



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

JUL 28 2022/

JOHN D. HADDEN
CLERK

Case No. 119,200

IN RE THE MARRIAGE OF:)
)
 LACI NICOLE JENNINGS,)
)
 Petitioner/Appellee,)
)
 vs.)
)
 TIMOTHY JACOB JENNINGS,)
)
 Respondent/Appellant.)

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE MARTHA OAKES, TRIAL JUDGE

AFFIRMED

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 <input type="checkbox"/>

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

Timothy Jennings (Tim) appeals the trial court's modification of custody of the parties' minor child. Both Tim and his former wife, Laci Jennings, sought to end their previously agreed-upon joint custody arrangement and become their child's sole custodian. After trial, the district court awarded sole custody to Laci and required Tim to complete at least twenty-six weeks of a batter's intervention

program before the court would consider allowing any visitation. On review, we find no error in the trial court's decision and affirm.

BACKGROUND

The parties were married in 2015 and divorced in 2018. They have one biological child, DORJ, born in 2015. An older child of Laci's was brought into the marriage. Custody of DORJ was originally joint by agreement, but Tim was labeled as the "primary residential custodian." Although the parties generally shared equal time with DORJ, the co-parenting relationship was far from smooth. The record indicates various hostile interactions. Tim states the initial points of contention were his disagreement with Laci's placing of DORJ in day-care if she was working while she had custody and his belief that Laci was a drug abuser. Later, as more fully discussed below, Tim became convinced that one or more of Laci's boyfriends were pedophiles.

In May 2019, Laci sought sole custody after one particularly alarming incident. She alleged that after DORJ and her older son had been in Tim's custody, her older son returned with bruising on his body. Laci reported the incident to DHS, which found the allegation of abuse "substantiated." She further alleged that Tim's behavior had become persistently intimidating and harassing. Tim responded and filed his own motion seeking sole custody, which accused Laci of "parental alienation."

In July 2019, Laci filed an application for emergency custody. She reported that on July 18th she and the children were visiting with her boyfriend, Eric, in his front yard. She alleged that soon after she arrived, Tim appeared, wielding a

knife. She reported that Tim attacked Eric, who was able to restrain Tim until police arrived and Tim was arrested. She also stated that, while being restrained on the ground, Tim shouted obscenities at her, imitated animal growling sounds, and threatened to send “people to kill us.”¹

The court granted an agreed emergency order which gave Laci sole custody. The order allowed Tim supervised visitation, using one or both of his parents as supervisors, and required Tim to undergo a domestic violence assessment. The court also reappointed Miranda J. Long as guardian *ad litem* for DORJ, at Tim’s request.²

After he arrived for the domestic violence assessment pursuant to the court assistance program, Tim marked much of the intake form “n/a,” then argued that the facts had been improperly reversed and he was, in fact, the victim of domestic violence. At trial, a witness for the court assistance program testified that, pursuant to state law and at the direction of the attorney general, the program was not allowed to continue with an assessment under these circumstances.³

¹ This incident apparently stemmed from Tim’s belief, allegedly based on reports from third parties, that Eric was a pedophile and Tim’s mistaken belief that Eric was prohibited from being in DORJ’s presence. In fact, the GAL had approved such contact on July 17th, prior to the attack, but Tim was either unaware of or disregarded this. Additionally, Tim appears to have been consistently under the mistaken belief that he had some right under the divorce decree to determine when and how Laci’s boyfriends might interact with DORJ. However, any such power was limited only to “romantic overnight guests with the child present,” which does not appear to be the case as to this incident, which occurred in Eric’s front yard.

² Ms. Long had apparently served as GAL previously in this matter.

³ There is no further explanation of what specific statute or attorney general’s direction governs here, and a cursory search does not reveal what statute the witness was referring to.

Tim did later complete an assessment with "Family Builders" which found that, while both parties "have been violent," the "overwhelming testimony" suggests that Tim "is the primary aggressor." The report further noted that Tim had told Family Builders staff that Laci was "under active investigation in a murder-for-hire plot," an allegation found to be entirely incredible. Family Builders recommended that Tim attend a Batterer's Intervention Program, but Tim disagreed with the assessment and did not do so. The Family Builders intake coordinator was so disturbed by Tim's responses that she felt it her legal duty to warn Laci that a potential threat to her life had been triggered. At trial, the coordinator testified that she contacted Laci and advised her to seek victim's services and move to a "safe location where she could not be found."

Tim continued to make concerning posts on social media platforms revolving around a theme that it was justified and even admirable to kill or mutilate those who would harm one's children or stand between a parent and a child. He told Laci that he did not care what the court ordered and believed that that court had no power over him. He continued to imply that Eric or others might molest, rape, kidnap, or abuse DORJ, and stated that "before this year is up, I will either have my kids back or I'll be dead or in prison." Tim posted a video on Facebook of a song he had written called "Western Showdown"⁴ that, coupled with other

⁴ At the time, Laci worked at a business on Western Avenue. Tr. V.1 pp. 104-105. A censored version of the song's lyrics are:

I always knew you were a fool / I guess it's true
Lord knows I tried to do it right / But you can't be cool so
I'm probably gonna shoot you / In the face before we're through
Might I suggest you change / Your ways before you're through
Cuz I don't play I play to kill - This ain't no game

specific information relayed by an acquaintance, so disturbed Tim's parents that they refused to continue to supervise visitation. Tim's parents feared that Tim might kill Laci or Eric. Tim's father was concerned enough to seek an emergency order of civil detention against Tim, which was obtained.⁵

Trial on the competing custody motions was held on August 3-4, 2020. On October 15, 2020, the court made an order finding domestic violence, terminating joint custody, and awarding sole custody to Laci. The court ordered Tim to complete at least twenty-six weeks of the Batterer's Intervention Program before the court would consider allowing visitation. Tim appeals.⁶

STANDARD OF REVIEW

"On appeal, this 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. The burden is upon the party appealing from the custody and visitation award to show that the trial court's decision is

Cuz I don't play I play to kill - This ain't no game

Cuz I don't play I play to kill - This ain't no game - Ain't no m***** f***** game

Tim subsequently claimed at trial that the song was an homage to Alphonso J. "Al" Jennings (November 25, 1863 – December 26, 1961), an Oklahoma territorial attorney who at one time had robbed trains, and later became a silent film star. Tim claims descent from Jennings. As an aside, we note that although Al Jennings admitted to robbing trains, he denied ever having killed anyone. As one biographic piece put it, "Al Jennings was a bad outlaw, not in the sense that he was dangerous or feared, but in the sense that he wasn't very good at outlawry." Clay Coppedge, *The Life and Times of Dangerous Al Jennings* (<https://www.arcadiapublishing.com/Navigation/Community/Arcadia-and-THP-Blog/February-2019/The-Life-and-Times-of-Dangerous-Al-Jennings>) (last viewed, May 11, 2022).

⁵ The length of the detention is not clear from the record, but Tim was present for and testified at trial.

⁶ The trial court also entered a five-year protective order against Tim and in favor of Laci and her older child. Tim did not appeal this aspect of the order.

erroneous and contrary to the child's best interests.” *Daniel v. Daniel*, 2001 OK 117, ¶ 21, 42 P.3d 863, 871 (footnote omitted).

ANALYSIS

Tim first argues that he was denied his constitutional rights to fully cross-examine the GAL and to confront certain parties the GAL interviewed. Second, he argues that evidence was insufficient to support the trial court’s finding of domestic violence and harassment.

CONFRONTATION AND DUE PROCESS

Tim’s first argument in this realm is that he was denied his constitutional right to confront the witness against him because the GAL mentioned talking to several individuals without naming them. He argues that these unidentified witnesses “testified” that Eric was not, in fact, a potential or practicing child abuser and hence acted as “witnesses against” his claims to the contrary. He argues that the GAL was required to have named these parties in her report or at trial.

We first note that Tim had no explicit right to confrontation. This Court has been clear:

[T]he Sixth Amendment’s right of confrontation applies only to criminal cases, not to civil trials. *In re K.N.L.*, 2007 OK CIV APP 22, 154 P.3d 1276 (citing *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *Kiddie v. Kiddie*, 1977 OK 69, 563 P.2d 139; and *In re A.M.*, 2000 OK 82, ¶ 9 n. 7, 13 P.3d 484, 487 n. 7)

In re H.T., 2012 OK CIV APP 49, ¶ 19, 276 P.3d 1054, 1059 (original quotation marks omitted).

Although *Kelley v. Kelley*, 2007 OK 100, ¶ 13, 175 P.3d 400, 406, is clear that a party’s *due process* right requires an opportunity to cross-examine the

GAL, here, Tim did cross-examine the GAL, but chose not to ask the identity of any of the allegedly unnamed witnesses. In one exchange the GAL testified, in response to questions by the court, that she would disclose the names if the court wishes but did not do so in the report because Tim “is a little bit scary,” and the GAL “didn’t want anything to happen with those people.” Tim’s counsel did not request an identification after this offer was made.

Further, *Rowe v. Rowe*, 2009 OK 66, ¶ 4, 218 P.3d 887, 889-90, states that a GAL who acts as a witness is subject to discovery pursuant to the Oklahoma Discovery Code. Tim sought no discovery seeking the name of any individual the GAL had interviewed in preparation of her report. Indeed, Tim did not even raise a formal objection to the GAL’s report during trial. We find that Tim was not denied due process here, but failed to take advantage of it as offered.

Tim further argues that the GAL, whose specific appointment he requested, showed such bias or incompetence in her report that the decision of the trial court must be reversed and a new trial ordered. Pursuant to 48 O.S.Supp.2019, §107.3:

2. The guardian ad litem may be appointed to objectively advocate on behalf of the child and act as an officer of the court to investigate all matters concerning the best interests of the child. In addition to other duties required by the court and as specified by the court, a guardian ad litem shall have the following responsibilities:

a. review documents, reports, records and other information relevant to the case, meet with and observe the child in appropriate settings, and interview parents, caregivers and health care providers *and any other person with knowledge relevant to the case* including, but not limited to, teachers, counselors and child care providers

Tim's argument is that the GAL failed to fulfill these statutory requirements. Tim states that he provided the GAL with a list of names and proposed testimony of persons who would testify that Eric was likely to molest DORJ. Tim argues that the GAL was statutorily required to interview these persons as "any other person with knowledge relevant to the case." The GAL confirmed at trial that she did not interview anyone on Tim's list. Beyond this, we have no information. We have no copy of the GAL's report, and no copy of this list of persons or their proposed testimony is in the record. We do not even know how many people were listed or whether Tim provided sufficient information such that the GAL might contact these people, should such contact be warranted.⁷

One immediate problem with Tim's argument is that the GAL's report was not admitted at trial and is not part of the record here. The Oklahoma Supreme Court recently noted the following:

The record we are presented with is incomplete and does not contain the guardian *ad litem* reports used by the trial court. We decline to expand our traditional appellate review beyond its appropriate sphere and make independent credibility determinations on appeal. Mother's assignment of error challenging the conclusion it was in the child's best interests for custody to father requires us to apply a clear-weight-of-the-evidence standard which in turn requires all of the evidentiary record to be before us. All of the record is not before us and we must affirm the District Court's decree.

Duke v. Duke, 2020 OK 6, ¶ 1, 457 P.3d 1073, 1075.

⁷ Only two possible witnesses were identified at trial—a "Misty Warnik" and a "Will Stewart." There was no mention of what testimony these witness were purportedly willing to give. No offer of proof was made.

Further, even assuming that the GAL's statement at trial that she did not interview Tim's proposed witnesses provides a basis for review, that does not require our review of the report. *Duke* is clear that, irrespective of any error in the GAL's report, "the decree awarding custody should be reversed on appeal only if":

(1) The error caused prejudice to [Tim] and resulted in a child custody award to [Laci] contrary to equity principles and causing an incorrect equitable result; or (2) The award was against the clear weight of the evidence on the issue of the best interests of the child and created an incorrect result; or (3) The legal error by the trial court prevented [Tim] from having an opportunity to present a legally cognizable claim or a defense relating to [his] claim for child custody.

Id. ¶ 11. We find the record here sufficient to support the decision of the trial court, irrespective of the content or methodology of the GAL's report. Hence, we find the first two bases for vacatur stated in *Duke* are not met. The only remaining question is whether the GAL's methodology or report "prevented Tim from having an opportunity to present a legally cognizable claim or a defense relating to his claim for child custody."

If, as Tim argues, Misty Warnik, Will Stewart, or others, had evidence to give on this troubling accusation, we see no reason why he could not have called them as witnesses, by subpoena if necessary. Indeed, if there is unheard evidence supporting Tim's allegations regarding Eric, there is nothing to prevent him from bringing this to the attention of the district court now, bringing these witnesses to testify under oath, and seeking a conduct order or a change of custody. We find, however, that the court did not deny Tim the ability to present an

otherwise legally cognizable claim or defense under the circumstances of this case.

THE FINDING OF "DOMESTIC VIOLENCE"

Tim's final argument is that the court erred in making a finding of "domestic violence" because there was no evidence that he had physically assaulted Laci, and neither Tim's assault on Eric, from which Laci had to flee with the children, nor his numerous violent statements, constitute domestic violence under Oklahoma law.

Pursuant to 43 O.S. § 109(I)(1):

In every proceeding in which there is a dispute as to the custody of a minor child, a determination by the court that domestic violence, stalking, or harassment has occurred raises a rebuttable presumption that sole custody, joint legal or physical custody, or any shared parenting plan with the perpetrator of domestic violence, harassing or stalking behavior is detrimental and not in the best interest of the child, and it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic violence, harassing or stalking behavior.

The definition section of the statute states:

- a. "domestic violence" means the threat of the infliction of physical injury, any act of physical harm or the creation of a reasonable fear thereof, or the intentional infliction of emotional distress by a parent or a present or former member of the household of the child, against the child or another member of the household, including coercive control by a parent involving physical, sexual, psychological, emotional, economic or financial abuse

Id. Even though there was no direct evidence of physical violence against Laci, the record suffices to show a "creation of a reasonable fear thereof." This was sufficient to trigger the presumption made by § 109(I)(1).

Tim next argues that this presumption was overcome by his own testimony that he would never harm Laci and that his numerous intemperate statements were merely temporary expressions of anger or frustration. The trial court is charged with interpreting the credibility of this explanation. Its interpretation here was not against the clear weight of the evidence.

CONCLUSION

After a thorough review of the record, it is clear that Tim cares deeply for the safety and well-being of DORJ. However, it is equally clear that he expresses his feelings in extremely counter-productive ways. It was not unreasonable to regard him, based on his own persistently intemperate statements, as posing a threat of infliction of injury to Laci and any other person that, in Tim's estimation, might stand between himself and DORJ, regardless of that person's legal rights. Neither the trial court's change of custody, nor its demand that Tim complete various social services before visitation might resume, was contrary to the weight of the evidence or an abuse of the court's discretion.

AFFIRMED.

WISEMAN, P.J., and HIXON, J., concur.

July 28, 2022