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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

NO. [redacted]

IN RE THE MARRIAGE OF [redacted],

Petitioner/Appellee

v.

[redacted],

Respondent/Appellant

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APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA
THE HONORABLE RODNEY SPARKMAN, JUDGE
Tulsa County Case No. [redacted]

NATURE OF ACTION: CHILD CUSTODY/CONSTITUTIONAL RIGHTS

BRIEF IN CHIEF OF APPELLANT

[redacted]

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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INTRODUCTION

This case arises out of a divorce and child custody proceeding. The named parties are Petitioner/Appellee [redacted] ("Father") and Respondent/Appellant [redacted] ("Mother"), but the interests of their minor children are very much at stake.

Father and Mother are of different religious faiths. When they were married, Father and Mother agreed to raise their two children in Mother's faith tradition. The two children have distinctive names that reflect Mother's faith tradition.

Father has now converted back to his pre-marriage religion. Father was awarded sole legal custody of the children. As a result, Father can—in large measure—control the children's religious education. There are signs that the children are rejecting Mother's faith. They are not yet teenagers.

Mother shares physical custody of the children. Mother acknowledges and recognizes Father's right to have input into the children's religious education. She wants to be able to exercise the same right herself—a right to acquaint her children with her faith tradition so that, when they come of age, they can make a meaningful choice.

The trial court denied Mother's right to have input into the children's religious education, even though that right is protected by the United States Constitution, the Oklahoma Constitution and the Oklahoma statutes. Curiously, the trial court consistently ruled as if someone were asking it to choose between Mother's religion and Father's religion.

The trial court also completely excluded the testimony of Mother's sole expert witness, on *Daubert* grounds. *Daubert* does not require complete exclusion of expert testimony in the context of a custody hearing. A custody hearing is a bench trial. There is no need for a trial judge to play the role of a *Daubert* "gatekeeper" when the trial judge is the factfinder.

ISSUES PRESENTED ON APPEAL

1. WHETHER MOTHER HAS A RIGHT TO HAVE INPUT INTO THE RELIGIOUS EDUCATION OF HER CHILDREN UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

2. WHETHER THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH MOTHER'S FREE EXERCISE OF RELIGION WHEN IT FAILED TO PERMIT OR ALLOW MOTHER TO HAVE INPUT INTO THE RELIGIOUS EDUCATION OF HER CHILDREN?

3. WHETHER THE TRIAL COURT VIOLATED THE OKLAHOMA RELIGIOUS FREEDOM ACT WHEN IT FAILED TO PERMIT OR ALLOW MOTHER TO HAVE INPUT INTO THE RELIGIOUS EDUCATION OF HER CHILDREN?

4. WHETHER THE TRIAL COURT IMPROPERLY FAILED TO CONSIDER RELIGION AS A PART OF ITS CHILD CUSTODY DECISION?

5. WHETHER THE TRIAL COURT IMPROPERLY GRANTED FATHER'S ORAL MOTION TO EXCLUDE THE EXPERT TESTIMONY OF DR. SOL RAPPAPORT?

6. WHETHER *CHRISTIAN V. GRAY* PERMITS A TRIAL COURT TO COMPLETELY EXCLUDE EXPERT TESTIMONY AT A BENCH TRIAL?

SUMMARY OF THE RECORD

This summary is based primarily upon the Findings of Fact and Conclusions of Law filed on April 8, 2014 (the "Findings") (R. at 90) and the transcript of the hearing held on January 27, 2014, through January 29, 2014 (the "1/27/14 Tr.", the "1/28/14 Tr." and the "1/29/14 Tr.").

A. OVERVIEW

Father and Mother were married on October 2, 2004, in Florida. *See* Findings at 2 (¶ 1); R. at 91. A Decree of Dissolution of Marriage was entered on June 24, 2014 (the "Decree"); R. at 172. A trial was held on January 27-29, 2014. *See* Findings at 1; Decree at 1; R. at 90, 172.

After the trial, the trial court entered the Findings. Among other things, the trial court found that Father should have sole custody of the minor children—[redacted] and [redacted] *See* Findings at 35 (¶ 214), *citing* 43 O.S. 2011, § 112; R. at 124. *See also* Decree at 3 (¶ 9) (to the same effect); R. at 174.

B. THE TRIAL COURT SUSTAINED FATHER'S OBJECTIONS TO TESTIMONY REGARDING RELIGION

The trial court ruled as follows on the first day of the trial:

> The Court is not going to decide what religion the minor child's brought up in. That's not an issue for this Court. The parents, once I decide the custody issues, they can decide. I'm not going to pick one religion over another.

1/27/14 Tr. at 149, lines 4 through 8.[1]

As a general matter, the trial court limited and prohibited questions by Mother regarding the religion and religious practices of the parties, their children and Father's live-in girlfriend.

---

[1] No one asked the trial court to choose the children's religion.

See 1/27/14 Tr. at 148-150 (permitting limited inquiry); 151-152 (sustaining objections); 153 (overruling and sustaining objections); 227-228 (sustaining objections); 1/29/14 Tr. at 66-67 (sustaining objection). The trial court made its broad ruling regarding religion in response to a relevance objection by Father's attorney (Mr. Raynolds) 1/27/14 Tr. at 148, lines 22 to 25. Counsel for Mother responded that religion was "a major area of custody and ...highly relevant." *Id.* at 149, lines 2-3.

Counsel for Father (Mr. Raynolds) asserted:

> We got [sic] a couple of cases that prohibit inquiries about faith. One is Shaw v. Hoedebeck, 1997 CIV APP 69 [*i.e, Shaw v. Hoedebeck*, 1997 OK CIV APP 69, 948 P.2d 1240]

1/27/14 Tr. at 151, lines 8 to 10.

Father's objections to questions about religion were joined by Lora Howard, an Assistant Public Defender who acted as attorney for the children at the hearing. *See* 1/27/14 at Tr. at 153, lines 19-20. Ms. Howard took no interest in the religion or religious upbringing of the children. *See, e.g.*, Minor Children's Closing Argument: Proposed Findings and Conclusions, filed March 11, 2014 (¶¶ 1-4) (no reference to religion); R. at 88-89.[2] The Findings do not mention religion (other than holiday visitation). *See* Findings at ¶¶ 1-240; R. at 90-131. The Decree does not mention religion (other than holiday visitation). *See* Decree at ¶¶ 1-30; R. at 73-185.

C. MOTHER AND FATHER PRACTICE DIFFERENT RELIGIONS

Mother is Muslim. *See* 1/27/14 Tr. at 78, lines 15-16 (Testimony of Father); 1/29/14 Tr. at 65, lines 22-24 (Testimony of Mother). Father was Christian at the time of the hearing. *See* 1/27/14 Tr. at 78, lines 13-14.

---

[2] As an Assistant Public Defender, Ms. Howard is an employee of the State of Oklahoma.

When Father was married to Mother, he was a Muslim. "At the time of the marriage I participated in the Muslim faith with Sarah [*i.e.*, Mother], yes." 1/27/14 Tr. at 150, lines 6-7. During the marriage, the children were being raised as Muslims. *See* 1/27/14 Tr. at 150, line 22 to 151, line 1. They have Muslim names. *See* Findings at 2 (¶ 3); R. at 91.

Father is no longer committed to raising the children in the Muslim faith. *See* 1/27/14 Tr. at 151, line 6 to 153, line 21. At the time of trial, prior to the entry of the Decree, Father had a live-in girlfriend—Amy Wykoff ("Wykoff"). *See* 1/27/14 Tr. at 78, lines 2 to 12. Father had a child with Wykoff in January 2014, prior to the hearing in the captioned case. *See* 1/27/14 Tr. at 54, line 23 to 55, line 5 *and* 78, lines 2 to 12. Father has lived with his girlfriend (Wykoff) since 2011. *See* 1/27/14 Tr. at 55, lines 2 to 5.

The Muslim religion does not permit adultery. *See* THE QUR'AN 17:32 (Oxford University Press 2004, 2005, 2010) ("And do not go anywhere near adultery: It is an outrage, and an evil path.") (hereinafter, the "Koran"). Wykoff has taken Mother's children to her church—a Baptist church—without Mother's knowledge. *See* 1/29/2014 Tr. at 37, lines 8 to 19. Father did not inform Mother of that action, or discuss it with her. *Id.* The following testimony by Mother is undisputed:

> There have been many times that Matthew [*i.e.*, Father] has told me she's [*i.e.*, Wykoff's] a better mother than you. And he basically has shown that he's wanting to give her [*i.e.*, Wykoff] preference about how the children are raised.

1/29/14 Tr. at 37, lines 4 to 7.

D. MOTHER WOULD LIKE TO HAVE INPUT INTO HER CHILDREN'S RELIGIOUS EDUCATION

Mother would like her children to be able to attend classes where they can learn about Islam and learn Arabic. *See* 1/29/2014 Tr. at 66, lines 2 to 10. *And see* 1/29/14 Tr. at 121, lines

2 to 21 *and especially* lines 20 and 21 ("I believe that his [*i.e.*, Hamzah's] religious training is an important part of his upbringing"). Mother said:

> And I would like to be able to have some decision making regarding the classes that—I mean, their religious education, some input on that.

1/29/14 Tr. at 67, lines 6 to 8. Mother said she would be willing to work with a parenting coordinator as to "religious upbringing." 1/29/14 Tr. at 67, line 24 to 68, line 3.

The trial court was not interested in Mother's preferences regarding the religious education of her children:

> I've already said I'm not going to pick one faith over another and order that faith be followed or any faith be followed. So if the request for me is to order that child or these children attend certain classes for a particular faith, **not going to happen**.

1/29/14 Tr. at 66, lines 20-25 (emphasis added).

As previously explained, a state employee (Lora Howard) was appointed to represent the interests of the minor children. The state employee interrupted Mother when she attempted to express concerns about the religious education and upbringing of her children:

> Q. The last thing I really want to talk to you about is the idea of a parent coordinator. I get the impression that you kind of have an issue with this person interjecting into the decision making process. Is that the case?
>
> A. I haven't gone through that process. I'm probably a little bit wary of it, but I mean, I'm willing to give it a try. I would prefer to be able to make decisions for my own children. I would prefer that Matthew and I consult as much as possible. And then where possible, you know—you know, I feel like I've made – I feel like we agreed when we were married he was Muslim, I was Muslim.
>
> Q. **Ma'am, we're not going to talk about religion.**
>
> A. Okay.

Q. **The Court's not going to rule on religion.** What I'm asking you, I understand that you would prefer it to be a certain way. Would you agree with me that it seems fairly clear that you and Matthew are not in agreement on several issues at this point?

A. Yes.

Q. Okay. And what are your concerns about having a parent coordinator involved in the decision making process?

A. Probably my biggest concern is over religion, because I'm not sure –

Q. **And, again, we're not going to be discussing religion.**

A. Yeah, but that would be something that a parent – if a parenting coordinator was given those rights to decide on religious activities or education, that would be kind of –

Q. That would be your major concern?

A. -- touchy. Yeah.

1/29/14 Tr. at 147, Line 18 to 148, line 21 (emphasis added).

E. MOTHER SUBMITTED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING HER DESIRE FOR INPUT INTO HER CHILDREN'S RELIGIOUS EDUCATION

Mother submitted proposed findings of facts and conclusion of law on February 28, 2014 ("Mother's Proposed Findings"); R. at 13. Paragraph 1(b) on page 1 of Mother's Proposed Findings states:

> There are substantial differences in cultural background and **religious faith** that require a joint custody plan for both parents to co-parent [sic] in their respective **religious beliefs** and Respondent [*i.e.*, Mother] should be allowed to have the visitation of the children for classes to educate them in the **Islamic faith** and/or **attend worship at the Mosque**.

(emphasis added).

Paragraph f on page 6 of Mother's Proposed Findings states:

> The Court must consider the **religious preference** of the Respondent [*i.e.*, Mother] as Petitioner [*i.e.*, Father] had agreed to raise the children in the **Islamic faith** but subsequently has converted to **Christianity** with Amy Wycoff; that Respondent's Father and her sisters and their children are members of the **Islamic faith** and Petitioner and Amy Wycoff are not likely to foster religious training in the **Islamic faith**.

(emphasis added; citing *Hoedebeck v. Hoedebeck*); R. at 18.[3]

[redacted] made disparaging remarks about the Muslim religion to his mother. *See* 1/27/14 Tr. at 182, lines 18 to 24:

> Q. [by Mr. Raynolds] Do you recall the question: What are you [sic] weaknesses as a parent?
>
> A. [by Mother] Yes, my weakness is struggling to deal with son, especially when he's coming home to me with really negative comments after being with his dad. **Sometimes he comes to me saying derogatory things about Islam and what's wrong with Muslims**, and I struggle with that and I try to keep a positive attitude about Christianity and Islam in his mind, but it's very difficult.

1/27/14 Tr. at 18, lines 16 to 24 (emphasis added).

F. THE TRIAL COURT BASED ITS DECISION TO AWARD SOLE LEGAL CUSTODY TO FATHER BASED UPON THE TESTIMONY OF DANIEL STOCKLEY—THE CHILD CUSTODY EVALUATOR WHO RECOMMENDED JOINT CUSTODY

Father called Daniel Stockley ("Stockley") as an expert witness. *See* 1/27/14 Tr. at 4. Stockley is a child custody evaluator. *See* 1/27/14 Tr. at 5, lines 1 to 4. The trial court relied on Stockley's testimony in awarding legal custody of the minor children to Father. *See* Findings at 27 (¶ 179), 28 (¶¶ 187 and 188), 29 (¶¶ 190-195), 30 (¶¶ 196-203) and 31 (¶ 203); R. at 116-120.

---

[3] *Hoedebeck v. Hoedebeck* is another name for *Shaw v. Hoedebeck*. "Considering" Mother's religious faith is not the same as "imposing" Mother's faith.

Stockley testified that his child custody evaluation "protocols" were based on protocols developed by the American Psychological Association (the "APA") and the Board of Examiners of Psychologists of the State of Oklahoma. *See* 1/27/14 Tr. at 6, lines 11 to 17.

Stockley testified that "[h]aving a live-in girlfriend prior to the divorce being finalized for me is a complicating variable." 1/27/14 Tr. at 96, lines 16 to 17.

Stockley testified that there was "inadequate data available in regard to the allegations" that Father had sexually molested his daughter. *See* 1/28/14 Tr. at 37, lines 3-4. Stockley said the DHS studies were inconclusive.

> Absent any additional information other than the child's alleged utterances, I don't believe that the science is available to help us determine what may have happened that far back to a child of that age.

1/28/14 Tr. at 39, lines 3 to 6.

Stockley ultimately concluded and recommended that Father and Mother should be awarded joint custody of the minor children. *See* 1/28/14 Tr. at 143, line 21 to 144, line 13. The trial court ignored Stockley's recommendation and awarded sole legal custody of the minor children to Father. *See* Findings at 35 (¶ 214); Decree at 3 (¶ 9); R. at 124, 174.

G. THE TRIAL COURT EXCLUDED THE TESTIMONY OF SOL RAPPAPORT--MOTHER'S SOLE EXPERT WITNESS

Mother called Sol Rappaport ("Rappaport") as an expert witness. *See* 1/29/14 Tr. at 3-20. Rappaport has a Ph.D. in psychology. *See* 1/29/14 Tr. at 4, lines 16 to 18. Mother intended to ask Rappaport to criticize Stockley's methodology. Father's attorney (Mr. Raynolds) objected, citing *Daubert*. *See* 1/29/14 Tr. at 5, lines 14 to 17.

The trial court granted Father's oral *Daubert* motion, and Rappaport was not permitted to testify. *See* 1/29/14 Tr. at 10, 11, and 20. At one point, the trial court said:

> THE COURT: Okay. Well, basically what the witness has testified to, he can educate the Court to the benefits, pros and cons of joint versus sole, benefits of a parenting coordinator, not – as he said, not the impact of divorce on minor children, but how to alleviate the effects of divorce on young minor children, and what the literature tells me as to best plans as far as young children. All that is CJE material. It's not evidence for me to rely upon for my decision about these children.
>
> Therefore, I'm going to grant Mr. Raynold's objection. And if that's all the testimony he has, then this witness is finished for today. If he cannot tell me information about these children, what's best for these children, because generalities, **I cannot rule on generalities.** I've read the literature, I wrote a CJE on that, a CLE on that. But we all know generalities do not apply to every family. Every family is different. I can only take expert testimony that relates to these parties, these children, after proper evaluations have been done.

1/29/14 Tr. at 10, line 21 to 11, line 14 (emphasis added).[4]

In response to the trial court's statement, Rappaport testified as follows:

> Q. (By Mr. Daniel) Dr. Rappaport, is there any other aspect of your expertise that you feel like would be of assistance to this Court?
>
> A. Well, given what I heard Your Honor say, I think that Your Honor is requesting that the general literature in any area isn't necessarily relevant since I can't apply it directly to these children. So the area that I could be of Assistance, as I indicated before, would be on **where Dr. Stockley failed to follow guidelines in conducting a proper evaluation** and other mistakes he made in his testimony and inaccuracies of his testimony.

1/29/14 Tr. at 11, lines 15 to 25 (emphasis added).

H. MOTHER'S MOTION FOR NEW TRIAL

[4] The trial court changed its position regarding the admissibility of Rappaport's testimony at least two times.

Mother filed a motion to vacate the Decree, for reconsideration and for a new trial on July 9, 2014. R. at 195-269 (the "Motion for New Trial"). The Motion for New Trial contained a statement of facts that was essentially as the same as the summary of the records in this Brief. R. at 197-205. The Motion for New Trial advances essentially the same legal arguments that are this Brief. R. at 205-212.

Father filed a brief written response to the Motion for New Trial on July 24, 2014. R. at 270-282. The trial court denied the Motion for New Trial on December 5, 2014. R. at 301-302.

STANDARD OF REVIEW

Questions of law are reviewed *de novo* review of a lower court's legal ruling is "plenary, independent and nondeferential." *Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, ¶ 16, 139 P.3d 897, 903. The *de novo* standard of review applies to contested questions of law regardless of the kind of proceeding involved. *Danne v. Texaco Exploration and Prod., Inc.*, 1994 OK CIV APP 138, ¶ 7, 883 P.2d 210, 213 (*citing Salve Regina College v. Russell,* 499 U.S. 225, 231 (1991)). "An appellate court claims for itself plenary, independent and nondeferential authority to reexamine a trial court's legal rulings." *National Diversified Bus. Services, Inc. v. Corporate Fin. Opportunities, Inc.* 1997 OK 36, 946 P.2d 662. *See also Rivas v. Parkland Manor*, 2000 OK 68, ¶6, 12 P.3d 452; *Thomas v. Thomas*, 1996 OK CIV APP 151, ¶ 7, 932 P.2d 54, 55.

ARGUMENT AND AUTHORITIES

I. THE COURT IMPERMISSIBLY INTEFERRED WITH MOTHER'S FREE EXERCISE OF RELIGION

Mother's right to free exercise of religion is protected by both the United States Constitution and the Oklahoma Constitution. Free exercise includes the right to direct the religious education of her children—a right she shares with Father. *See* Part I.A. and B., *infra*. (United States Constitution) and Part I.C. and D., *infra* (Oklahoma Constitution and statutes).

A. MOTHER HAS A RIGHT TO HAVE INPUT INTO THE RELIGIOUS EDUCATION OF HER CHILDREN UNDER THE FREE EXERCISE CLAUSE OF THE UNITED STATES CONSTITUTION

The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...

The First Amendment contains two religion clauses—the Establishment Clause and the Free Exercise Clause. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." The Free Exercise Clause states "Congress shall make no law ... prohibiting the free exercise [of religion.]"

Both the Establishment Clause and the Free Exercise Clause have been incorporated into the Due Process Clause of the Fourteenth Amendment and applied to the states. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause); *Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause).

1. **"Individual right v. structural restraint on government power:"** "[T]he Free Exercise Clause...clearly protects an individual right..." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring), *quoted* in MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 77 (3d ed. 2011) ("McConnell"). "The free exercise of religion is a quintessential individual right..." McConnell at 76. In contrast, The Establishment Clause is a structural restraint on government. *Id., citing* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 25-32 (1998) ("Esbeck").[5]

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[5]"[T]he object of the Establishment Clause is to patrol the boundary between government and religion, and not to protect individual rights as such." Esbeck, 84 IOWA L. REV. at 28. In the

2. **"The tension:"** There is a "tension" between the Free Exercise Clause and the Establishment Clause. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES, § 12.1.1 at 1249 (5th ed. 2015) ("Chemerinsky") "The tension exists because Government actions to facilitate free exercise might be challenged as impermissible establishments, and governmental efforts to refrain from establishing religion might be objected to as denying the free exercise of religion." *Id.* at n.11, *citing Locke v. Davey*, 540 U.S. 712, 718-719 (2004) (Chief Justice Rehnquist's majority opinion said that the case involved "tension" and "play in the joints" between the Establishment Clause and the Free Exercise Clause.)

3. **"Neutrality:"** The tension can be resolved by adopting principles that steer a neutral path between adopting a religion (or a religious position) and interfering with the free exercise of religion.

Andrew Koppelman, a law professor at Northwestern University, defends the First amendment—Religion Clauses doctrine developed and currently followed by the United States Supreme Court. Koppelman acknowledges "the deep **tension** in the Court's position, between the idea that religion ought to be accommodated and the idea that the government should be **neutral** between religion and non-religion." ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 4 (2013) (emphasis added) ("Koppelman").

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original Bill of Rights, before the First Amendment was incorporated, the Establishment Clause protected the states. The national government was required to be *agnostic* as to the establishment of a religion: Congress could neither establish a national religion nor disestablish a state religion. *See* AKHIL REED AMAR, THE BILL OF RIGHTS, 338 n. 70 (1998) ("[S]tate governments are not in part the special beneficiaries of, and rights holders under, the clause [*i.e.*, the Establishment Clause]. ("Amar"). "[T]he unfettered choice between establishment and dis-[establishment] was given to the states." Amar at 41.

Many contemporary commentators criticize religion as a superstitious, irrational anachronism—a bad thing. Professor Koppelman says that

> First Amendment doctrine treats religion as a good thing. It insists, however... that religion's goodness be understood at a high enough level of abstraction and that the state takes no position on any live religious dispute. It holds that religion's value is best honored by prohibiting the state from trying to answer religious questions.

Koppelman at 2 (emphasis added).

A standard constitutional law treatise makes the same point:

> There is a natural antagonism between a command not to establish religion and a command not to inhibit its practices. This **tension** between the clauses often leaves the Court with having to choose between competing values in religion cases. The general guide here is the concept of "**neutrality**." The opposing values require that the government act to achieve only secular goals and that it achieve them in a religiously neutral manner. Unfortunately, situations arise where government may have no choice but to incidentally help or hinder religious groups or practices.

JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.1(a) at 1539 (8th ed. 2010) ("Nowak & Rotunda") (emphasis added).

The United States Supreme Court has recognized that the tension is inherent in the First Amendment, and noted the difficulty of finding

> a **neutral course** between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.

Walz v. Tax Commn. 397 U.S. 664, 668-669 (1970), *quoted* in Chemerinsky at 1250 (emphasis added).

The concept of neutrality is not just difficult, it is controversial. Professor Steven D. Smith of the University of San Diego Law School says that the quest for neutrality "is an attempt to grasp an illusion." STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR

CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 96 (1995), *quoted* in Koppelman at 4 & n.9 (2015) ("Koppelman").

Other contemporary critics call the quest for neutrality "a disaster" and a "complete hash." Koppelman at 4. Despite the harsh criticism, the United States Supreme Court's endorsement of the principles of neutrality can still be defended. Fortunately, "neutrality is available in many forms"—that is, at many levels of abstraction. Koppelman at 5-6. "It is ... possible, without declaring religious truth"—that is, endorsing or establishing a specific religion—"for the state to favor religion **at a very abstract level.**" *Id.* at 6. For example, in *Texas Monthly, Inc., v. Bullock*, 489 U.S. 1 (1989), Justice William Brennan wrote for a plurality that a tax exemption would be appropriate for a publication that "sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life." 489 U.S. at 16, *quoted* in Koppelman at 6-7 & n. 23.

Justice Harry Blackmun—concurring in *Texas Monthly, Inc.*—thought it would be constitutionally permissible for the state to favor human activity that is especially concerned with "such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." 489 U.S. at 27-28, *quoted* in Koppelman at 7 & n. 24. In other words, it is permissible for the state to foster and encourage considerations of Big Questions/Deep Questions. "What is impermissible is for the state to decide that one set of answers to these questions is the correct set." Koppelman at 7.

In summary, the principle of neutrality works if it is applied at an appropriately high level of abstraction. The essence of neutrality—correctly understood—was captured in a statement by President-elect Dwight Eisenhower in 1952:

> Our form of government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is.

Koppelman at 2 & n. 1 ("Eisenhower... revealed a deep insight into the character of neutrality.")[6]

4. ***Wisconsin v. Yoder***: In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), three Amish families refused to comply with a Wisconsin law that required children to attend school until age 16. The United States Supreme Court granted an exemption to the Wisconsin law based on the Free Exercise Clause and the right of parents to direct the education of their children. 406 U.S. at 207, 232-236. *Wisconsin v. Yoder* relies upon a case decided by the United States Supreme Court in 1925 during the so-called "*Lochner* era"—*Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).[7]

Pierce held that the right of parents to direct the education of their children is a fundamental liberty and protected by the Due Process Clause of the Fourteenth Amendment. *See Pierce*, 268 U.S. at 573; Chemerinsky at 1322; §10.2.4 at 843; Nowak & Rotunda §14.26 at 1008

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[6] In many ways, the principle of "neutrality" is just a new name for "tolerance." *See* Koppelman at 19-20.

[7] The "*Lochner*" era is the era of the "old" substantive due process. The era lasted from 1890 to 1936 and is named for *Lochner v. New York*, 198 U.S. 45 (1905), a case in which the United States Supreme Court invalidated a state law limiting the number of hours that could be worked by bakers. *See* Chemerinsky § 8.2.2 at 642-648 (Economic Substantive Due Process During the *Lochner* Era); Nowak & Rotunda § 11.3 at 472-476 *and especially* 472 at n.4 ("the now infamous case of *Lochner* v. New York"); CHRISTOPHER TOMLINS, ED., THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 170 (2005) ("The *Lochner* Era").

Even though most scholars have little regard for *Lochner* era decisions, Pierce is "revered" as an expression of a "liberal and libertarian spirit" and the values of "pluralism" and "family autonomy." Barbara Bennett Woodhouse, "*Who Owns the Child?:*" Meyer *and* Pierce *and the Child as Property*, 33 WM & MARY L. REV. 995 (1992).

n. 8.[8] *Pierce* struck down an Oregon law that required all children to attend public schools, as opposed to Catholic "parochial" schools. Significantly, the right of parents to direct the education of their children is not an enumerated right: It is not expressly stated in the United States Constitution. S*ee Prince v. Massachusetts*, 321 U.S. 158 (1944) (confirming that there is a constitutional dimension to the right of parents to direct the upbringing of their children).[9]

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[8] Various state authorities have concluded that the right of parents to direct the education of their children is fundamental. *See, e.g., Michigan v. DeJorge*, 501 N.W. 2d 127 (Mich. 1993); *Michigan Dep't of Soc. Services v. Emmanuel Baptist Preschool*, 455 N.W. 2d 1, 16 (Mich. 1990) (Cavanagh, J., concurring): *Sheridan Rd. Baptist Church v. Dept. of Educ.*, 396 N.W.2d 373, 407-409 (Mich. 1986) (Riley dissenting) (finding the right to direct the education of one's children to be a fundamental right); *Ohio v. Whisner*, 351 N.E. 2d 750, 769 (Ohio 1976) ("[I]t has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a "fundamental right" guaranteed by the due process clause of the Fourteenth Amendment.").

[9] In *Troxel v. Granville*, 530 U.S. 57 (2000), the plurality opinion states that:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." ... We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."
>
> The liberty interest at issue in this case—the interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska* ... (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters* ...(1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the Statute; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." We returned to the subject in *Prince v. Massachusetts* ... (1944), and

Wisconsin v. Yoder was affirmed in *Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990). In discussing *Wisconsin v. Yoder*, the *Smith* Court emphasized the hybrid nature of the parents' right to have input into the religious upbringing and general education of the children. 494 U.S. at 881 & n.1 *citing Pierce*. *See* Chemerinsky at 1327 & nn. 90-91.

Mother possesses the hybrid right discussed in *Wisconsin v. Yoder* and *Employment Division v. Smith*. That right is based on the Free Exercise Clause, not the Establishment Clause.

> Parents have a fundamental right to make decisions regarding the care, custody, and control of their children. The parental right to determine the child's religious upbringing derives both from the parents' right to free exercise of religion and to the care and custody of their children.

> again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." ...
>
> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children in [citing cases]. In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children.

530 U.S. at 64-66 (omitting cases and citations).

Justice Thomas concurred in the judgment in *Troxel*, stating:

> Our decision in *Pierce v. Society of Sisters* ... (1925) holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them.

530 U.S. at 80 (omitting case citation).

Joanne Ross Wilder, *Resolving Religious Disputes in Custody Case: It's Really Not About Best Interests,* 22 J. AM. ACAD. MATRIMONIAL LAW 411, 413 & nn. 6-7 (2009) (footnotes omitted), *citing Troxel v. Granville,* 530 U.S. 57 (2000).[10]

B. THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH MOTHER'S FREE EXERCISE OF RELIGION WHEN IT FAILED TO ALLOW MOTHER TO HAVE INPUT INTO THE RELIGIOUS EDUCATION OF HER CHILDREN

The trial court has treated this case as an Establishment Clause case. The trial court was careful to maintain strict neutrality *at the lowest level of abstraction*, and to limit testimony regarding religious issues.

With respect, this case is a Free Exercise Clause case, not an Establishment Clause case. The trial court's general award of legal custody to Father does not recognize or acknowledge Mother's right to be involved in the religious upbringing of her children. As a result, the trial court's order violates Mother's rights under the Free Exercise Clause.

Mother was not asking the Court to rule that the children should be raised as Muslims, or to rule that the children should not receive training in the Christian/Baptist faith and tradition. Mother was asking the Court to acknowledge that

(a) There is a difference in the religious beliefs of the Father and Mother;

(b) The children are **not** currently receiving training in Mother's faith;

(c) Mother has a right to have input into the children's religious education; and,

(d) Mother wants the children to receive training in the Mother's faith.

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[10] *And see* Ariana S. Cooper, *Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post-Smith,* 108 COLUM L. REV. 716 (2008).

These factors are neutral. They are not specific to the Islamic religion. They would apply with equal force if Father were Baptist and Mother were Jewish, Catholic; or Unitarian.

Mother cited *Wisconsin v. Yoder* to the trial court. *See* Motion for New Trial at 11; R. at 207. This Court has cited *Wisconsin v. Yoder* for the proposition that:

> It is a matter of unquestioned constitutional principle that in the absence of jeopardy to health and safety of children, the government may not interfere with fundamental parental rights and interests in directing education and the religious upbringing of their children.

Stephen v. Stephen, 1997 OK 53, 937 P.2d 92, 97 (*also citing Pierce* and *Meyer*).

The trial court awarded sole legal custody of both children to Father, but awarded equal physical custody of both children to both Mother and Father. Decree at 3 (¶ 9); R. at 174. There are no "health" or "safety" reasons for the denial of Mother's right to have input into her children's religious education and upbringing. The trial court denied Mother's rights under the United States Constitution when it denied her input into the religious education of her children.

At the hearing, the trial court erected a "wall" between Church and State. In doing so, the trial court committed error: it failed to adopt a neutral principle at **an appropriately high level of abstraction**. In doing so, the trial court sacrificed Mother's free exercise right. No one was asking the trial court to choose between the Christian religion and the Muslim religion.

C. The Trial Court Violated The Oklahoma Religious Freedom Act When It Failed To Allow Mother To Have Input Into The Religious Education Of Her Children

State law provides a separate and independent basis for approval. The Oklahoma Constitution contains its own free exercise provision.[11] Mother's right to have input into their

[11]Article 1, Section 2 of the Oklahoma Constitution provides in pertinent part:

minor children's religious education is recognized in the Parent's Bill of Rights adopted by the Oklahoma Legislature. *See* 25 O.S. Supp. 2015, § 2002(A)(4) (reserving to the parents of a min9or child "[t]he right to direct the moral or religious training of the minor child."

Mother's interest is protected by the Oklahoma Religious Freedom Act, 51 O.S. 2011, §§ 251-258. Section 253 of the Oklahoma Religious Freedom Act provides:

> A. Except as provided in subsection B of this section, **no governmental entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability**.
>
> B. No governmental entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:
>
> 1. Essential to further a **compelling governmental interest**; and
>
> 2. The **least restrictive means** of furthering that compelling governmental interest.

51 O.S. 2011, § 253 (emphasis added).

The Oklahoma Religious Freedom Act was enacted in 2000. The Oklahoma Religious Freedom Act is a state version of a federal statute—the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). RFRA was the subject of the United States

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> Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights.

And see OKLA. CONST.—PREAMBLE (reference to "God").

Supreme Court's opinion in *Burwell v. Hobby Lobby*, 573 U.S. ____, 131 S.Ct. 2751 (2014). RFRA was enacted in 1993.

The Oklahoma Religious Freedom Act is a "mini-RFRA." McConnell at 197. Mini-RFRAs apply the *Sherbert/Yoder* compelling interest test to state laws burdening religion. *Id.* *See* Gary S. Gildin, *Blessing In Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J. L. & PUB. POL'Y 411 (2000).

The Decree and the Findings are "neutral on their face" as to religion, but it is "neutrality" at the wrong level of abstraction. The Decree and the Findings do not mention religion. They give no consideration at all to the Mother's frequently expressed interest in the religious education and upbringing of her children.

Mother's free exercise rights are entitled to heightened scrutiny under the "compelling interest test" adopted in the Oklahoma Religious Freedom Act. *See* 51 O.S. 2011, §253. The Decree and the Findings did not give Mother's free exercise rights the required scrutiny. The Court gave no consideration to the burden on Mother's free exercise of her right to educate her children in her religion. The Court gave no consideration to a less restrictive means of accomplishing the government's goal.

Significantly, a less restrictive means existed. The Court could have awarded joint custody—as recommended by Stockley—and could have appointed a parenting coordinator. *See* Part I.C.36, *supra.* The parenting coordinator could have been instructed to allow the religious rights of both parents to be considered and observed.[12]

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[12] It is not clear why the Father's live-in girlfriend should be permitted to take the children to *her* church. According to the Koran, the girlfriend is committing adultery, and is not a person who

The correct legal test was not applied. As a consequence, Mother is entitled to a new trial. *See, e.g., Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990); Jeffrey Shulman, *Spiritual Custody: Relational Rights and Constitutional Commitments*, 7 J.L. & FAM. STUD. 317 (2005).

The position taken by the Court effectively and silently grants Father (and his live-in girlfriend) full and complete control over the religious upbringing of the children. *E.g., Sanborn v. Sanborn*, 465 A.2d 888, 892-93 (N.H. 1983) (pre-RFRA Establishment Clause case). Such an outcome is not consistent with the United States Constitution, the Oklahoma Constitution or the Oklahoma Religious Freedom Act. *See* ROBERT SPECTOR, OKLAHOMA FAMILY LAW—THE HANDBOOK 339-341 (2013).

D. THE TRIAL COURT IMPROPERLY FAILED TO CONSIDER RELIGION AS PART OF ITS CHILD CUSTODY DECISION

It is not clear what authority the trial court relied upon to reach the conclusion that he should or could disregard Mother's free exercise rights. Father cited one case that he claims "prohibit[ed] inquiries about faith"—*Shaw v. Hoedebeck*, 1997 OK CIV APP 69, 948 P.2d 1240; *See* 1/27/14 Tr. at 151, lines 8 to 10 (Statement by Mr. Raynolds).

Father mischaracterizes the *Shaw* case. Contrary to Father's assertion, *Shaw* does not "prohibit inquiries about faith." In a case decided four years after *Shaw*, the Oklahoma Court of Civil Appeals stated:

> Husband's next contention of error is the trial court abused its discretion in allowing Wife's attorney to inquire and refer to her as "a good Christian woman". He cites *Hoedebeck v. Hoedebeck, 1997 OK CIV APP 69, 948 P.2d 1240 [i.e. Shaw]*, as holding that a

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would ordinarily be involved in the religious training of children. *See* Summary of the Record, *supra*. (quoting the Koran).

> parent's religious beliefs are irrelevant in child custody matters unless associated activities are harmful to the child. However, *Hoedebeck* [*i.e., Shaw*] does not prohibit any mention of religious matters.

In the Matter of the Adoption of M.C.D. 2002 OK CIV APP 27, ¶ 32, 42 P.3d 873, 883.

The point bears repetition: *Shaw* does not prohibit any mention of religious matters. Query: Why would Father cite *Shaw* to the Court but not cite *M.C.D.* a case that clarifies and explains *Shaw*?

Significantly, *Shaw* was decided prior to the enactment and adoption of the Oklahoma Religious Freedom Act in 2000, and prior to the adoption of the Parent's Bill of Rights. *Shaw* does not take the Oklahoma Religious Freedom Act—or the compelling interest test—into account.[13]

At the same time, the trial court sacrificed the "spiritual welfare" of the children. "Spiritual welfare" is a legitimate concern in a child custody case. *See, e.g., Finger v. Finger*, 1996 OK CIV APP 91, 923 P.2d 1195, 1997-1998.

The case proffered by Father—*Shaw*—improperly suggests that a "wall" should be built between Church and State. As explained above, no "wall" was necessary: no one was asking the trial court to choose between the Muslim religion and the Christian religion.

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[13] Father also mentions a case called *Campbell v. Campbell*. *See* 1/27/14 Tr. at 151, line 25. No citation for the case was given. *Id.* No case called *Campbell v. Campbell* has been found that addresses issues of religious or spiritual custody.

II. THE COURT IMPROPERLY GRANTED FATHER'S ORAL *DAUBERT* MOTION

A. THE TRIAL COURT IMPROPERLY GRANTED FATHER'S ORAL MOTION TO EXCLUDE THE EXPERT TESTIMONY OF DR. SOL RAPPAPORT

1. **The trial court's ruling**: The trial court thought Rappaport's testimony would not be helpful because Rappaport had not conducted a full-blown custody evaluation. The trial court thought that Rappaport would only testify about "generalities." *See* 1/29/14 Tr. at 7, lines 14 to 22. The trial court was incorrect; the trial court should have given Rappaport a fair chance to explain the subject matter of his opinion testimony.

Rappaport would have testified about problems and deficiencies in the methodology that Stockley applied—about Stockley's failure "to follow guidelines in conducting a proper evaluation and other mistakes that he [*i.e.,* Stockley] made in his testimony and inaccuracies in his testimony." 1/29/14 Tr. at 11, lines 15 to 25.

It is permissible to call expert witnesses to criticize and question the methodologies of other expert witnesses. It is common for expert witnesses to attack each other's methodologies and/or conclusions. *See, e.g., In re Fosamax Products Liability Litigation*, 645 F. Supp. 2d. 164 (S.D.N.Y. 2009) (competing motions in limine).

In the instant case, The trial court based its decision to award custody to Father on Stockley's testimony. *See* Findings at 27 (¶ 179), 28 (¶¶ 187 and 188), 29 (¶¶ 190-195), 30 (¶¶ 196-203) and 31 (¶ 203); R. at 116-120. Even though Stockley recommended joint custody, and the trial court rejected that recommendation, the trial court's reliance on Stockley's *analysis* meant that Stockley's methodology was relevant and material to the outcome of the case below.

2. **The applicable legal rule**: The admissibility of expert testimony is governed by Section 2702 of the Oklahoma Evidence Code:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise, if:
>
> 1. The testimony is based upon sufficient facts or data;
>
> 2. The testimony is the product of reliable principles and methods; and
>
> 3. The witness has applied the principles and methods reliably to the facts of the case.

12 O.S. Supp. 2015, §2702.

Section 2702 is virtually the same as Rule 702 of the current version of the Federal Rules of Evidence ("FRE"). Federal cases and authorities interpreting FRE 702 are relevant to the interpretation of Section 2702. *See, e.g., Willoughby by Oklahoma City*, 1985 OK 64, 706 P.2d 833, 887.

The current version of FRE 702 was adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 507 U.S. 579 (1993) and "the many cases applying *Daubert*." FRE 702—Advisory Committee Notes—2000 Amendments. Section 2702 enables a trial court to weigh the *Daubert* factors:

> (a) Whether the expert's methodology can be or has been tested;
>
> (b) Whether the expert's methodology has been subject to peer review or publication;
>
> (c) Whether there is a known or potential rate of error for the expert's methodology;
>
> (d) Whether standards or controls exist and are maintained; and
>
> (e) Whether the methodology is generally accepted in the scientific community.

FRE 702—Advisory Committee Note—2000 Amendments.

3. **The trial judge failed to employ the applicable rule:** The trial judge did not apply Section 2702 of the Oklahoma Evidence Code or discuss any of the *Daubert* factors incorporated therein. *See* 1/29/14 Tr. at 4-21 (testimony of Sol Rappaport and proceedings in connection therewith).

To be sure, Father's counsel and the trial court both cited Section 2702. *See* 1/29/14 at 16, line 25 to 17, line 7 and 20, line 23. Father's counsel also asked Rappaport about his own methodology. *Id.* at 12, line 5 to 23. Father's counsel also asked Rappaport if he had conducted any "longitudinal studies," without defining "longitudinal studies" or explaining their relevance. 1/29/14 Tr. at 12, line 24 to 13, line 13. The trial court correctly overruled Father's objection at that time. *Id.* at 14, lines 21 to 24.

Rappaport intended to testify about Stockley's methodology—his conformity to APA guidelines and his use of "MPI-2" and "Million-3" tests. *See* 1/29/14 Tr. at 14, lines 7 and 8; 18, lines 17-21; and 19. The trial court attached great significance to the fact that Rappaport had not met with Stockley and the parties. The trial court did not address the subject of Rappaport's testimony—the actual methodological critique that Rappaport proposed to give of Stockley's report. As a consequence, the trial court failed to apply the correct rule to the decision to admit or exclude Rappaport's testimony. The trial court should explicitly rule on any *Daubert* challenge. *See United States v. Nacchio*, 585 F.3d 1165 (10th Cir. 2008).

B. *Christian v. Gray* Does Not Permit A Trial Court to Completely Exclude Expert Testimony at a Bench Trial

Father's attorney—Mr. Raynolds—asked the trial court to disallow Rappaport's testimony on *Daubert* and relevance grounds, and the trial court granted Father's request. *See* Part I.D., *supra*; 1/29/14 Tr. at 10, 11 and 20.[14]

In a jury trial, *Daubert* requires the trial judge to act as a "gatekeeper." The trial judge protects the jury from "junk science" and unreliable expert opinions by deciding whether or not the jury will get to hear the expert's opinion. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 519 (1993). *Daubert* was adopted by the Oklahoma Supreme Court in *Christian v. Gray*, 2003 OK 10, 65 P.3d 591.

In a bench trial, *Daubert* helps the trial judge determine what **weight** to give the testimony of an expert witness. The trial judge does not serve as a "gatekeeper" in the same sense that he or she serves as a "gatekeeper" in a jury trial. The trial judge does not need to protect the fact-finder because the trial judge *is* the fact-finder. *See Metavante Corp. v. Emigrant Savings Bank*, 619 F.3d 748, 760 (7th Cir. 2010) ("usual concerns" of the *Daubert* rule—"keeping unreliable expert testimony from the jury"—are not present in a bench trial; more than a conclusory finding regarding *Daubert* factors is required);[15] *Attorney Gen. of Okla. v. Tyson*

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[14] When the trial court sustained Father's *Daubert* objection, it cited 12 O.S. Supp. 2015, § 2702. *See* 1/29/14 Tr. at 20, line 23. The trial court overruled the relevance objection *sub silento*. The relevance of Rappaport's proposed testimony is obvious. He was prepared to attack the methodology of Stockley—the child custody evaluator—and thereby call Stockley's various influences and conclusions into question. In other words, Rappaport's testimony would "make the existence of … fact[s] that [are] of consequence to the action more probable or less probable than [they] would be without the evidence." 12 O.S. 2011 § 2401 (Definition of "Relevant Evidence").

[15] The trial court's findings regarding the *Daubert* factors are conclusory.

Foods, Inc., 565 F.3d 769, 779 (10th Cir. 2009); *Valley View Dev., Inc. v. United States ex. rel. United States Army Corp. of Engineers,* 721 F. Supp. 2d 1024 (N.D. Okla. 2010).

The United States District Court for the Southern District of New York has held that "only serious flaws in reasoning or methodology" will warrant the exclusion of an expert witness's testimony in a bench trial, where

> there is no possibility of prejudice, and no need to protect the factfinder from being overawed by "expert" analysis.

Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB, 920 F.Supp. 2d 475, 502 (S.D.N.Y. 2013).

The trial court should have listened to Rappaport. The trial court could then have chosen to accept or reject Rappaport's criticisms of Stockley's methodology after

(i) hearing Rappaport's fully developed presentation of his critique of Stockley; and

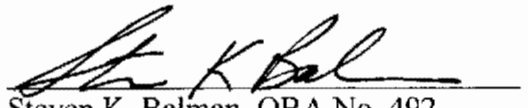
(ii) hearing Rappaport defend his opinion during cross-examination.

There was no jury. It was inappropriate for the trial court to use the "jury version" of the *Daubert* rule to reject Rappaport's testimony in its entirety. The *Daubert* factors go to the *weight* of an expert's testimony in a bench trial.

CONCLUSION

Mother respectfully submits that the Court should reverse the trial court's general, unrestricted grant of custody to the Father and direct the trial court to enter an order of joint custody, with a parenting coordinator sensitive to the rights of both parents to determine the moral and religious education of the children. At a minimum, the case should be remanded to the trial court with instructions to conduct a new custody hearing in accordance with (i) Mother's constitutional and statutory right to have input into the religious education of her children and (ii) the *Daubert/Christian* rule for the admission of expert testimony in bench trials.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was transmitted on the 28th of July 2015 in the following manner:

_____ faxed

_____ hand-delivered

✓ mailed with proper postage thereon

_____ mailed *via* certified mail

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I further certify that a copy of the above and foregoing was filed with the Office of the Court Clerk of the District Court of Tulsa County on the 28th day of July 2015.

Steven K. Balman