NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

Case No. 119,847

SUSAN RAE WILSON,

Petitioner/Appellee,

vs.

JASON ALLEN WILSON,

Respondent/Appellant.

APPEAL FROM THE DISTRICT COURT OF
POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE EMILY MUELLER, TRIAL JUDGE

AFFIRMED

Marianne Miller
THE PARSONS LAW FIRM, P.L.L.C.
Shawnee, Oklahoma — For Petitioner/Appellee

Allison Hart
Oklahoma City, Oklahoma — For Respondent/Appellant

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

Jason Wilson appeals the trial court's modification of the parties' joint custody plan after Jason's former wife, Susan Wilson, sought such modification. Although the parties remain joint legal custodians under the trial court's order, Susan was made the primary decision maker—previously there was none—and the primary custodian during the school week. On review, we find the trial court's decision is not against the clear weight of the evidence or an abuse of discretion, and therefore affirm.

BACKGROUND

Jason and Susan were married in 2008. Two children were born during the marriage: one in 2009 and one in 2012. They are presently eleven and thirteen years old. Susan filed for divorce in 2016. The parties entered into an agreed divorce decree in 2018, which awarded joint custody. The joint custody plan provided that neither party would be considered the primary decision maker, but that major decisions would be considered and made by agreement. Absent agreement, the parties agreed to consult with a named, local counselor, Mary Brazier. As to physical custody, the parents had substantially equal time with the children. Jason had the children Monday and Tuesday nights, while Susan had Wednesday and Thursday nights, and each had the children every other weekend, Friday through Sunday. During the summer, the parties alternated full weeks with the children.

In March of 2019, just over a year after the agreed decree was entered, Susan filed a *Motion to Modify Custodial Periods and Determine Final Decision Making Authority*. True to its title, Susan did not seek to terminate joint legal custody; however, she did seek two significant changes to the joint custody arrangement. First, she sought to become the "primary decision maker," in lieu of Mary Brazier, who had not been consulted before the filing of the motion because she was "not available" due to "her work load." R. 2. Second, Susan sought "primary custody during the school year." *Id.* Specifically, she asked that Jason's custodial periods be limited to every other weekend from Friday afternoon to Monday morning and overnight every other Wednesday.

In her motion, Susan pointed to several factors to justify her request. She claimed the children were having issues with so much back and forth between the parties and that it was especially affecting the older child's ability to focus at school. She also claimed that the children's older half-sister, Jason's daughter, was providing the primary parenting on weekdays that Jason had the children. Her final contention was that the children desired to stay with her for longer periods. The trial date for this motion to modify was originally set for April 8, 2019, but was reset to August 12, 2019, after Susan's request for a continuance was granted.[1]

Jason responded. He generally denied the allegations, stated no modification was necessary, and moved to dismiss. The basis of his request to dismiss was his assertion that, contrary to Susan's contention, Mary Brazier was in fact available and should have been consulted to mediate the dispute prior to court intervention.

In July 2019, Jason filed a motion to appoint a guardian ad litem (GAL). The motion was granted and Pamela Snider was appointed on August 7, 2019. On August 12, 2019, the same day trial was supposed to begin, the GAL filed a motion to continue along with a proposed temporary order that the GAL believed to be in the best interest of the children and to which both parties had agreed. The court entered the order, which placed the children in Susan's custody during the school week, but gave Jason custody three full weekends per month (Friday

[1] The order granting the continuance required the parties to participate in mediation. It is not clear from the record whether this mediation ever occurred.

after school to Monday morning). Jason also received an overnight visit each Friday that he didn't already have custody, a Tuesday evening "dinner visit" every week until 8 p.m., and custody after school every day until 4:45 p.m. when the children were returned to Susan. R. 44.

A status hearing was originally scheduled to take place in October 2019. For reasons unclear from the record, that hearing was held in December 2019 and at that time trial was scheduled for March 31, 2020. Due to the Covid-19 pandemic and resulting state-wide orders, the trial was continued several times but was eventually held on June 22, 2021. A second day of trial occurred on August 16, 2021.

Jason and Susan both testified.[2] Both parties testified that the temporary order schedule was adhered to with the exception that Jason began delivering the children to Susan on Sunday evenings rather than taking them to school on Monday mornings during his weekends since he had to be at work early.

The testimony of both parties revealed a myriad of disagreements and other points of contention between the two. Regarding the alleged issues with the back and forth under the prior schedule, the parties testified as follows. Susan said the children "did really well and excelled" under the temporary order and that the older child's anxiety levels had decreased, which she attributed to

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[2] The deposition testimony of Dr. Stanbro, Jason's psychiatrist, was also entered into the record as originally attached to the GAL's report. Jason has been diagnosed with ADHD. Dr. Stanbro met, at Jason's insistence, with the older child and both parents after the child had also been diagnosed with ADHD. Dr. Stanbro opined that the child's diagnosis was in error. He also testified that he thought Jason was a fit parent and that fit parents should generally receive equal time. Dr. Stanbro did not offer an expert opinion in the case, did not testify at trial, and made it clear he was "speaking in generalities." Tr. (1/16/20) at 26–27.

the new schedule. Jason testified that he was not aware of, and Susan didn't inform him of, any issues the children might have been having with going back and forth between his house and Susan's under the divorce decree schedule. However, Jason admitted that the older child had some difficulty concentrating in class under the old schedule and that the child saw a counselor for anxiety but had not seen the counselor in about two years. He testified that the issues with the older child were resolved, and when asked if the child has had any other issues since the initial anxiety, Jason responded: "Oh, no, he's a superstar."

Jason testified that the half-sister, who Susan alleged to be doing the primary parenting for Jason, would get the kids up for school, but that he would have breakfast and their clothes laid out and the children would dress themselves. The half-sister would also drive the children down the long driveway to catch the school bus in the mornings. She had her license at this time and if the kids missed the bus, designated adults would take the children to school as laid out by the divorce decree. Jason was not available to drop the kids off at school or take them to bus stop, as he had to leave for work at 6 a.m. He testified that, although he could have started later and thereby been available for the children in the morning, this was not possible under the temporary order because he had to maintain availability to pick the children up each afternoon.

The parents' animosity toward one another was evident throughout their testimony. Jason claimed that he was afraid Susan would use the decision-making authority that she requested to make decisions to spite him. Jason also questioned Susan's parenting skills, claiming she fed the children fast food every

night and donuts every morning for breakfast, which Susan denied. He also argued that the routine at Susan's was not consistent and that the children did not have consistent sleeping arrangements. However, Jason also admitted that he "do[es]n't know what occurs at Susan's house." Tr.Vol.I at 41, 121. Susan claimed that any time the two try to work together on anything involving the children it's like she has to "gear up for battle" because she knows "it's going to be a fight." Tr.Vol.II at 194.

In addition to the he-said-she-said testimony, a few specific disagreements were brought to the attention of the court. One disagreement in particular was an ongoing dispute about who the children would spend the upcoming fourth of July holiday with.[3] Susan wanted to take the children to a wedding in Missouri to meet her extended family, which would cut into the annual family reunion Jason had planned for the children to attend. The court ended up ordering that Susan would be permitted to take the children to the wedding, as it was scheduled to be her week with the children, but if the parties could work out an alternative arrangement, that was permitted. After some acrimony, the parties agreed to an arrangement accommodating both events.

The GAL filed her report on the first day of trial. The report noted that while it was the GAL's opinion that both parents love the children and want what is best for them, "it is clear these parents do not get along nor do I anticipate they will ever get along." R. 74. Nevertheless, the GAL recommended the parties

[3] The July holiday fell between the two days of trial in June and August.

continue to have joint custody. Her recommendation was to have Susan become the primary decision maker,[4] as well as the primary physical custodian during the school year. Although she "saw no reason custodial time should not be as close to equal as possible," she made the following recommendations as to Jason's time during the school year: every other weekend (Thursday after school until Sunday at 8 p.m.) and every other Wednesday evening, from after school until 8 p.m.

After hearing all the evidence, the judge took the matter under advisement, stating she would "have to really think about joint custody" and whether Jason and Susan can actually jointly parent the children. Tr.Vol.II at 255-56. She emphasized the importance of working together and presenting a united front to the children. The court took the week to decide, giving the GAL time to file a supplemental report[5] if she had any need to do so after hearing evidence at trial.

On August 27, 2021, the court issued its order on the motion to modify. The order kept joint custody in place, modified the custodial periods, and named Susan the final decision maker. Jason's custodial time was modified to "standard visitation." Under the court's order, Jason now has custody every other weekend from Friday at 6 p.m. until Sunday at 6 p.m. and a "dinner visit" every Tuesday

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[4] This was the general recommendation, subject to two notable exceptions. As to medical decisions, she recommended the "medical provider" should have tie-breaking authority. R. 74. Additionally, as to "sports, academic, and extracurricular actives," which "may be a source of contention for the parents," she gave this curious recommendation: "[E]ach parent should be able to make one decision for each child per semester and summer." *Id.*

[5] The record does not include any supplemental report from the GAL.

evening and once per month on a Friday evening (both until 8 p.m.). From this order, Jason appeals.

STANDARD OF REVIEW

When a party seeks to modify the terms of a joint custody plan, the trial court is to make its decision in the best interests of the children. 43 O.S. § 109(F). "On issues regarding the best interest of the child, the standard of review is whether the decision of the trial court is against the clear weight of the evidence or an abuse of discretion." *Robinson v. Robinson*, 2020 OK CIV APP 68, ¶ 4, 480 P.3d 924, 925. We give deference to the trial court in reviewing custody decisions because it is better able to determine controversial evidence by its observation of the parties, the witnesses, and their demeanor. *Shaw v. Hoedebeck,* 1997 OK CIV APP 69, ¶ 10, 948 P.2d 1240, 1243.

ANALYSIS

Jason argues that the decision was contrary to the children's best interests, that the trial court abused its discretion by relying on the GAL report, and that the trial court's decision was against Oklahoma's public policy of equal time. Each argument will be addressed in turn.

Best Interests of the Children

Jason first claims that the trial court's decision is contrary to the best interests of the children because the record is "completely devoid of testimony or other evidence that the children had issues with 'so much back and forth.'" *Brief-in-chief*, pg. 8. However, such a statement completely ignores Susan's testimony to the contrary. Susan testified at trial that the children were doing well staying

with her through the school week under the temporary order. She specifically mentioned that the older child has had less anxiety under the new schedule than they did going back and forth under the old schedule. Additionally, even Jason admitted that the older child had begun seeing a counselor during the prior schedule because he had difficulty concentrating in class, albeit "[f]or a short period." Tr.Vol.I at 38. Based on the testimony as a whole, the trial court could have reasonably concluded that Susan's contentions that there were issues with moving the children between households each week, and that the issues have improved under the temporary order schedule, were correct.

Jason also argues that Susan showed no evidence that the half-sister's relationship and involvement was detrimental to the children. He claims the problem is going away because the half-sister is about to leave for college. Jason is now married, so his wife, who was pregnant with Jason's child at the time of trial, could possibly take care of the kids when he cannot be there. Ultimately, we do not think the half-sister's relationship was shown to be detrimental to the children; however, nothing in the record indicates that the court's order was based on this relationship.

The next argument Jason makes is that the schedule should not have been changed because the children were excelling in school prior to the temporary order and because he and Susan parented well together before the temporary order. These arguments are contradicted by the significant amount of testimony exhibiting the general animosity between Jason and Susan. Even if the children did equally well in school before and after the temporary order, the best interests

of the children are to be determined not at the time the temporary order went into effect but at the time of trial. And at the time of trial, the children had been spending their school weeks with Susan for two years and had been, according to both parties, excelling. For better or for worse, Jason agreed to the temporary order. He cannot argue on appeal that which he should have argued over two years ago at a temporary order hearing that never occurred.

Jason also claims that the trial court abused its discretion by increasing time with Susan even though she had problems getting the older child to do his chores and homework. To support this claim, Jason points to testimony from trial where he explains that the older child's homework routine goes "very smoothly at [his] house," Tr.Vol.II at 216, while Susan's testimony was that she had difficulty getting the older child to focus on homework at her home. *Id.* at 218. But we cannot view testimony in isolation. Jason testified that under the temporary schedule he had thirty-five minutes with the children on school days, and during that time it was "literally all [they could] do to feed their chickens and get a snack in." Tr.Vol.I at 60. As a result, Jason says he didn't "have much of an opportunity to go through their school folder." *Id.* It is understandable that the trial court might not have given significant weight to Jason's contention regarding schoolwork because Jason did not have, or did not avail himself of, a meaningful opportunity to observe the children's homework routine. The resolution of such conflicts in testimony is generally left to the trial court.

The GAL Report

Jason's next argument is that the trial court abused its discretion by considering the GAL report when deciding what was in the children's best interests. Jason has several complaints with the GAL. At the outset, he claims that the GAL assured him she would be ready in time for trial, but ultimately was not as she filed a motion to continue. However, nothing in the record indicates that the GAL made those assurances, and we fail to see how Jason was prejudiced by this. He makes no claim that he relied on any alleged representation that the GAL would be ready for trial by a certain time or how that reliance led to any prejudice. Jason voluntarily agreed to sign the temporary order which led to two years of the children spending the school week with Susan. During the two-year period under the temporary order Jason did not attempt to file any motion or otherwise try to undo the temporary order.

Jason also complains that the GAL ignored his invitations and requests to investigate his home life. Jason had ample opportunity to give the trial court an idea of what life was like for the children at his home. He had two days of trial to testify and call witnesses. Similarly, he claims that he provided a list of five people for the GAL to interview but she only interviewed Susan and Jason. However, Jason could have called the people on his list as witnesses himself if he wanted the trial court to consider what they had to say. Most fatally, Jason failed to call the GAL as a witness to explore any of these claims in front of the trial court. If Jason believes the GAL's methodology and resulting report were

flawed, he should have called the GAL as a witness. The GAL's report was competent evidence in the record and the trial court did not err in admitting it.

A deposition of one of Jason's witnesses, Dr. Stanbro,[6] was included in the GAL report and considered by the trial court. This deposition is the center of Jason's final argument regarding the GAL report. His argument seems to be that the GAL only used a small, unhelpful portion of Dr. Stanbro's deposition in her report and ignored a critical piece of that deposition. Jason claims that the ignored testimony strongly supports Jason having equal access to the children and ignoring this testimony and reducing his time is clear error by the trial court. The specific testimony he points to is from Dr. Stanbro's deposition where he says that the opportunity to have a relationship with a half-brother or sister is very enriching. Dr. Stanbro also says parental alienation is damaging and that there should be equal access to parents. Jason says this testimony was overlooked and not presented to the court below.

But the trial court acknowledged having read the deposition as part of the GAL's report. Tr.Vol.I at 97. And nothing in the record suggests that the court ignored the deposition and based its decision only on information contained in the GAL report. Further, Dr. Stanbro goes on to clarify and say that he was not in a position to make any kind of recommendation as far as custody goes in this specific case, but he was just talking "in generalities."[7] Tr. (1/16/20) at 26–27.

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[6] *Supra*, note 2.

[7] Jason also notes, for the first time in his reply brief, the 2017 amendment to 43 O.S. § 107.3(A)(2)(d) as evidencing legislative intent to remove the GAL's ability to make

Oklahoma's Public Policy & Other Issues

Jason next argues that the trial court's decision was against Oklahoma's public policy of equal access according to *Robinson v. Robinson*, 2020 OK CIV APP 68, 480 P.3d 924. Citing statutory provisions, *Robinson* notes that "the public policy of Oklahoma encourages the provision of visitation to non-custodial parents unless against the best interests of the child." *Robinson*, ¶ 19. Jason claims reducing his time was not in the best interest of the children as it "removes them from their half sibling" and "does not allow them to bond with their [new] half sibling born immediately after trial." *Brief-in-chief*, pg. 23. Notwithstanding the fact that the older half-sibling has moved out and is now attending college, the children will still be able to see their new half-sibling under the schedule imposed by the trial court at least once per week and possibly more. We do not find this to be contrary to the best interests of the children.

Oklahoma's public policy is also set out in 43 O.S.2011 § 110.1.[8] This section provides that minor children should have "frequent and continuing" contact with both parents after divorce "provided that the parents agree to cooperate." As referenced above, the parents' inability to cooperate was evident

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"conclusions and recommendations" regarding child custody. New arguments may not be raised for the first time in a reply brief. *Cox Oklahoma Telecom, LLC, v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶ 33, 164 P.3d 150, 162–63. Nevertheless, this legislative change, which became effective well after the order being appealed was entered, does not bar GAL's from giving recommendations. Rather the amended language reinforces the fact that the trial court has the ultimate authority to make custody determinations. Nothing in the record indicates the trial court blindly relied on the GAL's recommendation when modifying the joint custody plan. Indeed, the court's order here varied significantly from the GAL's recommendation in several important ways.

[8] We refer to the statute prior to the amendment that went into effect in 2021, as the court's order was entered prior to the amendment.

at trial. Further, the "'substantially equal access' language unambiguously applies only to the temporary order hearing phase of a case," *Redmond v. Cauthen*, 2009 OK CIV APP 46, ¶ 6, 211 P.3d 233, 236, and thus, the trial court was not constrained to award Jason equal access to the children in its final custody order.[9]

Jason also claims the trial court erred in refusing to make findings of fact and conclusions of law. At the time the trial court entered its order, findings of fact and conclusions of law were not required unless requested by a party. 12 O.S.2011 § 611.[10] Although Jason claimed in Exhibit C of his petition in error that he requested that the court make specific findings, the record does not reveal any such request. Although Jason did file proposed findings with his motion to dismiss Susan's motion to modify, attaching such proposed findings

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[9] At the time the trial court entered its order the statute read as follows:

> To effectuate this policy, if requested by a parent, the court may provide substantially equal access to the minor children to both parents *at a temporary order hearing*, unless the court finds that shared parenting would be detrimental to the child.

43 O.S.2011 § 110.1 (emphasis supplied). This language was amended as of November 1, 2021, and the above italicized language changed from "temporary order hearing" to "temporary order *or final hearing*." 43 O.S. § 110.1 (West 2021) (emphasis supplied). But because this language was not effective at the time the trial court entered its final order, we cannot hold the court to this standard.

[10] Although, as Jason argues for the first time in his reply brief, 43 O.S. § 110.1 currently says that in a hearing involving parents' equal access to minor children the "court shall issue findings of fact and conclusions of law to support its decision after a final hearing on the merits," this language was also added in the amendment that went into effect on November 1, 2021, and thus was not required when the trial court entered its order in August 2021. Nevertheless, Jason argues that this Court should "not ignore the intent of the legislature in passing this statute." *Reply brief*, pg. 11. But we cannot agree that the legislature intended to require finding of facts and conclusions of law in a custody dispute prior to the enactment of the language cited above. Because the legislature did not intend to require trial courts to make findings and conclusions in equal access to children cases until November 1, 2021, we cannot hold that the trial court erred in making such findings absent a request under the then applicable statute, being 12 O.S. § 611.

to a motion to dismiss does not qualify as a request that the court make specific findings in its subsequent order modifying custody. The failure to make such request on an order modifying custody precludes appellate review. *See Alonzo v. Alonzo*, 1996 OK CIV APP 48, ¶ 9, 917 P.2d 1014, 1017.

Finally, Jason claims the trial court erred in refusing to dismiss the motion to modify when Susan had failed to attempt to mediate the dispute, which he argues was required by the divorce decree. *Brief-in-chief*, pg. 24. The agreed decree stated that both parties were to reasonably confer with one another and share decision making authority as to important decisions affecting the children. The decree continued that in "the event there is no agreement after reasonable discussion the parties will mediate through Mary Brazier." R. 6. Susan claims to have reached out to Ms. Brazier twice before filing her motion to modify, but Brazier could not fit them into her schedule. Jason claims that after learning of the motion to modify he reached out to Brazier who said she was available to help. But he says he never got an appointment and never reached out to her again.

The language in the divorce decree does not suggest that failure to mediate with Mary Brazier serves as a complete barrier to judicial review of the decree, as Jason's view would suggest. The decree simply states that if a decision regarding the children cannot be agreed upon, Ms. Brazier is to be consulted to help reach a decision. This reflects the fact that in the original divorce decree there was no final decision maker, making a mediator necessary to resolve any decisions regarding the children that would normally fall under the purview of

the final decision maker. Although the trial court of course had the power to order mediation prior to proceeding to trial, the failure to enter such an order (assuming there was such a failure—*see* note 1, *supra*) did not remove the power of the trial court to modify the joint custody arrangement upon request of either party.

CONCLUSION

On review we find that the record is full of uncertainty and disagreement over what each party believes to be right for the children. Cases such as these serve as a paradigmatic example as to why we give deference to the trial court's judgment in custody cases. It is the trial court that is in the best position to determine credibility, resolve conflict, and make a decision that serves the best interest of the children involved. Because we find the trial court's decision was not an abuse of discretion or against the clear weight of the evidence, we must affirm.

AFFIRMED.

FISCHER, J., and BARNES, V.C.J. (sitting by designation), concur.

February 16, 2023