IN THE SUPREME COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS

Willard Keith Bacon, Defendant/Appellant	)	CS 2003-1
	)	
v.	)	MEMORANDUM OPINION
	)	AND
Norma Jean Bacon, Plaintiff/Appellee	)	ORDER

Per Curiam (Chief Justice Rae Nell Vaughn and Associate Justices Frank Pommersheim and Carey Vicenti)

I. Introduction

This case centers on the award of custody pursuant to a divorce action brought by the Plaintiff/Appellee, Norma Jean Bacon, against her husband, Willard Keith Bacon, Defendant/Appellant. The parties were married on November 1, 1991. Ms. Bacon had two children from a previous relationship, namely Clymene Bacon, born February 15, 1986 and Merrick Lee Bacon, born August 26, 1987. Both of these children were legally adopted by Willard Keith Bacon. The parties also had three children of their own, namely Willard Keith Bacon, Jr., born October 27, 1989; Stevie Ray Bacon, born May 30, 1991; and Montae Shawn Bacon, born March 30, 1998.

The parties separated on December 25, 2001, and Norma Jean Bacon filed for divorce in March 2002. After trial, a decree of divorce was granted that provided in relevant part that custody of all five children was awarded to Norma Jean Bacon along with (pursuant to a stipulation) the marital home and child support in the amount of $400/month.

A timely Notice of Appeal was filed by Willard Keith Bacon. Briefs were duly filed by both parties and oral argument was heard on September 27, 2004.

II. Issues

The sole issue raised on appeal is whether the trial judge erred as a matter of law in granting custody of the five children to the mother, Norma Jean Bacon.

III. Discussion

The core of the Appellant father's claim is that the trial court misapplied Sec. 9-3-9 of the Choctaw Tribal Code. See 9-3-9 states in full:

> In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved, the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties and the natural presumption that the mother is best suited to care for the young children. The court may inquire of the children's desires regarding the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children's custody otherwise.

More precisely, Appellant claims that the language which speaks of the "natural presumption that the mother is best suited to care for the *young children*" (emphasis added) does not apply to children who are twelve years of age or older. In this case, that would include Clymene, Merrick, and Willard, Jr. all of whom testified at trial. Stevie Ray was only 11 years of age at trial, but he was allowed to testify. The youngest child, Montae Shawn did not testify at trial. All four children who did testify indicated a preference to live with their father. The legal argument advanced by the Appellant is that without the benefit of the statutory preference the trial court would not (could not?) have awarded custody of at least three of the children to the mother because the trial judge indicated that both parents were good parents and the statutory presumption in favor of the mother was used as an improper 'tie braker'.[1]

The Court rejects the conclusion advanced by the Appellant, but understands the necessity to provide some guidance to the practicing bar and trial court judges in this important

[1] Appellant's Brief at 2 quoting the trial court transcript at TR-171, lines 4-7.

area of developing tribal court jurisprudence.[2] The following discussion is meant to provide such guidance and direction.

1. The term 'young children' as it appears in Sec. 9-3-9 is understood to mean any child that is twelve years of age or older. The legal effect of this determination is that children 12 years or older have the right to testify in a divorce proceeding about their custodial preferences. Children younger than 12 years of age (at the time of the hearing) may only testify if the trial judge permits it as a matter of discretion.

2. The weight and merit of such testimony shall be determined by the trial judge. The trial judge must make specific written findings in regard to such testimony in the court's decision. Such testimony does *not* in and of itself dislodge "natural presumption that the mother is best suited to care for the young children". The presumption expressed in Sec. 9-3-9 applies to all children regardless of their age.

3. The presumption stated in 9-3-9 is an express legal declaration that reflects the history and culture of the Mississippi Band of Choctaw Indians as a matriarchal and matrilineal society. The presumption is therefore not inadvertent and must be closely adhered to. However, the presumption is *not* irrebutable and may be overcome only if there is clear and convincing evidence that the mother is not capable or fit to discharge her responsibilities as the custodial parent. This presumption was not overcome in the case at bar.

4. There was also considerable discussion of the role of the so-called *Albright* factors[3] in

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[2] The Court invites the Mississippi Band of Choctaw Tribal Council to provide any specific legislative clarification or direction that it deems appropriate in this area.

[3] The *Albright* factors derive from the case of *Albright v. Albright*, 437 So.2nd 1003 (Miss. 1983). In that case the Mississippi Supreme Court identified the following factors for consideration in making a custody award:

1. Age, health and sex of the child;
2. Which parent had continuing care of the children prior to the separation;
3. Which parent has the best parenting skills;
4. Which has the willingness and capacity to provide primary child care;
5. Employment responsibilities of both parents;

making an award of custody. The *Albright* factors are *not* part of the law of the Mississippi Band of Choctaw Tribe and are not dispositive or legally binding in any case. These factors are nevertheless helpful in providing a template or inventory of relevant factors to aid the trial court in making its custody decision. The dispositive Tribal legal standard remains the "best interests of the child".

5. Another significant issue in this litigation, but not fully addressed by the parties is the Tribal legal and cultural norm of keeping all children together whenever possible. This legal and cultural standard rises to the level of a presumption in favor of awarding the custody of all children to one parent. Such a presumption may only be overcome if there is clear and convincing evidence that it is in "the best interest of the children" to split them up. This presumption was *not* overcome in the case at bar.

6. The appropriate standard of review in the context of the award of custody is whether the decision of the trial judge constituted an abuse of discretion resulting in manifest injustice. There was no abuse of discretion resulting in manifest injustice in the case at bar.

The Court provides the guidance discussed above in the spirit of aiding the practicing bar and trial bench in carrying out its most serious responsibility under the Mississippi Band of Choctaw law and culture.

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6. Physical and mental health and age of parents;
7. Emotional ties of the parent and child;
8. Moral fitness of the parents;
9. Home, school and community record of the child;
10. Preference of the child at the age of twelve;
11. Stability of the home environment and employment of each parent;
12. Other relevant factors.

IV. Conclusion

For all of the above discussed reasons, the decision of the trial court is affirmed in its award of custody of all five children to their mother, Norma Jean Bacon.

IT IS SO ORDERED.

For the Court

Chief Justice Rae Neil Vaughn

Dated: March 21, 2005