

Unofficial Transcript
Court Hearing for Case FC2002-██████████
August 16, 2010
1:31 PM through 2:53 PM

Judge Klein: This is the time set for the hearing on FC2002-██████████, Petitioner and ██████████, Respondent. We are here for an evidentiary hearing on Mother's motion to modify custody, parenting time and child support. Would the parties identify themselves, along with counsel?

██████████, counsel representing ██████████, who is present and seated to my left.

J: May I ask the parties to both stand so we can swear you in.

Clerk: (Gave the oath, but it was not loud enough to record.)

T and D: I do

J: You may be seated. (pause) The way I like to do my trials is first see whether it's possible at all that I can help facilitate an agreement. I always believe and I'll believe it until I get off this assignment that if the parties themselves can reach an agreement with a little prodding by the judge, you'll both be somewhat happier than if you just present your case and let me make my findings. If I do, one of you, I guarantee, you will be disappointed. If you both participate, you may both not be happy, but the disappointment that one of you feel if you lose will be lessened. Now I'm smart enough to realize that there are some cases that no matter how hard I try, can't settle. I don't know if this is one of them, but I have some reservations. You had a settlement conference; you had a parenting conference with children interview. That didn't work and I don't think I'm such a great settlement conference judge that I can pull a rabbit out of my hat, but I do have a couple of suggestions. If the suggestion I make isn't palatable, you can tell me and all I do is waste 30 seconds of the time. But here's my thought. Sometimes one parent is against the notion of changing joint legal custody because they think somehow in their minds that if they give in then it becomes sole custody -- they give up their right to be a parent. Or that it means they are less of a parent. That's not true, but it doesn't mean those feelings aren't real. Now what I find is that sometimes parents who are hung up on sole versus joint custody agree to keeping joint custody, but one of the parents has the right to make the final decision on major issues, if and only if you try to agree between yourselves and can't come to a good-faith resolution, then one of you gets to make the final decision. It's called joint custody with the right of one of you to make the final decision on major life issues if you can't otherwise resolve it. That's all it is. It means that you have to confer as always. It means that you have to in good faith keep each apprised. It means that both of you get to go to all parent-teacher conferences, all medical appointments. You get access to all medical records and educational records. Get to confer jointly in all educational decisions, religious decisions, nudist decisions. But if you can't reach an agreement, then one of you is designated as the one that makes the final decision.

The only reason that I throw that out is because the parenting conference provider said she doesn't see any reason to change joint custody. The only disagreement is over the nudist issue. Mom has said that you are having some real difficulty communicating but that the real issue is the nudist issue. So I'm just throwing out something that I haven't seen in any of the reports. Would any agreement along those lines sound palatable to either one of you?

N: Actually, Mother and I have spoken about that and, yes, that would be fine with us.

D: Your Honor, the only real issue that, you know, in parenting, that we are **not** in agreement on at this point is the nudist issue. Uh, health care, religious, all other activities, uh, I don't have any problem with. I may not agree with everything, but it's not a major issue. So, yeah, I would consider that as well.

J: OK, you realize though, if you agree, it basically means that she would have to discuss with you those decisions, and you have your beliefs as to why there needs to be adult supervision, and she has her beliefs as to why it is as safe as any other activity, and if you can't agree, she'd get to make the decision. So . . .

D: I do have reservations on that fact, your honor.

J: But that is, if we make that agreement, you need to understand that she would have the final say. She cannot simply pay lip service to that designation. She can't say to herself, "You know, since I get to make the final say, why don't I just bypass all this good-faith discussion and just go right to the decision." She can't do that. In fact, I've had cases where one parent has tried to do that -- it is brought to my attention, and I'll change the agreement if I see that. So it truly is a good-faith effort to communicate and a good-faith effort to reach decisions, but if you can't, after trying, one of you has to make the call, and, let's face it, let's deal with the big elephant in the room. We're talking about the nudist decision. Otherwise, I'll have to make the decision which one of you gets to make the decision. So, that's really what we are talking about. In

fact, would you even be willing, Mom, if joint custody was retained exactly as it's been except as it comes to **nudist** decisions, if you can't reach agreement, you get to make the decision.

N: To [REDACTED]: So you get to be the decision maker on the nudist issues, everything else remains a joint decision.

T: I have concerns, though, that we have had issues in the past, both on education and on the medication and it's been a real struggle the last few . . .

J: OK, one thing I can do -- I'm just throwing ideas out -- Is put a provision that you might not have now, which is if you can't agree after good-faith effort, you must go to mediation. So there is a conciliation specialist, and you can get to see them two weeks after you file, who will help you work it out. Then if you can't, you can always come to the court. So It's not like if you can't agree there is a dead end. But it sounds like despite disagreements, despite the frustration, you have been able to agree.

T: And I don't see it that way because I have had to back off and struggle with things through because there is not that communication. As we met with the mediator, instead of being able to sit down and talk, that didn't happen. He got mad and left.

D: Excuse me, excuse me. [overtalk from both [REDACTED] and the judge]

J: Trust me. I understand this is her position, that's all it is. I don't automatically assume whatever I hear in this court is the gospel. Go ahead.

T: And all I'm saying is I've seen that kind of communication, and so my concern is I don't want coming back here on a regular basis to try to get something taken care of, uh . . . That's what I was trying to get here today. I totally agree that I am willing to do the joint custody if after I've worked with him, and we cannot come eye-to-eye, that because I am so involved with the kids, I think I should be the one who makes the final decision.

J: Alright. Dad, your -- your feelings.

D: My point about the mediation was I was willing to discuss the situation and had offered some potential solutions and ways that we could progress with mediation -- uh, [REDACTED] and her counsel were not willing to make any conciliation whatsoever. At that point the mediator informed me that he didn't think it was possible for us to reach an agreement and asked me to leave before he notified them so I did not have to meet -- see --, you know, come face-to-face with them in the lobby.

J: OK. What do you think then about her suggestion paired with my suggestion that we don't change custody at all, but if you can't agree after making a good-faith effort to do so, she makes the final decision?

D: Your honor, for the most part, that is what it has been. You know, I have given in on several things, on activities for the boys -- uh, she's given in on some as well. You know, we have reached the agreements. You know, maybe not easily, maybe not calmly or at low volume -- uh, but we've reached the agreements.

J: I, I understand that.

D: But **the one standing piece is the nudist activity.**

J: I understand, but what she's . . . I proposed the notion of joint custody, but she gets to make the final call if you can't otherwise agree. She said, "Yes, I'd be willing to do that," so . . .

D: I would prefer to go with the mediation route -- uh, if we could not reach that.

J: **OK, what about if she had the final decision on the nudists, though. [long pause] That's really the reason we're here. There are other issues, but that's the fundamental reason. That's what brought this to my attention in the first place. That one you are not going to agree on.** And if mediation . . .

D: [long sigh]

J: isn't going to help solve it, your fundamental differences . . .

D: [a few frustrated fits and starts to say something] On that one, no it's not. You know, this has been a situation that's been going on for several years now at this point. Within a year, [REDACTED], my oldest, will be able to make his own decision on that when he's 18. Uh, I think there's real problems that have been encountered. Uh . . .

J: I understand, we've been over those.

D: Uh, yeah, yeah . . .

J: I know what they are.

D: **Your honor, one of the points that you made in our previous meeting was that, you know, they can encounter this in school, in church, nudist activity . . .**

J: sports events . . .

D: . . . sports events – and I agree. They can. The facts of this matter is that in a nudist activity they **have**. It is not that the **potential** exists, it's the reality that they have encountered . . .

J: The reason I said that is because I've been on a four-year criminal assignment two assignments ago where I had teachers who were accused of molesting students. I had – uh, coaches who were accused of molesting students. I had pastors who were accused of molesting parishoners. They plead guilty. It wasn't a case where it **can** in those instances. No, it had. We have to. . .

D: But not to my children.

J: What happened in this case is that the checks and balances that were installed worked. There was a problem that nobody knew about. It was intercepted, as I understand. The gentleman who tried to contact your son was then arrested by authorities, and there was a parole violation. This didn't go undetected.

D: It was detected by the efforts of [REDACTED] of the mother, of the parent.

J: But wasn't a note or a letter sent initially to the nudist group in Arizona? Isn't that where the letter went? And they alerted Mom. This letter . . . this happens in California, the gentleman who was involved sends a letter from California . . .

D: to, to my son.

J: . . . to the Arizona chapter. The first thing they do is say, "This doesn't smell right." They pass it on to Mom. "What you want to do?" And Mom says, "This concerns me." They then contact authorities. The authorities look this guy up and say, "Whoa! He is an alleged – no, he's a convicted . . . uh, sex offender." And they arrest him for a parole violation. Everything that was supposed to happen in the system did. The cases I had in criminal court, the system **did not work. The schools hired these people. The sports teams hired these coaches. The churches hired these pastors. They gave the trust of their students. They gave the trust of the parishoners. They gave the trust of the athletes. And they abused it and committed a crime. All I'm saying is it can happen anywhere. But in this case, nothing happened. So, while I agree with you it's a concern, it sounds like they're vigilant. It sounds like they're conscious of these potential problems and they work to stop it. If anything, you could make the argument because this happened, there's now heightened awareness and the scrutiny is even better than it used to be.**

D: Perhaps there is. Um, the point remains that this individual was at one of these facilities. So, the . . .

J: In California, in Arizona . . .

D: In California, not Arizona. You know, the fact remains that in the club in Arizona there was another incidence (sic), uh, the process failed in those cases. You know, [REDACTED] and I as parents failed as well in the first case. The first individual we considered a friend. We did not know the background. [pause] So, you know, yes, the potential is there anyway. Ah . . . [pause]. . . I guess, I guess, the way I would probably describe this would be by example. If I were a business man and owned three businesses – a church, a school, a nudist club –three convenience stores, whatever, you may call them. You take precautions to protect the facilities, your wares, the business. If one of those businesses is robbed repeatedly, the proven thing to do was implement additional controls, additional security at that. The alternative is to close that business. **I see the benefit to the boys in body acceptance and – and – and feeling good about themselves in nudity.** The fact is that one business has been robbed – twice – so the proven thing is to identify the problem and institute additional controls.

J: The boys are also a lot older. The risk of anything untoward happening to them is a lot less with one of your sons just about to turn 17 and the other one not too far removed from being 15. You know, the first incident you talked about, as I understand it, happened in 2006. So at that time [REDACTED] was a lot younger – he's 12 years old. Now he's almost 17, [REDACTED]'s almost 15. It seems to me that they can. . . that they're an age where they can pretty much take start taking care of themselves. They're pretty much at an age where they know right from wrong, and, you know. I'm sure they are nice young men, and if they see something happening – they're not as naïve or as gullible or as vulnerable, even, as somebody that much younger.

So get's back to . . . I mean, we're here for a trial and that's what we're going to do that, but do you want to accept even tweaking, not that she even agrees yet, joint custody with the right to jointly make decisions except as it comes to nudism –

you'll let her make the final decision as long as she listens to your views and lets you healthily -- in a healthy manner --, explain them, and then if she doesn't agree, she can make the final decision.

D: I guess.

J: He says he guesses. I take that as a "yes." Is that something you want to agree to?

D: Yeah.

J: I take no position except to say that is what the parenting conference provider kind of recommended. It doesn't mean you've given up your right to get the court involved, it doesn't mean you've given up the right to get a third party involved. It would just take a little longer and it would be a more circuitous route because you'd have to first have a mediator, and, like I say, you can get into mediation within two weeks after you request it. Then if that didn't work, you could file something with the court. I recognize that communications are not as good as they once were. I can't do anything about that. It may never change. I don't know. But, you have to try.

T: [Very quiet, mostly unintelligible – concerned things that ██████ has not done to try to communicate, but I simply could not hear it all]

J: I'll tell you what I'm prepared to do today. While you have my attention, also while you have my time, I am prepared to make rulings on certain issues, for example: I will tell you that I have a history in this assignment of ruling that when it comes to diagnoses of ADHD and other psychiatric or psychological diagnoses by mental health professionals, I rule that the parents **must** follow the advice of the specialist. Neither one of you gets to decide that you disagree with the specialist. If you do, you file something with the court. I don't even know which one of you believes the diagnoses, which one of you doesn't, which one of you believes in the medication regimen, which one of you doesn't, but my feeling is if that's what a specialist that you went to recommends, that's what you follow, unless you can convince the court or mediator why its not in the children's best interest. I mean, I'll listen to what you both say, but I'll make a ruling on those issues today, because I'm very sensitive to kids who have ADHD. I believe it is a real diagnosis and if the schools and the psychiatrist think that they can benefit from medication, I'm all for it. I mean, we can go issue by issue and I'll give you my rulings today on those.

T: [too quiet to transcribe]

N: [too quiet to transcribe]

J: But if you disagree, I mean, I'm -- I'll take whatever issues you have right now and I'll tell you my thought and put it in an order and then neither of you can violate that order without coming back to court and you can tell me what we're dealing with, whether it's education, IEP, whether it's psychiatric diagnoses, whether it's medication prescriptions. We'll go through every one of them one by one. But you can't get around the fact that the ?? provider did who interviewed both of you said that I think we should keep joint legal custody with the exception of, of the nudist issue. In the legislature this past year, just changed the statute – I think it was 25-103 where they said that it is in children's best interests to be raised by both parents.

T: And I do agree [the rest is too quiet to transcribe] It's just frustrating to me that he doesn't show up for their eighth grade graduation, doesn't show up for their high school evaluation, [more too quiet]

J: I know, I can't – we can't – change that. He either is or he isn't. That's a choice he makes and he'll have to deal with it down the road. If he doesn't have a relationship with his children in later years.

D: May I, may I . . . ?

J: Well, I'm just saying that, if that's true, he has to live with the consequences. It still doesn't get around the fact that he has a right to participate in the decisions, even if he's not around to see the finished product. But I'm willing to take every issue that you guys want to talk about and make orders. I'm simply asking if you're willing to accept that you continue to make decisions jointly except on nudism. As for that, you can make the final decision. That's all. That's all I'm talking about.

T: [too quiet to transcribe, was asking the judge a question]

J: I'll take up as many issues today as you want to present to me – both of you. I'll make whatever rulings I think are in the children's best interests. Whether it's education or whether it's medication or whether it's medical, I believe that you trust the people who are specialists in that area. Just like if the educators said, "I think that ██████ needs to be in a special class." I can tell you right now that if that was their advice and if the two of you disagreed, I'd probably go with the advice of the educator.

D: And, and we have. You know, despite ██████ claims right now, I've been to many of the IEP meetings, you know, for the boys and have not disagreed with any of the findings.

J: I'd even put in the court order, if you guys want, that if there are specific recommendations made by a professional whose judgement you seek out, then you must follow those recommendations, and if you don't agree with them, you have to go to mediation and then file something with me, but their recommendations would hold.

D: And, your honor, the other point that was made was in the boys' medication and the psychiatrist. Yes, there was one psychiatrist – I've been to many of the meetings with the boys. I did not particularly find her **method** – now my degree is in psychology – I did not find the method that she was using to be appropriate, I mean, you know, sitting down and playing UNO with the boys. You know, well, possibly a good diagnostic tool for a five or six year old. I didn't find that appropriate. I made the recommendation to ██████ that I knew of another psychiatrist-- that perhaps you might want to, you know, have an appointment with him and take a look at the different styles. She did so, and has been seeing him. I have not, you know, I have my personal feelings about ADD and ADHD and how it's overdiagnosed, but I have **never** said to, you know, the boys, "Don't take the medicine that the doctors have recommended." So, you know, I would agree with the provision that, yes, we follow the recommendations of the doctors. If we do not [pause]

J: You have to follow them, but you still have the right to go to mediation. . .

D: Yes

J: . . . and the right to file something with the court. In other words, if there's a recommendation from a specialist, you can't just shop it around. Your first order is to follow it. Then you can seek redress from the courts.

D: Right. And, and that was basically what we did without the courts, your honor. [pause] You know, I disagreed with the one particular method, we got another. It is . . .

J: And you are welcome to get second opinions, I have no problem with that. Um, so what do you think?

T: So, I'm understanding that I'm going to have to talk to ██████ about nudism. but I would have that authority. Everything else, if we disagree, would go to mediation.

J: That is correct, that's correct. But I'm going to carve out some areas where there may be disagreements now, and we're going to put them in the order, and we'll be even more specific than just being generic. For example, if there is a specific recommendation already regarding medication or already regarding some type of counselling or already regarding some type of educational specialization. I'll listen to what you both think and I'll put an order in effect so that you know that that is the law of the case and if either of you want to do something different, you first discuss it with the other. If you can't reach agreement, you go to mediation. If that doesn't work, you file something with me. My belief is if we can address every issue head-on now and put it in the order, probably we are 90% of the way home.

N: But in the interim, you follow the recommendation of the specialist? What they have in place now.

J: Yeah [followed by some cross talk among ██████, ██████ and the judge.]

D: I don't have any disagreements with what the specialists have recommended now . . .

J: We'll put those all in the order so we're talking the same language. Can you agree to that?

T: Yes, sir.

J: And, Dad, can you agree to that?

D: Yes.

J: Then the court finds that the two of you have reached an agreement that you will **continue** the joint legal custody arrangement that is currently in effect for both children, except for one issue, and that issue is as it relates to the kids participation in nudist activities. You still have to confer in good faith, but if you can't reach agreement, Mother gets to make the final decision on that. As to all other issues, such as education and medical and medication, you will confer jointly. You will try to reach decisions jointly. If you can't reach decisions, you've agreed to mediate before you have access to the courts. The court finds that you've made those agreements knowingly, voluntarily and intelligently. The court finds those agreements to be fair and reasonable and in the best interests of the children. The court also finds that those decisions are binding agreements under rule 69 of the Arizona Rules of Family Law and Procedure.