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cause still means that the information could not be obtained from other sources.⁷¹

Conclusion

The Oklahoma Supreme Court's treatment of the good cause requirement under section 548 dealing with the discovery of tangible objects has been closely akin to the approach taken by the federal courts under pre-1970 rule 34. Oklahoma case law subsequent to *Carman* appears to indicate that relevancy and need are to be used in determining good cause under section 548.⁷² Indeed, although there are only a few cases which deal with the good cause requirement for discovery under section 548, all agree that the information sought must be relevant and that need be shown, often expressed as "whether the movant can obtain the facts without production of the documents."⁷³ Thus, in Oklahoma, the movant should be prepared to show that the material sought is both relevant and unavailable elsewhere. While this standard may appear rather inflexible, the supreme court's declaration that good cause will be determined on a case-by-case basis⁷⁴ suggests that subsequent decisions may broaden or narrow the scope of discovery. Clearly, the court has invited advocates to assist in the development. Nevertheless, until a reshaping occurs, the two-factor test of relevancy and need represents a consistent application of the law to the discovery process. An adherence to this test, sensitive to the facts of each situation, will greatly assist both the practitioner and the trial court.

Jed L. Marcus

Divorce: The Joint Custody Alternative

Divorce has become commonplace in our society. It is a well-known statistic that one-third of today's marriages will not survive.¹ Minor children will be involved in 75 percent of these divorces.² A Department of Health, Education and Welfare study has shown that approximately one million children annually experience the divorce of their parents.³

⁷¹ Arco Pipe Line Co. v. S/S Trade Star, 81 F.R.D. 416 (E.D. Pa. 1978).

⁷² Amoco Prod. Co. v. Lindley, 609 P.2d 733 (Okla. 1980); Lisle v. Owens, 521 P.2d 1375 (Okla. 1974); Jones Packing Co. v. Caldwell, 510 P.2d 683 (Okla. 1973).

⁷³ Jackson v. Kennecott Copper Corp., 27 Utah 310, 495 P.2d 1254, 1255 (1972), cited with approval in Cowen v. Hughes, 509 P.2d 461, 465 (Okla. 1973).

⁷⁴ Carman v. Fishel, 418 P.2d 963, 971 (Okla. 1966).

¹ M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT 48 (1978) [hereinafter cited as ROMAN & HADDAD].

² *Id.* at 49.

³ *Id.* See Department of Health, Education & Welfare, National Center for Mental Health Statistics, 1976.

This increase in the divorce rate indicates that courts are having to make many more custody decisions and that often they have to reconsider their determinations as dissatisfied parents return to court seeking to amend the original custody orders. Attorneys are necessarily being called upon to represent an increasing number of clients who are seeking a divorce. It is important, therefore, that the attorney be aware of all available custody options. This note will suggest one way to deal effectively and efficiently with a certain class of custody cases—by judicial approval of a joint custody agreement submitted by the parents involved.

Joint Custody in Practice

A joint custody arrangement is one in which the parents share legal responsibility for their child's care and alternate companionship with the child.⁴ Much of the opposition to joint custody comes from visions of a Solomon-like judge symbolically dividing the child in two—half to the mother, half to the father. In reality, however, joint custody awards are rarely such a 50/50 division.⁵ For example, many joint custody arrangements provide for the child to spend weekdays with one parent and weekends with the other parent. Other arrangements include the children living with one parent during the school year and joining the other parent for summer vacations. Physical custody may be alternated in any way that will best benefit the child.

Admittedly, joint custody is not a cure-all, and it will not suffice in every custody situation.⁶ A successful joint custody situation requires that the parents live in the same geographical area so that the child is not continually having to reestablish peer relationships.⁷ It also requires that the parents have respect for each other's parenting abilities, and that both are committed to placing the child's welfare above their own personal differences.⁸ Most commentators agree that both parents must sincerely want a joint custody ar-

⁴ Bratt, *Joint Custody*, 67 Ky. L.J. 271, 282 (1978-79) [hereinafter cited as Bratt].

⁵ Taussig & Carpenter, *Joint Custody*, 56 N.D.L. REV. 223, 230 (1977) [hereinafter cited as Taussig & Carpenter].

⁶ Bratt, *supra* note 4, at 304; Foster & Freed, *Joint Custody: A Viable Alternative?* 15 TRIAL 26, 31 (1979) [hereinafter cited as Foster & Freed]. Foster and Freed suggest that the following are preconditions for a successful joint custody arrangement: (1) Parental agreement to joint custody; (2) Parents capable of communicating and making decisions regarding the child; (3) No substantial disruption of the child's routine, schooling, peer association, etc.; (4) No indication that child's psychological and emotional needs and development will suffer from a joint custody arrangement; (5) Both parent's work hours are suitable for alternating physical custody; and (6) Child does not oppose joint custody.

Conversely, the authors advise against joint custody where: (1) The parents are unalterably opposed to joint custody; (2) Extreme animosity exists between the parents; (3) Disruption of child's routine, schooling, etc., would result; (4) Child would be subjected to a "double bind" because of conflicting decisions or practices of the parents; (5) Work hours of parents make joint custody impractical; or (6) Child is strongly opposed to joint custody.

⁷ Foster & Freed, *supra* note 6, at 31.

⁸ Taussig & Carpenter, *supra* note 5, at 234.

rangement for such an award to be successful.⁹ Thus, joint custody should not be imposed in every custody dispute. In fact, joint custody requests and awards at present appear to be confined to a small number of highly sophisticated couples, usually professionals.¹⁰

Evolution of the Tender Years Presumption

The present custody law in Oklahoma contains a preference for awarding the child in a divorce action to the mother when the child is of "tender years."¹¹ In fact, many Oklahoma judges seem unable to envision any kind of custody arrangement other than single custody, basing their decisions on the idea that a mother is somehow the natural custodian of the child.¹²

This feeling that the mother is better suited to care for a child has not always prevailed in our society.¹³ At common law, custody was routinely awarded to the father under the theory that he had a property right in a child's services.¹⁴ The Industrial Revolution, however, brought an end to the

⁹ Bratt, *supra* note 4, at 303; Foster & Freed, *supra* note 6, at 31. *Contra*, Taussig & Carpenter, *supra* note 5, at 233. Taussig suggests that, even though a situation where both parents are seeking joint custody is desirable, the advantages of joint custody make it the optimum custody arrangement even in the absence of parental agreement.

¹⁰ Bratt, *supra* note 4, at 288.

¹¹ 30 OKLA. STAT. § 11 (1971). "Rules for appointment. In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations: 1) By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question. 2) As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as a right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father."

¹² One judge, in modifying a joint custody order to vest sole custody in the mother, remarked that, "It is generally recognized that the mother is the natural custodian of her child of tender years, and that if she is a fit and proper person other things being equal, she should be given custody in order that the child may receive the attention, care, supervision and kindly advice, which arises from a mother's love and devotion, for which no substitute has ever been found." *See Hurt v. Hurt*, 315 P.2d 957, 959 (Okla. 1957).

Another court, espousing the same theories but in more eloquent language, declared that, "Courts know that mother love is a dominant trait in the heart of a mother, even in the weakest of women. It is of divine origin, and in nearly all cases far exceeds and surpasses the parental affection of the father. Every just man recognizes the fact that minor children need the constant bestowal of the mother's care and love.

"It is for these reasons courts are loath to deprive the mother of the care and custody of her children, and will not do so, as above remarked, unless it clearly appears that she is an improper person to be intrusted with their care and custody." *See Bruce v. Bruce*, 141 Okla. 160, 285 P. 30, 37 (1930).

The above case has been quoted and followed in several later decisions. *See Irwin v. Irwin*, 416 P.2d 853, 858 (Okla. 1966); *Kuykendall v. Kuykendall*, 290 P.2d 128, 130 (Okla. 1955).

¹³ ROMAN & HADDAD, *supra* note 1, at 24-40; Bratt, *supra* note 4, at 280; Taussig & Carpenter, *supra* note 5, at 224.

¹⁴ Taussig & Carpenter, *supra* note 5, at 224. *See also* Bratt, *supra* note 4, at 281, quoting language from an early case that illustrates the thinking of this period: "It [the authority

feudalistic society, forcing fathers into the workplace and away from the home. Children were left at home with the mother, and thus the concept of father/mother, mother/child-nurturer began to emerge.¹⁵ The tender years presumption did not become popular until the early nineteenth century.¹⁶

Thus, society's view of what is "natural" has changed over the years to fit the different theories of family roles. Today, the popular view of the roles that family members should play appears to be changing again.¹⁷ A 1978 Department of Labor study revealed that more than 50 percent of all women were working outside the home.¹⁸ This increase, in addition to the fact that fathers now have more leisure time as a result of a shorter work week, means that fathers are spending more time on child-rearing than ever before.¹⁹ Recent studies also have shown that "mothering" is a function that does not necessarily have to be performed by the female parent.²⁰ Thus there is no law of nature that requires that the mother be the primary caretaker of the child. Because it is now recognized that fathers are just as capable as mothers to care for their children, and because fathers now have more time in which to do so, custody arrangements in which both parents have an equal say in what is best for the child are more warranted than ever before.

Problems with Oklahoma's Present Custody Law

There is a traditional gap between social change and de jure recognition.²¹ Thus, despite our society's changing views of the family, mothers presently receive sole custody in more than 90 percent of the cases.²² As a result, the father is faced with the increased financial burden of having to support two households while losing all control over the day-to-day decisions regarding his child.²³ His demotion to "visitor status" causes him to lose self-esteem; thus he tends to see less and less of the child as time goes by.²⁴

of the father] is the doctrine of all civilized nations. It is according to the revealed law of nature, and it prevails even with the wandering savage, who has received none of the lights of civilization."

¹⁵ Roman and Haddad suggest that both the common law rule and the modern-day presumption are results of men's efforts to keep women in a subordinate position. In feudal times, the wife as well as the children were regarded as the husband's property, while the maternal presumption grew out of the view that a woman's place was in the home. See ROMAN & HADDAD, *supra* note 1, at 24-40.

¹⁶ Bratt, *supra* note 4, at 281.

¹⁷ *Id.* at 277.

¹⁸ *Id.*, quoting U.S. Bureau of Labor Statistics, 25 EMPLOY. & EARNINGS 43 (Dec. 1978).

¹⁹ Taussig & Carpenter, *supra* note 5, at 227-28.

²⁰ See *Watts v. Watts*, 350 N.Y.S.2d 285 (N.Y. County Fam. Ct. 1973), quoting studies by Spitz & Wolf, *Analetic Depression*, PSYCHOANALYTIC STUDY OF THE CHILD, 313-42 (1946) and Yarrow, *Maternal Deprivation: Toward an Empirical and Conceptual Reevaluation*, PSYCHOLOGICAL BULL. 58 (1961).

²¹ Foster & Freed, *supra* note 6, at 27.

²² ROMAN & HADDAD, *supra* note 1, at 23; Bratt, *supra* note 4, at 274.

²³ ROMAN & HADDAD, *supra* note 1, at 80-81.

²⁴ *Id.*

This often results in cessation of child support payments²⁵ and is probably the reason behind most child-snatching incidents.²⁶

However, the mother who is given full custody may also be greatly overburdened.²⁷ She is frequently thrust into the job market in order to support her family,²⁸ while also having to assume the awesome responsibility of being the only parent and decision maker in the family. In addition, it is often difficult for a single mother with young children to reestablish a social life.²⁹ As a result, single mothers often feel resentful, both toward the child and toward the father, whom she may hold responsible for her predicament.³⁰ This resentment often results in a poor mother-child relationship.³¹ On the other hand, some divorced mothers with sole custody may become overly protective, trying to "live through" their children when forced to sublimate their need for social activity.³²

Unfortunately, it is the child who suffers most from a sole custody arrangement.³³ When the attachment to one of his parents is severed, the child may find it hard to form other attachments.³⁴ He may be reluctant to make new friends for fear that they too will someday leave, as his father has done.³⁵ The child feels abandoned and rejected by the father whom he rarely sees.³⁶ This feeling is often intensified by a resentful mother's attempt to turn the child against the absent parent.³⁷ With only the one parent to rely upon, the child feels threatened by the mother's other relationships, for he fears that she too may someday leave and he will have no one.³⁸

Finally, the present Oklahoma custody statute puts too great a burden on the legal system. The statute requires that the court consider first what is in the child's best interests.³⁹ Most judges, however, have little or no training in psychology or family relations.⁴⁰ The decision as to which of two parents can best serve the child's interests is therefore too difficult for most judges to make. The fact that in 90 percent of the cases custody is awarded to the

²⁵ Bratt, *supra* note 4, at 275. This problem has become so pronounced in Oklahoma that the legislature recently enacted the Uniform Child Custody Jurisdiction Act. This Act specifies, *inter alia*, that any violation of court rules regarding custody of children under eighteen is a felony. See H.B. No. 1741, 1980 Okla. Sess. Laws.

²⁶ ROMAN & HADDAD, *supra* note 1, at 18-19.

²⁷ *Id.* at 76-80.

²⁸ *Id.* at 76.

²⁹ *Id.* at 77.

³⁰ *Id.* at 75.

³¹ *Id.* at 78-79.

³² *Id.* at 78.

³³ Bratt, *supra* note 4, at 296-305.

³⁴ *Id.* at 296-97.

³⁵ *Id.*

³⁶ *Id.* at 297.

³⁷ *Id.* at 305.

³⁸ *Id.* at 298.

³⁹ 30 OKLA. STAT. § 11 (1971), quoted at note 11 *supra*.

⁴⁰ Bratt, *supra* note 4, at 271-72.

mother⁴¹ seems to suggest that often judges are ignoring the child's "best interests" and are relying on the presumption in favor of maternal custody to make their decisions for them.⁴²

Advantages of Joint Custody

Joint custody, however, alleviates most, if not all, of the disadvantages that single custody holds for the parents, the child, and the courts. In a joint custody arrangement, the father retains an equal voice with the mother in making decisions that affect the child.⁴³ In addition, the father and mother alternate physical custody of the child for designated periods of time.⁴⁴ Because the father retains a measure of genuine control over his child, he does not experience the loss of self-esteem that a noncustodial father experiences as the result of being cut out of his child's life.⁴⁵ Conversely, the mother is given more free time in which to build a new life. She is therefore less resentful, making her a better mother.⁴⁶

The one who gains most from a joint custody award is the child. Studies of children in post-divorce situations demonstrate that the best-adjusted children were those who were able to maintain meaningful relationships with *both* parents.⁴⁷ Because joint custody parents share legal and physical custody of the child, frequent contact with both parents is an integral part of a joint custody arrangement.⁴⁸ The child does not feel abandoned by either parent; thus he experiences fewer of the emotional problems that often result from single custody arrangements.⁴⁹ Another advantage is that because the parents are required to communicate in order to make decisions regarding the child, the child is less likely to be able to manipulate the parents by playing one against the other.⁵⁰ The child is able to experience both parents in normal living conditions; thus the adjustment after the parents' divorce is easier for him to make.⁵¹

⁴¹ See text at note 22 *supra*.

⁴² This theory is also supported by the fact that even though a literal reading of the statute would invoke the maternal presumption only when all other things are equal, the Oklahoma Supreme Court has stated that the preference will be invoked unless the mother is clearly found to be an improper person. See *Irwin v. Irwin*, 416 P.2d 853, 858 (Okla. 1966).

⁴³ Bratt, *supra* note 4, at 282.

⁴⁴ *Id.*

⁴⁵ *Id.* at 273.

⁴⁶ *Id.* at 301; Ramey & Stender, *Joint Custody: Are Two Homes Better Than One?* 8 GOLDEN GATE U.L. REV. 559, 576 (1979) [hereinafter cited as Ramey & Stender].

⁴⁷ See ROMAN & HADDAD, *supra* note 1, at 55-58, discussing a study conducted by a group of Virginia psychologists. The psychologists observed 48 divorced couples and 48 intact families. They concluded that "the frequency of father contact with the child was associated with more positive mother-child interactions and with a more positive adjustment of the child." *Id.*

⁴⁸ Bratt, *supra* note 4, at 282.

⁴⁹ *Id.* at 296-97.

⁵⁰ Ramey & Stender, *supra* note 46, at 572.

⁵¹ *Id.* at 572-74.

Courts gain from joint custody because their job is made much simpler. The parents work out the details of a joint custody arrangement together and then submit it to the court for approval.⁵² The court is saved the time and expense of starting from scratch in devising an acceptable custody arrangement. Because the parties suggest joint custody, they are less likely to return to court seeking a modification of the original custody order.⁵³ The courts are therefore saved the time and expense of judicial review.

Joint Custody Under the Oklahoma Custody Statute

Although the Oklahoma custody statute contains a presumption in favor of maternal custody when the child is of tender years,⁵⁴ joint custody is permissible under the statute in many instances. Before reaching the presumption, the court is required to consider the best interests of the child.⁵⁵ As has been shown, the child's best interests are often served by a joint custody award.⁵⁶ Furthermore, the court is given instructions for "awarding the custody of a minor,"⁵⁷ not for appointing a *single* custodian. Therefore, joint custody is permissible under the Oklahoma statute. In fact, Oklahoma courts have already made joint custody awards in several cases,⁵⁸ although they have rarely been specifically designated as such.

In one such case, *Mattox v. Mattox*,⁵⁹ the court found that both parents were fit and originally awarded custody to the mother for nine months and to the father for the remaining three. Later, the mother returned to court and petitioned for full custody. The court, upon a finding that both parents were fit, was unable to choose who should be awarded custody of the child. Therefore, the court granted custody to both parents but in alternating years.⁶⁰

A joint custody award was also made in the case of *Guess v. Guess*.⁶¹ The court found that both parents were fit and that the child would benefit from some association with his father. Therefore, it modified a sole custody order to give the father custody during the summer months. The court stated that "other things being equal, a child of tender years should generally be awarded to the mother, but custody may be shared by the father so long as the division of custody does not interfere with the schooling of the child."⁶²

⁵² ROMAN & HADDAD, *supra* note 1, at 148; Foster & Freed, *supra* note 6, at 27.

⁵³ Ramey & Stender, *supra* note 46, at 576.

⁵⁴ 30 OKLA. STAT. § 11 (1971), quoted at note 11 *supra*.

⁵⁵ *Id.*

⁵⁶ See text accompanying notes 46-50, *supra*.

⁵⁷ 30 OKLA. STAT. § 11 (1971).

⁵⁸ *Guess v. Guess*, 274 P.2d 369 (Okla. 1954); *Childers v. Childers*, 202 Okla. 409, 214 P.2d 722 (1950); *Mattox v. Mattox*, 129 Okla. 301, 264 P. 898 (1928).

⁵⁹ 129 Okla. 301, 264 P. 898 (1928).

⁶⁰ *Id.*

⁶¹ 274 P.2d 369 (Okla. 1954).

⁶² *Id.* (syllabus).

In *Childers v. Childers*,⁶³ the court established the rule that “[w]hile the best interest of the minor child should be the paramount guide in considering a proposed change of custody, the rights and desires of both father and mother should be given consideration.”⁶⁴ Thus, in a situation where both parents are seeking joint custody and such an award would appear to be in the best interests of the child, there is no reason for the court to refuse.

Reasons Why Joint Custody is Rarely Considered

More joint custody awards may have been made in Oklahoma than the above cases indicate. Because joint custody is usually sought by both parents, these cases are rarely subjected to appellate review.⁶⁵ Such an award, however, is far from commonplace.⁶⁶

The paucity of joint custody arrangements is partly because of society’s ideas of the roles of mother and father in the family.⁶⁷ The mother is viewed as the primary caretaker of the child, whereas the father is seen mainly as a breadwinner.⁶⁸ Thus, even if the mother does not wish to have sole responsibility for the child, she often seeks sole custody because it is expected of her.⁶⁹ And courts, assuming that fathers neither want nor have time for their children, fail to recognize joint custody as a viable option.⁷⁰

In most cases, the parents are not even aware that the joint custody option is available to them.⁷¹ This is due in part to the role of the attorney in divorce actions. Although the statute requires that courts emphasize the best interest of the *child*, lawyers are committed to getting the most that they can for their *client*.⁷² Thus, the mother’s attorney encourages her to seek sole custody because she will probably win, while the father is often discouraged from seeking custody for the same reason.⁷³

Even where the parties are aware of the joint custody option, they may reject the idea because of the criticisms that have been advanced. One such criticism is that joint custody will fail because the parents are certain to disagree about what is best for the child.⁷⁴ Such disagreement, however, exists in many intact family situations and is not always harmful to the child.⁷⁵ Moreover, parents may be better able to reach an understanding regarding their child after their divorce. With other sources of marital conflict having

⁶³ 202 Okla. 409, 214 P.2d 722 (1950).

⁶⁴ *Id.*, 214 P.2d at 723.

⁶⁵ Bratt, *supra* note 4, at 284.

⁶⁶ See text accompanying note 20, *supra*.

⁶⁷ See note 15 and accompanying text, *supra*.

⁶⁸ *Id.*

⁶⁹ ROMAN & HADDAD, *supra* note 1, at 153.

⁷⁰ *Id.* at 19.

⁷¹ *Id.* at 150.

⁷² *Id.* at 167.

⁷³ *Id.* at 165-67.

⁷⁴ Taussig & Carpenter, *supra* note 5, at 232; Ramey & Stender, *supra* note 46, at 568.

⁷⁵ Taussig & Carpenter, *supra* note 5, at 232.

been eliminated, the child's welfare is the only aspect of their lives about which they are required to come to terms.⁷⁶ If both parents are committed to serving the child's best interests, they should be able to work together in making day-to-day decisions concerning their child.⁷⁷

Another criticism of joint custody is that the lack of a stable environment will adversely affect the child.⁷⁸ Uninterrupted physical custody is rare, however, even under the traditional sole custody situation because the non-custodial parent is almost always granted visitation rights.⁷⁹ Any change of physical circumstances will not necessarily be harmful, *e.g.*, the children of corporate and military personnel may change residences quite often without suffering adverse emotional consequences.⁸⁰ It appears that it is not environmental stability that is most important, but rather it is *emotional* stability.⁸¹ If the child involved knows that he is loved and wanted by both parents, his sense of security will be enhanced.⁸²

Critics of joint custody also assert that the child will develop loyalty conflicts as a result of being subjected to two authority figures.⁸³ Loyalty conflicts, however, may result from any kind of custody arrangement.⁸⁴ There need not be the question as to which parent has supreme authority in a joint custody arrangement—the child simply obeys the parent with whom he is residing at the time.⁸⁵

Conclusion

Perhaps the best way to ensure that joint custody is considered in a divorce situation would be to revise the Oklahoma statute. Iowa, North Carolina, Oregon, and Wisconsin already have statutes specifically permitting joint custody,⁸⁶ and California has recently passed a statute creating a

⁷⁶ ROMAN & HADDAD, *supra* note 1, at 117.

⁷⁷ Ramey & Stender, *supra* note 46, at 568.

⁷⁸ Bratt, *supra* note 4, at 299.

⁷⁹ *Id.* at 300.

⁸⁰ Ramey & Stender, *supra* note 46, at 574.

⁸¹ Bratt, *supra* note 4, at 298.

⁸² *Id.*

⁸³ *Id.* at 304.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ IOWA CODE ANN. § 598.21: "When a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be justified. The order may include provision for joint custody. . . ."

N.C. GEN. STAT. § 50-13.2(a): "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child. Provided, between the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child."

OR. REV. STAT. § 107.105 provides: [a court has power to decree as follows]: "(a) For the future care and custody, by one party or jointly, of all minor children of the parties born, adopted or conceived during the marriage, and for minor children born to the parties prior to