

ORIGINAL



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

NO. [REDACTED]

IN RE THE MARRIAGE OF [REDACTED]

Petitioner/Appellee

v.

[REDACTED]

Respondent/Appellant

FILED
SUPREME COURT
STATE OF OKLAHOMA
SEP 24 2015
MICHAEL S. RICHIE
CLERK

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

REPLY BRIEF OF APPELLANT
[REDACTED]

9-24-15
[Handwritten initials and stamp]

Steven K. Balman, OBA No. 492
FRANDEN | FARRIS | QUILLIN
GOODNIGHT + ROBERTS
Williams Center Tower II, Suite 900
2 West 2nd Street
Tulsa, Oklahoma 74103
Tel: 918/583-7129
Fax: 918/584-3814

-and-

Melissa F. Cornell, OBA # 20185
2504 E. 21st Street, Ste A
Tulsa, OK 74114
Tel: 918/574-8901
Fax: 918/508-2955

ATTORNEYS FOR RESPONDENT,
[REDACTED]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

NO. [REDACTED]

IN RE THE MARRIAGE OF [REDACTED]

Petitioner/Appellee

v.

[REDACTED]
Respondent/Appellant

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

REPLY BRIEF OF APPELLANT

Steven K. Balman, OBA No. 492
FRANDEN | FARRIS | QUILLIN
GOODNIGHT + ROBERTS
Williams Center Tower II, Suite 900
2 West 2nd Street
Tulsa, Oklahoma 74103
Tel: 918/583-7129
Fax: 918/584-3814

-and-

Melissa F. Cornell, OBA # 20185
2504 E. 21st Street, Ste A
Tulsa, OK 74114
Tel: 918/574-8901
Fax: 918/508-2955

ATTORNEYS FOR RESPONDENT,
[REDACTED]

TABLE OF CONTENTS

I. THE PROBLEM1

Shaw v. Hoedebeck, 1997 OK CIV APP 69, 948 P.2d 12404

State ex rel. Blankenship v. Freeman, 1968 OK 54, 440 P.2d 744 ____1

KAREN ARMSTRONG, ISLAM: A SHORT HISTORY (2002)2

WILLIAM MCCANTS, THE ISIS APOCALYPSE (2015)2

2 LEO H. WHINERY, OKLAHOMA EVIDENCE: COMMENTARY ON OKLAHOMA
EVIDENCE (2d ed. 2000).....1

II. FATHER HAS NOT ADDRESSED THE ISSUES PRESENTED ON APPEAL5

A. MOTHER HAS A RIGHT TO HAVE INPUT INTO THE RELIGIOUS EDUCATION OF
HER CHILDREN UNDER THE UNITED STATES CONSTITUTION5

Employment Division, Dept. of Human Services of Oregon v. Smith,
494 U.S. 872 (1990).....6

Meyer v. Nebraska, 262 U.S. 390 (1923).....7, 8

Pierce v. Socy' of Sisters of the Holy Names of Jesus and Mary,
268 U.S. 510 (1925).....6, 7, 8

Prince v. Massachusetts, 321 U.S. 158 (1944)7, 8

Stephen v. Stephen, 1997 OK 53, 937 P.2d 92.....7

Troxel v. Granville, 530 U.S. 57 (2000)7, 8

Wisconsin v. Yoder, 406 U.S. 205 (1972).....6, 7

Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.....6

U.S. CONST. AMEND I.....5, 6

U.S. CONST. AMEND. XIV6

B. THE TRIAL COURT IMPERMISSIBLY INTERFERED WITH MOTHER’S FREE EXERCISE OF
RELIGION WHEN IT FAILED TO PERMIT MOTHER TO HAVE INPUT INTO THE RELIGIOUS
EDUCATION OF HER CHILDREN8

C.	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	9
	51 O.S. 2011, §§251-258	9
D.	THE TRIAL COURT IMPROPERLY FAILED TO CONSIDER RELIGION AS PART OF ITS CHILD CUSTODY DECISION	10
	<i>Finger v. Finger</i> , 1996 OK CIV APP 91, 923 P.2d 1195	11
	<i>Le v. Nguyen</i> , 2010 OK CIV APP 104, 241 P.3d 647	11
	<i>Neilson v. Neilson</i> , 1954 OK 354, 278 P.2d 541	11
	43 O.S. 2011, § 109.....	10, 11
E.	THE TRIAL COURT IMPROPERLY GRANTED FATHER’S ORAL MOTION TO EXCLUDE THE TESTIMONY OF AN EXPERT WITNESS	11
	<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 507 U.S. 579 (1993).....	11
	12 O.S. 2011, §§2401-2403	11
	FED. R. EV. 702--Advisory Committee Note--2000 Amendments	12
F.	CHRISTIAN V. GRAY DOES NOT PERMIT A TRIAL COURT TO COMPLETELY EXCLUDE EXPERT TESTIMONY AT A BENCH TRIAL	13
	<i>Local 851 of Intern. Broth. Of Teamsters v. Kuehne & Nagel Air Freight, Inc.</i> , 36 F. Supp. 2d 127 (E.D. N.Y. 1998).	13
	<i>United States v. Garrett</i> , 402 F.3d 1262 (10 th Cir. 2005)	13
III.	THE AUTHORITIES CITED BY FATHER ARE INAPPOSITE	13
A.	FATHER’S “STANDARD OF REVIEW” CASES	14
	<i>Dunham v. Dunham</i> , 1989 OK CIV APP 44, 777 P.2d 403	14, 15
	<i>Kahre v. Kahre</i> , 1995 OK 133, 916 P.2d 1355.....	14
	<i>Manhart v. Manhart</i> , 1986 OK 12, 725 P.2d 1234.....	14
B.	FATHER’S “JOINT CUSTODY CASES”	14

	<i>Daniel v. Daniel</i> , 2001 OK 117, 42 P.3d 863	15
	<i>Dunham v. Dunham</i> , 1989 OK CIV APP 44, 777 P.2d 403	15
	<i>Foshee v. Foshee</i> , 2010 OK 85, 247 P.3d 1162.....	15
	51 O.S. 2011, §§251-258	15
	25 O.S. Supp. 2015, §2002(A)(4)	15
C.	FATHER’S RELIGION CASES	15
	<i>In the Matter of the Adoption of M.C.D.</i> , 2002 OK CIV APP 27, 42 P.3d 873.....	16
	<i>Shaw v. Hoedebeck</i> , 1997 OK CIV APP 69, 948 P.2d 1240	15
D.	OTHER INAPPOSITE CASES: THE STANDARD OF REVIEW REVISITED	17
	<i>Bilyeu v. Bilyeu</i> , 2015 OK CIV APP 58, 352 P.3d 56	17, 18
	<i>Danne v. Texaco Explorational and Prod. Inc.</i> , 1994 OK CIV APP 138, 883 P.2d 210	18
	<i>Davis v. Davis</i> , 1960 P.2d 196, 355 P.2d 572	17, 18
	<i>Lierly v. Tidewater Petroleum Corp.</i> , 2006 OK 47, 139 P.3d 897	18
	<i>Manhart v. Manhart</i> , 1986 OK 12, 725 P.2d 1234.....	17, 18
	<i>Salve Regina College v. Russell</i> , 499 U.S. 225 (1991).....	18
	<i>Williamson v. Williamson</i> , 2005 OK 6, 107 P.3d 589	17, 18
IV.	CONCLUSION.....	18

This reply brief is submitted by Appellant [REDACTED] (“Mother”) in response to the Brief of Appellee filed by Appellee [REDACTED] (“Father”) on September 4, 2015 (“Father’s Brief”). For the reasons explained herein, Father has failed to address the issues and authorities in the Brief in Chief of Appellant [REDACTED] filed July 28, 2015 (“Mother’s Brief”). As a result, Mother should prevail on appeal.

I. THE PROBLEM¹

When Father married Mother, he converted to Islam. Father and Mother agreed to raise their children as Muslims. When Father and Mother had children, they gave them Muslim names—Hamzah and Samira. Mother’s Brief at 1 and 5.

Then Father changed his mind. He converted back to the Christian religion. He began dating a Christian woman—Amy Wykoff (“Wykoff”)—and had a baby with her. Wykoff now takes Hamzah and Samira to a Baptist Church. *See* Mother’s Brief at 5.

It is a difficult time to be a Muslim in America—or to have a Muslim name. The “911” incident² and the human rights violations of the Islamic State of Iraq and Syria (“ISIS”)³ have

¹ With one exception—discussed below—this statement of the problem is based on the summary of the record that appears at pages 3 through 11 of Mother’s Brief. Father did not object to the summary of the record in Mother’s Brief. *See* Father’s Brief at 2 (“Father has no objections to Mother’s recitation of the summary of the record...”).

The third paragraph of Part I (“The Problem” is based upon *legislative facts*. The Court may take judicial notice of legislative facts. “Legislative facts are ordinarily general and do not concern the immediate parties.” 2 LEO H. WHINERY, OKLAHOMA EVIDENCE: COMMENTARY ON OKLAHOMA EVIDENCE § 6.02 at 88 n.2 (2d ed. 2000). *See State ex rel. Blankenship v. Freeman*, 1968 OK 54, 440 P.2d 744, 758.

resulted in substantial anti-Muslim sentiment. For example, the question of whether President Barack Hussein Obama is “really a Muslim” is a side-issue in the 2016 national political campaign.

Father and Mother gave their children Muslim names, in a time of heightened prejudice against Muslims. It is important for Mother and Father to be able to explain that prejudice—and the Islamic tradition—to their children. The evidence adduced at the hearing indicates Mother and Father have failed in that obligation.

Hamzah has made anti-Muslim remarks that Hamzah makes to his Mother:

Sometimes he [Hamzah] 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 182, lines 16-24, *quoted in* Mother’s Brief at 8.

As a general matter, the trial court limited and prohibited questions regarding religion and religious practices at the hearing on child custody. *See* Mother’s Brief at 3-4 (carryover paragraph). Father’s counsel persuaded the trial court that “inquires about faith” were “prohibit[ed].” 1/27/14 Tr. at 151, lines 8-10 (assertion by Mr. Reynolds), *quoted in* Mother’s

² A standard book in Islam describes the “backlash” against Muslims in Western countries. KAREN ARMSTRONG, *ISLAM: A SHORT HISTORY* 190 (2002) (hereinafter, “Armstrong”).

Immediately after the attack, there was a backlash against Muslims in Western countries. Muslims were attacked in the streets, and people of oriental appearance were forbidden to board aircraft, women felt afraid to leave their homes wearing the *hijab*, and graffiti appeared on public buildings urging “sand niggers” to go home. It was widely assumed that there was something in the religion of Islam that impelled Muslims to cruelty and violence, and the media all too frequently encouraged this assumption. Recognizing the danger of such an approach, President George W. Bush quickly proclaimed that Islam was a great and peaceful religion, and that bin Laden and the hijackers should not be regarded as typical representatives of the faith.

Armstrong at 190-191.

³ ISIS is an extremist, jihadist group. It believes that Islamic prophecy “requires the conquest of every country on earth.” WILLIAM McCANTS, *THE ISIS APOCALYPSE* 139 (2015). McCants directs the Project on U.S. Relations with the Islamic World at the Brookings Institution. ISIS does not speak for the Islamic world.

Brief at 4. As a consequence, it is difficult to understand why Hamzah was disparaging his own religious heritage and his Mother's religious belief.

Hamzah's anti-Muslim statements could have been caused by the general anti-Muslim sentiment currently prevalent in popular culture and public opinion (referenced above). Alternatively, the young man's unfortunate statements may reflect the table talk and views of Father and Wykoff, the woman who took Hamzah and Samira to a Baptist Church without Mother's knowledge. 1/29/14 Tr. at 37, lines 8-19. Father did not inform Mother of Wykoff's action, or discuss it with her. *Id.* See Mother's Brief at 5.

In theory, the interests of the children were represented at the custody hearing by a state employee (Lora Howard). Mother's Brief at 6. In fact, the state employee failed to recognize Hamzah's anti-Muslim comments as a symptom of an existing or developing inner conflict—a problem affecting the mental and moral welfare of the children.

When the state employee examined Mother at the hearing, she did not approach her task in a typical or conventional lawyerly fashion; she did not simply ask questions. Instead, the state employee interrupted Mother's testimony to make statements of her own:

Q. Ma'am, we're not going to talk about religion....

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

1/29/14 Tr. at 147-148. See Mother's Brief at 5-6 (*quoting* Ms. Howard's examination of Mother in detail). With respect, religion is *exactly* what the people at the custody hearing should have discussed.

Mother asked the trial court to allow her to have input into the religious education of her children. See Mother's Brief at 7-8 (referencing the proposed findings of fact and conclusions of law submitted by Mother on February 28, 2014); R. at 13 and 18. Mother repeated her request in

her motion for new trial. R. at 205-212 (setting forth the issues raised in this appeal).⁴ Among other things, Mother asked for the appointment of a parenting coordinator. *See* Mother's Brief at 22 & n. 12 ("The parenting coordinator could have been instructed to allow the religious rights of both parents to be considered and approved.") A parenting coordinator cannot make decisions regarding the religious education of the children. A parenting coordinator could frame the issues for a discussion of religious education, and foster and facilitate that discussion. A parenting coordinator could be part of an arrangement or mechanism that would permit Mother to have appropriate input into the religious education of her children.⁵ The trial court denied Mother's requests. *See* Mother's Brief at 22-23.

The trial court refused to acknowledge the problems associated with the children's Muslim heritage, and Father's rejection of Mother's faith. Instead of dealing directly with the children's spiritual welfare, the trial court abdicated: The trial court treated religion as a forbidden subject, and severely limited discussion of religious issues. The trial court acted as if someone expected it to pick one religion over another. *See* Mother's Brief at 3-4 (identifying relevant portions of the hearing transcript). The trial court refused to provide any arrangement that would permit Mother—the non-custodial parent—to have input into her children's religious education. For example, the trial court did not take the basic step of "order[ing] both parties not to interfere with the children participating in the religious life of the other parent. *Shaw v. Hoedebeck*, 1997 OK CIV AP 69, ¶ 5, 948 P.2d 1240, 1242. Judicial inaction is itself a form of action.

⁴ Father ignored Mother's motion for new trial in his answer brief. *See* Father's Brief 1-24.

⁵ Father quotes relevant provisions of the Parenting Coordinator Act in his answer brief. Ironically, those quotations undermine Father's argument. The quotations make it clear that a parenting coordinator could help the parties (a) make decisions regarding the religious education of their children, (b) understand their Islamic heritage and (c) cope with prejudice against Muslims. *See* Father's Brief at 9-13.

By refusing to provide for the religious education of the children—by failing to recognize the problems that children with Muslim names will inevitably face in today’s society—the trial court effectively delegated decisions regarding the children’s religious education to the custodial parent (Father) and his new life partner (Wykoff).

II. FATHER HAS NOT ADDRESSED THE ISSUES PRESENTED ON APPEAL

Six issues are presented in this 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 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?

Mother’s Brief at 2.

Father does not squarely address any of the six issues. *See* Father’s Brief at 1-24.

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

The first issue presented on appeal is: “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?” Mother’s Brief at 2, 12-19.

The primary case cited and discussed by Mother was *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *aff'd Employment Division, Dept. of Human Servs. of Oregon v. Smith*, 494 U.S. 872 (1990). *Wisconsin v. Yoder* recognized the right of parents to control—or at least have input into—the religious education of their children:

[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.... Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balance process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents in the religious upbringing of their children...

Yoder, 406 U.S. at 213-14 (citations omitted).

Father does not cite or discuss the Free Exercise Clause, the United States Constitution, *Wisconsin v. Yoder* or the *Smith* case. See Father's Brief at 1-24. Significantly, Father does not deny that Mother has a right to have input into the religious education of the children. *Id.*

The constitutional right of parents to direct the religious education of young children is a "hybrid" right. The right is grounded in the Free Exercise Clause of the First Amendment and in the Due Process Clause of the Fourteenth Amendment. See *Smith*, 494 U.S. at 881 & n.1.⁶

Wisconsin v. Yoder is based in part on a case decided by the United States Supreme Court in 1925—*Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

⁶ *Smith* was a very controversial opinion. The United States Supreme Court held that a state could prohibit the use of peyote as a religious sacrament, and deny unemployment benefits to persons discharged for such use, without violating the Free Exercise Clause of the First Amendment of the United States Constitution. As a general rule, neutral laws of general applicability do not violate the First Amendment. 494 U.S. at 879-880.

The *Smith* Court recognized an exception to the general rule for "hybrid rights"—rights based on the Free Exercise Clause and other constitutional provisions. The right recognized in *Wisconsin v. Yoder* is such a hybrid right. *Smith*, 494 U.S. at 881.

Smith was decided in 1990. Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), to modify the general rule and impose a strict scrutiny test for violations of the First Amendment. See Mother's Brief at 21-22.

Pierce held that the right of parents to direct the education of their children is a fundamental liberty—a liberty protected by the Due Process Clause of the Fourteenth Amendment. *Pierce*, 268 U.S. at 573. See Mother’s Brief at 16.

This Court has cited *Wisconsin v. Yoder* for the proposition that:

[T]he government may not interfere with fundamental parental rights and interests in directing education and religious upbringing of children.

Stephen v. Stephen, 1997 OK 53, 937 P.2d 92, 97.

Mother cited the *Stephen* case in her brief-in-chief. See Mother’s Brief at 20. Father did not cite or discuss the *Stephen* case in his answer brief. See Father’s Brief at 1-24.

The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

268 U.S. at 535, quoted in *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Pierce builds upon *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Meyer* held that the “liberty” protected by the Due Process Clause of the Fourteenth Amendment includes the right of parents to “establish a home and bring up children” and to “control the education of their own.” 262 U.S. at 399, quoted in *Troxel*, 530 U.S. at 65.

In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the United States Supreme Court “confirmed that there is a constitutional dimension to the right of parents to direct and control the upbringing of their children.” *Troxel*, 530 U.S. at 65 (describing the holding in *Prince*). See Mother’s Brief at 17 & n. 9.

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary obligation and freedom include preparation for obligations the state can neither supply nor hinder.

Prince, 321 U.S. at 166, quoted in *Troxel*, 530 U.S. at 65-66.

Father does not cite or discuss *Pierce, Meyer, Prince* or *Troxel*. See Father's Brief at 1-24. Father does not contend that such cases are inapplicable, or that Mother and Father do not have parental rights under the Due Process clause of the Fourteenth Amendment. *Id.*

Father does not identify any statement, ruling or holding by the trial court that addresses the issue of whether Mother does or does not have a right to have input into the religious education of her children under the United States Constitution. See Father's Brief at 1-24. The trial court never addressed the issue, even though Mother asserted her federal right to have influence/input with respect to her children's religious education in the case below. See Part I, *supra* ("The Problem") (referencing Mother's Brief, Mother's proposed findings of fact and conclusions of law and Mother's motion for new trial).

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

The second issue presented on appeal is: "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?" See Mother's Brief at 2, 19-20.

Mother asked the trial court to acknowledge her right to have input into the religious education of her children. See Mother's Brief at 5-8, *especially* 7-8. The trial court ignored her request: the trial court made no provision for her to express her views regarding the religious education of her children and failed to acknowledge the obvious fact that problems would—of necessity—arise from a mixed Christian-Muslim religious upbringing. Indeed, problems have already arisen. As noted in Part I, *supra*, Mother's son—Hamzah—has made disparaging remarks to her about Islam and Muslim people.

Mother is not asking the Court to choose one religion over the other. She did not ask the trial court to choose one religion over the other. She simply realizes that a "wall of religious

neutrality” cannot be erected in the children’s lives. Some mechanism for dealing with Christian-Muslim conflicts must be devised and implemented. As things stand, there is no such mechanism. *See* Part I, *supra* (suggesting that a parenting coordinator could facilitate a discussion of religious education, popular prejudice against Muslims, and strategies to cope with prejudice against Muslims).

C. 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

The third issue presented on appeal is: “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?” Mother’s Brief at 2, 20-23.

The Oklahoma Religious Freedom Act was enacted by the Oklahoma legislature in 2000. It is codified at 51 O.S. 2011, §§ 251-258. The Oklahoma Religious Freedom Act is a “mini-RFRA”—a state enactment of the federal Religious Freedom Restoration Act. *See* Mother’s Brief at 22.

The trial court violated the Oklahoma Religious Freedom Act when it failed to permit Mother to have input into the religious education of her children. The trial court substantially burdened Mother’s free exercise of religion—her hybrid right to have input into her children’s religious education. *See* 51 O.S. 2011, § 253; Mother’s Brief at 21-22.

Father cites but does not quote the Oklahoma Religious Freedom Act on page 16 of his brief. There are no other references. *See* Father’s Brief at 1-15 and 17-24. Father says:

Mother, in citing the Oklahoma Religious Freedom Act, Title 51 O.S. 2011 §§ 251-258, contends that the Court gave no consideration to the burden on Mother’s free exercise of her right to educate her children in her religion. Neither the Mother nor the Father were burdened. Father will be able to take the children to whatever church he deems appropriate during his custodial time, and Mother will be able to take the children to whatever religious instruction she deems appropriate on her parenting time.

Father's Brief at 16 (no citations to the record).

Father does not identify any "compelling state interest" that is served by the trial court's refusal to acknowledge a religious issue. Father does not acknowledge the existence of "less restrictive alternatives" to the trial court's *de facto* delegation of the responsibility for the children's religious education to Father and Wykoff. *See Part I, supra.*

The Divorce Decree and the Findings and Conclusions do not refer to the religion of the children or to the religious education of the children. Nothing says that Father will be able to take the children to "whatever church he deems appropriate." Nothing says that Mother will be able to take the children to "whatever religious instruction she deems appropriate." The trial court made no provision of any sort for the religious education of the children.

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

The fourth issue presented on appeal is: "Whether the trial court improperly failed to consider religion as a part of its child custody decision?" Mother's Brief at 2, 23-24.

Father contends that the award of child custody is controlled by Oklahoma Statute 43 O.S. 2011, § 109. *See* Father's Brief at 3-4, 6 and 16. Significantly, Father says that:

Title 43 O.S. § 109 does not require that the court do what is in the religious best interests of the child. Title 43 O.S. § 109A.

Father's Brief at 16 (first full paragraph).

Section 109(A) of Title 43 of the Oklahoma Statutes states that:

In awarding the **custody** of a minor unmarried child or in appointing a general guardian for said child, the court shall consider what appears to be in the **best interest** of the physical and **mental and moral welfare of the child.**

43 O.S. 2011, § 109(A) (emphasis added).

Section 109(A) uses the terms “mental and moral welfare of the child.” The “mental and moral welfare” of a child includes the *spiritual* and *religious* welfare of a child. *Finger v. Finger*, 1996 OK CIV APP 91, 923 P.2d 1195, 1198 (“welfare of the child or children... physical, material, moral and **spiritual** welfare”) (emphasis added). See Mother’s Brief at 24 (citing *Finger*). Compare Father’s Brief at 1-24 (failing to cite or distinguish *Finger*). See also *Neilson v. Neilson*, 1954 OK 354, 278 P.2d 541, 543; *Le v. Nguyen*, 2010 OK CIV APP 104, 241 P.3d 647 (child custody cases in which religious education was deemed to be a relevant consideration).

E. THE TRIAL COURT IMPROPERLY GRANTED FATHER’S ORAL MOTION TO EXCLUDE THE TESTIMONY OF AN EXPERT WITNESS

The fifth issue presented on appeal is: “Whether the trial court improperly granted Father’s oral motion to exclude the expert testimony of Dr. Sol Rappaport?” Father’s Brief at 2, 25-27.

At the hearing on custody, Father moved to exclude the testimony of an expert witness, Dr. Sol Rappaport. Father based his motion on Section 2702 of the Oklahoma Evidence Code, a statute that codifies the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See also FED. R. EVID. 702 (federal analog of Section 2702).

There are two primary *Daubert* factors—relevance and reliability. 507 U.S. at 589. Dr. Rappaport’s testimony was relevant. Dr. Rappaport questioned the methodology employed by the child custody evaluator, Dr. Daniel Stockley. The trial court based its decision to award sole legal custody to Father upon the testimony of Dr. Stockley. See 12 O.S. 2011, §§ 2401-2403 (relevance provisions of the Oklahoma Evidence Code).

Dr. Rappaport’s testimony was reliable. Dr. Rappaport was prepared to testify that Dr. Stockley had failed to follow the guidelines of the American Psychological Association and

improperly used the “MPI-2” and “Million-3” tests. *See* Mother’s Brief at 27, *citing* 1/29/14 Tr. at 14, lines 7-8, 18, lines 17-21; and 19.

There are five non-exclusive subsidiary *Daubert* factors a court may use to assess reliability:

1. Whether the expert’s methodology can be or has been tested;
2. Whether the expert’s methodology has been subject to peer review or publication;
3. Whether there is a known or potential rate of error for the expert’s methodology;
4. Whether standards or controls exist and are maintained; and
5. Whether the methodology is generally accepted in the scientific community.

FED. R. EVID. 702—Advisory Committee Note—2000 Amendments. These five factors are subsidiary to relevance and reliability. They do not apply in all cases. *See Daubert*, 507 U.S. at 593.

The trial court applied the wrong test.⁷ As a result, this Court should reverse the decision of the trial court and remand the case with instructions to hold a new hearing, this time applying the correct *Daubert* standard.

Father asserts that the trial court is free to reject the testimony of witnesses called by the parties:

[I]n an equitable cause of action, the court is free to determine which witnesses he [sic] will or will not hear.

Father’s Brief at 22 (citing no authority).

⁷ The trial court rejected Dr. Rappaport’s testimony because Dr. Rappaport had not interviewed the children and prepared his own child custody evaluation. The trial court apparently did not understand that Dr. Rappaport’s opinion was a critique of the methodology employed by the children custody evaluator, Dr. Stockley. *See* Mother’s Brief at 10 (*quoting* the trial court’s ruling). Father also seems to miss the point of Dr. Rappaport’s testimony. *See* Father’s Brief at 19-23 (describing the trial court’s ruling) *and especially* 21 (mischaracterizing Dr. Rappaport’s testimony as testimony “as to what literature says, research about joint custody versus sole custody, and benefits of a Parent Coordinator.) Father does not acknowledge Dr. Rappaport’s methodological criticism.

F. CHRISTIAN V. GRAY DOES NOT PERMIT A TRIAL COURT TO COMPLETELY EXCLUDE EXPERT TESTIMONY AT A BENCH TRIAL

The sixth issue presented on appeal is: “Whether *Christian v. Gray* permits a trial court to completely exclude expert testimony at a bench trial?” Mother’s Brief at 2, 28-29.

The trial court completely excluded the testimony of Mother’s expert, Dr. Sol Rappaport. That action might—in theory—have been justified in a jury trial. In a jury trial, the trial court acts as the “gatekeeper” and protects the jury-fact finder from “junk science” and unreliable expert opinion. The custody hearing was not a jury trial; it was a bench trial. As a result, there was no reason for the judge to act as a “gatekeeper.” In a bench trial, the judge is the fact finder: the judge can listen to the expert’s opinion testimony and use the various *Daubert* factors to determine the weight to be given to the opinion testimony. See Mother’s Brief at 28-29 (collecting authority).

Father asserts:

[I]t was not an abuse of discretion for the [trial] court, whether the jury was the trier of fact or the judge was the trier of fact, to not permit Dr. Rappaport to testify [sic].

Father’s Brief at 23. Father cites no legal authority in support of the quoted proposition. *Id.*

There is no other discussion of the sixth issue in Father’s answer brief. See Father’s Brief at 1-22 and 24. With respect, an unsupported *ipse dixit* assertion is not a sufficient response to a point of error. *United States v. Garrett*, 402 F.3d 1262, 1264 n.3 (10th Cir. 2005); *Local 851 of Intern. Broth. Of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp. 2d 127, 129 n.2 (E.D. N.Y. 1998).

III. THE AUTHORITIES CITED BY FATHER ARE INAPPOSITE

Father cites four cases decided by the Oklahoma Supreme Court and four cases decided by the Oklahoma Court of Appeals. None of the eight Oklahoma cases that Father cites address the six issues presented on appeal.

A. FATHER'S "STANDARD OF REVIEW" CASES

Father offers three cases in the "Standard of Review" section of his answer brief—

- *Kahre v. Kahre*, 1995 OK 133, 916 P.2d 1355;
- *Manhart v. Manhart*, 1986 OK 12, 725 P.2d 1234;
- *Dunham v. Dunham*, 1989 OK CIV APP 44, 777 P.2d 403.

Father's Brief at 2-5.

Kahre, *Manhart* and *Dunham* were all cases in which the appellant asserted that a child custody decision was not supported by sufficient evidence. *See Kahre*, 916 P.2d at 1359; *Manhart*, 725 P.2d at 1237; *Dunham*, 777 P.2d at 404. Mother does not make that argument in this case.

In this case, the trial judge committed errors of law. Legal errors are reviewed *de novo*. *See* Mother's Brief at 11; Part III. D, *infra*. In addition, 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; Mother's Brief at 22; Part II. C, *supra*.

B. FATHER'S "JOINT CUSTODY CASES"

Ignoring the six issues presented on appeal, Father recasts and recharacterizes the captioned appeal as a joint custody case—a case in which Mother asserts that the trial court erred by failing to award joint custody of the children to Mother and Father. *See* Father's Brief at 2-3 and 5-9. Mother actually wants something rather different:

- (1) a new joint custody arrangement or mechanism allowing both parents "to determine the moral and religious education of the children; and/or
- (2) a new custody hearing recognizing and respecting "Mother's constitutional and statutory right to have input into the religious education of her children."

Mother's Brief at 29. In other words, Mother wants an appellate outcome that is consistent with her six points of error/issues on appeal: Mother does not simply want joint custody. *Id.* at 1-2 and 29.

Father cites two cases in the "joint custody" section of his answer brief:

- *Foshee v. Foshee*, 2010 OK 85, 247 P.3d 1162;
- *Dunham v. Dunham*, 1989 OK CIV APP 44, 777 P.2d 403.

Foshee involved the termination of joint custody. It did not involve a legal error or a question of pure law. The court followed "the most recent, seminal case for terminating joint custody in Oklahoma"—*Daniel v. Daniel*, 2001 OK 117, 42 P.3d 863. There was no question or issue regarding the religious education or spiritual welfare of minor children. *Foshee* is inapposite.

Dunham was a case in which the trial judge awarded sole custody of minor children to the father even though experts recommended joint custody. 777 P.2d at 404. There is no indication that the trial judge considered issues relating to religious education or spiritual welfare.

Decided over 25 years ago—in 1989—*Dunham* predates the enactment of the Parenting Coordinator Act,⁸ the Oklahoma Religious Freedom Act,⁹ and the Parent's Bill of Rights.¹⁰ *Dunham* is inapposite.

C. FATHER'S RELIGION CASES

Father cites two cases in the section of his brief entitled "Free Exercise of Religion":

- *Shaw v. Hoedebeck*, 1997 OK CIV APP 69, 948 P.2d 1240;

⁸ See Father's Brief at 7 (acknowledging that *Dunham* "was decided before the implementation of the Parenting Coordinator Act").

⁹ 51 O.S. 2011, §§ 251-258 (enacted in 2000).

¹⁰ 25 O.S. Supp. 2015, § 2002(A)(4) (enacted in 2014).

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

Father's Brief at 13-19.

Shaw is an important case. At the hearing on custody, Father's counsel told the trial court that *Shaw* was one of a "couple of cases that prohibit inquiries about faith." 1/27/14 Tr. at 151, lines 8-10 (emphasis added), quoted in Mother's Brief at 4.

Father's counsel mischaracterized *Shaw*. *M.C.D.* points out that *Shaw* (also called *Hoedebeck v. Hoedebeck*) "does not prohibit any mention of religious matters." *M.C.D.*, 42 P.3d at 883.¹¹

On appeal, Father quotes *Shaw* for the proposition that:

The religious argument is neither new or rare. The fact that one parent is awarded custody of the children does not **in itself** violate the other parent's religious rights.

See Shaw, 948 P.2d at 1242 (emphasis added) quoted in Father's Brief at 17 (bottom of the page).

Two points are significant about the quoted passage from *Shaw*. **First**, Father quotes the passage out of context. The two sentences that precede the quoted passage are extremely important.

Again, the court may not decide that one religion is better or worse than another, but it does have the duty to determine the best interests of the children. To fail to consider the impact of certain actions the parents take, simply because the actions are labeled religious would be to exempt such acts from consideration, no matter the impact on the children.

948 P.2d at 1242.

¹¹ Ironically, Father quotes the relevant passage from *M.C.D.* in his answer brief. *See* Father's Brief at 18 (bottom of page).

The omission is significant. No one is saying that “one religion is better or worse than another.”

Second, Mother does not contend that the fact that Father was awarded custody of the children “in itself” violates Mother’s religious rights. She is saying that the trial court violated her rights under the Free Exercise Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment, the Oklahoma Religious Freedom Act and the Parent’s Bill of Rights when the trial court failed to provide an arrangement or mechanism for Mother to have input into the religious education of her children.

The issues presented in this case were not presented in *Shaw*. There is no discussion of the United States Constitution. The Oklahoma Religious Freedom Act and the Parent’s Bill of Rights had not been enacted at the time *Shaw* was decided. *Shaw* is inapposite.

D. OTHER INAPPOSITE CASES: THE STANDARD OF REVIEW REVISITED

Father cites four cases in the section of his brief entitled “Conclusion”:

- *Davis v. Davis*, 1960 P.2d 196, 355, P.2d 572;
- *Manhart v. Manhart*, 1986 OK 12, 725 P.2d 1234;
- *Williamson v. Williamson*, 2005 OK 6, 107 P.3d 589;
- *Bilyeu v. Bilyeu*, 2015 OK CIV APP 58, 352 P.3d 56.

Father cites the referenced four cases for this general proposition:

Custody contests are of equitable cognizance, and although an appellate court may examine and weigh the evidence, the findings and decree of the trial court cannot be disturbed unless found to be against the clear weight of the evidence or an abuse of discretion.

Father’s Brief at 23.

The general proposition does not apply in this case. Mother is not asking the Court to “examine and weigh the evidence.” The trial court applied incorrect legal rules and standards in the case below. Mother is asking the Court to reverse the case because the trial court committed

legal errors and to send the case back for further proceedings—this time applying the correct legal rules and standards.

Davis, Manhart, Williamson and Bilyeu do not involve appeals predicated upon errors of law, rights arising under the United States Constitution or the Oklahoma Religious Freedom Act or *Daubert* issues. *Davis, Manhart, Williamson and Bilyeu* are inapposite.

Questions of law are reviewed *de novo*. Review of a lower court's legal ruling is "plenary, independent and non-deferential." *Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, ¶ 16, 139 P.3d 897, 905. The *de novo* standard of review applies to contested questions of law regardless of the kind of proceeding involved. *Danne v. Texaco Explorational 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). See Mother's Brief at 11 ("Standard of Review").

IV. CONCLUSION

For the reasons stated herein and in Mother's Brief, Mother respectfully submits that the trial court committed legal errors, and that her rights under the United States Constitution and applicable state law have been violated. Mother respectfully prays that the Court reverse the trial court's decision and remand this case with instructions to conduct a new hearing in accordance with federal and state law.

Respectfully submitted,



Steven K. Balman, OBA No. 492
FRANDEN | FARRIS | QUILLIN
GOODNIGHT + ROBERTS
Williams Center Tower II, Suite 900
2 West 2nd Street
Tulsa, Oklahoma 74103
Tel: 918/583-7129
Fax: 918/584-3814

-and-

Melissa F. Cornell, OBA # 20185
CORNELL LAW FIRM
2504 E. 21st Street, Ste A
Tulsa, OK 74114
Tel: 918/574-8901
Fax: 918/508-2955

ATTORNEYS FOR APPELLANT,

████████████████████

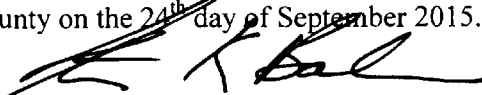
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was mailed on the 24th of September 2015, to:

to: Hugh Rineer,
LEONARD & RINEER, P.C.
1921 South Boston Ave.
Tulsa, Oklahoma 74119-5221
(918) 583-8700
Attorney for Petitioner,
Matthew Crawford Clark

Lora Howard,
Tulsa County Public Defender
423 South Boulder Ave., Suite 300
Tulsa, Oklahoma 74103
Attorney for Minor Children

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 24th day of September 2015.



Steven K. Balman