TAKING CUSTODY, 1 2 3

For purposes of this article, custody may be "taken" when court action occurs to vest a party with custody, without the presentation of evidence. Default custody orders, custody orders arising from the dismissal of a case, and/or custody orders created by requests for admission which are deemed admitted, are considered in this context as a taking of custody.

Default judgments, although not favored by the law[1], are regularly employed by Courts to resolve cases and remove them from the Court's dockets. A judges' performance is often, at least in part, rated on how many cases the court removed from the docket, by trial, disposition or dismissal.

Title 12 O.S. §2008 (D) provides that "averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. "

Service on a party, pursuant to *12 O.S. § 2004* is the perquisite for a default judgment. *2004 (B)* mandates that the summons contain language to notify the defendant that if he fails to timely appear and defend, judgment by default "will be rendered against him for the relief demanded in the petition."

[1] Midkiff v. Luckey, 1966 OK 49, 412 P.2d 175 , Haskell v. Cutler, 1940 OK 485.

Pursuant to *Rule 10, Rules for District Courts*, second paragraph, "notice of taking default is not required where the defaulting party has not made an appearance." Most of Rule 10 deals with notice requirements when an appearance has been made by either litigant or counsel or when a pleading has been filed.

"In matters in default in which an appearance, general or special, has been made or a motion or pleading has been filed, default shall not be taken until a motion therefore has been filed in the case and five (5) days notice of the date of the hearing is mailed or delivered to the attorney of record for the party in default or to the party in default if he is unrepresented or his attorney's address is unknown."

A default judgment may also be entered for failure to prepare and file a scheduling order or pretrial order, failure to appear at a pre-trial conference, or appearance at a conference substantially unprepared, or failure to participate in good faith in a pre-trial conference. See, *Rule 5, Rules for District Courts*.

A default judgment may be entered as a discovery sanction, pursuant to *Title 12 O.S. § 3237 B. 2*.

A case with an existing custody order, interim or temporary, may be dismissed for lack of diligence in prosecution. See, *12 O.S. § 684*.

A custody order can also be reversed or dismissed because the Court or the law has deemed requests for admissions admitted pursuant to *Title 12 O.S. § 3236 A*. "The matter is admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the mater, signed by the party or by his attorney…" Subsection B of *3236* provides that "any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

Upon service, for example, of a motion to modify, if the receiving party fails to respond to the motion within 15 days, the motion may be deemed confessed, and a default entered based on that confession. See, *Rule 4 e. of the Rules for District Courts*.

The Oklahoma Supreme Court, in *White v. White, 2007 OK 86, 173 P.3d 78* reversed a court's granting of a motion to modify child custody that was granted based on the receiving party's failure to respond, pursuant to Rule 4e.

In *White*, the Supreme Court holds that the proof required under *Gibbons v. Gibbons, 1968 OK 77, 442 P.2d 482*, must be demonstrated, whether or not there has been compliance with Rule 4 e. The Court's reasoning was broad, and not strictly limited to situations arising under Rule 4 e.

"A custody modification involves the health, safety, and well-being of a minor child. At the same time, it impacts "the right of a parent to the care, custody, companionship and management of his or her child [which] is a fundamental right protected by the federal and state constitutions." In re Adoption of D.T.H., 1980 OK 119, ¶ 18, 615 P.2d 287, 290 (overruled on other grounds). **Thus, the parents and the child are entitled to an adversary hearing regarding the existence of a material change in circumstances and a considered determination of the best interests of the child. The best interests of the child can be determined only by the evidence actually presented in an evidentiary hearing. This matter must be remanded to the trial court for such a hearing**." [Emphases supplied]. See*, White v. White, supra, at ¶ 12*.

" A request for modification of child custody is far too important to be decided essentially by default under the Rules for the District Courts. Those rules were established to facilitate the adjudication of civil disputes, not to impede the presentation of evidence in a child custody dispute. " See, *White v. White, supra, at ¶ 13*.

While the holding of *White* can be limited to its presenting facts, (i.e., it is an abuse of discretion to grant a motion to modify a custody order in a contested proceeding based on Rule 4 (e)), the above cited reasoning seems sound, and generally applicable to all "takings" of custody. "The best interests of the child can be determined only by the evidence actually presented in an evidentiary hearing." "A request for modification of child custody is far too important to be decided essentially by default under the Rules for District Courts."

White holds that in every custody decision "the parents and the child are entitled to an adversary hearing regarding the existence of a material change in circumstances and a considered determination of the best interests of the child".

The Court of Civil Appeals, in *Guyton v. Guyton, 2011 OK CIV APP 92, 262 P.3d 1145*, reviewed the trial court's entry of a default judgment which occurred when father's attorney appeared unprepared and without a pre-trial conference statement as required by the pre-trial order. On appeal, father's attorney successfully argued *White v. White*, and its reasoning.

A recent decision from the Court of Appeals, *Martin v. Martin, 2004 OK CIV APP 55, 92 P.3d 717*, in reviewing a trial court's decision of a motion to modify custody, held that "we further conclude that a judgment totally without evidentiary support should not stand, particularly one without explanatory rationale giving the parents some basis for the court's conclusion."

A trial court has the discretion to interpret case law as it chooses. However, these three cases speak loudly that a custody decision without evidence will not withstand appellate scrutiny. As such, despite the opportunity for the lawyer to get a quick win for his client, and despite a

judge's desire to remove a case from its docket, counsel and the court should take special care to put proof on the record at a default or any other taking, sufficient to inform an appellate court that there was real evidence presented by which legal standards (e.g., Gibbons) for modification were satisfied.

Our court administrators should also carefully reconsider dismissing cases on disposition dockets when there are existing custody orders that could be disturbed by the dismissal, because the Court is taking action that will result in someone's loss of custody, and the Court is doing so without an evidentiary foundation.