

SHORT TITLE: Child custody; creating presumption for joint custody;
codification; effective date.

STATE OF OKLAHOMA

1st Session of the 46th Legislature (1997)

SENATE BILL NO. 744

By: Smith

AS INTRODUCED

An Act relating to child custody; amending Section 1, Chapter 243, O.S.L. 1992, as last amended by Section 7, Chapter 131, O.S.L. 1996, and 43 O.S. 1991, Section 111.1 (43 O.S. Supp. 1996, Section 107.1), which relate to actions involving custody of minor children and visitation; modifying and clarifying language; deleting authority for certain temporary orders; deleting discretion to avoid certain time requirements; authorizing appointment of guardian ad litem and providing for certain expenses; requiring mediation under certain circumstances; defining terms; requiring certain proceeding regarding certain allegations and providing for sanctions; creating presumption for joint custody; providing guidelines for determining whether joint custody is in best interest of child; prohibiting consideration of certain factors when determining custody of child; providing for contents of certain orders; requiring court approval of certain parenting plan; providing procedure where custody is contested; providing for access to certain records; requiring order establishing periods of responsibility for joint custodial parents; providing penalty for violation of order establishing responsibility; providing for mediation or court hearing upon violation of

certain order; requiring cooperation of parents and providing guidelines; authorizing certain orders upon violation of certain order; clarifying certain rights of certain parties; conforming language; repealing 43 O.S. 1991, Sections 109 and 112, as last amended by Section 10, Chapter 131, O.S.L. 1996 (43 O.S. Supp. 1996, Section 112), which relate to care and custody of children; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY Section 1, Chapter 243, O.S.L. 1992, as last amended by Section 7, Chapter 131, O.S.L. 1996 (43 O.S. Supp. 1996, Section 107.1), is amended to read as follows:

Section 107.1 A. 1. In an action for divorce or such other action where there are minor children involved, the court shall not issue a final order thereon for at least ninety (90) days from the date of filing the petition which ninety (90) days may be waived by the court for good cause shown and without objection by either party.

2. The court may require that within the ninety-day period specified by paragraph 1 of this subsection, the parties attend and complete an educational program specified by Section § 107.7 of this ~~act~~ title, and complete a parenting plan as specified by Section 2 of this act.

B. This section shall not apply to divorces filed for any of the following causes:

1. Abandonment for one (1) year;
2. Extreme cruelty;
3. Habitual drunkenness;

4. Imprisonment of the other party in a state or federal penal institution under sentence thereto for the commission of a felony at the time the petition is filed;

5. The procurement of a final divorce decree outside this state by a husband or wife which does not in this state release the other party from the obligations of the marriage; and

6. Insanity for a period of five (5) years, the insane person having been an inmate of a state institution for the insane in the State of Oklahoma, or an inmate of a state institution for the insane in some other state for such period, or an inmate of a private sanitarium, and affected with a type of insanity with a poor prognosis for recovery.

~~C. After a petition has been filed in an action for divorce where there are minor children involved, the court may make any such order concerning property, children, support and expenses of the suit as provided for in Section 110 of this title, to be enforced during the pendency of the action, as may be right and proper.~~

~~D. The court may issue a final order in an action for divorce where minor children are involved before the ninety-day time period set forth in subsection A of this section has expired, if the parties voluntarily participate in marital or family counseling and the court finds reconciliation is unlikely.~~

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 107.3 of Title 43, unless there is created a duplication in numbering, reads as follows:

A. In any proceeding for the disposition of children where custody of minor children is contested by any party, the court may appoint an attorney at law as guardian ad litem on the court's motion or upon application of any party to appear for and represent the minor children. Expenses, costs, and attorney's fees for the guardian ad litem may be allocated among the parties as determined by the court.

B. When custody is contested, the court:

1. Shall refer the issue of custody to professional mediation if feasible unless a party asserts or it appears to the court that domestic violence or child abuse has occurred, in which event the court shall halt or suspend professional mediation unless the court specifically finds that:

a. the following three conditions are satisfied:

(1) the professional mediator has substantial training concerning the effects of domestic violence or child abuse on victims,

(2) a party who is or alleges to be the victim of domestic violence is capable of negotiating with the other party in mediation, either alone or with assistance, without suffering an imbalance of power as a result of the alleged domestic violence, and

(3) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between parties resulting from the alleged domestic violence or child abuse, or

b. in the case of domestic violence involving parents, the parent who is or alleges to be the victim requests mediation and the mediator is informed of the alleged domestic violence; and

2. May order, in addition to or in lieu of the provisions of paragraph 1 of this subsection, that each of the parties undergo individual counseling in a manner that the court deems appropriate, if the court finds that the parties can afford the counseling.

C. As used in this section:

1. "Child abuse" means:

a. that a child has been physically, emotionally, or psychologically abused by a parent,

- b. that a child has been:
 - (1) sexually abused by a parent through criminal sexual penetration, incest, or criminal sexual contact of a minor as those acts are defined by state law, or
 - (2) sexually exploited by a parent through allowing, permitting, or encouraging the child in obscene or pornographic photographing or filming or depicting a child for commercial purposes as those acts are defined by state law,
- c. that a child has been knowingly or intentionally or negligently placed in a situation that may endanger the child's life or health, or
- d. that a child has been knowingly or intentionally tortured, cruelly confined, or cruelly punished; provided, that nothing in this paragraph shall be construed to imply that a child who is or has been provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner of the church or denomination, is for that reason alone a victim of child abuse within the meaning of this paragraph; and

2. "Domestic violence" means one parent causing or threatening physical harm or assault or inciting imminent fear of physical, emotional, or psychological harm to the other parent.

D. During any proceeding concerning child custody, should it be determined by the court that a party has intentionally made a false or frivolous accusation to the court of child abuse or neglect against the other party, the court shall proceed with any or all of the following:

1. Find the accusing party in contempt for perjury and refer for prosecution;
2. Consider the false allegations in determining custody; and
3. Award the obligation to pay all court costs and legal expenses encumbered by both parties arising from the allegations to the accusing party.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 107.4 of Title 43, unless there is created a duplication in numbering, reads as follows:

A. There shall be a presumption that joint custody is in the best interest of a child in an initial custody determination. An award of joint custody does not imply an equal division of financial responsibility for the child. Joint custody shall not be awarded as a substitute for an existing custody arrangement, unless there has been a substantial and material change in circumstances since the entry of the prior custody order or decree, which change affects the welfare of the child, such that joint custody is presently in the best interest of the child. With respect to any proceeding in which it is proposed that joint custody be terminated, the court shall not terminate joint custody unless there has been a substantial and material change in circumstances affecting the welfare of the child, since entry of the joint custody order, such that joint custody is no longer in the best interest of the child.

B. In determining whether a joint custody order is in the best interest of the child, the court shall consider the following factors:

1. Whether the child has established or has been allowed to establish a close relationship with each parent;
2. Whether each parent is capable of providing adequate care for the child throughout each period of responsibility, including arranging for the child's care by others as needed;

3. Whether each parent is willing to accept all responsibilities of parenting, including a willingness to accept care of the child at specified times and to relinquish care to the other parent at specified times;

4. Whether the child can best maintain and strengthen a relationship with both parents through predictable, frequent contact and whether a child's development will profit from such involvement and influence with both parents;

5. Whether each parent is able to allow the other to provide care without intrusion, that is, to respect the other's parental rights and responsibilities and his or her right to privacy;

6. The suitability of a parenting plan for the implementation of joint custody, preferably, although not necessarily, one arrived at through parental agreement, through mediation if necessary and feasible;

7. Geographic distance between the parent's residences, and each parent's willingness and ability to travel and transport the child for periods of responsibility; and

8. Willingness or ability of the parents to communicate, cooperate, or agree on issues regarding the child's needs.

C. In any proceeding in which the custody of a child is at issue, the court shall not prefer one parent as a custodian solely because of gender, race, or religion.

D. In any case in which the parents agree to a form of custody, the court should award custody consistent with the agreement, unless the court determines that the agreement is not in the best interest of the child.

E. In making an order of joint custody, the court may specify the circumstances, if any, under which the consent of both legal custodians is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent.

F. When joint custody is awarded, the court shall approve a parenting plan for the implementation of the prospective custody arrangements prior to the award of joint custody. The parenting plan shall include a division of a child's time and care into periods of responsibility for each parent. It may also include:

1. Statements regarding the child's religion, education, child care, recreational activities, and medical and dental care;
2. Designation of specific decision-making responsibilities;
3. Methods for communicating information about the child, transporting the child, exchanging care for the child, and maintaining telephone and mail contact between parent and child;
4. Procedures for future decision-making, including procedures for dispute resolution; and
5. Other statements regarding the welfare of the child or designed to clarify and facilitate parenting under joint custody arrangements.

In a case where joint custody is not agreed to, or necessary aspects of the parenting plan are contested, the parties shall each submit parenting plans. The court may accept the plan proposed by either party, or it may combine or revise these plans as it deems necessary in the child's best interest, or it may order the parties to attend professional mediation on the specific contested issues to reach complete agreement on the parenting plan. The time of filing of parenting plans shall be set by local rule. A plan adopted by the court shall be entered as an order of the court.

G. Where custody is contested, the court shall refer that issue to mediation if feasible. The court may also use auxiliary services such as professional evaluations.

H. Notwithstanding any other provisions of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to a parent because that parent is not the child's physical

custodial parent or because that parent is not a joint custodial parent.

I. Whenever a request for joint custody is granted or denied, the court shall state in its order its basis for granting or denying the request for joint custody. A statement that joint custody is or is not in the best interest of the child is not sufficient to meet the requirements of this subsection.

J. An award for joint custody means that:

1. Each parent shall have significant, well-defined periods of responsibility for the child;

2. Each parent shall have, and be allowed and expected to carry out, responsibility for the child's financial, physical, emotional, and developmental needs during that parent's period of responsibility;

3. The parents shall consult with each other on major decisions involving the child before implementing those decisions. Neither parent shall make a decision or take an action which results in a major change in a child's life until the matter has been discussed with the other parent and the parents agree. If the parents, after discussion, cannot agree and if one parent wishes to effect a major change while the other does not wish the major change to occur, then no change shall occur until the issue has been resolved as provided in this subsection;

4. The following guidelines shall apply to major changes in a child's life:

- a. if either parent plans to change his home city or state of residence, he or she shall provide to the other parent thirty (30) days' notice in writing stating the date and destination of move,
- b. the religious denomination and religious activities, or lack thereof, which were being practiced during the marriage should not be changed unless the parties

agree or it has been otherwise resolved as provided in this subsection,

- c. both parents shall have access to school records, teachers, and activities. The type of education, public or private, which was in place during the marriage should continue, whenever possible, and school districts should not be changed unless the parties agree or it has been otherwise resolved as provided in this subsection, and
- d. both parents shall have access to medical and dental treatment providers and records. Each parent has authority to make emergency medical decisions. Neither parent may contract for major elective medical or dental treatment unless both parents agree or it has been otherwise resolved as provided in this subsection, and

5. Decisions regarding major changes in a child's life may be decided by:

- a. agreement between the joint custodial parents,
- b. a requirement that the parents seek family counseling, professional conciliation, or mediation services to assist in resolving their differences,
- c. agreement by the parents to submit the dispute to binding arbitration,
- d. allocating ultimate responsibility for a particular major decision area to one legal custodian,
- e. terminating joint custody and awarding sole custody to one person, or
- f. the district court.

K. No person other than a natural or adoptive parent shall be awarded custody absent of confirmed showing of unfitness of the natural or adoptive parent.

L. As used in this section:

1. "Child" means a person under the age of eighteen (18);

2. "Custody" means the authority and responsibility to make major decisions in a child's best interest in the areas of residence, medical and dental treatment, education or child care, religion, and recreation;

3. "Joint custody" means an order of the court awarding custody of a child to two parents. Joint custody does not imply equal division of the child's time between the parents, or an equal division of financial responsibility for the child;

4. "Parent" means a natural parent, adoptive parent, or person who is acting as a parent who has or shares legal custody of a child or who claims a right to have or share legal custody;

5. "Parenting plan" means a document submitted for approval of the court setting forth the responsibilities of each parent individually and the parents jointly in a joint custody arrangement;

6. "Period of responsibility" is a specified time period during which a parent is responsible for providing a child's physical, developmental and emotional needs, including the decision-making required in daily living. Specified periods of responsibility shall not be changed in an instance or more permanently except by the methods of decision-making described under the definition of joint custody;

7. "Sole custody" means an order of the court awarding custody of a child to one parent;

8. "Visitation" is a period of time available to a noncustodial parent, under a sole custody arrangement, during which a child resides with or is under the care and control of the noncustodial parent; and

9. "Mediation" means a session with both parents present and with a licensed mediator experienced in mediating the contested specifics of the case at hand, designed to facilitate the parties'

reaching of an agreement concerning the contested specifics of the case.

SECTION 4. AMENDATORY 43 O.S. 1991, Section 111.1, is amended to read as follows:

Section 111.1 A. Any order providing for the visitation of a noncustodial parent with any of the children of such noncustodial parent, or any order providing for established periods of responsibility as established in the parenting plan of a joint custodial parent with any of the children of such joint custodial parent, shall provide a specified minimum amount of visitation between the noncustodial or joint custodial parent and the child unless the court determines otherwise. Except for good cause shown and when in the best interests of the child, the order shall encourage additional visitations of the noncustodial parent and the child, and liberal period of responsibility for a joint custodial parent and the child, and in addition encourage liberal telephone communications and postal communications between the noncustodial parent and the child, and the joint custodial parent and the child.

B. Violation of an order providing for the visitation of a noncustodial parent with any of the children of such noncustodial parent, or violation of an order providing for established periods of responsibility as established in a parenting plan of a joint custodial parent and the child, may be enforced by the noncustodial parent or the joint custodial parent by indirect civil contempt. Unless the custodial parent or joint custodial parent establishes good cause for noncompliance, the noncustodial parent or the deprived joint custodial parent shall be entitled to recover court costs and attorney fees expended in enforcing the order.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 111.3 of Title 43, unless there is created a duplication in numbering, reads as follows:

A. If a parent has been granted visitation rights, or rights concerning established periods of responsibility, and such rights are denied or interfered with by the other parent, the parent having visitation rights or the other joint custodial parent may file with the clerk of the district court a motion for enforcement of such rights. Such motion shall be filed on a form provided by the clerk of the court. The court shall immediately:

1. Issue ex parte and order for mediation in accordance with Section 2 of this act; or

2. Set a time and place for a hearing on the motion, which shall be not more than twenty-one (21) days after the filing of the motion.

B. If mediation ordered pursuant to paragraph 1 of subsection A of this section is completed, the mediator shall submit a summary of the parties' understanding to the court within five (5) days after it is signed by the parties. Upon receipt of the summary, the court shall enter an order in accordance with the parties' agreement or set a time and place for a hearing on the matter, which shall not be more than ten (10) days after the summary is received by the court.

C. If mediation ordered pursuant to paragraph 1 of subsection A of this section is terminated, the mediator shall report the termination to the court within five (5) days after the termination. Upon receipt of the report, the court shall set the matter for hearing. Any such hearing shall not be more than ten (10) days after the mediator's report of termination is received by the court.

D. Notice of the hearing date set by the court shall be given to all interested parties by certified mail, return receipt requested, or as the court may order.

E. If, upon a hearing pursuant to paragraph 1, 2 or 3 of this subsection, the court finds that visitation rights or periods of responsibility of one parent have been unreasonably denied or

interfered with by the other parent, the court may enter an order providing for one or more of the following:

1. A specific visitation or period of responsibility schedule;
2. Compensating visitation or period of responsibility time for the visitation or period of responsibility denied or interfered with, which time shall be of the same type (e.g., holiday, weekday, weekend, summer) as that denied or interfered with and shall be at the convenience of the parent whose visitation or period of responsibility was denied or interfered with;
3. The posting of a bond, either cash or with sufficient sureties, conditioned upon compliance with the order granting visitation or period of responsibility rights;
4. Assessment of reasonable attorney fees, mediation costs, and costs of the proceedings to enforce visitation or period of responsibility rights against the parent who unreasonably denied or interfered with the other parent's visitation or period of responsibility rights;
5. Attendance of one or both parents at counseling or education sessions which focus on the impact of visitation or period of responsibility disputes on children;
6. Supervised visitation or period of responsibility; or
7. Any other remedy which the court considers appropriate.

F. In no case shall final disposition of a motion filed pursuant to this section take place more than forty-five (45) days after the filing of the motion.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 111.4 of Title 43, unless there is created a duplication in numbering, reads as follows:

A. Parents. A parent not granted custody or residency of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the

child's physical, mental, moral or emotional health, pursuant to Section 111.1 of Title 43 of the Oklahoma Statutes.

B. Grandparents. Grandparents may be granted visitation rights pursuant to the provisions of Section 5 of Title 10 of the Oklahoma Statutes.

C. Modification. The court may modify an order granting or denying visitation or period of responsibility rights whenever modifications would serve the best interest of the child.

D. Enforcement of rights. An order granting visitation or period of responsibility rights to a parent pursuant to this section may be enforced in accordance with Section 111.1 of Title 43 of the Oklahoma Statutes.

E. Repeated denial of rights, effect. Repeated unreasonable denial of or interference with visitation rights or period of responsibility granted to parent pursuant to this act may be considered a material change of circumstances which justifies modification of a prior order of child custody.

F. Repeated child support misuse, effect. Repeated child support misuse may be considered a material change of circumstances which justifies modification of a prior order of child custody.

SECTION 7. REPEALER 43 O.S. 1991, Sections 109 and 112, as last amended by Section 10, Chapter 131, O.S.L. 1996 (43 O.S. Supp. 1996, Section 112), are hereby repealed.

SECTION 8. This act shall become effective November 1, 1997.

46-1-0264 KSM