IN THE SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

No.2003-6

Shelly Carson,
Plaintiff-Appellant,

v.

Anka Joe,
Defendant-Appellee.

OPINION AND ORDER

Appearances: William E. Spell, Jr., for the Appellant, Shelly Carson and Donald L. Kilgore , for the Appellee, Anka Joe.

Before: Rae Nell Vaughn, Chief Justice, Frank R. Pommersheim, Associate Justice, and Carey N. Vicenti, Associate Justice.

C. N. Vicenti, A. J., for a unanimous Court.

This matter came before this Court upon a Notice of Appeal seeking a review of a ruling of the trial court wherein the trial court dismissed a civil complaint filed by Shelly Carson (the Appellant) against Anka Joe (the Appellee). This Court reviewed the trial court record, and briefs of the parties and heard oral argument. After a full consideration this Court hereby remands this matter to the trial court for further consideration consistent with the discussion herein and dismisses this appeal.

I. Factual and Procedural History.

This case arises out of Petition filed in the trial court to establish paternity, to determine custody and visitations and to set levels of child support all in regards to R.C., DOB 9/12/1997. The Plaintiff-Appellant Shelly Carson and the Defendant-Appellee Anka Joe had been in a relationship but had never married. This relationship did, however, by admission of the parties, lead to the birth of R.C. After the birth of the child the parties shared joint actual physical custody of the child. The Appellant initiated this action, though, on February 6, 2002, to acquire "sole legal and actual physical custody", of the couple's child. Petition at III. The Appellee, of course, resisted this Petition and sought to attain sole custody of the child as well. In his Answer, submitted April 10,

2002, he further alleged that the Appellant was unfit to serve as sole custodian of the child.

The matter was initially transferred to the Iti-kana-ikbi Court for negotiation and conciliation on June 7, 2002, but the traditional court determined that neither party was capable of reaching an agreement on the issues pertaining to the Petition. The case was then transferred back to the trial court on September 26, 2002. The trial court did convene to take testimony and evidence early in December of 2002 and then issued a ruling on December 20, 2002, embodied in an Opinion. The Opinion discussed in great depth the patterns of behavior for both parties regarding the care of their child.

The core of the court's opinion revolved around Section 9-3-9 of the Choctaw Tribal Code and what have commonly come to be called the *Albright* factors. See *Albright v. Albright*, 437 So.2d. 1003 (Miss. 1983). As the court states, Section 9-3-9 "provides that when 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 young children.'" Opinion at 4. The court goes on to state, however, that:

> of particular concern for the Court is that she has on two separate occasions since the birth of [R.C.] had men move into the house with her while the two were not married After having children by these men, the men have then apparently left her and the children behind, Anka must also accept some responsibility for this type of behavior due to the fact that he was one of these same men who apparently lived with Shelly for a short period of time and then left after the birth of the child.

Opinion at 5.

Together with a recitation regarding the 'impressionability' of children and "a number of incidents regarding the child's safety and cleanliness while in the custody" of the Appellant, ibid., the court held in favor of the Appellee. It then issued rulings regarding visitation and child support. The Appellant sought a new trial in the matter but the trial court denied that motion by an order entered September 16, 2003.

It is from that ruling that this appeal ensued.

It is important to note that at the time this matter came before this Court on oral argument, this Court was considering a separate case involving determinations of custody in *Bacon v. Bacon*, CS 2003-1.

II. Discussion.

This Court recognizes that a substantial amount of time has intervened since the trial court entered its ruling in this case and that, by necessary implication, the positions of the parties may have substantially changed to a degree worthy of further court examination. That having been said, however, since the trial court ruled in September of 2003, this Court has had occasion to visit the issue of custody determinations and the interrelationship between Section 9-3-9 of the Choctaw Tribal Code and the *Albright* factors. In the case decided after oral argument was heard in this case, *Bacon v. Bacon*, CS 2003-1(March 21, 2005), this Court set the appropriate standard of review "in the context of the award of custody... [to]... whether the decision of the trial judge constituted an abuse of discretion resulting in manifest injustice".

A substantial amount of the trial court's opinion in the present case focused upon Section 9-3-9 regarding "the past conduct and demonstrated moral standards of the parties" and one of the *Albright* factors, specifically the 'moral fitness of the parents'. Without stating conclusively that it found the Appellant lacking in moral fitness, it was clearly implied by the length of its discussion that it had entered a determination that the Appellant was morally unfit to maintain custody of R.C. This was somewhat troubling in light of the fact that it specifically recognized that the Appellee was a partner in the Appellant's allegedly unfit moral behavior, something akin to being a co-conspirator in allegedly immoral behavior Moreover, such a conclusion would instantly raise the question as to whether the Appellant could continue to maintain custody over her other children, R.C.'s half-siblings. To put it another way, the trial court appeared to have determined that the Appellant was unfit to have custody of R.C. but was fit enough to care for her remaining children. This has the unpalatable effect of creating what appears to be one child selected for preferential treatment leaving the other children subject to the care of an unfit mother. This Court cannot consider the conclusion of the trial court, therefore to be 'manifestly just.'

This is not to suggest that the trial court should reconsider its decision and consider the potential of removing the Appellant's other children from her care. Rather, in considering the "demonstrated moral standards" of any party, that such standards must

be clearly reprehensible to such extent that no child should remain in such person's care. This Court is aware, however, that the trial court rendered its decision before this Court ruled in the *Bacon* case, and was unaided by the 'guidance' rendered therein.

This Court, in *Bacon*, explained that the "natural presumption that the mother is best suited to care for the young children" set forth in Section 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." *Bacon* at 3. This Court went on to clarify that "[t]he presumption... is *not* irrebutable [sic] and may be overcome only if there is clear and convincing evidence that the mother is not capable or fit to discharge her duties as the custodial parent." Id. (Emphasis in the original). Again, this Court notes that the trial court could not have been advised by the discussion in *Bacon* since it had not yet been issued.

Finally, it should be noted that in *Bacon*, this Court addressed the issue of whether siblings ought to be separated from each other. This was a concern not addressed at all by the trial court and, apparently, not raised by the Appellant. In *Bacon*, this Court raised the concern regarding "the Tribal legal and cultural norm of keeping children together whenever possible." *Bacon* at 4. The Court went on to say that the norm "rises to the level of a presumption in favor of awarding the custody of all children to one parent", a presumption that "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." Id. Thus, there exist two presumptions, first, that the mother is 'best suited to care for young children, and, second, that siblings should remain together wherever possible[1], that can only be overcome by clear and convincing evidence of lack of fitness to serve as a custodian of a child.

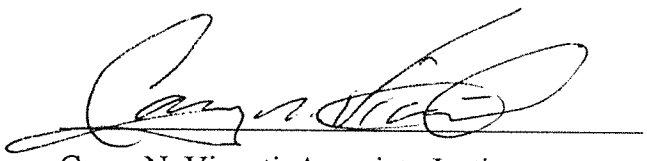
III. Conclusion.

This Court holds that the trial court did not commit any error under the laws and legal standards that were known to it at the time of its entry of judgment. This Court's rulings in *Bacon v. Bacon* have substantially altered that landscape. However, the

[1] And, perhaps, these presumptions should be characterized by a contrasting, yet illuminative, principle that a child's interests are served best in the care of his or her mother and in the company of his or her siblings. The children in *Bacon* were from the same parents, unlike the present case, however, this only creates complexity in rendering custodial and visitational decrees and does not defeat the principle that the company of siblings is good for a child.

mandates of Section 9-3-9 remain an on-going concern for any child who is subject to the jurisdiction of the Mississippi Band of Choctaw Indians. In light of the extensive amount of time intervening between the entry of judgment in the trial court and the present it remains "in the best interests of the child", Section 9-3-9, to remand this matter to the trial court for further consideration in light of *Bacon* and the foregoing discussion.

IT IS SO ORDERED this 10th day of May, 2006.



Carey N. Vicenti, Associate Justice