

SUPREME COURT OF OKLAHOMA

Duke v. Duke

2020 OK 6 · No. 116221 · Decided January 22, 2020

SUMMARY

The Oklahoma Supreme Court affirmed a divorce decree awarding sole custody of the parties' child to the father. The Court held that review under the clear-weight-of-the-evidence standard requires the complete evidentiary record, including guardian ad litem materials relied upon by the trial court. Because the appellate record was incomplete, the Court declined to reassess the custody determination or the alleged consideration of the mother's fiancé's expunged domestic-abuse conviction.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                            |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Oklahoma                                                                                                                                                                                                                                                                                                                                                                  |
| WRITING FOR THE COURT | Edmondson, J.; Winchester, J.; Kane, J.; Reif, S.J.; Barnes, S.J.;<br>Gurich, C.J.; Darby, V.C.J.; Kauger, J.; Combs, J.                                                                                                                                                                                                                                                                   |
| JURISDICTION          | Oklahoma                                                                                                                                                                                                                                                                                                                                                                                   |
| DECIDED               | January 22, 2020                                                                                                                                                                                                                                                                                                                                                                           |
| DOCKET                | 116221                                                                                                                                                                                                                                                                                                                                                                                     |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                                                                                   |
| PROCEDURAL POSTURE    | Mother appealed a divorce decree awarding sole legal and physical custody of the parties' minor child to father. The Supreme Court retained the appeal for decision.                                                                                                                                                                                                                       |
| STANDARD OF REVIEW    | Statutory interpretation and alleged conflicts between statutes are reviewed de novo. In an equitable custody appeal, the decree is affirmed unless it is against the clear weight of the evidence, contrary to law, or contrary to established principles of equity. Review of a clear-weight-of-the-evidence challenge requires the complete evidentiary record used by the trial court. |
| PRECEDENTIAL VALUE    | Published precedential opinion                                                                                                                                                                                                                                                                                                                                                             |
| PARTIES               | Paige Taylor Duke v. Joshua Joe Duke                                                                                                                                                                                                                                                                                                                                                       |

TOPICS

- child custody
- family law procedure
- appellate procedure
- standard of review
- statutory interpretation

## PRACTICE AREAS

family law

child custody

appellate procedure

statutory interpretation

evidence

## QUESTIONS PRESENTED

1. Whether an appellate court reviewing a child-custody award under the clear-weight-of-the-evidence standard must review all evidence relied upon by the trial court.
2. Whether the absence from the appellate record of guardian ad litem reports and other evidence required affirmance of the custody decree.
3. Whether an expunged domestic-abuse conviction may be used to create the rebuttable presumption under 43 O.S. § 112.2.
4. Whether the trial court's consideration of evidence concerning mother's fiancé required reversal of the custody award.

## HOLDINGS

1. An appellate court reviewing whether a child-custody order is against the clear weight of the evidence must review all evidence used by the trial court in adjudicating custody.
2. When the complete evidence used by the trial court is not included in the appellate record, the clear-weight-of-the-evidence standard cannot be applied, and the district court's custody order must be affirmed when the parties had an opportunity to preserve the alleged error but failed to do so.
3. If mother's fiancé had an expunged domestic-abuse conviction, the conviction could not be used to create the rebuttable presumption under 43 O.S. § 112.2 because the expungement statute deemed the conviction never to have occurred.
4. Even assuming the trial court improperly considered evidence of the fiancé's prior conviction, reversal was not warranted on the incomplete record because mother could not establish prejudice in relation to all evidence considered by the trial court.

## KEY QUOTATIONS

*“When all of the evidence used by the trial court to adjudicate custody is not before the appellate court the clear-weight-of-the-evidence standard may not be applied, and if the parties had an opportunity to preserve the assigned appellate error in the trial and appellate record but failed to do so, the district court's order must be affirmed.” (¶ 40)*

## FACTUAL BACKGROUND

The parties sought divorce and sole custody of their six-year-old child. Because the parents lived in different cities, the trial court concluded that joint custody was not feasible and awarded sole custody to father. The trial court considered testimony concerning mother's fiancé, including allegations that he had previously been convicted of domestic abuse, and also relied on guardian ad litem reports that were not included in the appellate record. The trial and appellate records were incomplete, preventing review of all evidence considered in the custody determination.

## PROCEDURAL HISTORY

Joshua Duke filed for divorce and sole custody in the District Court of Logan County. After a bench trial, the district court dissolved the marriage and awarded father sole custody, along with provisions concerning visitation, child support, property, insurance, and medical expenses. Paige Duke appealed, challenging the custody determination and the trial court's consideration of her fiancé's alleged domestic-abuse conviction.

## DISPOSITION

affirmed

## CASES CITED

- Osage Nation v. Bd. of County Comm'rs of Osage Cnty., 2017 OK 34, 394 P.3d 1224
- Worsham v. Nix, 2006 OK 67, 145 P.3d 1055
- Matter of Estate of Vose, 2017 OK 3, 390 P.3d 238
- Green v. Oklahoma Tax Commission, 1940 OK 360, 107 P.2d 180
- Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n, 2007 OK 55, 164 P.3d 150
- In re M.K.T., 2016 OK 4, 368 P.3d 771
- Braitsch v. City of Tulsa, 2018 OK 100, 436 P.3d 14
- Christian v. Christian, 2018 OK 91, 434 P.3d 941
- In re City of Durant, 2002 OK 52, 50 P.3d 218
- Laubenstein v. Bode Tower, L.L.C., 2016 OK 118, 392 P.3d 706
- McGinnity v. Kirk, 2015 OK 73, 362 P.3d 186
- Foshee v. Foshee, 2010 OK 85, 247 P.3d 1162
- Hedges v. Hedges, 2002 OK 92, 66 P.3d 364
- Bankhoff v. Bd. of Adjustment of Wagoner Cnty., 1994 OK 58, 875 P.2d 1138
- Raymond v. Taylor, 2017 OK 80, 412 P.3d 1141
- Antini v. Antini, 2019 OK 20, 440 P.3d 57
- Mustain v. Grand River Dam Authority, 2003 OK 43, 68 P.3d 991
- In re Initiative Petition No. 397, State Question No. 767, 2014 OK 23, 326 P.3d 496
- Wylie v. Chesser, 2007 OK 81, 173 P.3d 64
- Kahre v. Kahre, 1995 OK 133, 916 P.2d 1355
- Phillips v. Thompson, 1964 OK 18, 389 P.2d 473
- Maras v. Smith, 1966 OK 231, 420 P.2d 483
- Callison v. Callison, 1984 OK 7, 687 P.2d 106
- Matter of J.L.O., IV, 2018 OK 77, 428 P.3d 881
- Covell v. Rodriguez, 2012 OK 5, 272 P.3d 705
- Rogers v. Citizens National Bank in Okmulgee, 1962 OK 176, 373 P.2d 256
- Lee v. Bueno, 2016 OK 97, 381 P.3d 736

- Young v. Station 27, Inc., 2017 OK 68, 404 P.3d 829
- Crest Infiniti II, LP v. Swinton, 2007 OK 77, 174 P.3d 996
- Boughan v. Herington, 1970 OK 125, 472 P.2d 434
- Marshall v. Marshall, 1976 OK 127, 555 P.2d 598
- Kohler v. Chambers, 2019 OK 2, 435 P.3d 109
- In re M.K.T., 2016 OK 4, 368 P.3d 771
- Kelley v. Kelley, 2007 OK 100, 175 P.3d 400
- Rowe v. Rowe, 2009 OK 66, 218 P.3d 887
- La Bellman v. Gleason & Sanders, Inc., 1966 OK 183, 418 P.2d 949
- Oklahoma City v. Robinson, 1937 OK 16, 65 P.2d 531
- Chamberlin v. Chamberlin, 1986 OK 30, 720 P.2d 721
- Gorham v. Gorham, 1984 OK 90, 692 P.2d 1375
- Daniel v. Daniel, 2001 OK 117, 42 P.3d 863
- Ray v. Ray, 2006 OK 30, 136 P.3d 634