Family Law: Third Party Custody After *Baby Girl L.* and *A.G.S.: Now Where Are We?*

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Contested child custody proceedings, although normally associated with divorce, have, in recent years, increasingly involved parties other than parents and forums other than the divorce court. This Article discusses custody battles between third parties, usually grandparents, and the child’s parent or parents. The area has always been a difficult one in Oklahoma because it involves different types of proceedings and potentially different substantive standards from traditional custody battles between parents. Recent decisions by the Oklahoma Supreme Court in In re Baby Girl L¹ and In re Guardianship of A.G.S.² have prompted a reexamination of this problem to determine whether any coherent pattern has emerged.

I. The Type of Proceeding

Part I of this Article covers the different types of proceedings in which child custody decisions may occur: divorce, guardianship, habeas corpus, and juvenile.³ Part II concerns the substantive standard for deciding a custody case involving nonparents.

A. Divorce: Problems of Intervention and Abatement

Custody of a child may be awarded to a third party in a divorce action. Title 10, section 21.1A of the Oklahoma Statutes provides that custody shall be awarded in an order of preference according to the best interests of a child. The list, which begins with parents and then follows with grandparents and others, clearly indicates that custody may be awarded to third parties.⁴ The

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1. 2002 OK 9, 51 P.3d 544.
2. 2003 OK 1, 65 P.3d 587.
3. Adoption and termination of parental rights cases are also custody proceedings. A full discussion of these two actions is beyond the scope of this article. They will be discussed only insofar as they relate to the other proceedings.
   A. Custody should be awarded or a guardian appointed in the following order of preference according to the best interests of the child to:
      1. A parent or to both parents jointly except as otherwise provided in subsection B of this section;
Oklahoma Supreme Court, in *McDonald v. Wrigley*, overruled *Logan v. Smith* and held that the grandparent had a right to intervene in a divorce case to seek a modification of the divorce decree awarding custody to her instead of to the mother of the child.

However, intervention by third parties requires a proceeding in which to intervene. When one of the parties to a divorce dies, the divorce proceeding ordinarily terminates. In *Turley v. Turley*, the grandfather filed a motion to modify the divorce decree to grant him custody following the death of the custodial mother. The noncustodial father filed a habeas corpus petition seeking custody. The trial court judge consolidated the two actions, whereupon the father voluntarily dismissed his habeas action. The trial court found the father unfit and granted custody to the grandfather in the divorce proceeding. On appeal, the Oklahoma Supreme Court agreed that the father was unfit but held that it was error to grant the grandfather custody in the divorce proceeding because, when the mother died, the divorce case abated and therefore there was no decree to modify. The court remanded the case with instructions to reinstate the habeas proceeding and award the grandfather custody.

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2. A grandparent;
3. A person who was indicated by the wishes of a deceased parent;
4. A relative of either parent;
5. The person in whose home the child has been living in a wholesome and stable environment including but not limited to a foster parent; or
6. Any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

*Id.*

7. *McDonald*, ¶ 12, 870 P.2d at 782.
8. Chastain v. Posey, 1983 OK 46, ¶ 6, 665 P.2d 1179, 1181. It is well settled that if one party dies pending an appeal from a divorce action, the parties are divorced. The only exception to that rule is if one party is appealing the granting of the divorce. *See* 43 OKLA. STAT. § 127 (2001); Balfour v. Page, 1972 OK 1, ¶ 10, 492 P.2d 1088, 1091. The deceased spouse’s estate may continue the appeal only if property rights are involved. *See* Pellow v. Pellow, 1985 OK 88, ¶ 24, 714 P.2d 593, 598; Siler v. Siler, 1960 OK 19, ¶ 15, 350 P.2d 510, 513. Provisions of the divorce decree regarding alimony, child support, custody and visitation lapse with the death of one of the parties.
10. *Id.* ¶ 1, 638 P.2d at 470.
11. *Id.* ¶ 2, 638 P.2d at 470.
12. *Id.*
13. *Id.* ¶ 1, 638 P.2d at 470.
14. *Id.* ¶ 4, 638 P.2d at 470-71.
15. *Id.* ¶ 12, 638 P.2d at 471; *see also* Ingles v. Hodges, 1977 OK 18, 562 P.2d 845;
In S.W. v. Duncan, an unusual opinion, however, the court recently determined that the Uniform Child Custody Jurisdiction and Enforcement Act's (UCCJEA) continuing jurisdiction provisions overruled Turley. In Duncan, the mother and father divorced in October 1999. In January 2000, the mother died in an automobile accident. Following the mother's death, the maternal grandmother, aunt, and uncle cared for the child. Two weeks after the mother's death, the father refused to return the child from visitation, took the child to Kansas, and immediately instituted a custody proceeding there. The aunt and uncle filed a guardianship proceeding in Oklahoma two days later, in the same county where the divorce proceeding occurred. The Oklahoma court issued a temporary order, indicating that it had jurisdiction to determine custody, and placed guardianship with the aunt and uncle. The court thereafter phoned the Kansas court. The Kansas judge declined to indicate which court would have jurisdiction or what would occur in the Kansas proceeding. The father appealed the decision to the Oklahoma Supreme Court.

The Oklahoma Supreme Court affirmed the trial court. The court held that the issue was whether an Oklahoma court retained jurisdiction to modify the custodial provisions of a divorce decree following the death of one of the parties to the decree. The court correctly noted that upon the death of one of the parents, the other parent automatically becomes the custodial parent, as if no custody order was ever issued. Title 10, section 21.1B of the Oklahoma Statutes provides that upon the death of the custodial parent, the noncustodial parent is given custody, except under certain defined circumstances.

18. Id. § 551-202.  
20. Id. ¶ 2, 24 P.3d at 848.  
21. Id. ¶ 3, 24 P.3d at 848.  
22. Id. ¶ 4, 24 P.3d at 848.  
23. Id. ¶ 5, 24 P.3d at 848.  
24. Id. ¶ 8, 24 P.3d at 848.  
25. Id. ¶ 9, 24 P.3d at 848.  
26. Id. ¶ 34, 24 P.3d at 857-58.  
27. Id. ¶ 17, 24 P.3d at 852-53.  
28. Id.  
29. At the time Duncan was decided, the text of section 21.1(B) read as follows:  
   B. When a parent having physical custody and providing support to a child becomes deceased, in awarding custody or appointing as guardian of the child the noncustodial parent, the court may deny the custody or guardianship only if:  
      1. The noncustodial parent has willfully failed, refused, or neglected to
The court found that the section applied, but noted that the statute did not expressly provide that the jurisdiction of the divorce court continued following the death of one of the parties.\textsuperscript{30} It then held that the UCCJEA expressly provided for the continuing jurisdiction of the divorce court and, moreover, that the death of one of the parties was not listed in the UCCJEA as one of the bases for ending that jurisdiction.\textsuperscript{31} This, the court said, had the effect of overruling \textit{Turley}.\textsuperscript{32}

The court then found that the Kansas court incorrectly characterized the Kansas proceeding as a potential conflict between two states attempting to contribute to the support of the child for a period of at least twelve (12) months immediately preceding the determination of custody or guardianship action:

a. in substantial compliance with a support provision contained in a decree of divorce, or a decree of separate maintenance or an order adjudicating responsibility to support in a reciprocal enforcement of support proceeding, paternity action, juvenile proceeding, guardianship proceeding, or orders of modification to such decree, or other lawful orders of support entered by a court of competent jurisdiction adjudicating the duty, amount, and manner of support, or

b. according to such parent's financial ability to contribute to such child's support if no provision for support is provided in a decree of divorce or an order of modification subsequent thereto;

1. The noncustodial parent has abandoned the child; or

2. The court finds it would be detrimental to the health or safety of the child for the noncustodial parent to have custody or be appointed guardian.


31. \textit{Id.} The continuing jurisdiction provision of the UCCJEA is title 43, section 551-202 of the Oklahoma Statutes, which provides that:

§ 551-202. Exclusive, continuing jurisdiction

A. Except as otherwise provided in Section 16 of this act, a court of this state which has made a child custody determination consistent with Section 13 or 15 of this act has exclusive, continuing jurisdiction over the determination until:

1. A court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

2. A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

B. A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 13 of this act.


32. \textit{Duncan}, ¶¶ 17-18, 24 P.3d at 852.
exercise initial custody jurisdiction. The Kansas court had determined that Oklahoma was the home state of the child and, under Kansas cases interpreting its version of the Uniform Child Custody Jurisdiction Act, the court must defer to the home state because Kansas could only exercise significant connection jurisdiction. The Kansas court was still unsure whether the Oklahoma trial court would prefer that Kansas decide this case. The Oklahoma Supreme Court concluded that because Kansas was attempting to modify the Oklahoma decision, it was not acting in accordance with the UCCJEA and therefore any action on its part was improper.

While the Oklahoma Supreme Court’s ultimate decision, that Oklahoma had jurisdiction to proceed in this case under the UCCJEA, is correct, its reasoning seems strained. It was unnecessary to overturn settled Oklahoma law on the relationship between death and divorce. The UCCJEA has no relationship to internal state procedural matters. The court’s statement that the UCCJEA requires that the “divorce” court continue to exercise jurisdiction under section 551-202 is incorrect. It does not require that any particular state court continue to exercise jurisdiction, but merely provides that Oklahoma jurisdiction continue vis-à-vis any other state, assuming that local law would provide for continuing jurisdiction. Local law, at the time that the trial court made its determination, provided that the jurisdiction of the divorce court ended when one of the parties died.

This determination, that the divorce court continues to exercise jurisdiction over custody issues following the death of one of the parents, affects the Indian Child Welfare Act (ICWA). While the ICWA does not apply to divorce and delinquency cases, it does apply in other custody proceedings. Authorizing the continuation of the divorce proceedings following the death

33. Id. ¶ 26, 24 P.3d at 855-56.
34. The Uniform Child Custody Jurisdiction Act is the predecessor to the UCCJEA. For a full discussion of the two acts, see Robert G. Spector, The Uniform Child Custody Jurisdiction and Enforcement Act, 32 FAM. L.Q. 301 (1998).
35. Duncan, ¶ 28, 24 P.3d at 856.
36. Id.
38. It should be noted that the court specifically refused to decide whether, when a court awards a third party custody in a divorce proceeding, the jurisdiction of the divorce court ends when one of the parents dies. The appropriate result seemingly would be that a third party seeking custody in a divorce case should specifically intervene and be made a party to the case. This would obviate the problem and allow the divorce case to continue upon the death of one of the parents.
39. 10 OKLA. STAT. § 40.3 (2001).
of one of the parents drastically reduces the number of cases where the ICWA is applicable.

B. Habeas Corpus

Habeas corpus is a traditional method of contesting child custody. A custody proceeding between a parent and a nonparent may be commenced by seeking a writ of habeas corpus in the county where the child resides. In the past, the typical scenario occurred when the child lived with the grandparents or other relatives following the death of the custodial parent. As courts held that the divorce court lost jurisdiction with the death of one of the parents, the noncustodial parent used the writ to obtain custody. Today, that is not necessary, as the parent would continue in the divorce proceeding. The court is thus compelled to join the grandparents. If the child is not living with the grandparents, but with the noncustodial parent, the grandparents also have standing to begin a custody proceeding by use of the writ.

In *Ex parte Moulin*, the court authorized the use of a habeas proceeding to determine whether to give custody to the child’s natural father, whose parental rights had been previously terminated, or to the maternal uncle. The court held that the statute authorized the use of the writ to “enforce the rights and for the protection of infants.” The statute does not limit the persons who may enforce or protect. While *Moulin* suggests that anyone would have standing under title 12, section 1354 of the Oklahoma Statutes to initiate a custody proceeding, courts generally restrict the use of a habeas proceeding to family members related by blood; no stranger has been granted standing under the statute. While grandparents clearly may use the writ to begin a custody case, today it would probably be easier for the grandparents to

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42. 1950 OK 82, 217 P.2d 1029.
43. *Id.* ¶ 29, 217 P.2d at 1034.
44. *Id.* ¶ 27, 217 P.2d at 1034 (quoting 12 OKLA. STAT. § 1354 (1941)).
45. See id. ¶ 28, 217 P.2d at 1034; see also *In re Borcherding’s Custody*, 1945 OK 247, ¶¶ 13-16, 162 P.2d 184, 186 (use of habeas approved after parent’s death to decide custody between two sets of grandparents).
46. See Young v. Reynolds, 1978 OK CIV APP 43, ¶ 5, 586 P.2d 759, 761 (habeas not an alternative method to raise paternity). For other cases where grandparents have used habeas corpus as a method of obtaining custody of the child, see *Gibson v. Dorris*, 1963 OK 235, ¶ 1, 386 P.2d 186, 187 (mother and child had been living with grandmother; when mother and child left to join father in France, grandmother filed habeas) and *Scroggin v. Griffin*, 1939 OK 345, ¶ 2, 94 P.2d 244, 245 (grandparents filed habeas to prevent father from moving away with the child).

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intervene in the divorce proceeding, now that the divorce court has continuing jurisdiction.

The writ may be used in two other situations. The first occurs when no previous custody order exists. Often the parents leave the child with third parties to take care of pressing business. Occasionally the third party refuses to return the child; habeas corpus is the method used to obtain the child’s return.\textsuperscript{47} Second, the writ is used to enforce custody decrees against third parties.\textsuperscript{48}

One case also suggests that the noncustodial parent may properly use the writ to enforce visitation rights.\textsuperscript{49} Because the writ tests the immediate right to the custody of the child, it may not be used to modify a prior decree.\textsuperscript{50} Thus, the court may provide for child support in a habeas corpus proceeding.\textsuperscript{51}

C. Guardianships

Guardianships for minors are governed by title 30, sections 2-101 to 2-116 of the Oklahoma Statutes. Oklahoma recognizes a distinction between the guardian of a minor and the guardian of the minor’s estate.\textsuperscript{52} Because the guardian of the \textit{person} of a minor is entitled to custody, guardianships constitute custody proceedings.

The statute permits a court to appoint a guardian whenever it “appears necessary or convenient.”\textsuperscript{53} The statute has not been interpreted, however, to authorize the court to appoint a guardian for a child for \textit{any} reason.\textsuperscript{54} Guardianship proceedings are considered proper only when no prior order concerning the child exists. Therefore, guardianship proceedings may not be used to modify a prior custody determination.\textsuperscript{55} Normal guardianship proceedings occur when the custodial parent dies and the grandparents seek


\textsuperscript{48} See Ex parte Kelley, 1953 OK 243, ¶ 1, 261 P.2d 452, 453.

\textsuperscript{49} See Wilkerson v. Davila, 1960 OK 63, ¶ 18, 351 P.2d 311, 314.

\textsuperscript{50} See Application of Guthrie, 1990 OK CIV APP 36, ¶ 7, 792 P.2d 1197, 1201 (Means, J., concurring).

\textsuperscript{51} Act Relating to Marriage and Divorce, ch. 302, § 3, 2003 Okla. Sess. Law Serv. (West) (to be codified at 43 OKLA. STAT. § 110(D)).

\textsuperscript{52} 30 OKLA. STAT. § 2-101 (2001).

\textsuperscript{53} Id.

\textsuperscript{54} See Guardianship of Hill, 1977 OK 156, ¶ 16, 569 P.2d 444, 447 (neither natural father whose child has been adopted nor child himself can commence guardianship when child is in an otherwise intact family).

\textsuperscript{55} See Wilkerson v. Davila, 1960 OK 63, ¶ 12, 351 P.2d 311, 311 (guardianship proceedings inappropriate to try intra-parental claims to custody).
custody of the child. While habeas corpus is also proper, most cases have been brought as guardianship proceedings. Thus, guardianship and habeas corpus are, in this context, interchangeable procedures for obtaining custody of a child. Note that grandparents may also use the procedure after the death of a parent of an otherwise intact household.

D. Juvenile Proceeding

Proceedings under the Children's Code can also be brought to declare children deprived because of neglect by the custodial parent. Once a petition is filed, the juvenile court may, if it finds the child deprived, remove the child from the parents and place the child with third parties, including grandparents. Today, the process of invoking the jurisdiction of the juvenile court is a public law matter and only the appropriate authorities may bring such an action. Before 1982, private parties participated significantly in juvenile court proceedings because the law allowed such parties to invoke the court's jurisdiction and use it to obtain custody.

E. The Enigma of Title 10, Section 9

Title 10, section 9 of the Oklahoma Statutes provides:

The abuse of parental authority is the subject of judicial cognizance in a civil action in the district court brought by the child or any grandparent on the child's behalf, or by its relatives within the third degree of consanguinity or affinity, or by the officers of the poor where the child resides or by any foster parent of the child or any person who has been a foster parent of the child; and when the abuse is established, the child may be freed from the


57. See In re Guardianship of Walling, 1986 OK 50, ¶ 1, 727 P.2d 586, 587 (mother acquitted of murdering father and grandparent obtained guardianship when mother left for California with the children).

58. 10 OKLA. STAT. § 7001-1.1 to 7007-1.8 (2001 & Supp. 2002).

59. Id. §§ 7001-1.3, 7002-3.1.

60. Id. § 7004-1.1 (2001).

61. See id. § 7003-3.1 (Supp. 2002).

dominion of the parent, and the duty of support and education 
enforced.\textsuperscript{63}

Although this statute has existed since statehood, its exact meaning remains 
obscure. In \textit{Lively v. Lively},\textsuperscript{64} the court noted that the statute, although 
dormant for many years, received new life when the legislature amended it to 
include grandparents and foster parents as persons who may bring the action.\textsuperscript{65} 
This indicated to the court that the statute should be used as the basis for third-
party custody claims. Accordingly, it reversed the trial court's determination 
that the child's grandparents could not bring a custody action under this 
section.\textsuperscript{66}

Substantial problems of interpretation still exist, however. Although the 
\textit{Lively} court authorized the use of the statute as a procedural vehicle for a 
third-party custody action, its language might be interpreted to provide a 
private action for termination of parental rights. In \textit{Maupin v. Hastry},\textsuperscript{67} 
however, the Oklahoma Court of Civil Appeals held that private plaintiffs 
could not use the statute to effectuate a termination of parental rights.\textsuperscript{68} The 
result seems logical, because, if the statute were so construed, it would raise 
substantial issues concerning its relationship with the comparable provisions 
in the Children's Code, as well as the standards for an adoption without 
consent in the Adoption Code.\textsuperscript{69}

Moreover, the \textit{Lively} court failed to interpret the phrase "abuse of parental 
authority." In \textit{Maupin}, however, the court noted in dicta that the statute refers 
to "abuse of authority," rather than "neglect of duty."\textsuperscript{70} Therefore, in the 
court's opinion, a failure to pay child support or to visit the child does not 
amount to "abuse of parental authority," although it may demonstrate parental 
neglect.\textsuperscript{71} Given that the law allows parental neglect to form the basis of an 
action in juvenile court to declare the child deprived, which could result in the

\textsuperscript{63} 10 OKLA. STAT. § 9 (2001).
\textsuperscript{64} 1993 OK CIV APP 62, 853 P.2d 787.
\textsuperscript{65} \textit{Id.} ¶ 14, 853 P.2d at 789-90. The statute was amended in 1991 by the Oklahoma 
\textsuperscript{66} \textit{Lively}, ¶ 15, 853 P.2d at 790.
\textsuperscript{67} 2000 OK CIV APP 16, 996 P.2d 468.
\textsuperscript{68} \textit{Id.} ¶ 6, 996 P.2d at 470.
\textsuperscript{69} \textit{Compare} 10 OKLA. STAT. § 7006-1.1 (2001) (termination of parental rights), \textit{with id.} 
\S§ 7505-4.1 to 7505-4.3 (adoption without parental consent). There is also an issue as to 
whether a successful action under this section has the result of emancipating the child. If so, 
there is an issue as to the relationship between this section and title 10, section 91 of the 
Oklahoma Statutes, which deals with emancipation.
\textsuperscript{70} \textit{Maupin}, ¶ 8, 996 P.2d at 470.
\textsuperscript{71} \textit{Id.}

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termination of parental rights, it appears that considerable confusion still exists in the court’s mind as to the content of the phrase “abuse of authority.”

II. The Substantive Standard: The Original Order

A. Custody Cases Between Parents and Nonparents

1. The Judicially Created Standard

The Oklahoma Supreme Court often has held that a parent’s custodial rights are protected by both the United States and the State of Oklahoma constitutions. Oklahoma cases also hold that the substantive standard to determine custody in third-party cases does not vary with the nature of the proceeding. Prior to 1994, however, the court disagreed regarding the content of the substantive standard.

Most of these early cases held that only parental unfitness allows a third party to obtain custody of a child. The evidence establishing the parent’s unfitness must be clear and convincing. Unfitness means that the parent’s character and habits are such that provision for the child’s welfare cannot reasonably be expected from the parent, or that for some other reason the parent is unable to care for the child. The unfitness necessary to deprive a parent of custody must be positive and not comparative. In other words, the mere fact that the child might be better cared for by a third person is insufficient to justify taking a child from the parent.

In spite of the clear language in most cases addressing third-party custody, another line of cases, prior to 1994, suggested that custody in third party cases

73. See id., ¶ 10, 681 P.2d at 83 (habeas proceeding); Haralson v. Haralson, 1979 OK 73, ¶ 7, 595 P.2d 443, 445 (modification of divorce decree); Price v. Price, 1977 OK 205, ¶ 7, 573 P.2d 251, 253 (juvenile proceeding); In re Rogers, 1971 OK 151, ¶ 17, 492 P.2d 324, 327 (consolidated habeas and guardianship case); In re Hight’s Guardianship, 1944 OK 143, ¶ 16, 148 P.2d 475, 481 (guardianship).
is solely a determination of the best interests of the child. *Ex parte Parker* exemplifies these cases. At birth, the mother was unable to care for the child and allowed her neighbors to do so; three years later, she married and requested the child's return. The court denied her application for habeas corpus, noting that she had rarely visited the child. Additionally, her husband served in the military, and she had to move often. The court opined that all custody cases ultimately must be determined on the basis of the best interests of the child and granted custody to the neighbor.

The two lines of cases were not as disparate as they might appear. First, since 1960 the Oklahoma Supreme Court has consistently held that before a court can grant custody to a third party, the third party must prove the parent is affirmatively unfit by clear and convincing evidence. While none of the "best-interests" cases has been overruled, the Oklahoma Supreme Court has never cited them nor used their language in more than forty years. It seems safe to say that the court has departed from the "best interests" line of cases.

Second, in many of the "best interests" cases, the parent was either affirmatively unfit or had abandoned the child. Thus, in terms of their results, the two lines of cases were not as different as their approaches suggest.

In any event, the Oklahoma Supreme Court resolved the issue in *McDonald v. Wrigley*, where it held that custody, even on a temporary basis, can only be awarded to a nonparent if the court finds the parent unfit by clear and

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77. 1945 OK 61, 156 P.2d 584.
78. Id. ¶ 7, 156 P.2d at 586.
79. Id. ¶ 3, 156 P.2d at 586.
80. Id. ¶ 1, 156 P.2d at 589 (Welch, J., dissenting).
83. See, e.g., *Adams v. Adams*, 1956 OK 51, ¶ 10, 294 P.2d 831, 835 (mother unfit because she consorted with undesirable characters); *Hudspeth*, ¶ 12, 271 P.2d at 373 (father had seen 15 year old child only three or four times since birth); *Nasalroad v. Gayhart*, 1953 OK 144, ¶ 1, 5, 257 P.2d 299, 300 (parents had not seen child for seven years).
84. 1994 OK 25, 870 P.2d 777.
convincing evidence. The court also held that the custody order must include the conditions, determined by the trial court, that constitute parental unfitness. Further, the parent is entitled to the child’s return upon correcting the conditions.

2. The Problem of Baby Girl L.

In *In re Baby Girl L.*, the Oklahoma Supreme Court narrowed the affirmatively unfit standard for one type of case. The case arose out of a failed adoption. In such cases, the Adoption Code requires that there be a “best interests” custody hearing between the party attempting to adopt the child and the child’s biological parent or parents. In *Baby Girl L.*, the trial court determined that the biological father was a fit parent and ordered temporary joint custody to both the biological mother and father, deciding to determine later whether to grant sole custody to one or the other. The court further ordered that the custody change would not be enforced immediately, and that the transition would be pursuant to a plan established by the court. The court set a hearing on the custody plan and requested experts to testify at the hearing. The trial court also granted the biological mother and father unsupervised visitation with the child. The potential adoptive parents appealed.

The Oklahoma Supreme Court held first that the statute was constitutional. It found that the legislature could have determined that removing children from potential adoptive parents, after a long relationship with those parents, could psychologically harm the children. The court found this determination to be a compelling state interest that justified the legislation when challenged on substantive due process grounds.

At trial, the adoptive parents argued that a showing of serious psychological harm to the child — resulting from a change in custody from the adoptive to

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85. *Id.* ¶ 12, 870 P.2d at 781.
86. *Id.*
87. *See id.* ¶ 14, 870 P.2d at 782.
88. 2002 OK 9, 51 P.3d 544.
89. 10 OKLA. STAT. § 7505-2.1(E) (2001).
91. *Id.* ¶ 51, 51 P.3d at 562.
92. *Id.*
93. *Id.* ¶ 10, 51 P.3d at 548.
94. *Id.*
95. *Id.* ¶ 11, 51 P.3d at 548.
96. *Id.* ¶ 29, 51 P.3d at 556.
97. *Id.* ¶ 24, 51 P.3d at 556.
98. *Id.* ¶ 23, 51 P.3d at 555-56.
the biological parent after a lengthy failed adoption — defeats a biological father's right to custody when the father has neither had temporary custody nor fulfilled the role of a parent.99 Therefore, the adoptive parents argued that they should prevail in a best interests hearing.100 The trial court, however, held that if the father was a "fit parent," he was entitled to custody.101

The Oklahoma Supreme Court held that if the adoptive parents could show serious physical harm to the child by clear and convincing evidence upon remand, they could prevail in the custody proceeding.102 The court cautioned, however, that merely showing that the child has a strong relationship with the adoptive parents, or might be better off if left in their custody based on some type of comparative fitness test or balancing, is insufficient to show serious psychological harm.103 That is, the trial court is not authorized to determine who, between the father and the adoptive parents, would be the better custodians for the child.

The court further held that the "serious psychological harm" must be of a type that is both serious and enduring. It requires severe and long-term psychological trauma, rather than simple separation anxiety.104 The court also mandated an inquiry into whether the "harm" could be remedied through the efforts of the biological father.105 Therefore, "the capability of the biological parent to overcome any claim of such harm is a relevant factor in the inquiry."106 Moreover, the court held that "the conduct of the parties during the custody dispute [was] also relevant," requiring "expert psychological and other background examinations" to determine whether the child could be transferred to the biological parent without harm.107

Finally, the court held that any grant of custody to the adoptive parents could not be permanent.108 Thus, the biological father retains his parental rights, and can file to modify custody. The court held that he would be entitled to custody at a time when the court could transfer custody to the father without significant psychological harm.109 Other changes of condition might

99.  Id. ¶ 29, 51 P.3d at 556.  
100. Id. ¶ 29, 51 P.3d at 557.  
101. Id. ¶ 10, 51 P.3d at 549.  
102. Id. ¶ 34, 51 P.3d at 557.  
103. Id. ¶ 30, 51 P.3d at 556.  
104. Id. ¶ 31, 51 P.3d at 556.  
105. See id. ¶ 32, 51 P.3d at 556.  
106. Id. ¶ 32, 51 P.3d at 556.  
107. Id.  
108. Id. ¶ 34, 51 P.3d at 558.  
109. Id.
also require a change of custody. The court suggested that the parties prepare a plan to facilitate the transition of the child to the biological parent.

Baby Girl L. is interesting in that it suggests a narrowing of the court’s approach in third party custody cases. Prior to Baby Girl L., the court focused on the fitness of the parent. The Baby Girl L. court, however, focused on the child. The custody determination rested on the issue of whether the child would be harmed. The question — for practitioners and legal scholars — then becomes whether this child-centered approach comports with the parental preference approach to third party cases.

Recent decisions indicate that the court had contemplated a shift in approach. In Stephen v. Stephen, the court noted that the post-divorce family unit has the same “child rearing autonomy and freedom from unwarranted governmental interference” as the unbroken, two-parent family. In Stephen, a noncustodial father sought custody of his sons because the custodial mother was home-schooling them against his wishes. The trial court ruled that home-schooling was not in the best interests of the children and, unless they were returned to public school, the court would grant custody to the father. The Stephen majority reversed the order, finding that it conflicted with the clear weight of the evidence and constituted an abuse of discretion. Justice Simms, in a special concurring opinion joined by five justices, stated that:

It is not the business of the courts to become involved in everyday decisions of child rearing which are properly the prerogative of the parents or, in the case of divorced parents, the custodial parent. In the absence of specific provisions in the divorce decree or an agreement between the parents, the sole decision making power over significant decisions affecting the child’s welfare, including education, resides in the custodial parent.

This language appears quite significant. In In re Herbst and Neal v. Lee, the Oklahoma Supreme Court used the same approach to limit the trial

110. Id.
111. Id.
112. See cases cited supra note 82.
114. Id. ¶ 7, 937 P.2d at 99 (Simms, J., concurring).
115. Id. ¶ 1, 937 P.2d at 94.
116. Id.
117. Id. ¶ 2, 937 P.2d at 94.
118. Id. ¶ 2, 937 P.2d at 98 (Simms, J., concurring).
120. 2000 OK 90, 14 P.3d 547.
court’s discretion in ordering grandparental visitation absent a showing of harm to the child.\textsuperscript{121} Justice Simms’s concurring opinion also formed the basis of the decision in \textit{Kaiser v. Kaiser},\textsuperscript{122} where the Oklahoma Supreme Court prohibited a trial court, absent evidence of harm to the child, from ordering a modification of custody when the custodial parent relocates.\textsuperscript{123}

This use of the “harm” approach can be thought of as a strengthening of the parental preference standard. Prior cases often discuss the question of parental unfitness in the abstract, considering whether the character of the parent dictates that the child should not be given to that parent.\textsuperscript{124} The harm requirement strongly suggests that a nexus must exist between the alleged unfitness and the effect of the unfitness on the child. Thus, under this approach, a court could find a parent unfit only if the unfitness causes serious harm to the child. This interpretation would comport with the court’s approach in prior cases.\textsuperscript{125}

3. \textit{The Legislative Standard of Title 10, Section 21.1B}

In two fact patterns, the legislature has promulgated a substantive standard for third-party cases. Title 10, section 21.1B of the Oklahoma Statutes, amended in the 2001, 2002, and 2003 legislative sessions,\textsuperscript{126} now provides that:

B. Subject to subsection E of this section, when a parent having physical custody and providing support to a child becomes deceased or when the custody is judicially removed from such parent, the court may only deny the noncustodial parent custody of the child or guardianship of the child if:

1. a. For a period of at least twelve (12) months out of the last fourteen (14) months immediately preceding the determination of custody or guardianship action, the noncustodial parent has

\textsuperscript{121} \textit{Id.} ¶ 9, 14 P.3d at 550.

\textsuperscript{122} 2001 OK 30, 23 P.3d 278.

\textsuperscript{123} \textit{See id.} ¶ 40, 23 P.3d at 288.

\textsuperscript{124} \textit{See} cases cited \textit{supra} notes 74-82.

\textsuperscript{125} \textit{See}, e.g., Fox \textit{v.} Fox, 1995 OK 87, ¶ 10, 904 P.2d 66, 70 (parent’s sexual preference must affect the child in order to change custody); Gorham \textit{v.} Gorham, 1984 OK 90, ¶ 14, 692 P.2d 1375, 1378 (there must be a nexus between the complained of conduct of the parent and the child).

willfully failed, refused, or neglected to contribute to the child’s support:

(1) in substantial compliance with a support provision or an order entered by a court of competent jurisdiction adjudicating the duty, amount, and manner of support, or

(2) according to such parent’s financial ability to contribute to the child’s support if no provision for support is provided in a decree of divorce or an order of modification subsequent thereto, and

b. The denial of custody or guardianship is in the best interest of the child;

2. The noncustodial parent has abandoned the child as such term is defined by Section 7006-1.1 of this title;

3. The parental rights of the noncustodial parent have been terminated;

4. The noncustodial parent has been convicted of any crime defined by the Oklahoma Child Abuse Reporting and Prevention Act or any crime against public decency and morality pursuant to Title 21 of the Oklahoma Statutes;

5. The child has been adjudicated deprived pursuant to the Oklahoma Children’s Code as a result of the actions of the noncustodial parent and such parent has not successfully completed any required service or treatment plan required by the court; or

6. The court finds it would be detrimental to the health or safety of the child for the noncustodial parent to have custody or be appointed guardian.\textsuperscript{127}

Formerly, the statutory language applied only to those situations where the custodial parent died and the resulting custody fight was between a parent and a nonparent.\textsuperscript{128} The 2001 amendment, however, added the phrase “or when the custody is judicially removed from such parent.”\textsuperscript{129} The statute does not, by its terms, apply to any other contest between a parent and a nonparent. For example, in \textit{Marshall v. Marshall},\textsuperscript{130} the father filed a motion to modify custody.\textsuperscript{131} He informally cared for the child until the mother took the child

\textsuperscript{127} § 3, 2003 Okla. Sess. Law Serv. at 21-22 (to be codified at 10 OKLA. STAT. § 21.1(B)).
\textsuperscript{129} Act Relating to Children, ch. 141, § 1, 2001 Okla. Sess. Laws 714, 714 (current version to be codified at 10 OKLA. STAT. § 21.1(B)).
\textsuperscript{130} 1976 OK 127, 555 P.2d 598.
\textsuperscript{131} id. ¶ 4, 555 P.2d at 599.
to Texas and left the child with her brother. Originally, the mother did not seek to retain custody, and the dispute involved the father and the mother’s brother.\(^\text{132}\) The court ruled that the father was entitled to the child unless he was proven affirmatively unfit.\(^\text{133}\) The court noted that if the mother retained custody, she would leave the child with her brother.\(^\text{134}\) This case would be unaffected by the amended legislation because the dispute did not arise out of the death of the custodial parent or the removal of the child from the custodial parent.\(^\text{135}\)

Thus, the statute defines and limits the categories of noncustodial parents who are not entitled to custody of their children following the death of the custodial parent. The first category includes those parents who have willfully failed to pay child support, either according to the divorce decree, or according to their means if the divorce decree failed to specify an amount.\(^\text{136}\) In 2001, however, the legislature added language to indicate that *even if* a parent pays no child support according to this section, it still must be in the best interests of the child to award custody to a nonparent.\(^\text{137}\) This opens the door for noncustodial parents who have maintained a substantial relationship with their children to receive custody following the death of the custodial parent, even when they have failed to pay support.

The second category of noncustodial parents who are not entitled to custody includes those who have abandoned their children.\(^\text{138}\) The 2001 amendments equated abandonment in this section with the term as defined in the Children’s Code, specifying when parental rights can be terminated.\(^\text{139}\)

\(^{132}\) Id. \(\S\) 3, 555 P.2d at 599.

\(^{133}\) Id. \(\S\) 9, 555 P.2d at 599.

\(^{134}\) Id. \(\S\) 11, 555 P.2d at 600.

\(^{135}\) The statute also would not apply to cases like *Duffy v. King*, 1960 OK 57, 350 P.2d 277. In that case, the Texas divorce decree placed the child with the maternal grandmother until such time as the mother remarried. The mother remarried and commenced proceedings for the return of the child. The court held that she was entitled to the child unless proven unfit. See id. \(\S\) 17-18, 350 P.2d at 280.

\(^{136}\) Act of Mar. 19, 2003, ch. 3, \(\S\) 3, 2003 Okla. Sess. Law Serv. 17, 21-22 (West) (to be codified at 10 Okla. Stat. \(\S\) 21.1(B)(1)(a)). Earlier cases where a parent lost custody to a nonparent because of, among other reasons, a failure to pay child support, will continue to be good law. See, e.g., Osburn v. Roberts, 1946 OK 129, \(\S\) 2, 169 P.2d 293, 294; Taylor v. Taylor, 1938 OK 77, \(\S\) 6, 75 P.2d 1132, 1134. Those cases, where a failure to pay child support was not determinative should no longer be considered authoritative. See, e.g., Hood v. Adams, 1964 OK 217, \(\S\) 4, 396 P.2d 483, 484 (father had not paid child support in three years).


\(^{138}\) \(\S\) 3, 2003 Okla. Sess. Law Serv. at 22 (to be codified at 10 Okla. Stat. \(\S\) 21.1(B)(2)).

These provisions have been substantially broadened in recent years. The Children's Code now provides that:

For purposes of this paragraph the term "abandonment" includes, but is not limited to, the following:

a. the parent has left the child alone or in the care of another who is not the parent of the child without identifying the child or furnishing a means of identification for the child, the whereabouts of the parents are unknown, and the child's identity cannot be ascertained by the exercise of reasonable diligence,

b. the parent has voluntarily left the child alone or in the care of another who is not the parent of the child and expressed a willful intent by words, actions, or omissions not to return for the child, or

c. the parent fails to establish and/or maintain a substantial and positive relationship with the child for a period of six (6) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for termination of parental rights. For purposes of this paragraph, "establish and/or maintain a substantial and positive relationship" includes, but is not limited to:

(1) frequent and regular contact with the minor through frequent and regular visitation and/or frequent and regular communication to or with the child, and

(2) the exercise of parental rights and responsibilities.

Incidental or token visits or communications shall not be sufficient to establish and/or maintain a substantial and positive relationship with the child.\textsuperscript{140}

The amendment clearly states that lack of visitation or contact with a child serves as a basis for awarding custody to a nonparent. The amendment effectively overrules the 1987 case \textit{In re McNeely}.\textsuperscript{141} In \textit{McNeely}, the court held that a parent who has not "failed to discharge any court-imposed obligation or some well-defined legal duty and who bore no custodial responsibility does not come within the purview of [the term] 'abandonment.'"\textsuperscript{142} This new statutory definition of abandonment, however, comports with a number of earlier Oklahoma cases. In \textit{Bishop v. Benear},\textsuperscript{143} the Court articulated the following standard:

\begin{itemize}
  \item \textsuperscript{140} 10 OKLA. STAT. § 7006-1.1(A)(2) (2001).
  \item \textsuperscript{141} 1987 OK 19, 734 P.2d 1294.
  \item \textsuperscript{142} \textit{Id.} ¶ 8, 734 P.2d at 1297.
  \item \textsuperscript{143} 1928 OK 553, 270 P. 569.
\end{itemize}
We are not unmindful of the fact that a parent, by nature as well as by law, has a legal right to the custody of his minor children, but this strict legal right to the custody of the children must give way to the welfare of the child where for a number of years the parent has permitted the custody of his children to their grandparents, permitted their affections to grow up, as in the case at bar.\(^{144}\)

Problems of abandonment parallel those confronting the court in *Baby Girl L.* The problem in *restoring* a child to a parent who has previously abandoned him is in the psychological effects on the child resulting from *removing* him from the only home he has ever known, even if that home is with a nonparent. Seemingly, the result of *Baby Girl L.* is that abandonment must have the same effect on the child as it had in that case to justify denying custody to the parent. In other words, if the child can be restored to the parent without long-term, severe psychological effect, the child is not abandoned under section 21.1(B).

The 2003 amendments also added four new grounds for refusing custody to the surviving parent. First, the court may deny custody to the noncustodial parent if the parental rights of that parent have been terminated.\(^{145}\) Second, the child need not be given to the noncustodial parent if the child has been adjudicated a deprived child as a result of the actions of the noncustodial parent, and the noncustodial parent has not completed the parenting plan set out by the Juvenile Court.\(^{146}\) Third, custody may be refused if the parent has been convicted of child abuse or, indeed, any crime defined as being against public decency and morality under Title 21.\(^{147}\) Finally, this entire section is subject to subsection E of section 21.1, which requires the court to determine

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\(^{144}\) *Id.* § 16, 270 P. at 571; see also *Sims v. Sims*, 1960 OK 68, ¶ 5, 350 P.2d 493, 494 (father had become a stranger to the child over the last fifteen and one-half years); *Matthews v. Grant*, 1958 OK 150, ¶ 15, 326 P.2d 1043, 1048 (father had neither seen child nor paid support for a number of years); *Ex parte Hudspeth*, 1954 OK 172, ¶ 12, 271 P.2d 371, 373 (child had seen his father only two or three times in his life); *Long v. McIninch*, 1953 OK 372, ¶ 8, 264 P.2d 767, 769 (mother had not seen children in eight years); *Hamann v. Miesner*, 1931 OK 91, ¶ 14, 297 P. 252, 254 (father had not seen child in five years). However a different result should occur in cases such as *Application of Grover*, 1984 OK 20, 681 P.2d 81, and *Bow v. Julius*, 1954 OK 359, 279 P.2d 954. In both cases, the noncustodial father received custody of the child even though he had no contact with the child for a period of years. This interpretation would further the best interests of the child in continuing the child's stable physical environment.


\(^{146}\) *Id.* (to be codified at 10 OKLA. STAT. § 21.1(B)(5)).

\(^{147}\) *Id.* (to be codified at 10 OKLA. STAT. § 21.1(B)(4)).
whether any person seeking custody is subject to the Oklahoma Sex Offenders Registration Act,\(^{148}\) or a similar statute in another state.\(^{149}\) The statute creates a rebuttable presumption that awarding custody to such a person is not in the best interests of the child.\(^{150}\)

Finally, the statute allows the court to award custody to a nonparent when awarding custody to the noncustodial parent would be "detrimental to the health or safety of the child."\(^{151}\) The legislature failed to further explain the category. Perhaps the best way to understand the phrase "detrimental to the health or safety of the child" is as a codification of the time-honored "affirmatively unfit" standard. However, the effect of Baby Girl L. may be to hold that the alleged unfitness must be so great as to result in harm to the child.

Case law has never properly answered the question of whether this legislative standard — for situations involving the awarding of custody as an original matter in cases where the custodial parent has died — should be extended to the initial award in all third-party custody cases. The issue was present but not argued in State ex rel. Department of Human Services v. Stansbury.\(^{152}\) After a paternity proceeding, the court ordered the father to pay support to the mother.\(^{153}\) The father did so for four years. The mother subsequently married, ultimately divorced, and received custody of the child in her divorce. After the divorce, the mother asked her former in-laws to care for the child because she was unable to do so. They brought guardianship proceedings without notifying the biological father.\(^{154}\) The father then intervened in the divorce proceeding, seeking custody of the child. He also petitioned the probate court for guardianship.\(^{155}\) The guardianship request was held in abeyance, pending the outcome of the custody determination.\(^{156}\)

The court held a trial to determine whether the father had satisfied the "parental opportunity" test.\(^{157}\) The trial court determined that he had, and that he was a fit parent. It then awarded custody to the father.\(^{158}\) The in-laws appealed and the appellate panel affirmed.\(^{159}\) The in-laws argued that the trial

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149. § 3, 2003 Okla. Sess. Law Serv. at 22 (to be codified at 10 Okla. Stat. § 21.1(E)).
150. Id. (to be codified at 10 Okla. Stat. § 21.1(E)(2)).
151. Id. (to be codified at 10 Okla. Stat. § 21.1(B)(6)).
152. 2001 OK CIV APP 113, 30 P.3d 1180.
153. Id. ¶ 3, 30 P.3d at 1181.
154. Id.
155. Id. ¶ 2, 30 P.3d at 1181.
156. Id.
157. Id.
158. Id.
159. Id. ¶ 7, 30 P.3d at 1182.
court erred in finding that the father had exercised his parental opportunity interest, arguing that his parental opportunity interest was extinguished because he failed to invoke his rights through enforcement of the visitation order and because he stopped paying child support when the in-laws became temporary guardians of the child.\textsuperscript{160} The panel, however, rejected the argument that a parent must exercise his parental opportunity before he is entitled to pursue a motion to obtain custody of his child.\textsuperscript{161} The panel observed that courts have applied the parental opportunity interest test only "in cases where a party desiring to adopt a child attempts to terminate a putative parent's right without notice," and, thus, held that the test did not apply to the proceeding.\textsuperscript{162}

It is unclear from the opinion whether the case was argued incorrectly or whether the appellate panel failed to understand the issue. On one hand, the panel was correct in holding that the "parental opportunity" standard applies only to adoption cases. However, title 10, section 21.1B of the Oklahoma Statutes provides that after the death of the custodial parent, the court may deny the noncustodial parent guardianship and custody if the situation meets the provisions of the section.\textsuperscript{163}

While the section applies only to those situations where the custodial parent dies or the court terminates a parent's custody, \textit{Stansbury} presented an opportunity for the court to determine whether this section should apply to all third-party custody cases. If the statute applied, the father — unless it was not in the best interests of the child — should have been denied custody because he failed to pay child support for twelve of the preceding fourteen months and apparently had not visited the child for six of the last twelve months. It seems — because the legislature has issued standards for awarding custody to a third party — that instead of awarding custody to the child's parent in cases involving death or the judicial removal of a child from the custodial parent, these standards would be appropriate in all third-party custody cases.

\textbf{B. Nonparent vs. Nonparent}

Another unresolved problem in third-party cases is determining which substantive standard to apply when the case involves only nonparents. These cases occur after the death of both parents when different relatives desire

\begin{itemize}
\item 160. \textit{Id.} \textsuperscript{a} 4, 30 P.3d at 1181.
\item 161. \textit{Id.} \textsuperscript{a} 7, 30 P.3d at 1182.
\item 162. \textit{Id.} \textsuperscript{a} 4, 30 P.3d at 1181.
\item 163. Act of Mar. 19, 2003, ch. 3, \S\ 3, 2003 Okla. Sess. Law Serv. 17, 21-22 (West) (to be codified at 10 \textsc{Okla. Stat.} \S\ 21.1(B))
\end{itemize}
custody. The traditional standard for such cases has been solely the best interests of the child.164

In 1983, the legislature radically changed child custody law in Oklahoma by repealing the “tender years presumption”165 and enacting title 10, section 21.1(A).166 The statute appears to list possible custodians of a child in order of preference, “according to the best interests of the child.”167 The statute received its only construction in Application of Smith.168 In Smith, the minor child lived with his mother and stepfather. The mother died of cancer. The stepfather filed his petition to adopt on the same day the mother died. Almost immediately the maternal grandmother filed a writ of habeas corpus.169 The trial court consolidated both actions and, after a hearing on the merits, granted the stepfather guardianship of the minor child.170 The grandmother appealed, alleging that section 21.1(A) entitled her to custody because the statute lists grandparents second in order of preference.171

The Oklahoma Court of Civil Appeals disagreed with the grandmother. It found that the controlling language in the statute was the phrase “according to the best interests of the child.”172 The court also noted that (1) prior to her death, the mother had expressed a desire that the stepfather receive custody of the child; (2) the child had stated that she wished to live with her stepfather; and (3) the stepfather provided a stable home environment for the child.173 Therefore, the court held that the trial court did not err in awarding custody of the child to the stepfather.174 The court concluded that when both parties are fit, custody is not to be decided solely on the basis of the preference list.175


165. A child of tender years was to be given to the mother; if the child was old enough to learn a trade the child was to be given to the father. See 30 OKLA. STAT. § 11 (1981), repealed by Act Relating to Children, ch. 269, 1983 Okla. Sess. Laws 773; Gordon v. Gordon, 1978 OK 17, 577 P.2d 1271 (1978) (upholding statute against an equal protection challenge).


167. § 3, 2003 Okla. Sess. Law Serv. at 21 (to be codified at 10 OKLA. STAT. § 21.1(A)).


169. Id. ¶ 2, 837 P.2d at 930.

170. Id.

171. Id.

172. Id. ¶ 7, 837 P.2d at 932.

173. Id.

174. Id.

175. Id.
III. The Substantive Standard: Modification Cases

The Oklahoma Supreme Court has drastically changed the rules on modifications in third-party custody cases in the last few years. In McDonald v. Wrigley, the court opined in dicta that custody, even on a temporary basis, can be awarded to a grandparent or a third party only if the court finds the parent unfit by clear and convincing evidence. The court also held that the order must include the conditions creating the parental unfitness. The court reasoned that this must be done "so that the parent knows what, if corrected, would amount to a change of condition in the eyes of the court." Thus, all orders awarding custody to nonparents are considered temporary orders. The court will allow the parent to regain custody upon a showing that the parent has corrected the conditions that led to the trial court granting custody to a third party.

The court’s dicta in McDonald came to fruition in Guardianship of M.R.S. In M.R.S. the father moved to terminate the guardianship of his child. The parents had divorced following the mother’s abandonment, Shortly thereafter, the father had agreed to the guardianship because he was on call twenty-four hours a day, seven days a week, and therefore could not care for the child. The court had awarded him liberal visitation and ordered him to pay child support and medical expenses. Moreover, the order appointing the guardians specifically stated that the court had not found the father unfit to care for the child. The father subsequently moved to terminate the guardianship based upon changes in his circumstances; he had remarried and claimed that he was able to provide a home for the child.

The trial court applied a standard for modifying custody in a divorce case derived from Gibbons v. Gibbons, and required the father to show that there had been a permanent, material, and substantial change of circumstances since the guardianship order that directly affected the best interests of the child — in other words, that the child would be substantially better off with the father.
than with his current guardians.\textsuperscript{188} Applying the test, the trial court concluded that the child would be just as well off with the guardians as with the father and denied the motion.\textsuperscript{189}

The Oklahoma Supreme Court reversed.\textsuperscript{190} The court faced the issue of defining the proper standard, in a guardianship proceeding, for modification of custody when custody has been granted to a third party. The court therefore faced the conflicting standards between \textit{Gibbons} and \textit{In re Guardianship of Hatfield}.\textsuperscript{191} In \textit{Hatfield}, without discussing the \textit{Gibbons} case decided four years earlier, the court determined that the standard for terminating the guardianship of a child was that the guardianship was "no longer necessary."\textsuperscript{192} The court held in \textit{M.R.S.} that the appropriate standard was found in \textit{Hatfield} and appeared to say that \textit{Gibbons} supplied the appropriate test only for cases involving parents in divorce proceedings.\textsuperscript{193} The court arrived at this conclusion by examining a number of prior third-party custody cases\textsuperscript{194} that, the court stated, clearly established the parental preference doctrine in Oklahoma. The court therefore held that, in the absence of a showing of parental unfitness by clear and convincing evidence, the father was entitled to custody.\textsuperscript{195} The court then reaffirmed \textit{McDonald}, to the extent that it held that all third-party custody orders, absent an order terminating parental rights under the Children's Code, are temporary.\textsuperscript{196} A guardianship is "no longer necessary," the court held, "when the impediment to the natural parent's custody has been removed, unless to do so would be inimical to the welfare of the child."\textsuperscript{197} The person seeking termination of a guardianship bears the burden of proving that guardianship is "no longer necessary."\textsuperscript{198} The party must show, by clear and convincing evidence, that he has corrected "the conditions that led to [the] creation of the guardianship."\textsuperscript{199}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{188} \textit{M.R.S.}, \textsuperscript{1}6, 960 P.2d at 359.
\item\textsuperscript{189} \textit{Id.} \textsuperscript{1}5, 960 P.2d at 359.
\item\textsuperscript{190} \textit{Id.} \textsuperscript{1}28, 960 P.2d at 365.
\item\textsuperscript{191} 1972 OK 10, 493 P.2d 819.
\item\textsuperscript{192} \textit{Id.} \textsuperscript{1}8, 493 P.2d at 821. The language appears in the guardianship statutes at title 30, section 4-804 of the Oklahoma Statutes.
\item\textsuperscript{193} \textit{M.R.S.}, \textsuperscript{1}13, 26, 960 P.2d at 361, 364.
\item\textsuperscript{195} \textit{M.R.S.}, \textsuperscript{1}16, 960 P.2d at 362.
\item\textsuperscript{196} \textit{Id.} \textsuperscript{1}9, 960 P.2d at 360.
\item\textsuperscript{197} \textit{Id.} \textsuperscript{1}26, 960 P.2d at 364.
\item\textsuperscript{198} \textit{Id.}
\item\textsuperscript{199} \textit{Id.} \textsuperscript{1}26, 960 P.2d at 364-65.
\end{enumerate}
\end{footnotesize}
If the person found unfit is a parent, then he must establish his fitness. If the court has not found the parent unfit, "then the parent must show that the conditions which resulted in the guardianship ... have changed and that the parent is now able to take care of his child[]." Because the M.R.S. court never found the parent unfit, and because he had corrected the conditions that led to the establishment of the guardianship, the court held that he was entitled to the return of his child. The court did not expound on the meaning of the phrase "inimical to the welfare of the child."

These two decisions have generated considerable confusion. They are consistent with only one aspect of the court's past third-party modification cases. In those cases where the custodial parent has allowed third parties to raise the child, the common law entitles the noncustodial parent to custody without showing either a change of circumstances, as required by Gibbons v. Gibbons, or the presentation of newly discovered evidence, as Carpenter v. Carpenter demands. For example, in Haralson v. Haralson, the divorce decree awarded custody to the mother. She never assumed custody of the children, however; instead, they lived for three years with their grandparents. At the time the father filed to gain custody, the mother had no intention of assuming custody. Because the evidence showed that leaving custody with the mother would constitute, in effect, granting it to the grandparents, the court held that the father was entitled to custody. The court analyzed the case as a custody contest between the father and the grandparents. Absent clear and convincing evidence of the father's unfitness, he was entitled to custody of the child. The court discussed neither the changed circumstances test nor the newly discovered evidence test.

In short, the rule appears to be that if the custodial parent leaves the child in the care of third parties, he loses the right to custody granted in the decree. If the noncustodial parent is fit, the law entitles him to a modified decree granting him custody. A party need not prove a change of conditions or

200. Id. ¶ 26, 960 P.2d at 365.
201. Id.
202. Id.
203. 1968 OK 77, ¶ 4, 442 P.2d 482, 484.
204. 1982 OK 38, ¶ 13, 645 P.2d 476, 481.
205. 1979 OK 73, 595 P.2d 443.
206. Id. ¶ 1, 595 P.2d at 444.
207. Id. ¶ 4, 595 P.2d at 444.
208. Id.
209. Id. ¶ 8, 595 P.2d at 445.
210. Id. ¶ 5, 595 P.2d at 445.
211. Id. ¶ 7, 595 P.2d at 445.
212. There are a couple of inconsistent decisions where the custodial parent had abandoned
point to newly discovered evidence. However, the noncustodial parent must be prepared to actually exercise custody. The court will not modify the original custody order if the noncustodial parent merely plans to place the children with a different set of grandparents. 213

The cases cited by the court in M.R.S. that seem to support a return of the child to the custodial parent, without application of the Gibbons standard, were not on point. These cases, like Haralson, only supplied the applicable standard for situations involving an original custody determination between parents and nonparents. In third-party cases involving modifications of custody, another long line of Oklahoma decisions holds that once the initial custody order places the child with a third party, particularly in a divorce case, the standard for modification is the same as for any other custody decree: the movant must show that there has been a substantial change of circumstances that directly affects the child and that, as a result, the child would be substantially better off with the moving party. 214

None of these cases were cited or discussed by the M.R.S. court. This raises the question of whether the court overruled these cases by silence. If so, then the standard for change of custody in a third-party case would be as set out by the court in M.R.S., regardless of the form of the action. On the other hand, the possibility exists that the court intended to address only change of custody in the context of a termination of a guardianship. If that is the case, then the earlier decisions would retain vitality when the case involves a change of custody in the context of a divorce proceeding. The latter interpretation seems unlikely given that M.R.S. cites McDonald with approval, and that McDonald involved a potential change of custody to a third party in a divorce proceeding. Unfortunately, the court failed to recognize forty years of contrary precedent when it decided M.R.S.

Another problem arising from M.R.S. concerns its relationship to title 10, section 21.1(B) of the Oklahoma Statutes. The statute was not discussed in either M.R.S. or McDonald. If a court awards custody to a nonparent under the abandonment or child support provisions of the statute, it raises the question of what the custodial parent must do to regain custody of the child.

213. See Ex parte Lebsack, 1934 OK 314, 32 P.2d 923.
Under the court’s reasoning in M.R.S. and McDonald, it appears that if the noncustodial parent begins paying support, the parent becomes entitled to custody.\textsuperscript{215} How many payments are necessary is very unclear. The same is true if the third party receives custody under the abandonment prong. If the noncustodial parent reestablishes a parental relationship with the child, is that parent automatically entitled to regain custody? Application of Baby Girl L. suggests that, if the parent is fit, the court should determine whether harm would result if the child is returned to the natural parent and implement a plan to transition the child to his parent.

Unfortunately, the court returned to the area of third-party custody modifications in In re Guardianship of A.G.S.\textsuperscript{216} without resolving the confusion. The mother, in 1996, agreed to allow her parents to assume guardianship over her child after the Oklahoma County District Attorney’s Office told her that she would be charged with murder because her current boyfriend had killed her other child when she was in the home.\textsuperscript{217} In 2000, she filed a motion to dismiss the guardianship and resume custody of the child.\textsuperscript{218} The grandparents opposed the motion.\textsuperscript{219} The parties presented the court with conflicting evidence concerning the mother’s visitation with the child and her payment of support for the child,\textsuperscript{220} as well as conflicting evidence concerning the violent tendencies of the mother’s current husband.\textsuperscript{221} The trial court found the mother to be a fit parent and terminated the guardianship.\textsuperscript{222}

The grandparents appealed and the Oklahoma Court of Civil Appeals affirmed.\textsuperscript{223} The panel followed M.R.S., in holding that a guardianship can be terminated when, assuming the parent is fit, the conditions that led to the creation of the guardianship no longer exist.\textsuperscript{224} According to the appellate panel, the petition clearly indicated that the guardianship was created because the mother believed she was to be incarcerated.\textsuperscript{225} Because she was never sent to prison, the condition that created the guardianship no longer existed.\textsuperscript{226} The panel also found sufficient evidence in the record to justify the trial court’s

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{215} See supra notes 179, 197.
\item\textsuperscript{216} 2003 OK 1, 65 P.3d 587.
\item\textsuperscript{217} Id. ¶ 2-3, 65 P.3d at 587-88.
\item\textsuperscript{218} Id. ¶ 2, 65 P.3d at 587-88. Ultimately the mother was never charged with murder.
\item\textsuperscript{219} Id. ¶ 2, 65 P.3d at 588.
\item\textsuperscript{221} A.G.S., ¶¶ 5-6, 65 P.3d at 588.
\item\textsuperscript{222} Id. ¶ 12, 65 P.3d at 589.
\item\textsuperscript{223} A.G.S. II, available at http://oklegal.onenet.net/sample.basic.html.
\item\textsuperscript{224} Id. ¶ 8.
\item\textsuperscript{225} Id. ¶ 9.
\item\textsuperscript{226} Id.
\end{enumerate}
\end{footnotesize}
findings that the mother had visited the child, paid support, and that the violent tendencies of the mother's husband, if any, were never directed towards the children. The panel also rejected the argument that the court should use a best interests analysis in reaching its decision.

The Oklahoma Supreme Court granted certiorari and reversed both the appeals court and the trial court. The court focused on the phrase from M.R.S. that a guardianship may be terminated when the conditions that led to the guardianship no longer exist and the termination of the guardianship would not be "inimical to the welfare of the child." The court then, apparently, reweighed the evidence and concluded that the trial court erred. It noted that the original reason for the creation of the guardianship— that the mother might be indicted and convicted of murder— was removed years before she petitioned for the termination of the guardianship. It found overwhelming evidence that the mother was...

227. Id. ¶ 3, 12.
228. Id. ¶ 12.
230. Id. ¶ 13, 65 P.3d at 589.
231. Id. ¶ 20, 65 P.3d at 591. An appellate panel reviewing a case that originally sounded in equity is entitled to reweigh the evidence in reviewing a trial court's determination. The complete standard of review in equity cases is found in Carpenter v. Carpenter, 1982 OK 38, 645 P.2d 476, which states:

Custody contests are of equitable cognizance. The court may exercise continuing jurisdiction of disputed claims. On appeal, the trial court's disposition is reviewed by the standards applicable to chancery cases. The court's decision is presumed to include a finding favorable to the successful party upon every fact necessary to support it. While an appellate court may and will examine and weigh the evidence, the findings and decree of the trial court cannot be disturbed unless found to be against the clear weight of the evidence. Whenever possible, an appellate court must render, or cause to be rendered, that judgment which in its opinion the trial court should have rendered. A decree need not rest upon uncontradicted evidence. It is not fatal to the validity of an equity decision if, on the basis of the evidence presented, the chancellor might have been equally correct in reaching a conclusion different from that which he actually did. If the result is correct, the judgment is not vulnerable to reversal because the wrong reason was given for the decision or because the trial court considered an immaterial issue or made an erroneous finding of fact. We are not bound either by the reasoning or the findings of the trial court. Whenever the law and the facts warrant, we may affirm the judgment if it is sustainable on any rational theory and the ultimate conclusion reached below is legally correct. Unless the decision is found to be against the clear weight of the evidence, the appellate court must indulge in the presumption that it is correct.

Id. ¶ 10, 645 P.2d at 480 (citations omitted).
232. A.G.S., ¶ 15, 65 P.3d at 590.
satisfied to leave the child with the guardian until the mother’s father petitioned for an appointment as co-guardian and the Department of Human Services sought to collect child support from her.\textsuperscript{233} It also found clear and convincing evidence that the mother’s current husband was a violent man given that the mother and the guardian had filed several petitions for protective orders against him.\textsuperscript{234}

The court determined that title 10, section 21.3(C) of the Oklahoma Statutes provides persuasive authority for the standards that a trial court should consider when determining whether a termination of the guardianship would be inimical to the child.\textsuperscript{235} The statute provides that when a parent relinquishes custody to a relative without a court order, the parent may not obtain the child’s return, absent the consent of the relative, without a court decision.\textsuperscript{236} When deciding whether to return the child to the parent, the court is to consider:

(a) the duration of the abandonment and integration of the child into the home of the relative,
(b) the preference of the child if the child is determined to be of sufficient maturity to express a preference,
(c) the mental and physical health of the child, and
(d) such other factors as are necessary in the particular circumstances.\textsuperscript{237}

The court then found that the record demonstrated that returning the child to the mother would be inimical to the child.\textsuperscript{238} It focused on the facts that the mother delayed in filing to remove the guardianship, had not paid any child support for the child and, in particular, that her current husband was a violent man.\textsuperscript{239} The court, however, ultimately rested its decision on the fact that the murder of the mother’s older daughter, for which she was never indicted and which originally led to the creation of the guardianship, indicated that she lived in a violent household.\textsuperscript{240} Her current husband, the court stated, was also

\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{See id. ¶ 20, 65 P.3d at 591.} The court failed to note that although the protective orders were filed they were not granted. Telephone Interview with Neil Lynn, attorney for the mother (Jan. 16, 2003).
\textsuperscript{235} \textit{A.G.S., ¶ 17, 65 P.3d at 590.}
\textsuperscript{236} 10 OKLA. STAT. § 21.3(c) (2001).
\textsuperscript{237} \textit{Id. § 21.3(c)(2).}
\textsuperscript{238} \textit{A.G.S., ¶ 20, 65 P.3d at 591.}
\textsuperscript{239} \textit{Id.}
\textsuperscript{240} \textit{Id.}
violent, and therefore, it concluded the reasons that led to the guardianship in the first place still existed.\(^{241}\)

The court's opinion does not help in the analysis of the problem regarding modification of third-party custody decrees. The meaning of the phrase "inimical to the welfare of the child" remains rather vague. Even though the court refers to title 10, section 21.3(C) for guidance, it fails to indicate how the standard of "inimical to the child" relates to other parts of the issue regarding the return of a child. Clearly this appears to be something less than parental unfitness. Indeed, in this case, neither the trial court nor the Oklahoma Supreme Court found the parent unfit. Moreover, the test also must be something more than simply the "best interests of the child." The court's previous decisions clearly hold that a court may not deny a parent custody simply because a third party might, on a comparative basis, be a better parent.\(^{242}\) It appears that the "inimical to the child" prong of the test falls somewhere between these two standards and it also appears that the parent bears the burden of showing that a transfer of custody would not be "inimical to the child." If this prong of the test is to retain vitality, it seems that the most appropriate standard for determining when a return would be "inimical to the welfare of the child" should follow those standards set out by the Oklahoma legislature in title 10, section 21.1. Once again, the court has failed to consider the appropriate legislative enactments in arriving at its determination in third-party custody cases. This obviously casts more confusion into the area, the results of which will lead to conflicting decisions at the trial court level and considerable confusion amongst the bar.

**IV. The Confusion Continues**

The inconsistencies in the Supreme Court's cases are mirrored in lower court opinions which have often ignored both *M.R.S.* and *McDonald* to produce what the lower court considered to be a more appropriate result in a particular case. A classic recent example is *In re N.L.W.*,\(^{243}\) in which the mother filed a habeas corpus petition to obtain the return of her child from the paternal grandparents.\(^{244}\) Following a custody dispute with the paternal grandparents, the court awarded the mother custody of the two-year-old child

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241. *Id.*

242. *See, e.g., In re Baby Girl L.*, 2002 OK 9, ¶ 30, 51 P.3d 544, 557; *Guardianship of M.R.S.*, 1998 OK 38, ¶ 11, 960 P.2d 357, 361 (parent is entitled to custody unless found unfit; natural parents will not be deprived of custody simply because another family might be able to provide more amenities and opportunities for the child).


244. *Id.* ¶ 1, 999 P.2d at 449.
in November 1989. Later, however, she permitted the child to reside with his paternal grandparents, from late 1990 through the spring of 1997. She testified that, during this period, she spent as much time with the child as her work requirements allowed. The mother also testified that the child spent most of the summer of 1997 with her and her husband and that she intended to prepare the child to live with her.

The trial court denied the mother's writ, reasoning that the grandparents had provided the "only home . . . this boy has ever known," and that it did not want to upend the child "so close to the beginning of school." The mother appealed.

The appellate court affirmed the trial court's determination. In doing so, it ignored all recent case law from the Oklahoma Supreme Court, dismissing precedent as "simply [reflecting] special guidance in applying the best interests/balancing test to prevent it from being used to favor third parties on the basis of 'comparative fitness.'" It then employed older cases involving habeas corpus to determine that the trial court could balance all interests involved and decide the case on a simple best interests test. Applying that test, the appellate court concluded that the trial court correctly determined that the child should continue to reside with the grandparents. The appellate panel failed to discuss — or even to cite — M.R.S. or McDonald.

The appellate court in N.L.W. clearly agreed with the trial court that the mother was a fit parent. Moreover, neither court ever determined that the reason that led the mother to place the child with the paternal grandparents continued to exist. Indeed, the mother and her new husband apparently were able to care for the child. The facts appear to parallel those of M.R.S., where the court instituted a guardianship for the child when the father was working so many hours that he was unable to care for the child. As soon as he was no longer working those hours he was entitled to the return of his child and an end to the guardianship. The same result should have occurred in

245. Id.
246. Id.
247. Id.
248. Id.
249. Id. ¶ 2, 999 P.2d at 449 (alteration in original).
250. Id.
251. Id. ¶ 15, 999 P.2d at 542.
252. Id. ¶ 4, 999 P.2d at 449.
253. Id. ¶¶ 5-14, 999 P.2d at 449-52.
254. Id. ¶ 13, 999 P.2d at 452.
255. See id. ¶ 13, 999 P.2d at 451-52.
It would be ironic to conclude that it would be more difficult for a parent to obtain a return of the child when there is no custody order in place giving custody to the grandparents, as was the case in N.L.W., than when an order for guardianship exists, as in M.R.S. However, this must be qualified by the potential effect of the decision in Baby Girl L. If the child indeed would suffer severe psychological trauma by the transfer for custody to the mother, the decision would have been correct. The court would be required to implement a plan, however, in which the child could be returned to the mother.

The equities faced by the appellate panel are easy to understand. The child had lived with the grandparents for seven years and the school year was just about to begin. The panel felt strongly that the child should not be uprooted from the only home he knew and placed in another environment, even though he was to be placed with his parent. To reach this result, the court grasped some earlier cases that would authorize their decision. Hopefully N.L.W. will become just another classic example of why opinions from the Oklahoma Court of Civil Appeals are not precedential.

Conclusion

The law on third-party custody continues to be in disarray. The fault for this clearly lies with the Oklahoma Supreme Court. It has on several occasions failed to completely analyze its prior cases. The court’s failure to indicate which cases it considers good law and which should be considered overruled leads to opinions like N.L.W., where a court, confronted with a case in which the equities favored the third party, utilized old cases from the Oklahoma Supreme Court to justify its failure to even discuss some of the more modern cases. In addition, the supreme court has consistently failed to recognize appropriate legislation when it continues to ignore the effect of title 10, section 21.1 in formulating the substantive standards for awarding custody to a third party and modifications for third-party custody decrees.

The two opinions handed down this past year have simply added to the confusion. The Supreme Court gave no indication that it was aware that its more “child focused” standard in Baby Girl L was a departure from past decisions dealing with parental unfitness. The addition of the “inimical to the child” prong to the standard for when a guardianship should be terminated and

258. Id. ¶1-2, 999 P.2d at 449.
259. Id. ¶13, 999 P.2d at 451-52.
261. OKLA. SUP. CT. R. 1.200(c)(2).
the child returned the parent in *Guardianship of A.G.S.* remains undefined. Its indefiniteness invites lawyers and judges to manipulate the standard to arrive at inconsistent results in individual cases where the equities so dictate. Given the unwillingness of the Oklahoma Supreme Court to analyze its prior cases, it may be that the best hope of bringing uniformity and certainty to this troubled area lies with the legislature.