CRAZY LOVE,
THE MARRIAGE OF JOINT CUSTODY AND
PARENT COORDINATION

Title 43 O.S. §109, inter alia, defines joint custody and sets the conditions under which a court may grant, modify and terminate joint custody. It also mandates the manner in which the court must decide custody when it abrogates a joint custody plan.

Section 109 loosely defines "joint custody:" to "mean the sharing by parents in all or some of the aspects of physical and legal care, custody and control of their children."[1]

Relevant case law suggests that "joint custody requires parents who: 1) have an ability to communicate with each other even though they are no longer married; 2)are mature enough to put aside their own differences; and 3) who work together and engage in joint discussions with each other and make joint decisions regarding the best interest of their children.[2]

Pursuant to Section 109, the Court has the unbridled discretion to adopt the parties joint custody plan, in whole or part, and may entirely reject the parties request for joint custody and proceed "as if the request for joint custody had not been made."[3]

The primary concern of this article is to consider the direction of joint custody in light of the Supreme Court's decision in *Foshee v. Foshee, 2010 OK 85, 247 P.3d 1162*, decided December 7, 2010, and the appropriateness of creating a parenting

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1 Title 43 O.S. §109 B.

2 *Foshee v. Foshee, 2010 OK 85, 247 P.3d 1162 @ ¶ 16.*

3 Title 43 O.S. §109 C.

coordinator in joint custody cases.

In Foshee, supra, the Supreme Court was faced with reviewing a request to terminate a joint custody plan, and award sole custody to mother. The father appealed the court's termination of the plan and award of sole custody to mother on the basis that the trial court erred because the children preferred the existing joint custody arrangement, and because no change in circumstances sufficient to modify the existing joint custody had occurred. The mother countered that the joint custody plan was not working, that it was absolutely necessary to terminate it, and that it was in the children's best interest to award sole custody to her. [4]

The Supreme Court reviewed what it regarded as its "seminal precedent" in Daniel v. Daniel, 2001 OK 117, 42 P. 3d 863, and made the following remarks:

"Joint custody will not succeed without the cooperation of the parties. When it becomes apparent to the court that joint custody is not working and it is not serving the child's best interest, then a material and substantial change of circumstance has occurred and the joint custody arrangement must be vacated."[5]

Our Court of Appeals cases have reiterated nearly annually that "a party's opposition to joint custody indicates his or her lack of willingness to cooperate, and to force joint custody on an unwilling parent should give a trial court pause. See, *Kilpatrick v. Kilpatrick, 2008 OK CIV APP 94, 188 P.3d 406, 409, and Fast v. Fast, 1989 OK CIV APP 31.*

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[4] *Foshee v. Foshee, 2010 OK 85, 247 P.3d 1162* @ ¶ 10.

[5] *Foshee v. Foshee, 2010 OK 85, 247 P.3d 1162* @ ¶ 15.

At this juncture in the domestic practice of law in Tulsa County, this practitioner is seeing a succession of agreed joint custody plans created, in which a marriage is made between that plan and a corresponding contemporaneously entered parenting coordinator order. Additionally, this practitioner sees custody evaluation reports today, regularly, that recommend joint custody with the appointment of a "strong parent coordinator".

If a joint custody plan is properly created, (i.e., the parties "1) have an ability to communicate with each other even though they are no longer married; 2)are mature enough to put aside their own differences; and 3) who work together and engage in joint discussions with each other and make joint decisions regarding the best interest of their children"), why on earth would the Court need to implement a parenting coordinator?

Why would mature parents who can work together need a parenting coordinator? Why would they need the assistance of "an impartial third party" to assist them in resolving issues and deciding disputed issues? Why would they need assistance with identifying disputed issues, reducing misunderstandings, clarifying priorities, exploring possibilities for compromise, developing methods of collaboration and parenting, and complying with the court's order of custody? Haven't "mature parents" the wherewithal to parent their children without such assistance?

High conflict cases would never, in this practitioner's notion of common sense, be proper cases for the award of joint custody. The Parenting Coordinator Act defines a "high conflict case" as one in which minor children are involved and the parties demonstrate a pattern of ongoing: a. litigation, b. anger and distrust, c. verbal

abuse, d., physical aggression or threats of physical aggression, e., difficulty in communicating about and cooperating in the care of their children, or conditions that in the discretion of the court warrant the appointment of a parenting coordinator."

If a practitioner (or judge) is honest with his or her self, he or she must acknowledge that as joint custody has been defined by statute and case law, no joint custody plan should be made an order of the Court when a finding of "high conflict" is made. These two legal concepts are not logically reconcilable.

Title 43 O.S. §120.3 smartly provides that "the court shall not appoint a parenting coordinator if any party objects". I say "smartly" because if a party objects to the appointment of a parenting coordinator, what is the likelihood that such a party will invest in a parenting coordinator process?

Our legislature obviously believes that parent coordinator's have a role to play in cases, both high and low conflict under the circumstances set forth in Section 102.3, but not even the statutes envision that high conflict could also be "joint custody" cases, whether the parent coordinator is a "strong" one or not.

Our Supreme Court last December, in Foshee v. Foshee, supra., and our Court of Appeals, last October, in Le v. Nguyen, 2010 OK CIV APP 104, 241 P.3d 647 have said loudly and clearly that a" cardinal criterion for continuing joint custody is the agreement of the parties and their mutual ability to cooperate"[6], that "a party's opposition to joint custody.....is in effect the antithesis of the concept of joint custody", and that "when parents are unable or unwilling to execute parental duties jointly, a material change in circumstances has occurred such that joint custody must be

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[6] Le v. Nguyen, 2010 OK CIV APP 104, 241 P.3d 647, @ ¶ 27

modified and one parent must be given primary custody".[7]

I submit to you that based on the law, properly created joint custodians should never require a parent coordinator, and that the appointment of a parent coordinator in a joint custody case is suspect *ab initio*. I further submit to you that based on the law, that our courts should lack the discretion to award joint custody in a "high conflict" case. If this view were adopted by our judges, it would, perforce, require that our courts make regular sole custody determinations.

As a parenting coordinator, as a mediator, and as a family law litigator, I submit to you that is time, once again, to reconsider our direction. We are not social scientists. We are lawyers, trained to honestly and professionally advocate our client's positions. We are not trained to heal the mentally infirm, Are we honest with clients when we tell them, despite their opposition to joint custody, that a strong parent coordinator will resolve all of their problems and concerns? Are we honest with our clients, despite their disbelief, that custody is "just decision-making"? No matter the laws definition of custody, parents never the lose the notion that "custody" is unimportant. We will never separate ego from the notion of "custody" in the minds of litigants no matter how we define that concept in the law or in practice.

As a parent coordinator, I have approximately 30 cases, 90% of which are horrible joint custody plans, that had no business being created in the first place. I have had joint custodians cursing at each other, insulting each other, yelling at each other, and threatening each other in my office. This is pure toxicity, and you will never convince me that in such circumstances such parents ever were proper joint

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[7] *Foshee v. Foshee, 2010 OK 85, 247 P.3d 1162 @ ¶ 9.*

custodians.

I ask you, who are we serving? If our system's ultimate beneficiaries are the children of toxic joint custodians, we are harming the children by allowing their parents to settle, for whatever reasons, on joint custody.

I propose that each and every proposed joint custody plan be examined on the record, prior to its approval by the court, and, that in that examination, the court's inquiry of the parties establish factually to the court that both parents are in total agreement with joint custody; that they have an ability to communicate with each other even though they are no longer married; that they are mature enough to put aside their own differences; and that they will work together and engage in joint discussions with each other and make joint decisions regarding the best interest of their children. I further propose that if any of the behaviors identified in the definition of high conflict are present, that our courts boldly refuse to approve a joint custody plan.