Tulsa Law Review

Volume 6 | Number 2

1970

Child Custody: Statutory Preference in Favor of the Mother Is Not Applicable in Proceedings to Modify a Prior Custody Order

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vestors who would have standing to bring an action is not so restrictive as to destroy this congressional purpose. Above all, the courts should construe these rules and regulations with the idea that every shareholder is entitled to a complete and truthful statement of those facts which might tend to influence his vote, regardless of how important the solicitor might consider them to be.

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DOMESTIC RELATIONS—Child Custody: Statutory Preference in Favor of the Mother is Not Applicable in Proceedings to Modify a Prior Custody Order

The Oklahoma Supreme Court in the recent case of *Gibbons v. Gibbons*[1] held that in an action between parents to modify a custody order the statutory preference[2] given the mother cannot apply. To successfully move the court to grant a change in custody, the parent asking for modification of the prior order must generally sustain a twofold burden of proof:

1. Show a permanent, substantial and material change of condition which directly affects the best interests of the minor child;
2. Show that as a result of this change the minor child would be substantially better off with respect to its temporal and its mental and moral welfare if parental custody were modified.[3]

[1] 442 P.2d 482 (Okla. 1968) (5-4 decision).

[2] OKLA. STAT. tit. 30, § 11 (1961), which provides in part:

> [2] As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother . . . .

[3] Gibbons v. Gibbons, 442 P.2d 482, 485 (Okla. 1968).

The parties were divorced in 1962. Pursuant to the divorce decree, the mother received custody of their four and one-half year old son. Approximately three months later, upon joint application of the parties, custody was transferred to the father. For the next five and one-half years the boy lived with his father. In 1967, on the basis of changed circumstances, the mother applied to the district court asking that she be given full custody of the boy. Subsequent to the last custody order the mother had remarried and she and her husband wanted the boy and said they were able to provide him with a good home.

The trial court specifically stated that the father was a fit person to have custody and even commented that he had done an outstanding job of raising the boy. They were active in church, Scout and other activities together; they had a good relationship with each other and with the boy's mother; and excellent arrangements had been made for supervision of the boy while the father worked. The boy was healthy, progressing satisfactorily in the parochial school he attended and had presented no unusual disciplinary problems.

The district court, however, granted the mother's motion for modification and awarded her full custody. The court based its decision on the mother's changed living conditions (her remarriage and ability to provide a home) and upon the statute providing that all other things being equal, custody of children of tender years should be given to the mother.[4] The father appealed.

In Oklahoma, authority to modify a custody order is specifically given by statute.[5] The courts have held that modification of a custody order is proper upon showing a material

[4] OKLA. STAT. tit. 30, § 11 (1961).

[5] OKLA. STAT. tit. 12, § 1277 (1961), which provides in part:

> [T]he court . . . may modify or change any order in this respect [dealing with guardianship, custody, support and education of minor children] whenever circumstances render such change proper . . . .

change in circumstances;[6] however, this change must be one which materially affects the temporal, moral and mental welfare of the child.[7] There are no set standards to measure the amount of change required which leaves the courts with very broad discretion.[8] Each case must be decided on its own merits in light of the court's primary concern of providing for the child's best interest.[9] In essence, it is not the changes which must be measured but rather the result these changes would have on the welfare of the child. Even though a change in circumstances is required before the order can be modified, this fact alone, without showing a substantial benefit to the child, will not support modification of the prior custody order.[10]

The mother is not entitled, as a matter of law, to the custody of her children despite the universal recognition

[6] *See, e.g.,* Perry v. Perry, 408 P.2d 285 (Okla. 1965) (showing of changed circumstances); Taylor v. Taylor, 387 P.2d 648 (Okla. 1963) (whenever best interests of the child demand it); Tisdell v. Tisdell, 363 P.2d 277 (Okla. 1961) (under proper circumstances).

[7] Earnest v. Earnest, 418 P.2d 351 (Okla. 1966); Young v. Young, 383 P.2d 211 (Okla. 1963); Miracle v. Miracle, 360 P.2d 712 (Okla. 1961); *see* Foster & Freed, *Child Custody,* 39 N.Y.U. L. REV. 615, 623 (1964).

[8] Fletcher v. Fletcher, 362 P.2d 691 (Okla. 1961); Ness v. Ness, 357 P.2d 973 (Okla. 1960); *see* Foster & Freed, *Child Custody,* 39 N.Y.U. L. REV. 423, 438 (1964); Inge, *Problems in Child Custody Cases,* 26 ALA. LAW. 327, 340 (July 1965).

[9] Morgan v. Morgan, 268 P.2d 855 (Okla. 1954); Ford v. Ford, 206 Okla. 561, 245 P.2d 75 (1952); Childers v. Childers, 202 Okla. 409, 214 P.2d 722 (1950); *see* Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards,* 5 J. FAM. L. 21 (Spring 1965).

[10] Stanfield v. Stanfield, 350 P.2d 261 (Okla. 1960); *see* 27B C.J.S. *Divorce* §317(2a) (1959).

that the mother is the natural custodian of her young.[11] There are certain intangible factors—such as the love, care and influence a mother can provide—which will be weighed by the court in determining what is in the child's best interests.

In some cases prior to *Gibbons,* the court seemed to have felt compelled, in light of the statutory preference in favor of the mother, to modify prior custody orders upon a showing by the mother that she had remarried and was able to provide a home in which to raise the children.[12] Although the court presumably was at all times guided by what was in the best interests of the child, they frequently used the statutory preference as the touchstone for their decision. It seemed to be presumed that if the mother could provide a

[11] *See, e.g.,* Blackwood v. Blackwood, 204 Okla. 317, 229 P.2d 602 (1951) (statutory preference given mother in divorce proceedings); Logan v. Logan, 197 Okla. 88, 168 P.2d 878 (1946) (proceedings between paternal grandparents and mother); Bell v. Bell, 196 Okla. 130, 163 P.2d 548 (1945) (application of statutory preference for the mother upheld with respect to custody provision of divorce decree).

See Comment, *Child Custody: Considerations in Granting the Award Between Adversely Claiming Parents,* 36 S. CAL. L. REV. 255, 258 (1963). California's statutory provision, CAL. CIV. CODE § 138 subsection 2, is identical to OKLA. STAT. tit. 30, § 11 (1961). The Comment concluded that the first part of the rule, that children of tender years should be given to the mother, is based on a universal concept that the mother is the natural guardian and custodian of her child, and that there is no substitute for mother's love. It was nevertheless questioned whether things are ever equal as required by the state. *See also* Foster & Freed, *Children and the Law,* 2 FAM. L.Q. 40, 41 (1968). The mother usually prevails over the father, although the "best interests" test theoretically gives each parent an equal chance.

[12] *See, e.g.,* Warren v. Warren, 365 P.2d 974 (Okla. 1961). (In reversing the trial court, the supreme court found that the mother's remarriage, home ownership and resumption of the role of housewife were significant changes in circumstances which for the best interests of the children re-

suitable home then everything was equal and the statutory preference for the mother was applicable.

The inconsistencies in the cases previous to *Gibbons* were due, at least in part, to the failure to make the distinction between matters relating to custody in the divorce decree and those matters relating to an application to modify a previous custody order. The court had quoted and cited cases involving custody in divorce decrees, where the statutory preference had been applied, to support their decisions in applying the same statutory preference in actions to modify a previous custody order.[13]

quired giving custody to the mother. Although both parents were fit, the statute required them to give custody to the mother.); Miracle v. Miracle, 360 P.2d 712 (Okla. 1961). (Here the court applied the preference and reversed the determination of the trial court that the child's interests would be best served by giving custody to the father. The mother, who remarried, had moved to Italy and this was not enough to overcome the application of the preference in her favor since Jan was a child of tender years and the mother could provide a suitable home.); Ness v. Ness, 357 P.2d 973 (Okla. 1960). (The supreme court affirmed the trial court's holding that the mother's allegation of remarriage and ability to provide a suitable home and properly care for the children was a sufficient change in circumstances in light of the statutory preference to give her custody, although there was nothing in the record reflecting adversely on the fitness of the father.) *But cf.* Stanfield v. Stanfield, 350 P.2d 261 (Okla. 1960). (An application for modification made eight years after the prior order and alleging the remarriage and home ownership of the mother, without evidence as to the children's present situation, was not sufficient reason to require transplanting the children to a totally new environment.)

[13] *See, e.g.,* Ness v. Ness, 357 P.2d 973 (Okla. 1960). (This case cited Blackwood v. Blackwood, 204 Okla. 317, 229 P.2d 602 (1951), which was an appeal from the custody provision of a divorce decree.); Miracle v. Miracle, 360 P.2d 712 (Okla. 1961). (This case cited *Blackwood* and Bruce v. Bruce, 141 Okla. 160, 285 P. 30 (1930) which was an appeal from the

The *Gibbons* court took a hard look at the statutes in question[14] as well as their holdings in previous cases and determined that paragraph 2 of OKLA. STAT. tit. 30, § 11 (1961) could not apply in an action between parents to modify a prior custody order. The court said that under its previous decisions the person asking for the modification had the burden of proving changed circumstances and, as a result of the change, the best interests of the child required modification of the custody. If the person asking for the change sustained the burden of proof, things obviously were not equal. If things were not equal, then the statutory preference given the mother could not apply since it was expressly conditioned upon things being equal. If the burden of proof was not sustained, then at the most things were equal and for that very reason custody could not be changed from one parent to another.

The effect of the *Gibbons* decision is that the mother can no longer rely on the statutory preference in actions to modify a custody order. She will now have to show that the child would be substantially better off if his custody were changed. The court has not limited what the trial court may look to in determining what is in the best interests of the child; *e.g.*, the age of the child or the fact that the mother has remarried and could provide a good home for the child. The court will probably continue, as in the past, to give a good deal of weight to the advantages a mother can supply a child.[15]

divorce decree that gave custody of minor children to the father.)

[14] OKLA. STAT. tit. 30, § 11 (1961); OKLA. STAT. tit. 12, § 1277 (1961).

[15] *See*, Note, *Modification of Divorce Decrees With Respect to the Custody of Minor Children—Oregon*, 2 WILLAMETTE L.J. 216, 223 (1963). Reached the conclusion that although the Oregon statute was amended to specifically provide that no preference should be given to either parent, the courts would continue to prefer the mother though they would phrase this in general terms of the welfare of the