THE COURT OF APPEALS OF THE CHOCTAW NATION OF OKLAHOMA

STEVEN CALLICOAT,
Respondent/Appellant
vs.
BRANDY LEANN RUSSELL,
Petitioner/Appellee

APPEAL FROM THE CHOCTAW NATION DISTRICT COURT
HONORABLE MARK MORRISON, PRESIDING
DISTRICT COURT CASE NO.: JFP-16-10
CHOCTAW COURT OF APPEALS NO.: AC-18-1

AFFIRMED
Blake E. Lynch, Brecken A. Wagner, Wagner & Lynch, McAlester, Oklahoma, for Appellant/Respondent.

Micah Knight, Durant, Oklahoma, for Appellee/Petitioner.

DECISION

This appeal comes on from a decision by the District Court of the Choctaw of Nation of Oklahoma wherein the issues were as follows:

A) custody and visitation of the minor child of the parties, wherein the parties had joint custody and a motion to modify was filed by each party to terminate joint custody;

B) calculation of child support by including the Appellant's overtime earnings, excluding overnight visitation credit and disallowing parenting adjustment reduction.

Both parties filed motions to terminate the divorce court's joint custody order, with each requesting sole care, custody and control of the child. The evidence revealed that both parties had remarried. The Appellant sought custody, reasoning that his new wife taught at the school where the child attended and further that he wanted to spend more time with his child. The

evidence revealed that the Appellant had obtained a new job wherein he worked long hours, was unable to attend all the extracurricular school activities and did not attend parental activities at school such as parent-teacher conferences. Evidence disclosed that the six year old child was allowed to sleep in Appellant's bed between he and his new wife. There appeared to be controversies and arguments between the parties and the spouses of the parties. Since the divorce, the Appellee had been the primarily care taker of the child of the parties. The parties had agreed, contrary to the divorce decree, that Appellant should have visitation with the child every other weekend and on Tuesday nights.

The Appellee produced evidence of Appellant's income which was used to prepare the child support computation. The proposed child support computation was introduced into evidence which included Appellant's overtime pay as part of his gross income. The Appellee's income was listed as being imputed to minimum wage. After the close of evidence, Appellant was given ten days by the trial judge to submit a child support guideline calculation; however, Appellant chose not to submit a proposal to the Court. Appellee prepared a journal entry of judgment and submitted to Appellant. Appellant did not sign the same. At a hearing on Appellee's motion to settle journal entry, the Appellant's response raised for the first time, a) that another child lived in the household, b) that it was improper to include overtime income as part of the Appellant's gross income, and c) that child support reduction should be allowed for overnight visits in the Appellant's home.

The District Court determined that the Appellee should have primary custody of the six year old child of the parties with visitation for the Appellant every other weekend and every Tuesday night as the parties had previously agreed. Child support was set according to the Child

Support Guidelines of the Choctaw Nation. The Appellant's income was determined by using overtime pay in the calculation. The trial court did not give credit for another child living in the household nor reduce the amount of child support for overnight visitation with the Appellant.

STANDARD OF REVIEW

Custody, visitation and child support are matters of equity and are left to the sound discretion of the trial court. Accordingly, unless it is determine that the trial court's decision is clearly against the weight of the evidence so as to constitute an abuse of discretion, it will not be disturbed. An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling.

OPINION

The Tribal Council of the Choctaw Nation has provided in the *Choctaw Nation Marriage and Divorce Code* that the court may terminate joint custody upon the request of either of the parents or on the court's own judgment. *Choctaw Nation Marriage and Divorce Code, Section 109(G)(1).* When the joint custody plan is terminated that court shall make provisions for the child's custody and visitation as if there had been no joint custody plan. *Choctaw Nation Marriage and Divorce Code, Section 109(G)(2).* The controlling basis for the court is what is in the best interest of the child. Insofar as the court's ruling to terminate joint custody and the awarding of custody of the minor child to Appellee with visitation to Appellant as set out above, this court must affirm the trial court's decision using the above standard of review. It appears from the record that the Appellee had been the primary custodial parent after the divorce and prior to this hearing. There was evidence presented that the Appellant allowed the child to sleep in the same bed with the Appellant and his new wife. This court does not substitute its

judgement for the trial court wherein the trial court had the opportunity to see and hear the witnesses, judge their credibility and determines if sufficient evidence exists in the record to support the decision of the trial court. There was no abuse of discretion in this case as to the trial court's decision to terminate joint custody, award the custody of the minor child to the Appellee and grant visitation to the Appellant.

As to the issue of overtime earnings being included in the income of the Appellant, the Tribal Code instructs the court that the court in setting child support should first calculate the gross income of each parent. In computing gross income, "the court shall include for each parent whichever is the most equitable of: a) all actual monthly income described in this section, **plus such overtime and supplemental income as the court deems equitable**, b) the average of the gross monthly income for the time actually employed during the previous three (3) years, c) the minimum wage paid for a forty-hour week, or d) gross monthly income imputed as set forth in subsection D of this section." *Choctaw Nation Marriage and Divorce Code, Section 118B (C)(1)* (emphasis added). Therefore the court had before it the amount of overtime income pursuant to testimony and submitted child support guidelines (although the complaining party, Appellant herein, did not submit, as the trial court requested, proposed child support calculations). Using the above standard of review, this court must affirm that part of the order using overtime to calculate gross income of the Appellant represents no abuse of discretion by the trial court.

Appellant complains that the court did not allow a deduction for gross income for other children. The Code provisions for this deduction is found at *Choctaw Nation Marriage and Divorce Code, Section 118 (C)(2).* It should first be noted that there is absolutely no evidence

of any in-home children living with Appellant. This issue was not raised until the attorney for Appellant raised the issue in a response to a motion to settle journal entry. For an in-home child deduction to be applicable, the parent seeking said deduction must establish a legal duty of support and that the child resides with said parent more than fifty (50) per cent of the time. Since there was no evidence in the record to establish this deduction by the Appellant, the trial court clearly did not abuse its discretion. This part of the decision by the trial court will be affirmed.

The final issue raised by the Appellant is the deduction of child support for overnight visits called a "parenting adjustment." This adjustment is found in the Tribal Code at *Choctaw Nation Marriage and Divorce Code, Section 118E.* Parenting time adjustments are not mandatory, but presumptive. *118E(C)*. The presumption may be rebutted in a case where the circumstances indicate the adjustment is not in the best interest of the child or that the increased parenting time by the non-custodial parent does not result in a greater expenditure which would justify a reduction in the support obligation. *118E(C)*. Appellant again, with the exception of the change of custody, presented no evidence in the record to support this request. The issue was raised by a response to a motion to settle the journal entry. No child support guidelines were submitted by the Appellant as requested by the trial court. While the issue of parenting adjustment can not be raised until the court has pronounced it's order regarding custody and visitation, efforts by the requesting party should be raised in a timely manner. Although the trial court did not make findings as to why it decided that the presumption of parenting time was overcome, such requirement is not mandated. Evidence reveals that the Appellant's lack of consistency in exercising visitation with his child in the past, which, if repeated would obviously not create added child expenditures for the Appellant. Further the response by Appellee to the

response to the motion to settle journal entry indicates that there is an issue as to how many nights the Appellant would actually exercise. It is noted that attached to the Appellant's brief is a calendar in an attempt to show overnight visits. There is nothing in the record that indicates this calendar was presented to the trial judge. Materials which were not before the trial court at the time of the decision appealed are not properly part of the record on appeal without an order of the trial court or the appellate court. *Choctaw Nation Code of Civil Procedure, Choc. Ct.App.R., Rule 1.28(b).* There is no order allowing the calendar to be part of the record. Therefore, this court will not consider the calendar attached to the Appellant's brief. in deciding this appeal.

Thus employing the same standard of review as set out above, there is no abuse of discretion. Therefore we affirm this part of the trial court's order.

PAT PHELPS, C. J.

BOB RABON, J.

WARREN GOTCHER, J.

Concur.