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No. DF-113542

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE THE MARRIAGE OF

[REDACTED]

Petitioner/Appellee,

and

[REDACTED]

Respondent/Appellant.

9-4-15  
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APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY

THE HONORABLE RODNEY SPARKMAN  
TULSA COUNTY CASE NO. FD-2009-3883

BRIEF OF APPELLEE

Hugh V. Rineer, OBA #7593  
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September 4, 2015

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**TABLE OF CONTENTS  
AND INDEX OF AUTHORITIES**

<b>Statement of Case</b> . . . . .	1
<b>Summary of the Record</b> . . . . .	2
<b>Standard of Review.</b> . . . . .	3
Title 43 O.S. §109. . . . .	3
<u>Kahre v. Kahre</u> , 1995 OK 133, 916 P.2d 1355. . . . .	4
<u>Manhart v. Manhart</u> , 1986 OK 12, 725 P.2d 1234 . . . . .	4, 5
<u>Dunham v. Dunham</u> , 1989 OK CIV APP 44, 777 P.2d 403. . . . .	5
<b>Joint Custody</b> . . . . .	5
<u>Foshee v. Foshee</u> , 2010 OK 85, 247 P.3d 1162 . . . . .	6, 8
Title 43 O.S. §109. . . . .	6
<u>Dunham v. Dunham</u> , 1989 OK CIV APP 44, 777 P.2d 403. . . . .	7, 8
Title 43 O.S. §120.1. . . . .	7
Title 43 O.S. §110.1. . . . .	8
<b>Parenting Coordinator</b> . . . . .	9
Title 43 O.S. §120.2. . . . .	10
Title 43 O.S. §120.3. . . . .	10, 11
<b>Free Exercise of Religion</b> . . . . .	13
Title 43 O.S. §109. . . . .	16
Title 51 O.S. 2011 §§251-258. . . . .	16
<u>Shaw v. Hoedebeck</u> , 1997 OK CIV APP 69, 948 P.2d 1240 . . . . .	16, 17, 18

In the Matter of the Adoption of M.C.D., 2002 OK CIV APP 27,  
42 P.3d 873 . . . . .18

**Daubert** . . . . .19

Daubert v. Merrell Dow Pharmaceuticals, Inc.,  
507 U.S. 579 (1993) . . . . .22

Title 12 O.S. §2702 . . . . .22

**Conclusion.** . . . . .23

Bilyeu v. Bilyeu, 215 OK CIV APP 58, 352 P.3d 56. . . . . .

IN THE SUPREME COURT  
OF THE STATE OF OKLAHOMA

IN RE THE MARRIAGE OF )  
 )  
 [REDACTED] )  
 )  
 Petitioner/Appellee, )  
 )  
 vs. )  
 [REDACTED] )  
 )  
 Respondent/Appellant. )

Case No. [REDACTED]  
Tulsa County [REDACTED]

**BRIEF OF APPELLEE**

**Statement of Case**

The Petitioner/Appellee, [REDACTED] ("Father"), filed his Petition for Dissolution of Marriage from the Respondent/Appellant, [REDACTED] [REDACTED] [REDACTED] ("Mother"), on September 11, 2009. The case finally went to trial on January 28, 2014, with the primary issue being that of custody of the minor children. The Tulsa County Public Defender's office was appointed to represent the children on May 7, 2013, following a motion by the Father for appointment of the Public Defender based on numerous unsubstantiated abuse allegations against Father filed with the Department of Human Services. The Court appointed a custody evaluator on August 13, 2012.

Following a three-day trial, the court issued its Findings of Fact and Conclusions of Law, dividing the marital estate, ruling on the respective Motions to Modify and Applications for Contempt Citation, awarding custody, visitation and child support.

The court awarded sole legal custody to the Father and equal shared custody to both, the shared custody being a week on, week off.

Mother 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. Mother asks that, at a minimum, the case should be remanded to the trial court with instructions to conduct a new custody hearing in accordance with her Constitutional and statutory right to have input into the religious education of her children and the Daubert/Christian rule for the admission of expert testimony in bench trials. (See Brief in Chief of Appellant, p. 29.)

Father submits that the trial court did not abuse his discretion in awarding sole custody to the Father, that the court had sufficient evidence to determine that joint custody was not workable, with or without a Parenting Coordinator, that Mother was not denied any Constitutional or statutory rights regarding religious education, and the court was well within its rights to exclude the testimony of Mother's expert witness.

#### **Summary of the Record**

Father has no objections to Mother's recitation of the Summary of the Record; however, would add that in the Respondent's

Proposed Findings of Fact and Conclusions of Law, she requested that she be awarded the sole physical and legal custody of the two minor children. If the trial court did not award her sole custody, then she requested joint custody with the appointment of a Parenting Coordinator subject to Mother being granted the primary physical custody of the children, that she 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, and that in the event of an impasse, she be granted final decision making as to matters of health, education, and religion, effectively granting her sole legal custody. (See Respondent's Proposed Findings of Fact and Conclusions of Law.) Additional portions of the record will be provided in the body of Father's Brief.

#### Standard of Review

Did the trial court abuse its discretion in awarding sole custody to Father?

Title 43 O.S. §109 provides:

A. 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.

B. The court, pursuant to the provisions of subsection A. of this section, may grant the care, custody, and control of a child to either parent or to the parents jointly.

C. If either or both parents have requested joint custody, said parents shall file with the court their plans for the exercise of joint care, custody, and control of their child. The parents of the child may submit a plan jointly, or either parent or both parents may submit separate plans. Any plan shall include but is not limited to provisions detailing the physical living arrangements for the child, child support obligations, medical and dental care for the child, school placement, and visitation rights. A plan shall be accompanied by an affidavit signed by each parent stating that said parent agrees to the plan and will abide by its terms. The plan and affidavits shall be filed with the petition for a divorce or legal separation or after said petition is filed.

D. The court shall issue a final plan for the exercise of joint care, custody, and control of the child or children, based upon the plan submitted by the parents, separate or jointly, with appropriate changes deemed by the court to be in the best interests of the child. The court also may reject a request for joint custody and proceed as if the request for joint custody had not been made.

The divorce court is a court of equity.

Custody contests are equity matters and the trial court's ruling will not be disturbed unless it is against the clear weight of the evidence. Kahre v. Kahre, 1995 OK 133, ¶19, 916 P.2d 1355.

An action for divorce, alimony, or division of property is one of equitable cognizance, and the trial court's judgment will not be disturbed on appeal unless found to be clearly contrary to the weight of the evidence. Manhart v. Manhart, 1986 OK 12, ¶5, 725 P.2d 1234.

The burden of showing that the judgment is against the clear weight of the evidence is on the appellant. Manhart, ¶5.

In fixing the primary custody of a minor child in a divorce action, the best interests of the child must be the paramount concern of the court. Manhart, ¶13.

If the trial court's judgment awarding primary custody is not against the clear weight of the evidence concerning the best interests of the children, it will not be grounds for reversal. Manhart, ¶14.

In awarding child custody in an action for divorce, the trial court is vested with wide discretion. The court must be guided in its decision by the best interests of the children. This court will not reverse the trial court unless appellant demonstrates an abuse of discretion. If appellant fails to demonstrate the trial court's judgment was against the weight of the evidence respecting the children's best interest, we will not disturb it. Dunham v. Dunham, 1989 OK CIV APP 44, ¶3, 777 P.2d 403.

#### **Joint Custody**

Both parents tried the case with the intention of proving to the court that sole custody should be awarded. (See the Proposed Findings of Fact and Conclusions of Law of both parties.)

Mother requested, in the alternative, joint custody, but her request was, in principal, one of sole custody with her having final decision making authority. (See Respondent's Findings of Fact and Conclusions of Law.) Mother now comes before this Court requesting joint custody with a Parenting Coordinator, apparently dropping her request to have final decision making authority.

Joint custody requires parents who:

(1) have an ability to communicate with each other even though they are no longer married;

(2) are mature enough to put aside their own differences; and

(3) work together and engage in joint discussions with each other and make joint decisions regarding the best interests of the children.

Foshee v. Foshee, 2010 OK 85, ¶16, 247 P.3d 1162.

The trial court did not err in granting Father sole custody.

Oklahoma law requires that the judge shall consider in awarding custody what appears to be in the best interest of the physical and mental and moral welfare of the child. Title 43 O.S. §109.A. There is no mention in the statute of the religious welfare of the child.

The parents had joint custody since the entry of the Temporary Order in 2009. (Temporary Order entered November 17, 2009, filed January 7, 2010.) The information provided to the expert witness, Dr. Stockley, was such that over four years after the entry of the joint custody order, Dr. Stockley would not have guessed that the parties had joint custody. (January 28 Transcript, Page 156, Lines 14-17.) Mother, during that entire period of time, did nothing to foster a joint custody arrangement. It is surprising that she would come into court and testify that she wants joint custody, although in truth, she did not really want joint custody and clearly did not want a parenting

coordinator after she failed to do anything that would indicate that joint custody would work or that she would work with joint custody. Mother told Dr. Stockley, "I don't want to be forced to be engaged with Matt at that level." (January 28 Transcript, Page 157, Lines 2-10.)

The issue in the instant case is not unlike that in Dunham v. Dunham, 1989 OK CIV APP 44, 777 P.2d 403, where the experts recommended joint custody while neither party requested joint custody. Dunham was decided before the implementation of the Parenting Coordinator Act. Title 43 O.S. §120.1 et seq.

The Dunham court found that joint custody should only be considered where certain circumstances are present. These circumstances include the likelihood of parental cooperation in matters affecting the child, a capacity to provide equally beneficial home environments, and that the situation will not be unduly disruptive of other important aspects of the children's life. Dunham, ¶4.

The instant court found that based on the testimony, the parents were not able to work together. (Findings of Fact and Conclusions of Law ¶169.) Mother was not willing to work together during the pendency of the action but wanted total control and effectively exercised total control, although there was nominally a joint custody order.

The Dunham court also stated:

Other jurisdictions have found a cardinal criterion for an award of joint custody is the agreement of the parties and a mutual ability to cooperate in reaching shared decisions in matters affecting the children's welfare. See Annot., 17 ALR 4<sup>th</sup> 1013 (1982). In this respect we find that a party's opposition to joint custody is in effect the antithesis of the concept of joint custody. To force joint custody on an unwilling parent should always give a trial court pause. Dunham, ¶4.

In the instant case, neither party requested joint custody because both parties readily acknowledged that they could not work together. (January 27 Transcript, Page 46, Lines 11-14; Page 69, Lines 11-22; Page 71, Lines 2-19; Page 72, Lines 2-10; Page 75, Lines 8-14; and January 29 Transcript, Page 60, Lines 12-21; Page 118, Lines 21-25; Page 122, Lines 14-25; Page 123, Lines 1-7; Page 123, Lines-22-25; Page 124, Lines 1-3.)

Again, in Dunham, there was no testimony or evidence that a joint custody plan would be superior. "The record and testimony showed a pattern of acrimony and hostility between the parties, not cooperation." Dunham, ¶5.

Title 43 O.S. §110.1 states:

It is the policy of this State to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage, provided that the parents agree to cooperate.

See also Foshee v. Foshee, 2010 OK 85, ¶12, 247 P.3d 1162.

Notwithstanding the fact that the court found that the parties were not good candidates for joint custody, the court awarded to each of them frequent and continuing contact with the children. (Findings of Fact and Conclusions of Law ¶¶214 and 215.)

Mother asks this Court to reverse the trial court's decision awarding sole legal custody to the Father. Mother is requesting that the Court follow Dr. Stockley's recommendation to award joint custody with a parenting coordinator.

Dr. Stockley stated in his report that the court should "thoughtfully consider" joint legal custody. (January 28 Transcript, Page 156, Lines 9-13.) The court thoughtfully considered joint legal custody and determined it was not in the best interest of the children.

#### Parenting Coordinator

Mother argues that joint custody should have been awarded with the appointment of a Parenting Coordinator. The trial judge made it clear that it is his responsibility to do what is in the best interests of the children and to decide the appropriate time share, and it is not up to a Parenting Coordinator to make time sharing decisions. (January 28 Transcript, Page 158, Lines 1-9; Findings of Fact and Conclusions of Law ¶¶212, 213, 214, and 215.)

What can a Parenting Coordinator do?

Title 43 O.S. §120.2 provides:

1. "Parenting Coordinator" means an impartial third party qualified pursuant to Subsection A. of Section 120.6 of this title appointed by the Court to assist parties in resolving issues and deciding disputed issues pursuant to the provisions of the Parenting Coordinator Act relating to parenting and other family issues in any action for dissolution of marriage, legal separation, paternity, or guardianship where a minor child is involved.

What is the authority of a Parenting Coordinator?

Title 43 O.S. §120.3 provides:

B. The court shall not appoint a Parenting Coordinator if any party objects unless:

(1) the court makes specific findings that the case is a high conflict case; and

(2) the court makes specific findings that the appointment of a parenting coordinator is in the best interests of any minor child in the case.

The only authority a Parenting Coordinator has is provided in §120.3.C.(1). The authority of a parenting coordinator shall be specified in the order appointing the parenting coordinator and limited to matters that will aid the parties in:

(a) identifying disputed issues;

(b) reducing misunderstandings;

(c) clarifying priorities;

(d) exploring possibilities for compromise;

(e) developing methods of collaboration and parenting; and

(f) complying with the court's order of custody, visitation, or guardianship.

Nothing in the Parenting Coordinator Act shall abrogate the custodial or non-custodial parent's rights or any court ordered visitation given to grandparents or other persons except as specifically addressed in the order appointing the parenting coordinator. Title 43 O.S. §120.3.F.

A Parenting Coordinator has no authority to make decisions on any issues related to custody, including religious issues. The Parenting Coordinator can act as a mediator and attempt to assist the parties in reaching agreements related to their children. The Parenting Coordinator is not a therapist or a counselor, and therefore, cannot provide counseling or therapeutic assistance to either of these parents. The Parenting Coordinator cannot make a recommendation to the court regarding the religious training of the children.

Father has testified under oath that he has no objection to the children being educated in the Islamic faith. (January 27 Transcript, Page 153, Lines 6-14.) Mother's attitude at trial was one of "I will agree to a Parenting Coordinator provided the Parenting Coordinator agrees with me." Mother was asked whether she was willing to work with a Parenting Coordinator on the religious upbringing. Her response was, "I would like to coordinate so that my child could attend religious education yes." (January 29 Transcript, Page 67, Lines 24-25 and Page 68, Lines 1-2.)

Mother also testified with regard to a Parenting Coordinator that she would hope that her input would be taken into consideration regarding school. (January 29 Transcript, Page 119, Lines 7-10.)

It appears that Mother is under the impression that a Parenting Coordinator is going to make decisions regarding school and religion. The ultimate decision is up to the parents. In this instance, school decisions are up to the sole custodian, the Father. Mother cannot take the children to a school different than the one that Father chooses. Mother can take the children to religious services different than the Father chooses. That situation occurs in numerous divorces when a parent has every other weekend visitation and invariably the non-custodial parent will be taking the children to a church different than the custodial parent. There may be cases where the non-custodial parent takes the children to church and the custodial parent does not take the children to church. It is up to the parent to make that decision during that parent's custodial time.

Mother was under the impression that the Parenting Coordinator was given the right to decide on religious activities or education. (January 29 Transcript, Page 148, Lines 17-19.)

And, Mother stated her wariness to even have a Parenting Coordinator involved in the religious issue. (January 29

Transcript, Page 150, Lines 1-8.) The decision is the parents' not the Parenting Coordinator.

**Free Exercise of Religion**

Mother states that the trial court impermissively interfered with Mother's free exercise of religion. On the face of the case in the trial court, it is clear that the trial court did not restrict, limit, modify, or impact the Mother's free exercise of religion. Mother can attend the mosque if she so desires, she can attend classes at the mosque if she so desires. There are absolutely no restrictions on her exercising whatever religion she determines is appropriate for her.

Does the fact that the Court awarded sole custody to Father somehow restrict Mother's free exercise of her religion? It does not. Does the Court awarding sole legal custody to Father restrict Mother's rights to provide a religious education to the minor children? Again, it does not. The Court did not restrict either parent from allowing the children to participate in any activities when the children are in their respective custody. The Court imposed no obligation on Mother regarding religious training of the children. The Court put no restraints on Mother regarding religious training of the children. When she has visitation with the children, she is free to take the children to the mosque, provide religious training for them, and feed them meals according to her religious tenets.

Mother states, "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." The Court had no need to recognize or acknowledge the Mother's right in its decision. Simply allowing the Mother alternate week visitation gives her the opportunity to train the children in whatever religious upbringing she chose. To decide that either Mother or Father should have additional time for religious instruction would have been improper. (It would also be improper for a Parenting Coordinator to recommend that.)

Mother goes on to state, "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." The Court did acknowledge a difference in their religious beliefs. (January 27 Transcript, Page 149, Lines 4-8 and 18-23; Page 150, Lines 15-19; and Page 151, Lines 11-13; and January 29 Transcript, Page 66, Lines 20-25.) (b) The children are not currently receiving training in Mother's faith. There was no need for the Court to acknowledge that since Mother had primary physical custody of the minor son and total physical custody of the minor daughter such that she could have been

providing the training that she desired for the children during the Temporary Order timeframe. (c) Mother has a right to have input into the children's religious education. Again, there is nothing stopping the Mother from exercising input into the children's religious education. (d) Mother wants the children to receive training in the Mother's faith. The Mother has every right under the Court's ruling to provide for training for the children in her faith, just not on Father's time.

Mother appears to argue that the Court is acting as a government and is interfering with the fundamental parental rights and interest in the religious upbringing of children. The trial judge did everything he could to avoid interfering with the fundamental parental rights in directing the religious upbringing of the children by stating, "I will say this. 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 issue, they can decide." (January 27 Transcript, Page 149, Lines 4-8.)

Father testified as follows:

I have no objection to the kids learning about any Abrahamic religion and will facilitate them learning about Abrahamic religion. And they certainly may choose for themselves which religion to follow as they grow older. Sarah has the opportunity to educate him about Islam, I have the opportunity to educate him as Islam--or Christianity. I will also educate him about the others. And then when he gets to the appropriate age we can make a

decision for himself. Same thing with Samira.  
(January 27 Transcript, Page 153, Lines 9-14.)

Mother argues that the Court should have awarded joint custody so that the parents would be compelled to discuss the religious training of the children. 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. §109.A.

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.

The case of Shaw v. Hoedebeck, 1997 OK CIV APP 69, 948 P.2d 1240, addresses the issues of the modification of joint custody where religious disputes were rampant. The parties had a joint custody plan which both parties moved to modify. The court of appeals stated that joint custody will not succeed without the cooperation of the parties. When it becomes apparent to the court that joint custody simply does not work, then a material change of circumstances has occurred, and the joint custody arrangement must be vacated. At that point, the court must enter a custody order which is in accord with the best interests of the children.

In the instant case, the Court found that a joint custody plan will not work; therefore, the custody order must be in accord with the best interests of the children. (Findings of Fact and Conclusions of Law ¶¶212, 213, and 214.)

The Shaw court noted that it appears that the religious beliefs of the parties cause disputes and stated, "While courts may not decide religious issues, the trial court found itself in the position of being required to determine the best interests of the children even though religious disputes were rampant." Shaw, ¶3.

The trial court found that the children have no difficulty in adjusting to Mother's religious beliefs. To the contrary, the children enjoy participating in the religious lives of both parents and the extended families of both parties. In this connection, the court ordered both parties not to interfere with the children participating in the religious life of the other parent. Shaw, ¶5.

Father testified he will not interfere with the children learning Islam. (January 27 Transcript, Page 153, Lines 6-14.)

The court stated 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. Shaw, ¶8.

The religious argument is neither new nor rare. Anytime divorced parents have different religious faiths, this contention may be made by the losing party. The fact that one parent is awarded custody of the children does not in itself violate the other parent's religious rights. Shaw, ¶8.

When custody of minor children is the issue, the primary consideration is always to be what is in the best interests of the children. One who challenges the trial court's determination on custody, based on the best interests of the children, has the burden of demonstrating an abuse of discretion and must put forth the evidence relied upon to establish the trial court's error and must affirmatively show how this evidence shows the trial court's decision to have been contrary to the children's best interests. Absent such a showing, the trial court's determinations are presumptively correct. Shaw, ¶11.

The instant trial court acknowledged that the religious education of the children was a problem that the parents would have to resolve on their own because the trial judge was not going to pick one religion over another. (January 27 Transcript, Page 149, Lines 4-8.)

The Mother criticizes Father's attorney for not citing the case to the trial court of In the Matter of the Adoption of M.C.D., 2002 OK CIV APP 27, 42 P.3d 873, 883:

Husband's next contention of error is that 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, as holding a parent's religious beliefs are irrelevant in child custody matters unless associated activities are harmful to the child. However, Hoedebeck does not prohibit any mention of religious matters. Husband fails to show a substantial right was affected by the reference to wife as "a good Christian woman." M.C.D., ¶32.

In the instant case, there was testimony about religious matters in that both parties were able to testify that they were of different religious faiths. (January 27 Transcript, Page 78, Lines 13-16 and January 29 Transcript, Page 65, Lines 8-10.)

Mother, in her Proposed Findings of Fact and Conclusions of Law, requested the Court award to her sole physical and legal custody but if the Court declined to do that to award joint custody and further requested that she be given primary physical custody, that she 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, that in the event of an impasse, she be granted final decision making as to matters of health, education and religion. (See Respondent's Proposed Findings of Fact and Conclusions of Law.) Clearly, the Mother was requesting the Court make a finding regarding religion by giving her final decision making in that regard.

The trial judge, by awarding alternate week visitation, allowed the Mother to make religious decisions during her visitation time.

#### Daubert

Mother requests the Court send the case back to the trial court for improperly excluding the testimony of the Mother's witness, Dr. Sol Rappaport. Dr. Rappaport did not evaluate the children or the parents and could not make a recommendation about

what was in their best interests. (January 29 Transcript, Page 6, Lines 2-7.) Dr. Rappaport could not give an opinion on what Dr. Stockley's conclusion was. He could only give an opinion on how Dr. Stockley drew his conclusions. (January 29 Transcript, Page 6, Lines 8-13.) Dr. Rappaport could not testify to the parenting capacity of the Father, to the parenting capacity of the Mother, or the present condition of the children. (January 29 Transcript, Page 6, Lines 18-25.) The witness acknowledged that he could provide a summary of what research says but could not tell the court that the research applies 100% to the particular family since he did not evaluate the family. (January 29 Transcript, Page 10, Lines 5-12.)

The judge declined to allow Dr. Rappaport to testify because he could not offer evidence for the judge to rely upon for his decision about these particular children. (January 29 Transcript, Page 10, Lines 21-25 through Page 11, Lines 1-4.) The judge further stated that he could only take expert testimony that relates to these parties, these children, after proper evaluations had been done. (January 29 Transcript, Page 11, Lines 12-14.)

Dr. Rappaport offered that he could critique Dr. Stockley's report and discuss where Dr. Stockley failed to follow guidelines and where he made mistakes in his testimony and inaccuracies in his testimony. (January 29 Transcript, Page 11, Lines 18-25.) He agreed that regardless of his critique of Dr. Stockley's

methodology, he could not testify as to whether Dr. Stockley's opinion is in the children's best interests or not. (January 29 Transcript, Page 13, Lines 14-18.)

The trial judge did not abuse his discretion in his ruling not to permit Mother's expert from testifying. Dr. Rappaport indicated that he would testify as to what the literature says, research about joint custody versus sole custody, and benefits of a Parent Coordinator. (January 29 Transcript, Page 8, Lines 16-25.) He also stated he could testify about the best literature on how to develop parenting plans for young children. (January 29 Transcript, Page 9, Lines 1-5.) He stated he would testify about what the literature says on child development and alternative schedules. (January 29 Transcript, Page 9, Lines 13-19.) Finally, he stated, "Depending on where the testimony leads, obviously expertise in terms of helping the court understand mistakes that were made or problems with the custody evaluation that was conducted." (January 29 Transcript, Page 9, Lines 22-25.)

On voir dire, Dr. Rappaport confirmed that he could not apply the literature to the children in the instant case. (January 29 Transcript, Page 10, Lines 5-12.)

Again, on voir dire, Dr. Rappaport admitted that he does not have an established protocol in a finished form to evaluate other

psychologists' custody evaluations. (January 29 Transcript, Page 12, Lines 5-23.)

Dr. Rappaport's principals and methods are a rough draft of the protocol that he has established himself. It has not been peer reviewed and no studies have been done to determine its accuracy and reliability. (January 29 Transcript, Page 17, Lines 24-25 and Page 18, Lines 1-3.) It was unclear that Dr. Rappaport had reviewed all of the data. He received certain data from Mother's attorney. He did not have any contact with Dr. Stockley.

Dr. Rappaport gave the court an example of a problem with Dr. Stockley's report/testimony, that being use of the word "attachment" but admitted he was just using the word differently and Dr. Stockley had adequately defined it in his testimony. (January 29 Transcript, Page 20, Lines 2-8.)

The court, after confirming that Dr. Rappaport had not met with the parties, the collaterals, the children, sustained Father's objection and did not allow Dr. Rappaport to testify. (January 29 Transcript, Page 20, Lines 22-25.)

The trial court did not err in finding that Dr. Rappaport could not testify because he did not meet the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 507 U.S. 579 (1993) or Title 12 O.S. §2702. In addition, in an equitable cause of action, the court is free to determine which witnesses he will or will not hear. Based on the questions and answers of the witness,

questions of the attorneys, and questions of the judge, it was not an abuse of discretion for the court, whether a jury was the trier of fact or the judge was the trier of fact, to not permit Dr. Rappaport to testify.

### Conclusion

"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." Manhart v. Manhart, 1986 OK 12, ¶14, 725 P.2d 1234 (Weight of the Evidence); Davis v. Davis, 1960 OK 196, ¶0, 355 P.2d 572 (Syllabus 1) (Abuse of Discretion); Bilyeu v. Bilyeu, 215 OK CIV APP 58, ¶3, 352 P.3d 56.

". . ., in Williamson v. Williamson, 2005 OK 6, ¶5, 107 P.3d 589, the Supreme Court noted in a custody case that, 'Unless we determine that the trial court's decision is clearly against the weight of evidence so as to constitute an abuse of discretion, it will not be disturbed.'" Bilyeu, ¶5.

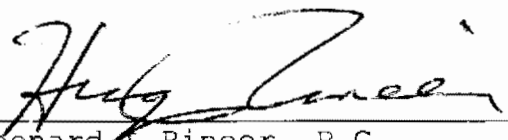
The lodestar by which a trial court must judge a custody contest is *the best interest of the child*. [Emphasis in the original.] Bilyeu, ¶8. In the Bilyeu case (a joint custody dispute), the trial court noted some hostility between the parents but expressed a belief that hostility could be overcome. No such finding was made by the trial court in the instant case.

The trial court recognized religion as an issue when determining joint versus sole custody. The trial court did not restrict Mother's freedom to provide religious training to the children. The evidence was overwhelming that joint custody was not in the best interests of the children. The evidence was overwhelming that the best interests of the children would be served by Father being the sole legal custodian. The judge did not abuse his judicial discretion in disallowing the testimony of Mother's expert witness.

The decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING TO PARTIES

I certify that a true and correct copy of the Brief of Appellee was mailed this 4<sup>th</sup> day of September, 2015, to:

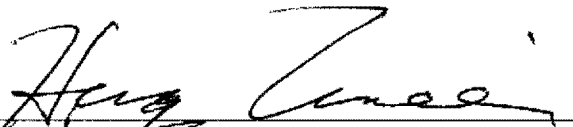
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I further certify that a copy of the above and foregoing was filed with the Office of the Court Clerk of the District Court of Tulsa County on the 4<sup>th</sup> day of September, 2015.

  
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Hugh V. Rineer