described DHS’s investigation of this incident as Mother described it which DHS found to be unsubstantiated. Father also took the child to the dentist for a free cleaning and was notified she had cavities, so he discussed with Mother getting the cavities filled which would require nitrous oxide. Father said Mother had no objection to the nitrous oxide

until the day of the appointment when she said the child should not have it due to her asthma and to an adverse reaction to it when she had ear tubes inserted. Father confirmed with the dentist that it would not affect her asthma. However, the police were eventually called. Father also testified about the difficulties in getting the child's prescriptions filled while she was on stepfather's insurance.

Miranda Long, the GAL, then provided her recommendation:

I feel that both parties are extremely selfish. I don't know that anyone is really taking into account [the child's] best interest. I feel it's selfish to move her 1,000 miles away from her family, but I think that it's selfish that dad wouldn't work with mom over the summer when he knew that she was up there. Granted, it was probably wrong that she was up there, but he wouldn't work with her to get his visitation.

.....

And the Motions to Enforce that father has had to file, that have been sustained, I think definitely go in dad's favor, that mom has made a pretty good effort to thwart that relationship, between him and his daughter.

I have concerns that [the child] has not been in counseling since, according to Ms. Shine, when I spoke to her, since August of 2020. She told me that there's a huge insurance fiasco, which I think we heard testimony to, but she also told me that [the child's] number one problem is, that her parents can't get along. She said that both parents need to work on things like parenting classes and general parenting and co-parenting abilities. Both need to work on being better parents for [the child]. So, I think both parents have some things they need work on.

.....

So, I do think that the child should remain in Oklahoma. I think that the parties should be awarded joint custody. They can't agree on a pizza toppings [*sic*]. I'm not sure how they're going to agree to raise this child

together, but mom having full custody is obviously not working and I don't know that dad having custody is going to be any better.

I'm recommending that father be primary over [the child's] medical care. That the child be added to stepmom's insurance, so that dad can obtain medications and obtain the proper medical care that mom has not been able to do.

I'm recommending that she be returned, re-enrolled in St. Philip Neri. I know dad has a huge objection to that, but again, I think that's the selfishness coming out. I understand he doesn't like it, but [the child] loved that school and has friends there and that's going to be familiar to her. The parties should get together and enroll her to make sure that they're both on all the paperwork.

After careful review of the evidence to determine whether the *Gibbons* test has been met, we find the evidence supports the trial court's conclusion to modify custody. In her appellate brief, Mother takes issue with the trial court's decision to modify custody only in passing and without citation to the record. Mother argues, "In making its decision, the trial court did not require [Father] to demonstrate 'a permanent, substantial and material change of circumstances which directly and adversely affects a child in such a material way that as a result the child would be substantially better off if custody were changed to the other parent.'" (citation omitted). Father, by contrast, went into considerable detail in his brief about the circumstances constituting "a permanent, substantial and material change" necessitating a change of custodial parent.

We find Father's argument well-founded. Mother's pattern of interference with Father's parental relationship, such as her failure to follow court-ordered visitation, her defiance of the order denying temporary relocation until trial on the merits, and her interference with the child's medical treatment, constitute permanent, material and substantial changes of condition that certainly affect the child's best interests. Pursuant to 43 O.S.2011 § 112(D), "Except for good cause shown, a pattern of failure to allow court-ordered visitation may be determined to be contrary to the best interest of the child and as such may be grounds for modification of the child custody order." Such interference has directly affected the child's welfare to a substantial or material extent rendering the child being substantially better off, with respect to her temporal, mental and moral welfare, with Father having custody. We see no abuse of discretion in modifying custody from Mother to Father.

Relocation Issues

We also agree with Father that because the trial court granted his motion to modify custody, it became unnecessary to consider the statutory relocation factors. Pursuant to 43 O.S.2011 § 112.3(A)(3), a "[p]erson entitled to custody of or visitation with a child" means a person so entitled by virtue of a court order or by an express agreement that is subject to court enforcement." And 43 O.S.2011 § 112.2A states that "[a] parent entitled to the custody of a child has a right to

change his residence, subject to the power of the district court to restrain a removal which would prejudice the rights or welfare of the child.” As a practical and legal matter, § 112.2A “gives the custodial parent a ‘presumptive right’ to relocate.” *Scocos v. Scocos*, 2016 OK 36, ¶ 6, 369 P.3d 1068. Based on the change in sole custody from Mother to Father, the relocation factors in 43 O.S. § 112.3(J) became immaterial as Mother no longer had sole custody or was a “parent entitled to custody.” The trial court’s order is affirmed.

CONCLUSION

Our review of the evidence persuades us that the trial court did not abuse its discretion in its decisions, and we affirm.

AFFIRMED.

BARNES, J. (sitting by designation), concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

I respectfully dissent. Because the trial court changed the custody of the child, the evidence must support a finding that the child will be “substantially better off” because of the change. *Gibbons v. Gibbons*, 1968 OK 77, 442 P.2d 482, 485. After a careful review of the record, I do not believe the trial evidence supports such a finding. Nor does it appear the trial court believed as much. In its ruling, the trial court made the following observations:

With all things being equal, folks, I'll be perfectly honest, I wouldn't give Mr. Dauzart custody of this child. I just wouldn't do it. His behavior yesterday, if he does it in this courtroom, I guarant[ee] he does it at home. And when the guardian *ad litem* says that the child is afraid of her father, I don't doubt it.

And I will say it on the record, Mr. Dauzart, if I had any other choice, any other choice, I would not give you custody.

Tr. (February 4, 2021) 4, 5-6.

In my view, the best explanation for the trial court's order is that the mother was being punished for moving the child without any court order in place. Although I agree that the mother's actions in this regard were without excuse and worthy of punishment, such punishment could have been accomplished through orders in contempt proceedings. A change of custody that is not in the best interest of the child is, by definition, an abuse of discretion. For this reason, I would reverse the change of custody. Additionally, because I believe the evidence shows that the mother met statutory requirements, I would reverse the trial court's denial of the mother's request for relocation.

July 28, 2022