ANTHOLOGY OF OKLAHOMA AUTHORITIES FOR ANALYSIS OF CHILD CUSTODY & VISITATION ISSUES

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Scope: Authorities referenced are principally limited to inter-parental disputes and matters affecting "merits" decisions. Third party custody/visitation issues are only incidentally discussed and jurisdictional issues are excluded. Authorities are organized within topical groups and are there listed in their public domain citation sequence. The approach taken is to present data (authorities) for your analysis and application with as little analysis/comment by me as possible. Quoted material is mainly copied from materials on-line at The Oklahoma Supreme Court Network (OSCN) at http://www.oscn.net/ and no attempt has been made by me to determine the accuracy of such data.

Navigation: Whenever you see something underlined, it's a link to automatically jump to the referenced location. Each section topic, below in Contents, links (jumps) to that section. Each topic includes links to "Topic Contents", "General Contents", "Prior Topic" and "Next Topic". "Topic Contents" jumps to the table of contents for the item. "General Contents" moves to the top of Contents. "Prior Topic" moves to immediately prior topic and "Next Topic" moves to the next section topic. Sometimes, "Next statute/case" and/or "Prior statute/case" links are present and, if so, these links move to next or prior authority within the current topic. Other links will occasionally be used.Ctrl+Home moves to the top of the first page and Ctrl+End moves to the top of the last page. Use Adobe Acrobat Reader's Search feature, and, at the very bottom left corner of the window, click the ◂|▸ icon to open page and bookmark indices.

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General Statutes - Title 43

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§107.2. Court Authority to Mandate Educational Program Concerning the Impact of Separate Parenting and Coparenting, Visitation, Conflict Management, etc.-Adoption of Local Rules

Next Statute

A. In all actions for divorce, separate maintenance, guardianship, paternity, custody or visitation, including modifications or enforcements of a prior court order, where the interest of a child under eighteen (18) years of age is involved, the court may require all adult parties to attend an educational program concerning, as appropriate, the impact of separate parenting and coparenting on children, the implications for visitation and conflict management, development of children, separate financial responsibility for children and such other instruction as deemed necessary by the court. The program shall be educational in nature and not designed for individual therapy.

B. Each judicial district may adopt its own local rules governing the program.

§107.3. Proceeding for Disposition of Children

Next Statute Prior

A. In any proceeding for the disposition of children where custody of minor children is contested by any party, the court may appoint an attorney at law as guardian ad litem on the court's motion or upon application of any party to appear for and represent the minor children. Expenses, costs, and attorney's fees for the guardian ad litem may be allocated among the parties as determined by the court.

B. When property, separate maintenance, or custody is at issue, the court:

1. May refer the issue or issues to mediation if feasible unless a party asserts or it appears to the court that domestic violence or child abuse has occurred, in which event the court shall halt or suspend professional mediation unless the court specifically finds that:

a. the following three conditions are satisfied:

(1) the professional mediator has substantial training concerning the effects of domestic violence or child abuse on victims,

(2) a party who is or alleges to be the victim of domestic violence is capable of negotiating with the other party in mediation, either alone or with assistance, without suffering an imbalance of power as a result of the alleged domestic violence, and

(3) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between parties resulting from the alleged domestic violence or child abuse, or

b. in the case of domestic violence involving parents, the parent who is or alleges to be the victim requests mediation and the mediator is informed of the alleged domestic violence; and

2. When custody is at issue, the court may order, in addition to or in lieu of the provisions of paragraph 1 of this subsection, that each of the parties undergo individual counseling in a manner that the court deems appropriate, if the court finds that the parties can afford the counseling.

C. As used in this section:

1. "Child abuse" means:

a. that a child has been physically, emotionally, or psychologically abused by a parent,

b. that a child has been:

(1) sexually abused by a parent through criminal sexual penetration, incest, or criminal sexual contact of a minor as those acts are defined by state law, or

(2) sexually exploited by a parent through allowing, permitting, or encouraging the child in obscene or pornographic photographing or filming or depicting a child for commercial purposes as those acts are defined by state law,

c. that a child has been knowingly or intentionally or negligently placed in a situation that may endanger the child's life or health, or

d. that a child has been knowingly or intentionally tortured, cruelly confined, or cruelly punished; provided, that nothing in this paragraph shall be construed to imply that a child who is or has been provided with treatment by spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner of the church or denomination, is for that reason alone a victim of child abuse within the meaning of this paragraph; and

2. "Domestic violence" means one parent causing or threatening physical harm or assault or inciting imminent fear of physical, emotional, or psychological harm to the other parent.

D. During any proceeding concerning child custody, should it be determined by the court that a party has intentionally made a false or frivolous accusation to the court of child abuse or neglect against the other party, the court shall proceed with any or all of the following:

1. Find the accusing party in contempt for perjury and refer for prosecution;

2. Consider the false allegations in determining custody; and

3. Award the obligation to pay all court costs and legal expenses encumbered by both parties arising from the allegations to the accusing party.

§109. Best Interest of Child Considered in Awarding Custody or Appointing Guardian-Joint Custody-Plan-Arbitration

Next Statute Prior

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 interests 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.

For the purposes of this section, the terms joint custody and joint care, custody, and control mean the sharing by parents in all or some of the aspects of physical and legal care, custody, and control of their children.

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 affidavit 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.

E. The parents having joint custody of the child may modify the terms of the plan for joint care, custody, and control. The modification to the plan shall be filed with the court and included with the plan. If the court determines the modifications are in the best interests of the child, the court shall approve the modifications.

F. The court also may modify the terms of the plan for joint care, custody, and control upon the request of one parent. The court shall not modify the plan unless the modifications are in the best interests of the child.

G. 1. The court may terminate a joint custody decree upon the request of one or both of the parents or whenever the court determines said decree is not in the best interests of the child.

2. Upon termination of a joint custody decree, the court shall proceed and issue a modified decree for the care, custody, and control of the child as if no such joint custody decree had been made.

H. In the event of a dispute between the parents having joint custody of a child as to the interpretation of a provision of said plan, the court may appoint an arbitrator to resolve said dispute. The arbitrator shall be a disinterested person knowledgeable in domestic relations law and family counseling. The determination of the arbitrator shall be final and binding on the parties to the proceedings until further order of the court.

If a parent refuses to consent to arbitration, the court may terminate the joint custody decree.

§109.1. Custody of Child During Separation without Divorce

Next Statute Prior

If the parents of a minor unmarried child are separated without being divorced, the judge of the district court, upon application of either parent, may issue any civil process necessary to inquire into the custody of said minor unmarried child. The court may award the custody of said child to either party or both, in accordance with the best interests of the child, for such time and pursuant to such regulations as the case may require. The decision of the judge shall be guided by the rules prescribed in Section 2 of this act.

§109.2. Determination of Paternity, Custody and Child Support

Next Statute Prior

Except as otherwise provided by Section 3 of Title 10 of the Oklahoma Statutes, in any action concerning the custody of a minor unmarried child or the determination of child support, the court may determine if the parties to the action are the parents of the children. If the parties to the action are the parents of the children, the court may determine which party should have custody of said children, may award child support to the parent to whom it awards custody, and may make an appropriate order for payment of costs and attorney's fees.

§110. Orders concerning property, children, support and expenses

Next Statute Prior

A. After a petition has been filed in an action for divorce or separate maintenance either party may request the court to issue:

* * * [temporary order and temporary restraining order provisions omitted]

D. The court may in its discretion make additional orders relative to the expenses of any such subsequent actions, including but not limited to writs of habeas corpus, brought by the parties or their attorneys, for the enforcement or modification of any interlocutory or final orders in the divorce action made for the benefit of either party or their respective attorneys.

§110.1. Policy for equal access to the minor children by parents

Next Statute Prior

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. To effectuate this policy, if requested by a parent, the court shall provide substantially equal access to the minor children to both parents at a temporary order hearing, unless the court finds that such shared parenting would be detrimental to such child. The burden of proof that such shared parenting would be detrimental to such child shall be upon the parent requesting sole custody and the reason for such determination shall be documented in the court record.

§111.1. Order to Provide Minimum Visitation for Noncustodial Parent-Violation of Order

Next Statute Prior

A. 1. Any order providing for the visitation of a noncustodial parent with any of the children of such noncustodial parent shall provide a specified minimum amount of visitation between the noncustodial parent and the child unless the court determines otherwise.

2. Except for good cause shown and when in the best interests of the child, the order shall encourage additional visitations of the noncustodial parent and the child and in addition encourage liberal telephone communications between the noncustodial parent and the child.

B. 1. Except for good cause shown, when a noncustodial parent who is ordered to pay child support and who is awarded visitation rights fails to pay child support, the custodial parent shall not refuse to honor the noncustodial parent's visitation rights.

2. When a custodial parent refuses to honor a noncustodial parent's visitation rights, the noncustodial parent shall not fail to pay any ordered child support or alimony.

C. 1. Violation of an order providing for the payment of child support or providing for the visitation of a noncustodial parent with any of the children of such noncustodial parent may be prosecuted as indirect civil contempt pursuant to Section 566 of Title 21 of the Oklahoma Statutes or as otherwise deemed appropriate by the court.

2. Unless good cause is shown for the noncompliance, the prevailing party shall be entitled to recover court costs and attorney fees expended in enforcing the order and any other reasonable costs and expenses incurred in connection with the denied child support or denied visitation as authorized by the court.

§111.2. Liability and Remedies Available Where Person Not a Party to a Custody Proceeding Denies Another of Right to Custody or Visitation

Next Statute Prior

Any person who is not a party to a child custody proceeding, and who intentionally removes, causes the removal of, assists in the removal of, or detains any child under eighteen (18) years of age with intent to deny another person's right to custody of the child or visitation under an existing court order shall be liable in an action at law. Remedies available pursuant to this section are in addition to any other remedies available by law or equity and may include, but shall not be limited to, the following:

1. Damages for loss of service, society, and companionship;

2. Compensatory damages for reasonable expenses incurred in searching for the missing child or attending court hearings; and

3. The prevailing party in such action shall be awarded reasonable attorney fees.

§111.3. Interference with visitation rights of noncustodial parent - Motion for enforcement.

Next Statute Prior

A. When a noncustodial parent has been granted visitation rights and those rights are denied or otherwise interfered with by the custodial parent, in addition to the remedy provided in subsection B of Section 111.1 of Title 43 of the Oklahoma Statutes, the noncustodial parent may file with the court clerk a motion for enforcement of visitation rights. The motion shall be filed on a form provided by the court clerk. Upon filing of the motion, the court shall immediately:

1. Issue ex parte an order for mediation; or

2. Set a hearing on the motion, which shall be not more than twenty-one (21) days after the filing of the motion.

B. Within five (5) days of termination of mediation ordered pursuant to paragraph 1 of subsection A of this section, the mediator shall submit the record of termination and a summary of the parties' agreement, if any, to the court. Upon receipt of the record of termination, the court shall enter an order in accordance with the parties' agreement, if any, or set the matter for hearing, which shall be not more than ten (10) days after the record of termination is received by the court.

C. Notice of a hearing pursuant to subsection A or B of this section shall be given to all interested parties by certified mail, return receipt requested, or as ordered by the court.

D. If the court finds that visitation rights of the noncustodial parent have been unreasonably denied or otherwise interfered with by the custodial parent, the court shall enter an order providing for one or more of the following:

1. A specific visitation schedule;

2. Compensating visitation time for the visitation denied or otherwise interfered with, which time shall be of the same type (e.g. holiday, weekday, weekend, summer) as the visitation denied or otherwise interfered with, and shall be at the convenience of the noncustodial parent;

3. Posting of a bond, either cash or with sufficient sureties, conditioned upon compliance with the order granting visitation rights;

4. Assessment of reasonable attorney fees, mediation costs, and court costs to enforce visitation rights against the custodial parent;

5. Attendance of one or both parents at counseling or educational sessions which focus on the impact of visitation disputes on children;

6. Supervised visitation; or

7. Any other remedy the court considers appropriate, which may include an order which modifies a prior order granting child custody.

E. If the court finds that the motion for enforcement of visitation rights has been unreasonably filed or pursued by the noncustodial parent, the court may assess reasonable attorney fees, mediation costs, and court costs against the noncustodial parent.

F. Final disposition of a motion filed pursuant to this section shall take place no later than forty-five (45) days after filing of the motion.

G. The Office of the Court Administrator shall develop the form required by subsection A of this section to be used for a motion to enforce visitation rights.

§112. Care, Custody and Support of Minor Children

Next Statute Prior

A. A petition or cross-petition for a divorce, legal separation, or annulment must state whether or not the parties have minor children of the marriage. If there are minor children of the marriage, the court:

1. Shall make provision for guardianship, custody, medical care, support and education of the children;

2. Unless not in the best interests of the children, may provide for the visitation of the noncustodial parent with any of the children of the noncustodial parent; and

3. May modify or change any order whenever circumstances render the change proper either before or after final judgment in the action; provided, that the amount of the periodic child support payment shall not be modified retroactively or payment of all or a portion of the past due amount

waived, except by mutual agreement of the obligor and obligee, or if the obligee has assigned child support rights to the Department of Human Services or other entity, by agreement of the Department or other entity. Unless the parties agree to the contrary, a completed child support computation form provided for in Section 120 of this title shall be required to be filed with the child support order.
The social security numbers of both parents and the child shall be included on the child support order summary form provided for in Section 120 of this title, which shall be filed with all child support orders.

B. In any action in which there are minor unmarried children in awarding or modifying the custody of the child or in appointing a general guardian for the child, the court shall be guided by the provisions of Section 21.1 of Title 10 of the Oklahoma Statutes and shall consider what appears to be in the best interests of the child.

C. 1. When it is in the best interests of a minor unmarried child, the court shall:

a. assure children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and

b. encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

2. There shall be neither a legal preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody.

3. When in the best interests of the child, custody shall be awarded in a way which assures the frequent and continuing contact of the child with both parents. When awarding custody to either parent, the court:

a. shall consider, among other facts, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and

b. shall not prefer a parent as a custodian of the child because of the gender of that parent.

4. In any action, there shall be neither a legal preference or a presumption for or against private or public school or home-schooling in awarding the custody of a child, or in appointing a general guardian for the child.

5. In making an order for custody, the court may specify that:

a. unless there is a prior written agreement to change the permanent residence of the child either parent shall notify the other parent if the parent plans to change the permanent residence of the child, and

b. the noncustodial parent is to notify the custodial parent if the noncustodial parent plans to change permanent residence.

D. 1. Except for good cause shown, a pattern of failure to allow court-ordered visitation may be determined to be contrary to the best interests of the child and as such may be grounds for modification of the child custody order.

2. For any action brought pursuant to the provisions of this section which the court determines to be contrary to the best interests of the child, the prevailing party shall be entitled to recover court costs, attorney fees and any other reasonable costs and expenses incurred with the action.

E. Any child shall be entitled to support by the parents until the child reaches eighteen (18) years of age. If a dependent child is regularly and continuously attending high school, said child shall be entitled to support by the parents through the age of eighteen (18) years. No hearing shall be required to extend such support through the age of eighteen (18) if the child is regularly and continuously attending high school.

F. In any case in which provision is made for the custody or support of a minor child or enforcement of such order, the court shall inquire whether public assistance money or medical support has been provided by the Department of Human Services for the benefit of each child. If public assistance money or medical support has been provided for the benefit of the child, the Department of Human Services shall be a necessary party for the just adjudication and establishment of the debt due and owing the State of Oklahoma, as defined in Section 238 of Title 56 of the Oklahoma Statutes, for the just adjudication and establishment of paternity, current child support, and medical insurance coverage for the minor children in accordance with federal regulations.

G. In any case in which a child support order or custody order or both is entered, enforced or modified, the court may make a determination of the arrearages of child support.

§112.2. Evidence of Domestic Abuse Considered-Rebuttable Presumption

Next Statute Prior

In every case involving the custody of, guardianship of or visitation with a child, the court shall consider evidence of ongoing domestic abuse which is properly brought before it. If the occurrence of ongoing domestic abuse is established by clear and convincing evidence, there shall be a rebuttable presumption that it is not in the best interests of the child to have custody, guardianship or unsupervised visitation granted to the abusive person.

§113. Preference of Child Considered in Custody or Visitation Actions

Prior Statute

In any action for divorce, legal separation, or annulment in which a court must determine custody or limits of or period of visitation, the child may express a preference as to which of its parents the child wishes to have custody. The court may determine whether the best interest of the child will be served by the child's expression of preference as to which parent should have custody or limits of or period of visitation rights of either parent. If the court so finds, the child may express such preference or give other testimony. The court may consider the expression of preference or other testimony of the child in determining custody or limits of or period of visitation. Provided, however, the court shall not be bound by the child's choice and may take other facts into consideration in awarding custody or limits of or period of visitation.

If the child expresses a preference or gives testimony, such preference or testimony may be taken by the court in chambers, with or without the parents or other parties present, at the court's discretion. If attorneys are not allowed to be present, the court shall state, for the record, the reasons for their exclusion. At the request of either party, a record shall be made of any such proceeding in chambers.

Appellate Standard of Review

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Carpenter v. Carpenter, 1982 OK 38, 645 P.2d 476 (the father was found to have committed fraud in a post-decree proceeding in which he obtained child custody and custody was subsequently awarded to the mother):

¶10 Custody contests are of equitable cognizance. The court may exercise continuing jurisdiction of disputed claims. On appeal, the trial court's disposition is reviewed by the standards applicable to chancery cases. The court's decision is presumed to include a finding favorable to the successful party upon every fact necessary to support it. While an appellate court may and will 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. Whenever possible, an appellate court must render, or cause to be rendered, that judgment which in its opinion the trial court should have rendered. A decree need not rest upon uncontradicted evidence. It is not fatal to the validity of an equity decision if, on the basis of the evidence presented, the chancellor might have been equally correct in reaching a conclusion different from that which he actually did. If the result is correct, the judgment is not vulnerable to reversal because the wrong reason was given for the decision or because the trial court considered an immaterial issue or made an erroneous finding of fact. We are not bound either by the reasoning or the findings of the trial court. Whenever the law and the facts warrant, we may affirm the judgment if it is sustainable on any rational theory and the ultimate conclusion reached below is legally correct. Unless the decision is found to be against the clear weight of the evidence, the appellate court must indulge in the presumption that it is correct.

Change of Law During Action's Pendency

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Manhart v. Manhart, 1986 OK 12, 725 P.2d 1234 (the father was awarded child custody prior and during the mother's appeal the "tender years" statute, former 30 O.S. §11, was repealed):

> ¶12 During the pendency of the appeal of the district court's order concerning the primary custody of the Manhart children, the statutory guidelines for awarding child custody contained in 30 O.S. §11 (the "tender years doctrine") were repealed and replaced by 12 O.S. §1275.4 (A), which states:
>
> > 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.
>
> ¶13 For the purpose of this appeal, the Court adopts the statutory guidelines of 12 O.S. §1275.4 (A), for guidance in determining the custody of the Manhart children. In fixing the primary custody of a minor child in a divorce action, the best interest of the child must be the paramount concern of the court. *Frankovich v. Frankovich*, 459 P.2d 583 (Okl. 1969); *Duncan v. Duncan*, 449 P.2d 267 (Okl. 1969); *Lynn v. Lynn*, 443 P.2d 106 (Okl. 1968); *Waller v. Waller*, 439 P.2d 952 (Okl. 1968).

Change of Modification Venue

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Cooper v. Cooper
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Cooper v. Cooper, 1980 OK 128, 616 P.2d 1154 (intrastate change of venue where non-custodial parent moves from state):

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> ¶4 Under principles previously expressed by this Court, the district court also correctly ruled that it had no jurisdiction to modify the Comanche County court's decree and increase child support payments. *Jones v. Jones*, 177 Okl. 181, 58 P.2d 330, 333 (1936) (per curiam). We are convinced by the authorities in Appellant's brief, however, that under the circumstances of this case we should depart from the rule of *Jones v. Jones* and allow the District Court of Pottawatomie County to exercise jurisdiction to hear Appellant's motion to modify. We do so without reaching Appellant's equal protection arguments under the U.S. Constitution. Our holding is that when the following circumstances are present, the district court in the movant's county may exercise jurisdiction, concurrent with the court that granted the divorce, to hear the motion to modify:
> 1. One parent has moved away from Oklahoma and is now domiciled in another state.
> 2. The child is physically and lawfully present within the county in which the motion to modify is filed. See *Application of Price*, 528 P.2d 1107, 1110 (Okl. 1974).
> 3. The action is not brought for purposes of forum shopping.
> 4. The nonresident parent is properly served with process, in order to confer personal jurisdiction upon the new court. 12 O.S. 1971 §1701.03 (a)(7); cf. *Application of Price*, 528 P.2d at 1109.
> 5. The movant demonstrates that it would be a burden to return to the court that granted the original decree.

Rodriguez v. Moinian, 1990 OK CIV APP 55, 798 P.2d 232 (intrastate change of venue where objection not timely presented):

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¶5 In his Petition in Error and Brief in Chief in support of this appeal, Father asserts (1) lack of subject matter jurisdiction of the Comanche County District Court over Mother's motion to modify the support order entered by the Caddo County District Court, (2) lack of personal jurisdiction of the Comanche County District Court over Father for lack of proper service of Mother's motion to modify, (3) deprivation of Father's right to present his objections to venue and jurisdiction to the Comanche County District Court, and (4) abuse of discretion by the Comanche County District Court in setting an unreasonable and inequitable amount of child support. However, we find no record reflecting that Father's objections to venue, service of process, and personal jurisdiction were properly raised in the Trial Court. Father's motion to vacate under 12 O.S. §1031.1, raising these issues apparently for the first time, was filed out-of-time, and Father does not appeal the Trial Court's rulings thereon in the present case. Therefore, and finding no record reflecting that Father's objections to venue, service of process and personal jurisdiction were properly raised in the Trial Court, we deem those objections waived, and address only Father's assertion of the Trial Court's lack of subject matter jurisdiction. 12 O.S.Supp. 1984 §2012 (F) (waiver of objections); *Zahn v. Obert*. 60 Okl. 118, 159 P. 298 (1916) (objection to subject matter jurisdiction may be raised at any time).

¶6 As to the Comanche County District Court's jurisdiction to hear Mother's motion to modify, Father asserts that the recent case of *Barnett v. Klein*, 765 P.2d 777 (Okla. 1988) is dispositive of the instant appeal. In Barnett, the noncustodial nonresident father filed a Motion to Modify visitation and child support in Tulsa County, where the original divorce decree had issued. The custodial mother objected to the proceedings and requested a transfer to Washington County, where she and the child resided. The Tulsa County District Court refused to transfer, and the mother filed an original action in the Oklahoma Supreme Court, seeking to prohibit the District Court of Tulsa County from hearing father's Motion to Modify. The Supreme Court held (1) the court of rendition has continuing "authority" to modify the original divorce decree and child custody and support provisions thereof, and (2) that "venue was proper in Tulsa County" under 12 O.S. §1277.*Barnett*, 765 P.2d at 781.

¶7 However, we find Barnett supportive of the Comanche County District Court's action in modifying the Caddo County support order. Since 1967, the District Courts of Oklahoma are courts of "unlimited original jurisdiction," having authority over "all justiciable matters." Oklahoma Constitution, Art. VII, §7. While the Supreme Court in Barnett discusses intrastate "jurisdiction" to modify support orders, the true holding of Barnett turns on a determination of the proper venue for subsequent modification of support orders. 765 P.2d at 781. In the present case, and as we have previously held herein, Father failed to timely raise any objection to venue of the Comanche County District Court by timely and proper objection thereto, and effectively waived the objection.

¶8 We therefore find the District Court of Comanche County, as a court of unlimited original jurisdiction, had subject matter jurisdiction over resident Mother's motion to modify. Clearly, all the parties resided in Comanche County, and Father's general appearance without objection appearing of record renders Father's objections to venue, service of process and personal jurisdiction unavailing. To blindly apply the holding of*Barnett* to the facts of this case and hold that the District Court of Comanche County did not have jurisdiction to hear the instant modification action would be to create a result never intended by the Oklahoma Legislature and Supreme Court, and would require the parties to drive some thirty miles north to the Caddo County District Court for a relitigation of the identical issues decided against Father. Comanche County is clearly the most convenient forum for all parties, and evidence regarding the parties' relative circumstances was more readily available in Comanche County. Under the facts and circumstances of this case, we therefore hold that the District Court of Comanche County had jurisdiction over the subject matter and parties, and the authority to modify the prior support order from Caddo County. See also, *Cooper v. Cooper*, 616 P.2d 1154, 1156 (Okl. 1980) (concurrent jurisdiction of intrastate courts over motions to modify under certain circumstances).

Barnett v. Klein, 1988 OK 132, 765 P.2d 777 (intrastate change of venue where objection timely presented):
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¶9 In *Griffy v. McAllister* [59 OBJ 1884 (6/16/88) but otherwise unpublished] the non-custodial parent residing in California filed a motion to modify custody in the District Court for Tulsa County. The custodial parent residing in Major County filed a motion to transfer the modification proceeding from Tulsa to Major County. The custodial parent asserted that application of the doctrine of forum non conveniens would require transfer of the proceeding. Therein we required the trial court to transfer the proceeding from Tulsa to Major County. A transfer from one court to another is only proper when the action could have been properly brought in the transferee court. *Simpson v. Woodson*, 508 P.2d 1069 (Okl. 1973). *Griffy* may be construed as expanding *Cooper v. Cooper* because requiring transfer to the county where the children and custodial parent resided is predicated upon venue being proper in that county, had a proceeding been brought there by that out of state resident. Thus, *Griffy*, stands for the proposition of treating the out of state resident and the custodial parent equally; either party may bring the motion to modify in either the county where the custodial parent and child are lawfully located or the county where the divorce decree was pronounced. Under forum non conveniens the facts in *Griffy* came down in favor of transfer to the county of location.

¶10 This Court has recognized that the doctrine of intrastate forum non conveniens in transitory tort actions springs from the common law of Oklahoma. *Pribram v. Fouts*, 736 P.2d 513, 515 (Okla. 1987). The Legislature has indicated that the inconvenience of the forum is to be considered in cases involving the UCCJA. 10 O.S. 1981 §1609 .

¶11 However, application of the UCCJA to purely intrastate custody disputes is not in accordance with the Act. In *State ex rel. Murphy v. Boudreau*, 653 P.2d 531 (Okl. 1982), we said:

> "The primary problems the Uniform Child Custody Jurisdiction Act attempts to address are child-snatching and multistate jurisdictional squabbles. . . . On the other hand, 12 O.S. 1981 §1277, in general language, gives Oklahoma trial courts continuing jurisdiction to modify their own child custody and support orders. . . .
> In applying the rules of statutory construction set out above, the more recent, specific Uniform Child Custody Jurisdiction Act controls.
> This is not to say, however, that the continuing jurisdiction provided in §1277 may not still be utilized in custody matters which are not affected by the Uniform Child Custody Jurisdiction Act." Id. 653 P.2d at 534, [citation omitted].

¶12 The stated purpose of the UCCJA is to avoid jurisdictional conflict between courts of different states. 10 O.S. 1981 §1602 (1). Language involving intrastate jurisdictional and venue disputes is conspicuously absent. The legislature having not seen fit to make the Act apply in purely intrastate controversies, we acknowledge that it does not apply in this case.

¶13 In this case venue was proper in Tulsa County. 12 O.S. 1981 §1277 . The county of the mother's residence is not available as an alternative venue under the authority of either *Griffy v. McAllister* or *Cooper v. Cooper*. It is true that child custody and support responsibility attendant thereto may be adjudicated within the context of an habeas corpus proceeding in the county where the child resides, 12 O.S. 1981 §1354 ;*Roundtree v. Bates*, 630 P.2d 1299, 1303 (Okla. 1981), although the availability of such a procedure does not divest a court of its continuing jurisdiction under 12 O.S. 1981 §1277.

¶14 But in this case the District Court of Washington County does not have the authority to modify a divorce decree from Tulsa County. Because no county other than Tulsa has venue to determine this post-decree visitation controversy between two Oklahoma residents the trial court correctly refused the requested transfer. The Application for Writ of Prohibition is denied.

Child's Preference

Topic Contents General Contents Prior Topic Next Topic

Davis v. Davis
Kennedy v. Kennedy
Nazworth v. Nazworth
Ex Parte Hudspeth
Sims v. Sims
Coget v. Coget

Davis v. Davis, 1960 OK 196, ¶11, 355 P.2d 572:

Next Case

¶10 * * * Both parents expressed and have shown a great deal of love and affection for the child and have had in mind the best interest of the child since the divorce. They have catered to her whims and wants, although the mother has exercised a greater degree of discipline. The child is bright and inquisitive and no doubt recognized that she might have more latitude with her father than with her mother which appears to be the basis for her wanting her father to have custody of her.

¶11 However, the whims, wants and desires of a minor child are not the criteria for determining which parent should be granted custody of a minor child, although the court or judge may consider the preference of a child who is of sufficient age to form an intelligent preference. In determining the custody of a minor child in a divorce case, this Court has consistently held the best interest of the child should be the paramount consideration, and where it does not appear that the trial court has abused its discretion, this Court will not reverse the order of the trial court.

Kennedy v. Kennedy, 1969 OK 180, 461 P.2d 614:

Next Case Prior

¶6 Defendant contends that the trial court erred in granting the custody of the parties' 12-year-old son to plaintiff in view of the son's wishes, expressed at trial, to live with his father. To support this contention, defendant cites 30 O.S. 1961 §11, which provides: [statute's text omitted]

¶7 In *Davis v. Davis*, Okl., 355 P.2d 572, 575, we stated:

> "However, the whims, wants and desires of a minor child are not the criteria for determining which parent should be granted custody of a minor child, although the court or judge may consider the preference of a child who is of sufficient age to form an intelligent preference. In determining the custody of a minor child in a divorce case, this Court has consistently held the best interest of the child should be the paramount consideration, and where it does not appear that the trial court has abused its discretion, this Court will not reverse the order of the trial court."

¶8 In our review of the evidence, we have found no evidence other than that the plaintiff was a good mother. Until the parties' separation, she had maintained for approximately thirty years a home in which four children were reared. It is apparent that the 12-year-old son loved both his mother and father, but preferred to live with his father on the grounds that the latter could help him with schoolwork and that the mother made certain requirements of him relating to discipline, etc., which he considered somewhat unfair.

¶9 At trial, an adult son of the parties expressed his opinion that it was in the best interests of his 12-year-old brother that the latter's custody be awarded to plaintiff mother. Further, in defendant's own testimony, there are certain statements relating to his living conditions and to prior personal difficulties which would warrant the trial court in awarding custody to the mother.

¶10 After a review of all of the evidence submitted below, it is our opinion that the trial court did not abuse its discretion in awarding the custody of the 12-year-old son to plaintiff.

Nazworth v. Nazworth, 1996 OK CIV APP 134, 931 P.2d 86:
Next Case Prior

¶1 This appeal arises from a proceeding brought by Barry Nazworth seeking to change custody of the parties' thirteen year-old son and to receive a credit on his child support obligation for social security benefits paid directly to his son and daughter. Mr. Nazworth testified that he sought the change of custody of his son because: "He's requested to come live with me." He asked the trial court to interview his son and counsel for mother agreed to make the child available if the court chose to talk with him. However, counsel for mother also argued that the child's preference was not a permanent, substantial, and material change of conditions to warrant a change of custody. Without interviewing the child, the trial court agreed with counsel for mother and entered a directed verdict denying the motion to change custody. As to the credit for the social security benefits, the trial court did not give a direct credit toward the current support obligation. Instead, the trial court added the benefits paid directly to the children to mother's income for purposes of recomputing the parties' respective support obligations. The trial court also indicated that it would entertain a motion for attorney fees from mother's counsel, because the trial court felt the motion to change custody was frivolous. Mr. Nazworth seeks review of these decisions. For the reasons that follow, we reverse.

¶2 Mr. Nazworth's testimony that his son requested the change of custody was "proof that called for in-depth judicial assessment of the existing custodial arrangement." *Wells v. Wells*, 648 P.2d 1223, 1224 (Okla. 1982). Therefore, it was error for the trial court to dispose of the motion for change of custody without taking and considering evidence from the child and custodial mother, if she desired to present it.

¶3 Mother has argued that the trial court's denial of the motion for change of custody is supported by the rule in *Davis v. Davis*, 355 P.2d 572, 575 (Okla. 1960), that "the whims, wants and desires of a minor child are not the criteria for determining which parent should be granted custody." See also *Duncan v. Duncan*, 449 P.2d 267, 269 (Okla. 1969). Additionally, there is authority that an expression of preference alone is not sufficient to constitute a change of circumstances to support a change of custody. *Marriage of Padbury*, 46 Or. App. 533, 612 P.2d 321, 323 (1980); *Merrill v. Merrill*, 82 N.M. 458, 483 P.2d 932, 933-34 (1971).

¶4 However, where the preference is explained by the child and good reasons for the preference are disclosed, the preference and supporting reasons will justify a change of custody. *Yates v. Yates*, 702 P.2d 1252, 1254 (Wyo. 1985). It is almost a "universal rule that ... when a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment as to its future welfare, based upon facts and not mere whims, its wishes are one factor which may be considered by the court in determining custody ... because the consideration of such wishes will aid the court in making a custodial decision which is for the best interests and welfare of the child." Annotation, Child's Wishes as Factor in Awarding Custody, 4 A.L.R. 3d 1396, 1402 (1965) (emphasis added) (footnotes omitted).

¶5 Oklahoma case law and statutory law mirror this "universal rule." In the case of *Ex parte Hudspeth*, 271 P.2d 371, 373 (Okla. 1954), the supreme court upheld the trial court's custody determination because the child in question "was of the age and intelligence to give mature consideration to his own problems, and his discussion with the court was a factor which received serious consideration in settling the matter of his custody." Significantly, one of the earliest cases to consider this issue held that the "trial court erred in not taking into consideration the wishes of these children ages 14, 12 and 10 in determining their custody," and reversed with directions that the trial court hold a hearing for the purpose of "taking into consideration the wishes of the children." *Bishop v. Benear*, 132 Okla. 116, 270 P. 569, 571-72 (1928). Even *Davis* and*Duncan* recognize that the court may consider the preference of a child who is of sufficient age to form an intelligent preference. This was also the statutory rule in Oklahoma for just over sixty years. See 30 O.S. §11 (1981) (repealed in 1983).

¶6 The current statutory authority governing a child's expression of a custodial preference is codified as 43 O.S. §113 (1991). The current statute does allow the trial court to determine "whether the best interest of the child will be served by the child's expression of preference." This is a good rule in cases involving an initial custody decision. However, where a change of custody is sought because a child has asked for the change, the child's interests are best served by "serious consideration" of the

> preference and the reasons for it, *Hudspeth*, 271 P.2d at 373, and "in-depth judicial assessment" of the current custodial arrangement. *Wells*, 648 P.2d at 1224. It may well turn out that the change of custody is not in the child's best interests, but such a determination cannot be made fairly and reasonably without hearing from the child.

A practitioner may wish to analyze the reliability of *Nazworth's* case and statutory underpinnings, particularly its reliance upon *Ex Parte Hudspeth*, 1954 OK 172, 271 P.2d 371 (habeas corpus proceeding by child's father against maternal grandmother after custodial mother's death to obtain 14 year old child's custody and in the absence of evidence that the father was an unfit parent, excerpted below), in light of *McDonald v. Wrigley*, 1994 OK 25, 870 P.2d 777 and *Guardianship of M.R.S.*, 1998 OK 38, 960 P.2d 357, and the grandparent visitation cases occurring in 2000 (covered by another paper).

Ex Parte Hudspeth, 1954 OK 172, 271 P.2d 371:
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> ¶6 Respondent's evidence disclosed her continuing care of the children over the years. The record discloses this minor is quite musically inclined, and although above the average scholastically, devotes the greater portion of his time to musical endeavors. By his own testimony this child, nearly 15 years old at the time of this hearing, had seen his father very few times (3-4) during his lifetime. He bore his father no animosity, but having lived his entire life with respondent he did not want to move to California. His friendships and musical connections were in Oklahoma City, where he was associated with a recognized choral organization, played for churches and made radio appearances, and practically was able to support himself by his musical ability. Additionally, the trial court interviewed the boy privately and ascertained both his desires and the reasons for the boy's feelings in the matter. As a result of the interview the court noted the boy's desire to remain with respondent did not arise from any animosity toward petitioner, but simply because he had spent his life in Oklahoma City and had many things worked out for himself here.
>
> ¶7 At the conclusion of the evidence the trial court made certain specific findings as the basis for the conclusion that the petition for the writ should be denied and this boy permitted to remain with respondent. In substance the court stated: (1) This boy's best interests being involved it would be contrary to his welfare to require anything to be done that would take him away from Oklahoma City; (2) consideration of petitioner's parental rights was insufficient to overcome what was determined as being the child's best interests; (3) under the statute, 10 O.S. 1951, §§17-19, respondent was entitled to custody of the boy by virtue of having cared for him since infancy. Judgment was entered denying the petition for writ of habeas corpus, granting respondent the continuing care of the minor, and enjoining petitioner from interfering with respondent's care of the child or removing him from the court's jurisdiction.
>
> ¶8 Petitioner's argument for reversal of this judgment is presented under three propositions. It is argued under the first proposition that the only issue involved is the question of the right to custody of the child. Hence, petitioner now contends it was reversible error for the trial court to admit certain of respondent's evidence relating to petitioner's failure to comply with the order and judgment in the original divorce action. It is argued that respondent offered no evidence to show petitioner was an unfit person to have custody, so that the evidence complained of did not relate to his unfitness or inability to care for his children and thus was incompetent and erroneously admitted. We consider it unnecessary to consider such argument at length, for the reason that even casual examination of the record will disclose that no prejudice could have resulted from admission of the evidence complained of on appeal.
>
> ¶9 10 O.S. 1951 §5, provides:
>
> "The father of a legitimate unmarried minor child is entitled to its custody, services and earnings; but he cannot transfer such custody or services to any other person, except the mother, without her written consent, unless she has deserted him, or is living separate from him by agreement. If the father be dead, or be unable, or refuse to take the custody, or has abandoned his family, the mother is entitled

thereto."

¶10 The principal contention is that under the above statute petitioner was granted an absolute right to custody of his minor son. The argument to support this contention is based upon the language of several of our earlier decisions, all holding to the effect that to justify a court in depriving a parent of his child's custody the evidence must clearly and conclusively show the parent's unfitness. See *Hedtke v. Kukuk*, 93 Okl. 264, 220 P. 615; *Brooks v. Preston*, 134 Okl. 272, 273 P. 345; *Sherrick v. Butler*, 175 Okl. 538, 53 P.2d 1097;*Green v. Hight*, 194 Okl. 214, 148 P.2d 475. Hence petitioner concludes that because the burden was upon respondent to show him an unfit person, and since the evidence showed him a fit person and financially responsible, the issue was to be decided solely upon the rule announced in the cited cases. Thus, there being no evidence establishing his unfitness, it was reversible error for the trial court to refuse to issue the writ.

¶11 Two valid reasons preclude application of the rule contended for by petitioner. 30 O.S. 1951 Guardian and Ward, §11, in part, provides:

> "In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations:
> 1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question."

¶12 Subdivision 1 (just quoted) clearly invests the trial court with authority, in determining the matter of custody, to consider the child's own preference in the matter in instances where the child is of sufficient age to form an intelligent preference. The record herein discloses this boy was nearly 15 years of age when the matter was heard. The boy expressed a definite wish to remain in the care of his grandmother. From the remarks of the trial judge it is plain the minor was of the age and intelligence to give mature consideration to his own problems, and his discussion with the court was a factor which received serious consideration in settling the matter of his custody.

¶13 The second reason supporting the trial court's judgment is to be found in our recent decision in *Long v. McInnich*, Okl. 264 P.2d 767. We there considered the exact contention advanced by petitioner herein, that 10 O.S. 1951 §5 gives the natural parent absolute right to custody of a minor child, to the exclusion of other considerations. And, in that case even a more serious question was presented because of the minor's tender years, and the age and circumstances of the grandparents. In considering the matter we directed attention to three interests which always are the subject of careful scrutiny in such cases. Therein we again acknowledged the applicable rule in such cases to be that expressed in *Taylor v. Taylor*, 182 Okl. 11, 75 P.2d 1132, as follows:
"The right of a parent to the custody of a minor child is of great importance in awarding its custody, but it is not an absolute right, and is qualified by considerations affecting the welfare of the child."

Hudspeth was followed in another habeas corpus proceeding by a father against a grandparent, ***Sims v. Sims*****,** 1960 OK 68, 350 P.2d 493, 350 P.2d 493:
Next Case Prior

¶11 We are of the opinion that it would be against the best interests of said almost-sixteen-year-old child to change her care and custody at this time, she having elected to stay with the respondent, by whom she has been reared in a good environment.

Coget v. Coget, 1998 OK CIV APP 164, ¶5, 966 P.2d 816
Next Topic Prior Case

¶5 We are aware, as Father states, that the child, who was nine years old at the time of the hearings, expressed a desire to live with Father. The preference of a child is a factor which may be considered in modifying custody where the child is of sufficient age, intelligence and discretion. *Davis v. Davis*, 1960 OK 196, 355 P.2d 572. When for good reasons and well supported by facts, the

expressed preference of a child may assist the court in determining that a change of custody is warranted and in assessing what is in the child's best interests and welfare. See *Nazworth v. Nazworth*, 1996 OK CIV APP 134, 931 P.2d 86. However the evidence on this point in this record is equivocal and not sufficient to constitute a permanent, material and substantial change of circumstances such as justifies a modification in the custody of this minor.[2]

Footnote 2 For example, the only reason cited by the child during an in camera interview for wanting to live with Father was "I get to play with my [half] brother and [half] sister." Although there was evidence that the child had previously expressed a desire to live with Father to Mother, Father, and to others, when she was initially asked by the trial court where she wanted to live, she said she did not know. She expressed to the trial court a desire to live with Father only after what can best be described as a generally suggestive interview in which the trial court appeared to emphasize the good things about living with Father.

Exemplary earlier cases: *Bishop v. Benear*, 270 P. 569, 132 Okl. 116 (1928); and *Lutke v. Lutke*, 176 P.2d 496, 198 Okl. 131 (1947).

Discretionary Authority of Trial Court

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Perry v. Perry, 1965 OK 160, 408 P.2d 285:

¶4 This court has heretofore held that in determining the custody of a minor child in a divorce case, the best interest of the child should be the paramount consideration, and where it does not appear that the trial court has abused its discretion in the matter, this court on review will not reverse the order of the trial court. *Davis v. Davis*, Okl., 355 P.2d 572; *Bowring v. Bowring*, 196 Okl. 520, 166 P.2d 415; *Lewis v. Sisney*, 205 Okl. 599, 239 P.2d 787; *Gilcrease v. Gilcrease*, 176 Okl. 237, 54 P.2d 1056, and numerous similar cases.

¶5 There is a good reason for the existence of this rule. The trial court is confronted with the parties themselves and the witnesses. It is better able to determine a controverted issue of fact than is this court, which, of necessity, is permitted only to consider the dry, printed words appearing in the record. * * *

Ethics Issues - 5 O.S., Ch1, App3-A (Lawyers) and 5 O.S., Ch1, App4 (Judges)

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ORPC 1.1 - Competence
ORPC 1.7 - Conflict of Interest
ORPC 3.1 - Meritorious Positions
ORPC 3.3 - Candor to Tribunal
ORPC 3.5 - Impartiality of Tribunal
Kahre v. Kahre
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Robbins v. Robbins
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ORPC 8.4 - Misconduct
OBA v. Holden
OBA v. Hine

Rule 1.1. Competence

Next Rule

A lawyer shall provide competent representation to a client. Competent representation requires the

legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Rule 1.7. Conflict Of Interest: General Rule

Next Rule Prior

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 3.1. Meritorious Claims And Contentions

Next Rule Prior

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.3. Candor Toward The Tribunal

Next Rule Prior

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take the following remedial measures:

(A) when a client has offered false evidence, the lawyer shall promptly call upon the client to rectify the same; if the client refuses or is unable to do so the lawyer shall promptly reveal its false character to the tribunal; or

(B) when a person other than a client has offered false evidence, the lawyer shall promptly reveal its false character to the tribunal.

(b) The duties stated in paragraph (a) are continuing, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4. Fairness To Opposing Party And Counsel

Next Rule Prior

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5. Impartiality And Decorum Of The Tribunal

Next Case Prior

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other decision maker except as permitted by law or the rules of a tribunal;

(b) in an adversary proceeding, communicate or cause another to communicate as to the merits of the cause, with a judge or an official before whom the proceeding is pending except:

(1) in the course of the official proceeding in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if not represented by a lawyer;

(3) orally upon notice to opposing counsel or to the adverse party if not represented by a lawyer; and

(4) as otherwise authorized by law; or

(c) communicate directly or through another with a juror or prospective juror except as permitted by law or the rules of court; or

(d) engage in conduct intended to disrupt a tribunal.

Kahre v. Kahre, 1995 OK 133, 916 P.2d 1355 (in a heated child custody dispute, the Court described the conduct of a litigant's attorney as follows):

Next Rule Prior Same Case - GAL Same Case - restricted visitation, etc.

¶9 * * * Following the trial court's refusal to grant Greg Kahre a new trial, Mr. Gassaway engaged in a tirade before television cameras outside Judge Humble's courtroom at the Oklahoma County Courthouse. Mr. Gassaway was convicted of contempt of court and fined for his conduct.

Canon 3. A Judge Should Perform the Duties of Judicial Office Impartially and Diligently

Next Case Prior Rule

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In performance of those duties, the following standards apply.

B. Adjudicative Responsibilities.

* * *

(6) A judge should accord to every person who has a legal interest in a proceeding, or that

person's lawyer, the right to be heard according to law. A judge should not initiate, nor consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided that the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, with a record being made, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Robbins v. Robbins, 1998 OK CIV APP 44, 964 P.2d 930

Next Case Applicable Rule

¶4 Mother challenges the order deferring jurisdiction to California on the grounds that it (1) resulted from ex parte proceedings, (2) was entered without notice and opportunity to be heard, and (3) was contrary to statutory law that favored transfer of the case to the court that made the original custody determination, i.e., the District Court of Osage County. For the reasons that follow, we find no error by the trial court.

***

¶8 §508(A). "If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state." 43 O.S. 1991 §508(B). In such circumstances, the court is expressly authorized to "stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum." 43 O.S. 1991 §508(C). The court herein did nothing more than comply with its statutory duties.

In Re Wheatley, IllAppCt 5thDist, No. 5-97-0846 (a trial court's custody decision to the mother was reversed for a new trial before a different trial judge. The trial judge received a letter from an ex-Congressman urging a favorable ruling for the mother in a child custody dispute. The following excerpt was copied from the Illinois Supreme Court's website. The official reporter citation is 697 N.E.2d 938 (Ill.App. 1998).)

Next Rule Prior Case Applicable Rule

The alleged appearance of impropriety arose as follows. On August 26, 1997, the date the trial court announced its decision in this case, the trial court also informed the parties of his receipt of the ex parte communication. The trial judge explained that on August 18, 1997, just two days prior to the trial in this matter, he returned from a two-week vacation and began to go through his mail. He discovered that he had received an envelope addressed to him and marked "personal and confidential," purporting to be from the office of a former United States congressman. The judge opened the envelope and discovered that it was on the letterhead of a retired United States congressman and concerned a divorce case pending before him. The judge had not yet seen the file in the case, and so he did not read the letter, but he folded it up, replaced it in the envelope, and left it on his desk. He forgot about the letter until the day he rendered his decision in the case.

After preparing his order in this case, the judge rediscovered the letter on his desk. He opened it, saw that it referenced this case, read the first line which read, "As you know, custody cases are very difficult", and looked at the signature. He folded the letter back up and did not read any further. After consulting with another judge, the trial judge called the parties together to disclose to them his receipt of the letter and to render his decision in the case. The judge insisted that he had never read the letter and that he had no idea what it contained. Both parties were provided with copies of the letter.

The letter was contained in an envelope addressed to the judge. The envelope is marked "personal and confidential", with a return address indicating the Congress of the United States, House of Representatives, and the name and address of the congressman. It consists of three full, single-spaced, typewritten pages and argues strongly in favor of custody in Mary Jane. Excerpts from the letter include:

> "I hepe [sic] the Court will not atke [sic] offense if I use my 24 years in Congress and the expertise of my Daughter in Florida[,] who has a Masters Degree in counseling, to point out at least a dozen reasons why I believe Mary Jane Wheatley, the Mother of this child[,] should have full custody with liberal visitation by the Father."

The letter goes on to list those "dozen reasons", often referring to the reports of the guardian ad litem and the home-study investigator. The letter concludes:

> "I want to apologize to the Court for this lenghty [sic] letter[;] however[,] since the child's very future is at stake I felt constrained to[,] as Paul Harvey would say[,] `tell the rest of the story'. I pray that this baby can stay with it's [sic] Mother."

* * *

In conclusion, we find that the actions of the trial court with respect to the ex parte communication created an appearance of impropriety and that the trial court erred in denying petitioner's motion to vacate the judgment of dissolution entered August 26, 1997. Accordingly, we reverse the order denying the motion to vacate, vacate the judgment of dissolution entered August 26, 1997, and remand this cause for a new trial before a judge who has not read the letter in question.

Rule 8.4 Misconduct

Next Case Prior Rule

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

State ex Rel. Oklahoma Bar Association v. Holden, 1995 OK 25, 895 P.2d 707

Next Case Applicable Rule

¶0 The complainant, Oklahoma Bar Association (Bar Association), charged the respondent, Darril Lonnie Holden (Holden/attorney), with a single count of misconduct. The trial panel found that the attorney advised his client to remove a child from Oklahoma in violation of a court order. The trial panel recommended an eighteen month suspension and the imposition of costs. We find that the Bar Association established by clear and convincing evidence that Holden advised his client to remove a child from Oklahoma in violation of a court order. The conduct warrants a one year suspension and the payment of costs in the amount of $5,333.39.

* * *

¶9 Holden denies saying anything to DeVore which could have been interpreted as advice to leave Oklahoma with his son in violation of the district court's order. He insists that the trial panel's findings are not supported by clear and convincing evidence. Holden contends that if the Court should find the charges to be substantiated that a lesser discipline should be imposed. However, he does not state what an appropriate discipline would be. The Bar Association supports the recommended discipline -

an eighteen month suspension and the imposition of costs.

¶10 Before this Court may impose discipline upon an attorney, the charges must be established by clear and convincing evidence. In disciplinary matters, this tribunal exercises exclusive original jurisdiction. Our review is de novo in considering the record presented as well as recommendations for discipline. The ultimate decision rests with this Court. Neither the findings of fact of the trial panel nor its view of the weight of the evidence or credibility of the witnesses bind us.

¶11 This is not a situation in which the sole testimony against the attorney is presented by a dissatisfied client. Instead, the condemning evidence was presented through an out-of-state attorney who confirmed that Holden admitted to telling DeVore to leave the jurisdiction of the Oklahoma court with his son. Cox, through his testimony before the trial panel, in his affidavit submitted with the complaint, and by the presentation of his notes during the hearing, established the facts of his conversation with Holden. The evidence is clear and convincing that Holden advised DeVore to leave Oklahoma and to return to Washington with his son. The conduct complained of is a violation of Rule 8.4(a)(b)(c) and (d) and Rule 1.2(c), Rules of Professional Conduct, 5 O.S. 1991, Ch. 1, App. 3-A.13

State of Oklahoma ex Rel. Oklahoma Bar Association v. Hine, 1997 OK 52, 937 P.2d 996 (an Ohio attorney and member of a special interest group, Stop Child Abuse Now (SCAN), became involved in a child custody dispute in LeFlore County, and sent written information directly to the trial judge. Upon a litigant's complaint, the attorney was disciplined.):

Next Topic Prior Case Applicable Rule

¶1 In this disciplinary proceeding against a lawyer we are called upon to decide an issue of first impression: whether a licensed practitioner who is not an advocate for any parties in a pending case may nonetheless communicate ex parte with the trial judge about issues in the matter which the court has under consideration.

* * *

¶11 The respondent correctly argues that the rules governing ex parte communications by advocates do not apply to her.18 The standards of practice enumerated in Rules 3.1 et seq., ORPC, are designed to govern the behavior of litigants and their counsel actively involved in the legal process. Otherwise, that section's caption, "ADVOCATE", is rendered meaningless. This is not to say that lawyers - who are non-advocates - can interject themselves in a case pending before the district court without impunity.

¶12 Because of her license to practice law, Hine is obligated as an officer of the court not to engage in conduct that is prejudicial to the administration of justice. Rule 8.4(d), ORPC.20 In this cause we are not concerned with communications to the press or other public fora. Here the respondent communicated directly with a trial judge, sitting in a pending cause, with the intent to influence him on the proceeding's merits.

¶13 While this court has not previously circumscribed the reach of Rule 8.4(d), ORPC, the rule's intent mandates that the respondent's conduct be assayed against a reasonable-likelihood-of-material-prejudice standard. This standard is to be applied to the facts in the statements and the circumstances under which they were made - including time, place and the respondent's justifications for the conduct. If Hine knew or should have known that there was a reasonable likelihood her actions would materially prejudice the pending adjudicative proceeding, discipline is appropriate. The standard which the court adopts today fosters and protects the State's interest in fair trials and delimits the outer contours of that conduct which - if engaged in by a licensed lawyer - would offend Rule 8.4(d).

¶14 While the SCAN letter contains speech of a mixed character, the language used was published to no one other than the trial judge. Had Hine's offending speech been contained in a statement to the public media - as was the practitioner's offending conduct in *State of Oklahoma ex rel. Okla. Bar Ass'n. v. Porter*, 766 P.2d 958, 961 (Okla. 1988) or in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034, 111 S.Ct. 2720, 2724, 115 L.Ed.2d 888 (1991) - a different test might have applied. Such is not the case. The evidence is clear and convincing that the SCAN letter representations were communicated directly to the trial court with the underlying intention of influencing the outcome of the Perry child-custody hearing. We express no opinion today regarding a [non-advocate] lawyer's statements

about a pending case made to persons other than the presiding trial judge.

Evidence of Conduct Before Prior Custody/Visitation Order

Topic Contents General Contents Prior Topic Next Topic

Ness v. Ness
Weatherall v. Weatherall
Stewart v. Stewart
Carpenter v. Carpenter
Lyons v. Lyons

Ness v. Ness, 1960 OK 259, 357 P.2d 973 (in the father's appeal from an order awarding the mother child custody in her second post-decree motion to modify, he alleged trial court error in allowing the mother to relitigate matters determined in the previous custody proceedings):

Next Case

¶7 The provisions for care and custody of minor children may not be modified unless it be shown that the circumstances of the parties have changed or unless material facts are disclosed, which were either unknown or could not have been ascertained with reasonable diligence at the time when the last prior determination was made. See *Duffy v. King*, Okl., 350 P.2d 280 and cases cited therein.

* * *

¶10 Although the trial judge (who did not preside over prior hearings in this action) was at first inclined to treat the last order as interlocutory in nature and indicated that a showing of a change in circumstances might be dispensed with, neither party was in any manner limited as to the range of inquiry. In an attempt to fortify their positions, both parties elicited facts occurring previous to the last order. The evidence adduced at prior hearings is not before us. The record does not disclose and counsel does not point out that the conditions existing at the time of plaintiff's preceding application for change of custody were the same as those shown by her in the present proceeding. We, therefore, find no basis for defendant's contention that plaintiff was permitted to relitigate issues concluded by the determination made in the last prior order.

Weatherall v. Weatherall, 1969 OK 22, 450 P.2d 497 (father moved to modify agreed custody decree, alleging that pre-decree evidence showed mother's unfitness):

Next Case Prior

¶2 The defendant admitted in the hearing on his motion that he was well aware of the conduct of plaintiff at the time he agreed that she could be awarded the custody of the children but that he believed then that she was repentant of her past misdeeds; and that under these circumstances he agreed to the custody of the children being awarded plaintiff. Defendant urges - although he readily admits there is no previous Oklahoma decision to support him - that the trial court in a custody matter may consider circumstances which were unknown to it at the time it rendered its decree concerning custody notwithstanding such facts were known to the movant at the time of the original hearing but not presented to the court. In other words, defendant contends that there exists an exception to the rule that would bar subsequent consideration of such evidence in a matter involving the custody of minor children - that in such matters the welfare of the children should be the paramount concern of the courts and the fact that one, or the other, of the parents failed to present evidence to the court which might have caused the court to fix the custody of the children in some person other than the one in whom it was placed should not be allowed to prevent the court from examining such facts in a subsequent proceeding to vacate or modify such custody order.

¶3 Although there are no previous Oklahoma cases which have similar factual basis as the one here being considered, the defendant says this court has indicated its tacit approval of such theory in cases such as*Jackson v. Jackson* (1948), 200 Okl. 333, 193 P.2d 561; *Jones v. Jones* (1956), Okl., 294 P.2d

304; *Young v. Young* (1963), Okl., 383 P.2d 211 and *Earnst v. Earnst* (1966), Okl., 418 P.2d 351 wherein this court has announced the following rule in substance: A decree fixing the custody of a child is, however, final on the conditions then existing and should not be changed afterward unless on altered conditions since the decree or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child. (Emphasis supplied). See also 9 A.L.R.2d 624 and 17A Am.Jur. Divorce and Separation §830.

¶4 This divorce action was originally filed on December 31, 1963. The defendant filed a cross-petition in which he sought to have the custody of the children set apart to him. The case was set for trial March 31, 1964, but in the meantime the parties settled their differences and entered into a property settlement agreement. Thereafter, on October 8, 1964, a decree of divorce was entered by which the plaintiff was awarded the custody of the children. This decree, before it was signed by the trial court, was approved by attorneys representing both of the parties and it was apparently agreeable in every detail to both parties at that time. It thereafter became final. On April 1, 1965, the plaintiff moved with the children to Texas and on April 9, 1965, she married the same young man whom the defendant contends she promised him she would not see again. The plaintiff and her second husband have been living in Texas since their marriage, as far as the record shows. The defendant's motion to modify and/or vacate the decree was filed July 14, 1965, and came on for hearing in the trial court on August 31, 1965. At that hearing it was shown that at the time of the original decree the defendant was well aware of all of the facts and circumstances which he thereafter contended established (or would have established if made known to the court) that the plaintiff was an unfit person to have the custody of the children. We think it is clear from the record that unless the trial court considered the alleged misconduct of plaintiff which antedated the decree, there is nothing in the record to indicate that the children were not, at the time of the court's hearing of defendant's motion, being well cared for by plaintiff and there is nothing to indicate that the children would be any better off with respect to their temporal, mental and moral welfare if the court - at that time - had modified the original decree and changed the custody from the mother to the father.

¶5 We are of the view that in a proceeding to modify provisions of an order relating to custody of a child where the movant relies on facts which were unknown to the court at the time of the order, the movant has the burden to establish not only that these facts would, if they had been known to the court, have had a material effect upon that court's determination of the question involving custody of the children, but to also show that it would now be for the best interest of said child to modify the original order and to make some order regarding the custody other than the order originally entered. The mere showing of circumstances which were unknown to the court at the time of the original order will not, of itself, furnish grounds for the vacation or modification of such order.

Stewart v. Stewart, 1980 OK 160, ¶s 6-8, 619 P.2d 606 (the mother moved to modify the agreed decree which awarded visitation to the father; the trial court disallowed evidence of the father's pre-decree conduct and the mother made an offer of proof):

Next Case Prior Same Case - restricted visitation

¶6 There can be little doubt under the general application of the principles of res judicata or excessive vexation of same issue the trial court was correct in sustaining the objections of the husband to the evidence as offered. What convinces us an application of res judicata should not be applied is that we deal with the best interests of a child of tender years. Under the facts and circumstances of this case, we hold evidence should be admitted and considered by the trial court upon remand. To us, the rationale of applying res judicata to a custody matter assumes that the act or conduct of the parties, pre decree, has been considered and judgment rendered thereon. Such is not the case here. Questions of whether either or both of the parties knew of the purported acts of the husband are not important. The trial court had no knowledge of such facts and has not considered same in the best interests of the child, all things considered.

¶7 Our statute, 12 O.S.Supp. 1979 §1277 permits modification and as we held in *Weatherall v. Weatherall*, 450 P.2d 497, 499 (Okl. 1969):

". . . the movant has the burden to establish not only that these facts would, if they had

> been known to the court, have had a material effect upon that court's determination of the question involving custody of the children, but to also show that it would now be for the best interest of said child to modify the original order and to make some order regarding the custody other than the order originally entered."

¶8 The United States Supreme Court speaking through Mr. Justice Douglas observed in *People of the State of New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947):

> . . . "the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, if such facts were not presented or considered at a former hearing." (Italics added.) . . . a custody decree "is not to be materially amended or changed afterward, unless on altered conditions shown to have arisen since the decree, or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the court, and then only for the welfare of the child."

Carpenter v. Carpenter, 1982 OK 38, 645 P.2d 476 (the father was found to have committed fraud in a post-decree proceeding in which he obtained child custody and custody was subsequently returned to the mother):

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¶9 The father contends the trial court erred when it removed exclusive custody from him and gave it to the mother. The order changing custody, he argues, was, in legal effect, a vacation of a prior custody order effected without conforming to the mandatory requirements of 12 O.S. 1971 §1031 . He also contends the order cannot constitute a valid modification under 12 O.S. Supp. 1979 §1277, because it fails to include both a finding of permanent and substantial change in conditions and that the decreed change is for the best interest of the child. We find the order under review legally unassailable as a modification of prior custody order.

* * *

¶11 A change of custody is justified when the case falls into one of two categories: (1) when circumstances of the parties have changed materially since the prior custody order or (2) when material facts are revealed which were either unknown or could not have been ascertained with reasonable diligence at the time the last prior determination was made. *Ness v. Ness*. This rationale of *Ness* - bottomed upon early Oklahoma case law - is to be regarded as a guidepost in custody contests. Our continued approval of its teaching is clearly demonstrated by precedent that followed its pronouncement.

¶12 Our review of the record yields ample evidentiary support for the decision reached below. A former roommate of the mother who was a witness for the father in the Louisiana habeas corpus proceeding testified that her New Orleans testimony against the mother was false. She stated that the father had suborned her perjured testimony by certain inducements. The falsehood of the prior account given by this witness was not known to the trial court during the April 4th custody hearing at which the father relied on her testimony to secure exclusive custody and to suspend the mother's visitation rights. The facts concerning the father's fraudulent conduct came to light during subsequent proceedings on the mother's motion to vacate the adverse custody arrangement.

¶13 Under the *Ness* standards, the fraud so practiced by the father in knowingly offering perjured testimony would clearly fall under the rubric of a material fact which though in existence was unknown to the court when making the prior permanent custody order. Its subsequent disclosure would alone be sufficient legal warrant for a change of custody. [Footnote references omitted]

Lyons v. Lyons, 1998 OK CIV APP 153, 970 P.2d 200 (in a post-decree proceeding to terminate an agreed joint custody order six months after its entry, the trial court's refusal to terminate the joint custody award was reversed and remanded for new trial with instructions to receive pre-decree evidence):

Next Topic Prior

¶3 We agree with both of her arguments. First, at the beginning of the proceedings, the trial court

explicitly stated that, "[w]e're not going back in the Divorce, we are not going behind the Decree. We are going to stay in front of the Decree." The examination of witnesses began after this statement by the trial court. During testimony of the first witness called by Mother, questions about matters prior to entry of the decree were met with objections, and those objections were sustained. The trial court allowed Mother's counsel to make an offer of proof, but no change in its ruling was induced by such offer. Thus, as Mother argues, the matter was treated as a modification and a change of circumstances was being used as a standard.

¶4 The matter before the trial court, though technically a modification, should have been treated as an initial determination of custody as required by §109(G)(2), which states that

> "[u]pon termination of a joint custody decree, the court shall proceed and issue a modified decree for the care, custody, and control of the child as if no such joint custody decree had been made." (Emphasis added.)

When a joint custody arrangement is being terminated the trial court must make two determinations. First, the permanent and material change of circumstances test from *Gibbons v. Gibbons*, 1968 OK 77, 442 P.2d 482, must be applied in determining whether to end joint custody and then, once it has been found that a permanent and material change justifies the ending of joint custody, placement of the child with either parent must be based solely on the best interest of the child. *Newell v. Nash*, 1994 OK CIV APP 143, 889 P.2d 345. Thus, all facts bearing upon the parties' fitness as parents and the children's best interest should have been considered. The second part of Mother's argument addresses the first *Gibbons* determination.

* * *

¶7 As the Court noted in *Stewart v. Stewart*, 1980 OK 160, ¶8, 619 P.2d 606, 607, citing with approval the United States Supreme Court speaking through Mr. Justice Douglas in *People of the State of New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 612, 67 S.Ct. 903, 905 91 L.Ed. 1133 (1947):

> "the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, if such facts were not presented or considered at a former hearing." . . . a custody decree "is not to be materially amended or changed afterward, unless on altered conditions shown to have arisen since the decree, or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the court, and then only for the welfare of the child." (Emphasis added; citations omitted.)

This record also contains evidence of several matters affecting the best interest of the children which was not considered by the trial court in the recent hearings and which, because of the agreed nature of the divorce and initial custody arrangements, was not previously brought to the attention of the trial court.

¶8 The trial court's conclusion that the *Gibbons* test had not been met for terminating the joint custody plan was clearly against the weight of the evidence and must be reversed. Based on that conclusion, all evidence relevant to the best interest of the children, including evidence of acts by the parties which would have been admissible if presented at the time of the divorce, must be considered on remand. The trial court's order is reversed, and the case is remanded for new trial in accordance with this opinion.

Fact Patterns Affecting The Decision - The Usual Suspects

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Brim v. Brim
Cooper v. Cooper
Park v. Park
Grim v. Grim

Stover v. Stover
Gilbert v. Gilbert
Rice v. Rice
Boatsman v. Boatsman
Brown v. Brown
Brown v. Brown
Boyd v. Boyd
Stephen v. Stephen
Smith v. Smith
Lyons v. Lyons

Brim v. Brim, 1975 OK CIV APP 4, 532 P.2d 1403 (**lifestyle; live-in lovers**; the father's post-decree custody award is affirmed):

Next Case

¶0 Trial court granted father's motion to modify divorce decree by changing custody from the mother to him. Mother appeals. Affirmed.

* * *

¶12 To begin with Mrs. Brim's own testimony forecloses any doubt about a substantial post-divorce change in the home environment of the little boy. She said she did not become intimate with Mr. Jackson until about a month or two after the divorce and the first custody order was rendered, so it follows his part-time live in at the child's home was a change that occurred after the previous order - a change which we think was a substantial one.

¶13 Was the change one affecting in any respect the child's temporal, mental or moral welfare? Mrs. Brim argues it was not because there was no proof "that the mother's conduct had a direct effect upon the child." Of course just what type or kind of proof of a direct effect she has in mind we do not know. But as a sociologist Mrs. Brim should appreciate the fact that communities do establish standards of conduct either through custom or law, with which compliance is considered right and a departure from which the adult majority considers wrong. She must know that the brain of a child begins to record impressions through his senses from infancy (even while en utero according to some scientists) and cerebral tapes made during this very early period are the ones which later on psychiatrists may have to be hired to erase in order to relieve some serious mental malfunction.

¶14 So here admittedly we have a situation where a three-year-old's subconscious is recording a man staying in the house and sleeping in the same bed as his mother three to five nights a week. He may not at all have any meaningful understanding of what is going on. He is unlikely to realize the counterculture implications, or the antisocial character of the relationship between his mother and Mr. Jackson. But still his brain records what his eyes see and his ears hear. And unless he can begin now to learn through the same senses society's conceptual norm of man-woman, mother-child, father-child relationships, it will, in the next few significant months, become fixed in his mind that his mother's relationship with Mr. Jackson is one society accepts as proper. And because of all people it is his mother involved he can become an excellent candidate for a real psychic hang-up when faced with having to accept, live and cope with existing incompatible social mores. And this problem is entirely independent of the issue of whether established mores are ill-conceived and in need of a correctional social force. So the direct effect on the child at this point as we see it is that (1) he is not being subconsciously introduced to the community's generally accepted moral code of conduct relating to a man-woman relationship; (2) he is contrarily being subconsciously conditioned to assume his mother's conduct in the home is generally accepted as proper.

¶15 It can be seen, therefore, from the foregoing that the home environment does have a "direct effect" on the three-year-old. Because the effect implies a future consequence its exact nature cannot be foretold with certainty. But this does not mean the court must await the finite proof of ultimate results. This would be absurd. The fact finder is entitled to infer that any prolonged subjection of a young child to a countercultural environment probably will have a future adverse effect on the small one's psychological well-being, and if the other parent offers a less risky alternative, then it seems to

us that the paramount consideration - the child's welfare - is best served by a transfer of custody which will improve his chances for adequate adjustment later to establishment's society as well as reduce the risk of later impairment of his mental health.

¶16 The availability of such a custodial alternative - as in this case - means that the court can choose it without passing moral judgment on the social, cultural, or philosophical aims, views, or disappointments of any of the adults involved. It was in recognition of such alternative that the trial judge explained, in terms of the subject matter for decision in this case, that he was unconcerned with the propriety or lack thereof regarding what Mrs. Brim and Mr. Jackson wanted to do or how they wanted to live their lives, except as their conduct affected the child. Like other parents Mrs. Brim took on an added responsibility - and in a sense a restrictive one - when she gave birth to a child and while the courts can provide no remedy for the child's loss suffered as a result of the marital failure it can help reduce it by awarding custody to the parent who is most willing and able to achieve normalization of the youngster's temporal, mental and moral needs during the early formative years.

* * *

¶18 The only contention left to dispose of is Mrs. Brim's first one - that the change of custody was reversibly erroneous because it was premised solely on the fact that she, a white woman, "had been cohabiting with a black man, thereby denying her right of freedom of association under the First and Fourteenth Amendments of the Constitution of the United States, and her rights of privacy and of due process and equal protection of the law under the 14th Amendment of the Constitution of the United States."

¶19 In supporting argument Mrs. Brim quite unequivocally asserts that the "decision of the Court to deprive appellant of custody of her child" was "based on racial issues" and therefore deprived her of her freedom of association and all the other constitutional rights mentioned above.

¶20 The trial judge responded to this suggestion at the close of the case thusly: ". . . [T]his is where the buck stops, this is where the Court has to take all things into consideration in reaching its judgment. Perhaps I am a square judge and perhaps I wouldn't see things as my two long-haired sons would see them, but based upon the evidence as this Court sees it, it is to the best interests of this child that he be removed from his present home and I am granting the father temporary custody of the child pending an examination of his home by the State Welfare Department . . . .

¶21 "Now, you can read into this whatever you want to read into it, but as far as this Court is concerned this is not a question of color, it is a question of morals and to the best interest of the child. When a woman starts living with a man without the benefit of marriage, where the man spends three to five nights a week in that home where the child is . . . whether or not this man is married or unmarried . . . . [t]his does not agree with the Court's concept of moral conduct."

¶22 Of course Mrs. Brim can say the disclaimer was actually a disguise for the concealment of a racially motivated conclusion. But to do so she must be prepared to say the judge does not accurately perceive the moral code in this part of the country and that if Mr. Jackson were a white man under the same circumstances there would be no immoral implications from the fornication. As a trained social worker we doubt Mrs. Brim is prepared to sponsor such a notion regardless of how wrong she may consider the current social order to be. Certainly we are not. And without committing ourselves to either praise or condemn Mrs. Brim's life-style, we can say without fear of prognosticatory disappointment that a resolution extolling its virtues if submitted to a vote of the citizenry would fall far short of achieving a consensus whether her swain be white, yellow, red, brown or black.

Cooper v. Cooper, 1980 OK CIV APP 12, 610 P.2d 1226 (**drugs, disruptive homelife, associates, paramours**; the father's successful motion to modify custody filed six months the initial decree was sustained on appeal):

Next Case Prior

¶2 The father's motion for the custodial change was founded on the allegation of these facts. Following the divorce the 31-year-old mother began to use - and associate with persons who habitually used and abused - "intoxicants, narcotics, and other related drugs in the presence of the children." The kiddies' home became the frequent scene of large, noisy, and drunken gatherings. At times, the children were left at home either by themselves or with drug consumers.

* * *

¶7 The rejected testimony had to do with the father's post-divorce living arrangement with another woman and a pre-divorce incidence of his taking a puff on a marijuana cigarette. The offering, said the mother, was meant to cast a shadow on the father's custodial fitness. Such evidence was somewhat irrelevant, it seems to us, because neither item was shown to have had an undesirable impact potential with regard to the children. The pot incident was not only prior to the divorce but was not in the presence of the offspring. And, as to the other "woman," it developed the father had married her July 7, 1977 - some four months before the modification hearing.

Park v. Park, 1980 OK CIV APP 19, 610 P.2d 826 (**interest in child shown by actions**; trial court's initial custody award to the father was affirmed):
Next Case Prior

¶6 At the time of trial the parties' two boys were ages five and eight and both in school. The mother - whose faithfulness and devotion to marital duties were seriously deficient - testified that the father was "a very good" one, was "interested in his kids and what they do," was "active with them," "takes them places" and "does things with them." Although the mother said she also loved her children the trial court rightfully found her past conduct demonstrated a general lack of concern for them. Three weeks before the temporary custody hearing, for instance, the father had taken the children to Waurika and was to return them to the mother a week and a half prior to the August 17 hearing. He did not return them but instead arranged for the mother to visit them at a cousin's house on the day of the hearing. Not only did the mother not try to locate them when they failed to return on time but she visited with them only about 30 minutes when she next saw them on August 17, then left and did not see them again until Labor Day when she visited with them but briefly two different times during the day. Other evidence indicated that the care arranged for by the father was superior to that contemplated by the mother.

Grim v. Grim, 1983 OK CIV APP 42, 666 P.2d 1310 (**improved mental state not enough**):
Next Case Prior

¶0 Defendant mother filed a motion to modify the custody provisions of a divorce decree entered between the parties. The trial court sustained this motion and changed custody of minor child from plaintiff father to defendant mother. Plaintiff father appeals. We vacate the trial court's order.
* * *

¶6 After a hearing in the matter, held on July 1, 1982, the trial court entered its ruling, stating:
"The Court is inclined at this time not to give any final determination on the matter but to place the custody in the movant for a period of six months which would put it into January, and in the meantime, ask the department of Human Resources to make a continuing investigation as to the movant's fitness take care of the child. Obviously from what some of the testimony's been today, there is a question in the Court's mind now as to whether or not she (the movant) is fit to raise a child or not, but I think she deserves the opportunity to show the Court that she can and would, that she has materially changed and that she would be a proper person to raise a child."
The trial court then stated that it had found the following reasons to hold that a change of conditions justifying the modification of custody existed:
"The fact that her [defendant's] high state of nervousness and confusion at the time of the divorce, the fact she was unrepresented, and the fact that she alleges that she did not leave but that she was run off. None of these things were ever litigated at the granting of the divorce. I also feel the fact of the age of the child being just a mere two and a half years of age, being a child of tender years."
* * *

¶8 Plaintiff's contentions on appeal may be distilled into one proposition; that defendant's evidence did not show the requisite substantial change of condition necessary to justify a modification of custody. We agree.
* * *

¶12 In the present case the trial court found that the improvement in defendant's mental state constituted a change of condition. The case of *Pirrong v. Pirrong*, Okl., 552 P.2d 383 (1976), held that

the showing of an improvement in the mental state of the party seeking modification is insufficient in itself to warrant a change in custody.

Stover v. Stover, 1984 OK CIV APP 43, 689 P.2d 952 (**guns, inappropriate new spouse, attentiveness to child's needs**; the father's second post-decree custody motion substantially succeeded based upon evidence substantiating the father's allegations, as follows):

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¶3 The father first moved to modify the child custodial provision of the decree on May 8, 1981. A series of motions and delays kept the matter from being heard for several months. Then, on December 22, 1981, the father went to the mother's home to pick up the children for Christmas vacation. As he stood in the entry hall, the mother approached with a 357 Magnum pistol. At a distance of about 6 or 8 feet, she aimed the deadly weapon and squeezed the trigger. The deafening explosion sent a lethal lead missile streaking toward the father, missing him by only inches, and on out of doors in the direction of a pickup truck occupied by the two minor children.

¶4 The mother admitted loading the gun and shooting at the hapless man. But said she, "I didn't intend to shoot him."

¶5 Why, then, did she do what she did? "I was in fear," she said. "He's not supposed to come in."

¶6 She did not know whether the older daughter invited him in or not. "I was combing Mitzi's hair, so therefore, I know she did not." Lagina was not supposed to have invited him in because the visitation is with the children, "not us," evidently referring to herself and a man she cohabited with for some time prior to marrying him shortly before subject hearing.

¶7 The main reason she gave for the dangerous assault was that she felt threatened by his previous showing of affection for her, his attempts to kiss her, and his writing notes to her closing with "I love you."

¶8 And so as she and Mitzi left the bathroom, she said, "we walked out the door and he was coming down the hallway and I said - I told him right then, I said, `Jimmy, get out of here. Don't touch me.' And he said, `I'm not going to bother you.'"

¶9 Other testimony disclosed that the mother's new husband - Raymond Smith, an exconvict - had given her the Magnum weapon with which to protect herself. And more violence had occurred in the past according to Smith. He admitted he once hit the father in the face allegedly after the latter "took a swing" at him.

¶10 Aside from the shooting incident, the mother admitted she had used money from Lagina's savings account without replacing it and that she had once rubbed the girl's face in wet bed clothes as a means of curing a bedwetting problem.

¶11 A chamber examination of the children by the judge alone found the younger girl, Mitzi, expressing no parental preference but the older one, on the other hand, requesting to live with her father because she said she received better care and because his method of handling her nocturnal kidney problem was less loathsome and a lot more effective - he woke her up during the night. It should be mentioned at this point that Mitzi had earlier indicated she did not want to be separated from her sister - a desire that no doubt affected the court's decision.

***Gilbert v. Gilbert*, 1969 OK 133, 460 P.2d 929 (**post-decree stability of non-custodial parent combined with instability of custodial parent**; the mother's post-decree custody motion succeeded at trial court and on appeal):

Next Case Prior

¶3 At the time the parties were divorced, the mother of the child was nineteen years old. She then had no trade or profession nor was she possessed of any considerable amount of funds or property. She agreed for the father, who was some four or five years older than herself, and who had a permanent position with an established oil company, to be awarded custody of the child in the decree of divorce. The award was so made.

¶4 On the day the divorce was granted the mother removed to Lubbock, Texas, where she has since resided, been employed, learned to be an accountant and acquired a comfortable, satisfactory

home. She has remained unmarried.

¶5 The father of the child has twice remarried. His second marriage was not successful and soon terminated in a divorce. Insofar as the record shows, his third marriage appears to be a satisfactory, happy and successful one.

¶6 After defendant was divorced from plaintiff he moved from Bartlesville to Pawhuska and left the child with defendant's parents. Meanwhile he, himself, resided with his grandmother for some 2 1/2 years. Then he was married the second time and took the child back into his home and moved back to the Bartlesville area where he lived for about one and one-half or two years. Thereafter, he was divorced (January, 1966) and moved the child back to Pawhuska where substantially the same arrangements were made as before. After another two years or so he married the third time (about January, 1968).

¶7 Defendant's present wife has four children, two grown, and one 17, and one 14 at the time of trial. She is employed regularly during the day outside the home.

* * *

¶14 By reason of circumstances relating to the divorces and remarriages of the father and his financial affairs not necessary to delineate herein, the judge of the trial court apparently decided that, in this case, custody should be taken from the father and awarded to the mother.

Rice v. Rice, 1979 OK 161, 603 P.2d 1125 (**ability to care for child's health problems, use of belt for discipline, striking testimony related to drug use**; the post-decree modification awarding custody to the father and terminating the pre-statute initial joint custody award was affirmed):

Next Case Prior

¶9 The child has medical problems requiring careful attention, and the evidence presented reflected that the child probably would be better cared for by the father. There was also uncontradicted testimony that the mother had occasionally punished her by striking her with a leather belt. However, we find that child custody should be modified, if for no other reason than to eliminate the dual custody provisions of the original decree.

¶12 The mother asserts that the trial court committed error when it sustained the motion to strike from the record all testimony concerning the father's possession or use of marijuana.

¶13 Jennifer Ross, a witness who admittedly was engaged in a legal dispute with the father, testified that he had used marijuana in his home, and that he had permitted others to do so. However, when she was questioned on cross-examination, she refused to answer. The father's counsel moved to strike the testimony, and the motion was sustained.

¶14 When a witness answers a question in an unresponsive manner, and objection is made to the response, the trial court may permit the testimony to stand, or grant the motion to strike. The determinative test concerning whether to strike the testimony is if the answer would unduly prejudice one of the litigants. The refusal of the witness to fully answer the questions propounded concerning the incident of the use of marijuana by the father justified the trial court's refusal to consider the testimony.

Boatsman v. Boatsman, 1984 OK 74, 697 P.2d 516 (**"permanence" of alleged parental defects - frequent moves, alcohol, sex - and getting them fixed before trial**; the trial court's denial of the father's post-decree custody motion was affirmed on appeal):

Next Case Prior

¶6 The father contends that the evidence conclusively shows an adverse impact upon the child from the mother's alleged frequent moves, alleged alcohol abuse, alleged illicit sexual affairs, and generally unstable lifestyle. He contended that the trial court refused to modify based upon this evidence simply because the mother "promised" to do better.

¶7 The record does not support the father's attempts to paint with such a broad brush. The "frequent" moves were from Oklahoma City, where the mother was living at the time of the divorce, back to Blackwell, where her parents and other relatives live, from Blackwell to Stillwater, where the child's father lives, and back to Blackwell when anticipated financial improvement did not develop. The

record supports the mother's contention that the moves were made for legitimate reasons. While they necessarily have some adverse impact on the child, they do not reveal some newly developed character defect in the mother which gives rise to a conclusion that these moves will be recurring. At the time of the hearing, the mother had established a home for herself and the child in Blackwell. The child was involved in both sports and school activities with success.

¶8 The sole evidence of post-decree alcohol abuse by the mother was the father's testimony concerning her arrest and conviction upon a plea of guilty to public intoxication arising out of an incident occurring approximately a year and one-half prior to the hearing. The mother admitted that she pleaded guilty to such a charge, but denied that she was in fact intoxicated. She explained, without objection, that she was a passenger in a vehicle stopped by the police and impounded when the driver was alleged to be intoxicated. She contended that the police officer placed her in custody only after he discovered she had no identification with her, but conducted no test to determine her sobriety. The plea of guilty, and the payment of a $35.00 fine resulted, she says, from advice of an attorney friend that the cost of contesting the charge would be prohibitive compared with the fine.

¶9 While there is credible evidence that the mother's judgment with regard to alcohol use is not what it should be, there was also evidence that it has improved considerably from the time of the divorce. The father offered no evidence of the mother's present alcohol habits, although he testified as to abuse occurring before the divorce. If the mother's testimony is to be believed, and it is undisputed, there is adequate support for the trial court's conclusion that the husband had not demonstrated a change for the worse in the conditions affecting the child's welfare in this regard.

¶10 The father also presented evidence of the mother's having allowed a boyfriend to spend the night at her home in Stillwater on occasions when the child was present. The mother testified without contradiction that the child was always asleep when the boyfriend shared her bedroom, and that the boyfriend was always "on the couch" when the child got up in the morning after these stays. She testified that after the father had told the boy that the boyfriend was in fact sleeping with the mother, she indicated to her son that what had gone on was wrong. The trial court determined that the father had not shown that the conduct was "permanent", and we cannot conclude that such a finding is against the clear weight of the evidence.

¶11 While the trial court expressed reservations about the actions taken by the mother, and her ability to "live up" to the standards which she had adopted which led him to believe that the "changes" the father described were not permanent, its conclusion that the father had failed to show a permanent, substantial, and material change of conditions which affected the welfare of the child was supported by more than just the mother's promise to "be good." We cannot say that its discretion was abused.

Brown v. Brown, 1992 OK CIV APP 125, 840 P.2d 46 (**relinquishment of custody due to financial inability to care for child and fixing that problem later, visitation denial**; in the initial custody decree, the mother was awarded custody but on an agreed post-decree order, the father was awarded custody; in the mother's subsequent custody modification, joint custody was awarded *sua sponte*):

Next Case Prior

¶6 Appellant contends on appeal that the trial court erred in modifying custody as there was no change in condition to allow such a modification. There was evidence at the trial: (1) that Appellee had relinquished custody of the child due to lack of financial ability to care for the child; (2) that Appellee had been denied visitation and, (3) that Appellee now had established a stable home environment and was gainfully employed. These were permanent, substantial and material changes of circumstances. See *Boatsman v. Boatsman*, 697 P.2d 516 (Okl. 1984).

***Brown v. Brown*,** 1993 OK CIV APP 142, 867 P.2d 477 (**ongoing physical abuse**; custody award to the father was affirmed; see *Smith v. Smith*, below):

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¶8 We do not wish anything said here to be construed as approval of Shelly's behavior. As he readily

admitted, his temper got the best of him on those occasions (and a few others involving third parties). Even so, we do not see in this behavior any sort of pattern of abuse; much less do we find any evidence which supports Michele's claim that Shelly's acts constitute "ongoing domestic abuse" within the meaning of that phrase in 43 O.S. §112.2 . See also 10 O.S. §21.1 (D).

¶9 The phrase "ongoing domestic abuse" should be construed with reference to the definition of "domestic abuse" found in the criminal statutes. The Protection From Domestic Abuse Act, 22 O.S. 1991 §§60 et seq.1 defines "domestic abuse" as "any act of physical harm, or the threat of imminent physical harm[,] which is committed by an adult, emancipated minor, or minor age sixteen (16) or seventeen (17) years against another adult, emancipated minor or minor child who are family or household members." 22 O.S. 1991 §60.1 (1).

¶10 The word "ongoing" adds two connotations to that definition: first, the objectionable conduct must still be occurring or have recently occurred; and, second, at least some suggestion that the abuse is developing or evolving. See, e.g., Webster's Third New International Dictionary 1576 (1986). We therefore construe the phrase "ongoing domestic abuse" to mean abuse which is still occurring, or has occurred with sufficient frequency and recency to give rise to some expectation that it will continue or will recur, and thus will constitute a threat to any child of whom the abusive person is granted custody. As such, "ongoing domestic abuse" is not merely one or two isolated instances of proscribed behavior.

Boyd v. Boyd, 1993 OK CIV APP 196, 867 P.2d 492 (**admissibility of evidence concerning new spouse's history of violence where it's remote**; the trial court's refusal to terminate a prior joint custody order was reversed and remanded for further hearing):

Next Case Prior

¶4 Mark also contends it was error for the Court to exclude testimony regarding possible violent propensities of Sami's new husband. The Court sustained an objection to testimony by a witness that the new husband had raped and stalked her. The Court also made reference to the fact that the rape/stalking incident was prosecuted as a rape. An offer of proof was made. There was testimony by the new husband regarding his drinking habits, his use of illegal drugs prior to the marriage, his pulling a gun on his ex-wife within a year prior to trial, and his conviction of assault with a dangerous weapon. A psychologist, called as an expert witness, testified regarding new husband's violent propensities. However, the Court disallowed the rape/stalking testimony because the incident occurred ten years ago, and was too remote in time.

¶5 A Court has wide discretion in determining whether evidence is lacking in probative value due to remoteness. *Oklahoma City v. Moore*, 491 P.2d 273 (Okl. 1971). However, the rape/stalking evidence did not show an isolated instance of possible violent behavior. There was other evidence before the Court on this subject. The issue to be determined was the child's best interest and the fitness of the family with which the child would live. Evidence of the history and continuing nature of new husband's conduct was relevant to that issue. 12 O.S. 1991 §2609 relates to "attacking the credibility of a witness", and is inapplicable.

¶6 Even though the Court has broad discretion in determining the admissibility of evidence and the testimony of witnesses, probative evidence should be admitted and considered by the Court. The excluded evidence should have been admitted and given such weight as the Court determined to be proper.

Stephen v. Stephen, 1997 OK 53, 937 P.2d 92 (**limitations on role of the courts, education, home schooling**):

Next Case Prior

¶0 Mark Stephen, appellee, applied to modify child custody based on the fact that the mother, Lynn Martin, appellant, had begun to educate the two minor boys at home. Both parties sought modification of child support and the mother requested supervised visitation. The trial court found that the mother's home schooling was a substantial change of circumstances adversely affecting the best interests of the children. The court ordered that if the mother did not re-enroll the two minor boys in public school, custody would be changed to the father and ordered standard visitation. In reducing child support, the

court imputed an income to the mother equivalent to what she had made before she quit her employment to educate the minors at home. The trial court subsequently awarded attorney's fees and some costs to the father.

* * *

¶1 Lynn Stephen, now Martin, appellant, was granted an uncontested divorce from Mark Stephen, appellee, on March 29, 1989. Martin was granted custody of their two boys, born in August 1982, and June 1987. During the 1994-1995 school year Martin quit her job to educate the boys at home. In response, Stephen filed a motion to modify custody alleging that Martin was not qualified to serve as their teacher, and that a home-school education was not in their best interests. After a five-day hearing, the court concluded that the children were probably better off with Martin, but that she was not qualified to educate her children at home. The court ordered a change in custody from Martin to Stephen unless the children were placed in public school. Martin appealed, and her motion to retain was granted.

¶2 The dispositive issue is whether the evidence supports the trial court's determination that home schooling had a direct and adverse effect on the children. We find the evidence does not establish that Lynn Martin's home schooling of her two boys adversely affected their best interests. We hold that when the trial court found this home schooling was not in the best interest of the children, and ordered a change of custody unless the children were returned to public school, such change was against the clear weight of the evidence, and was an abuse of discretion. Accordingly, we reverse the order.

* * *

¶10 While the trial court finds in its order that Martin is not capable of educating her children properly because of her limited formal education, and cannot educate the children to a normal level, the standardized tests, tests of the court's expert, and testimony of the witnesses are all to the contrary. The only limitations the record supports is that the mother has a high school degree and overlooked some misspelled words and a grammatical error on some exhibits Stephen's attorney found in a stack of graded papers. But the Iowa Tests and the testimony of the experts reveal that both boys made substantial improvement in one year. So the trial court's conclusions are not supported by the record.

¶11 Even if the trial court were correct in finding that Martin's education of the boys at home was not in their best interests, the court does not find that one deficiency outweighs all of the other circumstances and therefore requires that custody be moved to Stephen. There was substantial evidence presented that Stephen may be a problem drinker, occasionally drinks and drives, that he had to be taken to court once to collect past due child support, that he did not regularly visit the boys until after he filed his motion to change custody, that he did not keep his appointments when he did promise to visit them, that when he had them at his home in Tulsa for visitation he left them alone during the day and checked on them by phone. In contrast, Martin gave up a $50,000 a year job to stay home to give the boys a better education and more behavioral supervision than she believed that they were receiving in the public school system. She has had custody of the boys for eight years now. The trial court makes the formal education of the mother, and the overlooking of a few misspelled words outweigh the substantial negative evidence against custody being changed to the father. A change in custody, given these facts, is simply not supported. The trial court cannot presume that a parent possessing only a high school degree is unqualified to educate her children at home and make that the sole basis for a change in custody. The trial court's personal beliefs should not be forced on a custodial parent who has made a legitimate decision for the benefit of the minor children. Finding that Martin, whose formal education is limited to a high school degree, is incapable of educating her children at home without evidence supporting such a finding is an abuse of discretion in light of the academic advances made by these boys as revealed by the court's expert, the Iowa tests, and the testimony of other witnesses. The trial court abused its discretion in finding that because of the mother's home schooling, a change in custody would be in the best interests of the children. The decision is against the clear weight of the evidence.

* * *

SUMMERS, V.C.J., concurring in part and dissenting in part, with whom Lavender, J. joins.

¶1 The trial court found that the custodial mother's decision to home-school the children herself, in light of the testimony presented, would amount to a material change of circumstances adverse to the best interests of the children, justifying a change of custody unless the mother accepted certain conditions. The issue before us (on the custody question) is whether the trial court should be reversed

for doing so. By what standards do we review the trial judge's work?

¶2 There are cases in which this Court has said we will not reverse a custody decision where it does not appear that the lower court "abused its discretion". *Gorham v. Gorham*, 692 P.2d 1375, 1380 (Okla. 1984);*Roemer v. Roemer*, 373 P.2d 55, 57 (Okla. 1962). There are other custody cases where the Court used the traditional equity-based standard, that the findings and decree cannot be disturbed on appeal unless found to be "against the clear weight of the evidence." *Kahre v. Kahre*, 916 P.2d 1355, 1360 (Okl. 1995); *Carpenter v. Carpenter*, 645 P.2d 476, 480 (Okla. 1982); *Snow v. Winn*, 607 P.2d 678, 681 (Okla. 1980). There is a recent case, *Mueggenborg v. Walling*, 836 P.2d 112, 115 (Okla. 1992), in which we found "no abuse of discretion" in granting custody because the decision "is not against the clear weight of the evidence."

¶3 There is, however, no disagreement that divorce litigation, and custody contests within it, are matters of equitable cognizance. This was thoroughly laid out in *Carpenter*, supra, at 480. I counsel, therefore, that in child custody matters we stay with the traditional norm used in other matters of equity jurisprudence -- that custody findings and decrees not be disturbed unless found to be against the clear weight of the evidence.

¶4 Having said that, what would I do with this custody judgment on appeal? I would affirm it.

* * *

SIMMS, J., CONCURRING:

¶1 I agree with the majority that these facts do not support the trial court's determination that Ms. Martin is incapable of educating her children and that the trial court's decision requiring her to enroll her boys in public school under threat of losing of their custody, must be reversed. I would go further, however, and hold that the threshold for judicial interference in Ms. Martin's custody of her children was not reached by the noncustodial father's challenge to her choice of one lawful educational alternative over another, and that the entire scope of the inquiry into the adequacy of her teaching was inappropriate for the trial court's consideration of change of custody.

¶2 It is not the business of the courts to become involved in everyday decisions of child rearing which are properly the prerogative of the parents or, in the case of divorced parents, the custodial parent. The right of the custodial parent to determine and control the education of the child is well-settled. In the absence of specific provisions in the divorce decree or an agreement between the parents, the sole decision making power over significant decisions affecting the child's welfare, including education, resides in the custodial parent. See Annot., Noncustodial Parent's Rights As Respects Education of Child, 37 ALR 3 1093; *Bennett v. Bennett*, 73 So. 274 (Fla.1954); *Von Tersch v. Von Tersch*, 455 NW 2 130 (Neb.1990); *Jenks v. Jenks*, 385 SW 2 370 (Ct.App.Mo.1964); *Rust v. Rust*, 864 SW 2d (Tenn.Ct.App.1993); *Griffin v. Griffin*, 699 P2d 407 (Colo.1985); *Parrinelli v. Parrinelli*, 524 NYS 159 (Sup.Ct.Suffolk Co.1986).

Smith v. Smith, 1998 OK CIV APP 71, 963 P.2d 24 (**ongoing physical abuse**; custody award to the father was reversed; see *Brown v. Brown*, above):

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¶1 Plaintiff, Larry Smith (Father), and Defendant, Alta Jo Smith (Mother), were married in 1988. Their only child was born in 1993. In December 1995, Father filed a petition for divorce. The next day, Mother applied to the district court for a temporary restraining order on the basis that four days earlier, Father had physically and verbally abused Mother, threatened to kill her, and threatened to kill himself, all in the presence of the child. On December 13, 1995, the trial court gave Father temporary custody of the child. After a trial, the trial court granted a divorce to the parties and awarded Father custody of the child and awarded visitation to Mother. Mother appeals this portion of the divorce decree.

¶2 Mother argues the trial court erred in denying admission of evidence of ongoing domestic abuse and abused its discretion by awarding custody of the child to Father. Title 43 O.S. §112.2 provides: [statute's text omitted]

¶3 In *Brown v. Brown*, 1993 OK CIV APP 142, 867 P.2d 477, a child custody case, the Court of Civil Appeals held the phrase, "ongoing domestic abuse," means abuse which is still occurring or has occurred with sufficient frequency and recency to give rise to some expectation that it will continue or will recur and, thus, will constitute a threat to any child of whom the abusive person is granted custody;

ongoing domestic abuse is not merely one or two isolated instances of proscribed behavior.

¶4 Moreover, ongoing domestic abuse should be construed with reference to the definition of domestic abuse found in the criminal statutes. The Protection From Domestic Abuse Act, 22 O.S. 1991 §60 et seq., defines "domestic abuse" as "any act of physical harm, or the threat of imminent physical harm, which is committed by an adult, emancipated minor, or minor age sixteen (16) or seventeen (17) years against another adult, emancipated minor or minor child who are family or household members." 22 O.S. 1991 §60.1(1). In the*Brown* case the Court of Civil Appeals noted the behavior of the father did not form a "pattern of abuse."

¶5 Herein, a witness testified Father dragged Mother by her feet down the sidewalk, that he slapped Mother while he was holding the child, and that he tore apart the child's crib. Another witness testified Father hit Mother, gave her a black eye and explained he has to hit something when he gets angry. Mother testified Father flung the child's crib against the wall with the four month old child in it. Another witness testified that during one incident, Father repeatedly screamed, "Shut the -- up" in the child's face. Yet another witness testified she found Father violently shaking the then 15 month old child and screaming at her to "shut up." Evidence of Father's physical abuse of Mother, when she was pregnant with the child was denied as being too remote in time.

¶6 Although Mother complains the evidence not admitted at trial, together with evidence admitted, constitutes ongoing domestic abuse, this Court finds the evidence admitted, alone, constitutes ongoing domestic abuse. Father denied ongoing domestic abuse. The evidence admitted meets the Brown test for frequency and recency. Thus, there arises a presumption it is not in the best interests of the child for Father to have custody of her. Father did not rebut this presumption.

Lyons v. Lyons, 1998 OK CIV APP 153, 970 P.2d 200 (**joint custodian being a jerk and not being interested in child**; in a post-decree proceeding to terminate an agreed joint custody order six months after its entry, the trial court's refusal to terminate the joint custody award was reversed and remanded for new trial with instructions to receive pre-decree evidence):

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¶5 Mother testified that Father had moved three times since their divorce and was now living outside the children's school district, that he had never provided her with any of the addresses and that once while he had physical custody, she did not know where the children were for two weeks. She further testified that because he is not interested in her son's extracurricular activities, Father won't let her son participate, causing her to switch days with him. She also testified that most of the time during Father's physical custody the children are not even with him, and that living 11 days with Father and 18 days with her was not providing a stable environment for the children.

Gender Preference

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Although Oklahoma statutory law disallows a parent's gender from being considered in determining child custody, vestiges of such notion may persist. Hence, this brief statutory review may be useful.

30 O.S. §11, Oklahoma's statute embracing the "tender years doctrine", existed until July 1, 1983. It provided as follows:

In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations:

1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question.

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father.

Exemplary decisions under 30 O.S. §11 are *Gordon v. Gordon*, 1978 OK 17, 577 P.2d 1271 and *Boyle v. Boyle*, 1980 OK 123, 615 P.2d 301.

30 0.S. §11 was repealed by Laws 1983, c. 269, §4, effective July 1, 1983. 12 O.S. §1275.4(A) (renumbered as 43 O.S. §109 by Laws 1989, c. 333, §1, effective November 1, 1989) took its place:

> 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.

Later, the current specific prohibition as added at 12 O.S. §1277, recodified in 1989 to become 43 O.S. §112, the current statute. §112.C.3.b. provides:

> 3. When in the best interests of the child, custody shall be awarded in such a way so as to assure the frequent and continuing contact of the child with both parents. To this effect, in making an order for custody to either parent, the court:
> a. shall consider, among other facts, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and
> b. shall not prefer a parent as a custodian of the child because of the gender of that parent.

Few cases have addressed the post-1983 law. In the paternity case of *Miles v. Young*, 1991 OK CIV APP 101, ¶14, 818 P.2d 1258, the court noted that after paternity is established a trial court may not prefer a parent as custodian because of gender. In ***Meigs v. Meigs***, 1996 OK CIV APP 76, 920 P.2d 1077, the court noted the trial court's "unfortunate" remarks but affirmed it's custody modification award to the mother:

> ¶6 Appellant also argues the trial court improperly considered gender in determining custody. According to Appellant, comments made by the trial court when it announced its decision indicated trial court relied on the "tender years doctrine." We agree that doctrine has been abolished in Oklahoma. However, it does not appear the trial court based its decision on this impermissible factor.
> ¶7 Although the trial court made some perhaps unfortunate general comments about "mothers" being "better equipped" to help "little girls," the trial court, specifically based its decision "upon the testimony and all the conditions that do exist in this matter." Father raised this issue in his motion for new trial, arguing that the trial court had improperly based its order on the conclusion that "women as a whole" were better custodians of minor children. In denying the motion, the trial court specifically disclaimed any such view, and stated its decision was based on Appellee's individual qualities as a parent. Under these circumstances, we will not presume the trial court ignored 43 O.S.Supp. 1994 §112 (C)(3)(b).

Guardians Ad Litem

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Clark v. Alexander
Kahre v. Kahre
Perigo v. Wiseman

The role of guardian ad litem has not been precisely defined in Oklahoma as much as in some other states. 43 O.S. §107.3 became effective November 1, 1997. A lawyer-guardian ad litem raises numerous ethical and practical issues such as confidentiality, the potential of lawyer testimony and other matters.

The following excerpts from ***Clark v. Alexander***, No. 96-298, Supreme Court of Wyoming (2/18/98) were copied from that Court's web site and this thoughtful and thorough opinion may be of use in thinking through unresolved Oklahoma GAL issues. 953 P.2d 145 (Wyo. 1998) contains the official report.

> The role of the attorney/guardian ad litem during the proceedings is central to the disposition of this case. Mother claims that because the guardian ad litem actively participated as the children's attorney, it was improper to allow her to testify at the modification hearing. Father and the guardian ad litem respond that Mother failed to preserve this issue when no objection was lodged with the district court.
>
> Generally, we will not address an issue raised for the first time on appeal absent special circumstances.*Rowan v. Rowan*, 786 P.2d 886, 889 (Wyo. 1990). However, "[t]he definition of the precise roles of the attorney and the guardian ad litem for children is still evolving and not without difficulty." *S.S. v. D.M.*, 597 A.2d 870, 877 (D.C.App. 1991). [Our decision here does not address many areas of chronic confusion in the appointment of a guardian ad litem, e.g., when an appointment is necessary, the necessary qualifications to serve as guardian ad litem, and the timeliness of the court 's communication of the specific duties expected by the court. In recognition of the need for clarification and the lack of uniformity throughout our state, we urge our courts, legislators, professionals, and concerned citizens to undertake a consolidated effort to address the appointment of counsel and guardians ad litem for Wyoming 's children. See *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162, 178-80 App. A (1993); Minnesota Rules of Guardian Ad Litem Procedure (adopted August 27, 1997); Colo. Rev. Stat. 14-10-116 (effective July 1, 1997); Michigan Guidelines for Advocates for Children (submitted by the State Bar of Michigan 's Children 's Task Force); Missouri Supreme Court Standards for Guardians Ad Litem (Sept. 17 1996); Virginia Standards to Govern the Appointment of Guardians Ad Litem, Va. Code 16.1-266.1 (effective Jan. 1, 1995); ABA Proposed Standards of Practice for Lawyers Who Represent Children In Abuse and Neglect Cases (approved by the Council of the Family Law Section August 5, 1995), 29-3 Fam.L.Quart. 375 (1995); Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings, 13 J. Am. Acad. Matrim. Law. 1 (Summer 1995); and Renee Goldenberg and Nancy S. Palmer, Guardian Ad Litem Programs: Where They Have Gone and Where They Are Going, 69-Dec. Fla. B.J. 83 (1995) (discussing recent amendments to Florida statutes regarding guardian ad litem practice).] In Wyoming, the role of an attorney or guardian ad litem in custody cases is not addressed by statute, and like many jurisdictions, case law has failed to clearly delineate the parameters of the duties incumbent upon appointment. Moreover, the juxtaposition of the separate roles of attorney and guardian ad litem into one "attorney/guardian ad litem," appears especially problematic. [See*Leary v. Leary*, 97 Md.App. 26, 627 A.2d 30, 37 (1993) ("A dichotomy exists between the attorney as guardian and the attorney as advocate, and the lines become very easily blurred. "); Ann Haralambie, The Role of the Child 's Attorney in Protecting the Child Throughout the Litigation Process, 71 N.D. L. Rev. 939, 941 (1995) ("Courts and legislatures have not provided much assistance and have often required attorneys to assume dual and potentially inconsistent roles."); Nancy J. Moore, Conflicts of Interest in the Representation of Children, 64 Fordham L. Rev. 1819, 1842 (1996) ("[A] more common example of a possible conflict arising from duties * * * is the lawyer in a child custody * * * case who serves both as the child 's attorney and as guardian ad litem. ") (emphasis in original); and Roy T. Stuckey, Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality, 64 Fordham L. Rev. 1785, 1786 (1996) ("Role definition and confidentiality issues can arise whenever attorneys are appointed to serve as guardians ad litem ; however, they become even more complex when an attorney is appointed to serve as both the attorney and the guardian ad litem for a child. ").] Given the lack of clear direction provided to those who must fulfill this role in Wyoming, and our certainty that the issues in this case will reappear in the future, we speak to those issues here. In providing guidance to the role of an attorney appointed to represent a child while at the same time acting as guardian ad litem, we do not intend to usurp the role of the district court in appointing individuals to act solely as an attorney or as guardian ad litem. It is imperative, however, that the appointee request clarification from the appointing court if questions regarding the duties arise.
>
> The guardian ad litem's role has been characterized as investigator, monitor, and champion for the

child. Ann M. Haralambie and Deborah L. Glaser, Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children, 13 J. Am. Acad. Matrim. Law. 57, 73-74 (Summer 1995). The traditional role of a guardian ad litem in custody proceedings has been described as follows:

[I]n custody matters, the guardian ad litem has traditionally been viewed as functioning as an agent or arm of the court, to which it owes its principal duty of allegiance, and not strictly as legal counsel to a child client. * * * In essence, the guardian ad litem role fills a void inherent in the procedures required for the adjudication of custody disputes. Absent the assistance of a guardian ad litem, the trial court, charged with rendering a decision in the "best interests of the child," has no practical or effective means to assure itself that all of the requisite information bearing on the question will be brought before it untainted by the parochial interests of the parents. Unhampered by the ex parte and other restrictions that prevent the court from conducting its own investigation of the facts, the guardian ad litem essentially functions as the court's investigative agent, charged with the same ultimate standard that must ultimately govern the court's decision--i.e., the "best interests of the child." Although the child's preferences may, and often should, be considered by the guardian ad litem in performing this traditional role, such preferences are but one fact to be investigated and are not considered binding on the guardian. * * * Thus, the obligations of a guardian ad litem necessarily impose a higher degree of objectivity on a guardian ad litem than is imposed on an attorney for an adult.

State ex rel. Bird v. Weinstock, 864 S.W.2d 376, 384 (Mo.App. 1993); *Berndt by Peterson v. Molepske*, 211 Wis.2d 572, 565 N.W.2d 549, 553 (1997); see also *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222, 1230 (1997) (noting traditional role of guardian ad litem as arm of the court). In many jurisdictions, the guardian ad litem is required to oversee the progress of proceedings involving the child and, after reaching an independent conclusion, to recommend to the court the outcome which the guardian ad litem believes to be in the child's best interests. See Ann M. Haralambie and Deborah L. Glaser, supra, 13 J. Am. Acad. Matrim. Law. at 70-72, nn. 55-57 (listing guardian ad litem duties in various jurisdictions).

In contrast, the traditional role of an attorney is that of advisor, advocate, negotiator and intermediary. Wyo. R. Prof. Cond., Preamble. Counsel appointed to represent a child must, as far as reasonably possible, maintain a normal client-lawyer relationship with the child, Wyo. R. Prof. Cond. 1.14, and "abide by a client's decisions concerning the objectives of representation * * *." Wyo. R. Prof. Cond. 1.2. Thus, counsel for a child is not free to independently determine and advocate the child's "best interests" if contrary to the preferences of the child.

Wyo. Stat. 14-3-211 (1997), addressing the appointment of counsel to represent children in abuse and neglect proceedings, distinguishes the role of guardian ad litem from the role of "counsel for the child," but combines the two if no guardian ad litem is appointed. [Wyo. Stat. 14-3-211 provides: (a) The court shall appoint counsel to represent any child in a court proceeding in which the child is alleged to be abused or neglected. Any attorney representing a child under this section shall also serve as the child 's guardian ad litem unless a guardian ad litem has been appointed by the court. The attorney or guardian ad litem shall be charged with representation of the child 's best interest. (b) The court may appoint counsel for any party when necessary in the interest of justice.] Although the statute does not address custody proceedings, in *Moore v. Moore*, 809 P.2d 261, 264 (Wyo. 1991), we applied the statutory language regarding "representation" of the child to custody cases, and held that an attorney appointed as guardian ad litem may not engage in ex parte communications with the trial court. We stated that the attorney/guardian ad litem acts as an advocate for the child and "has the same ethical responsibilities in the proceeding as any other attorney." See also In Interest of MFB, 860 P.2d 1140, 1152 (Wyo. 1993) (the attorney/guardian ad litem "must act with reasonable diligence in the role of an advocate for the child, Wyo.R.Prof.Cond. 1.3, and participate as necessary in all phases of the process * * * Wyo.R.Prof.Cond. 1.14.").

Our decision in Moore, 809 P.2d 261, however, did not address other situations where the attorney's ethical duties under the Rules of Professional Conduct may not coincide with the duties expected of the guardian ad litem. The circumstances of this case clearly illustrate several examples of the problems which may arise. Here, the attorney/guardian ad litem represented three siblings, two of whom expressed conflicting preferences regarding custody. A guardian ad litem, not bound by the expressed preferences of the child, has no conflict in this situation. On the other hand, the Rules of Professional Conduct require the attorney to zealously represent the client's interests. Therefore, the

attorney must discontinue representation when two clients' interests, and thereby the attorney's duty, diverge. Wyo. R. Prof. Cond. 1.2 and 1.7. Similarly, a conflict is present when the attorney/guardian ad litem does not believe the child's expressed interest is in the child's best interest.

The guardian ad litem is also required to inform the court of all relevant information. This expectation may often collide with Wyo. R. Prof. Cond. 1.6, which requires the attorney to maintain confidentiality unless the client consents to disclosure. In this case, Father's recording of the children's conversations with Mother also included a recording of one child's telephone call to the guardian ad litem. The attorney/guardian ad litem allowed this conversation to be admitted into evidence without objection and without the consent of the child.

Finally, the attorney/guardian ad litem is expected to actively participate as legal counsel for the children, i.e., presenting opening and closing statements and examining witnesses. In contrast, Wyo. R. Prof. Cond. 3.7 prohibits an attorney from participating as an advocate in a case where it is likely that he or she will be called to testify to a matter of import at the proceeding. In this case, the attorney/guardian ad litem not only testified regarding the ultimate issue in the case, but was the vehicle through which the taped conversations were admitted.

In those cases where the facts relevant to the children's best interests may not be otherwise presented to the court, the traditional role of guardian ad litem is essential. It is equally apparent that the skills of a legal advocate are invaluable to the child caught within a contentious custody dispute. With counsel, the child has an unbiased adult who can explain the process, inform the court of the child's viewpoint, and ensure an expeditious resolution. See *J.A.R. v. Superior Court in and for County of Maricopa*, 179 Ariz. 267, 877 P.2d 1323, 1331 (1994) ("a mental health professional * * * simply cannot assure that * * * all relevant information is properly investigated and introduced in an admissible fashion at trial, or that irrelevant or biased information is either kept out or cross-examined.").
While some jurisdictions have required the separation of these roles, a number of courts have declared the role a "hybrid," which necessarily excuses strict adherence to some rules of professional conduct. *In Interest of J.P.B.*, 419 N.W.2d 387, 391-92 (Iowa 1988); *In re Marriage of Rolfe*, 216 Mont. 39, 699 P.2d 79, 86-87 (1985), aff'd 234 Mont. 294, 766 P.2d 223 (1988). We believe that the costs attending the appointment of both an attorney and a guardian ad litem would often be prohibitive and would in every case conscript family resources better directed to the children's needs outside the litigation process. Thus, we too acknowledge the "hybrid" nature of the role of attorney/guardian ad litem which necessitates a modified application of the Rules of Professional Conduct.

Contrary to the ethical rules, the attorney/guardian ad litem is not bound by the client's expressed preferences, but by the client's best interests. If the attorney/guardian ad litem determines that the child's expressed preference is not in the best interests of the child, both the child's wishes and the basis for the attorney/guardian ad litem's disagreement must be presented to the court. *In re Marriage of Rolfe*, 699 P.2d at 86-87.

In the same light, the confidentiality normally required in the attorney-client relationship must be modified to the extent that relevant information provided by the child may be brought to the district court's attention. While it is always best to seek consent prior to divulging otherwise confidential information, an attorney/guardian ad litem is not prohibited from disclosure of client communications absent the child's consent. As legal counsel to the child, the attorney/guardian ad litem is obligated to explain to the child, if possible, that the attorney/guardian ad litem is charged with protecting the child's best interest and that information may be provided to the court which would otherwise be protected by the attorney-client relationship. Wyo. R. Prof. Cond. 1.2, 1.4 and 1.14. [We recognize that in some instances a child may be too young to understand the purpose of the proceedings or the role of the attorney/guardian ad litem. However, in most cases, the information may be conveyed in an age-appropriate manner.]

Although the above rules require compromise in order to effect the dual roles of attorney and guardian ad litem, we do not find the same need applies to Wyo. R. Prof. Cond. 3.7. Our holding in Moore, 809 P.2d 261 clearly mandates that the attorney/guardian ad litem is to be an advocate for the best interests of the child and actively participate at the proceedings. As counsel, the attorney/guardian ad litem has the opportunity and the obligation to conduct all necessary pretrial preparation and present all relevant information through the evidence offered at trial. Recommendations can be made to the court through closing argument based on the evidence received. It is, therefore, unnecessary to allow

the attorney/guardian ad litem to place his or her own credibility at issue. Consequently, we join those jurisdictions which hold that an attorney/guardian ad litem may not be a fact witness at a custody hearing. Colo. Rev. Stat. 14-10-116(2)(a) (1997); S.S., 597 A.2d at 877; *Hollister v. Hollister*, 173 Wis.2d 413, 496 N.W.2d 642, 644-45 (1992).

This is not to say that the attorney/guardian ad litem may not submit a written report to the parties. A detailed report which timely informs the parties of the relevant facts and the basis of the guardian ad litem's recommendation may facilitate agreement prior to trial. If the parties so stipulate, the report may be presented to the court. However, the report should not be filed with the court or received into evidence without the express agreement of the parties. To the extent that prior Wyoming cases may conflict with this holding, they are here overruled. [*Wilcox-Elliott v. Wilcox*, 924 P.2d 419 (Wyo. 1996); *Matter of Parental Rights to ARW*, 716 P.2d 353 (Wyo. 1986); *Matter of Parental Rights of PP*, 648 P.2d 512 (Wyo. 1982).]

***Kahre v. Kahre*,** 1995 OK 133, 916 P.2d 1355 (the facts and procedural circumstances of this bizarre case are beyond my capability of rendering brief description; only opinion excerpts which discuss the role of a guardian ad litem will be given here; other excerpts are in the Ethics and Visitation, Orders Restricting, sections.):

¶30 The guardian ad litem's role in this matter was important and unusual. To achieve a full understanding of the issues, it will be useful to explore what it is he was obliged to do, and what he did in this case.

The Guardian ad Litem's Role as an Arm of the Court

¶31 The guardian ad litem was appointed under 43 O.S. 1991 §§109 and 112.A.1, which require that in a divorce action, the trial court "shall consider what appears to be in the best interests of the physical and mental and moral welfare of the child," (§109), and "shall make provision for guardianship, custody, medical care, support and education of the minor children." (§112.A.1). A guardian ad litem "becomes an officer of the court and is charged with the duty of protecting the rights of the infant for the State in its role of parens patriae." *Hoffman v. Morgan*, 206 Okla. 567, 245 P.2d 67, 69, 30 A.L.R.2d 1141 (1952). Here, the guardian ad litem, and the trial court, had the express duty to provide for the best interests of the Kahre children. "In awarding the custody of a minor unmarried child or in appointing a general guardian for a child, the court shall consider what appears to be in the best interests of the physical and mental and moral welfare of the child." 43 O.S. 1991 §109.A.

¶32 We have not previously considered the duties of guardians ad litem in custody disputes. In recent years many cases from other jurisdictions and commentators have examined the role of the guardian ad litem in custody disputes. Although the issue in most was whether a guardian ad litem was immune from suit by one of the parties over his handling of the guardianship, these cases are of interest here because they examine in detail the duties imposed on guardians ad litem in custody cases. For a collection of many of these opinions see *Collins v. Tabet*, 111 N.M. 391, 397, 806 P.2d, 40, 46, 14 A.L.R.5th 1094 (1991). See particularly *Myers v. Morris*, 810 F.2d 1437, 1466-67 (8th Cir. 1987) (guardian ad litem of children investigating sexual abuse allegations performed "delegated functions."); and *Short v. Short*, 730 F. Supp. 1037 (D.Colo. 1990) (in custody dispute guardian ad litem acted as the "agent of the court.")

¶33 In custody matters the guardian ad litem has almost universally been seen as owing his primary duty to the court that appointed him, not strictly to the child client. *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 384 (Mo.App. 1993). See also *Elrod*, Counsel for the Child in Custody Disputes: The Time is Now, 26 Fam.L.Q. 53, 59-62 (1992), in which the author observes that the guardian ad litem fills a void for the court. Without the guardian ad litem, the trial court has no practical means to ensure that it receives the information it needs to secure the best interests of the child are served until after the information has been filtered through the adversarial attitudes of the warring parents. The guardian ad litem makes his own investigation as the trial court's agent. The wishes of the minor child are one factor to be considered, but the guardian ad litem's obligation remains the same as that of the trial court: the child's best interests, although the child's wishes may be otherwise.

¶34 We concur with the analysis of a guardian ad litem's duties set forth in the cases discussed above. The guardian ad litem in a custody dispute is an arm of the court and must see to the best

interests of the child. What the minor child's own wishes may be, particularly a very young child, is only one factor to be considered by both the guardian ad litem and the court.

Perigo v. Wiseman, 2000 OK 67, 11 P.3d 217 (guardian ad litem has limited liability):

¶0 Original jurisdiction is assumed. Let a writ issue prohibiting the respondent Judge Jane Wiseman, or any other judge from proceeding further with that cause now pending before the District Court in Tulsa County in which the real party in interest Catia Marie Dorwart, a minor by and through Erica Anne Dorwart her mother and custodial parent are the plaintiffs, and petitioner Jerry L. Perigo is the defendant, Cause No. CJ-00-2070. A court-appointed guardian ad litem in a custody matter is immune from suit by the ward or any other party, for all acts arising out of or relating to the discharge of his duties as guardian ad litem. *Kahre v. Kahre*, 1995 OK 133, 916 P.2d 1355; *Kirschstein v. Haynes*, 1990 OK 8, 788 P.2d 941.

Joint Custody

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Rice v. Rice, 1979 OK 161, 603 P.2d 1125 (probably the first Oklahoma decision referencing joint custody pre-joint custody statute's adoption; the issue was not involved in the instant appeal which resulted in termination of the initial joint custody award by awarding custody to the father; nonetheless, the court's observations may be useful):

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¶10 Joint custody has been commonly employed in Oklahoma, and in other jurisdictions, to permit a child to be placed under the care and control of one parent during the school year and with the other parent during summer vacation. Although joint custody has been thought to be an anathema, new studies have proposed that it is preferable under certain conditions. The question of custody, joint or otherwise, must be decided by reference to the consequences for the particular child in each case. The primary contemplation must always be the welfare and best interests of the child. An award of joint child custody is a viable alternative for courts to consider when favorable circumstances are present so that it probably will work.

¶11 In this instance the mother specifically testified that: the arrangement was not working well (the child had to be placed in two nurseries); and that the custodial arrangement was not in the child's best interest. We concur with the findings in *Spencer v. Spencer*, 567 P.2d 112, 113 (Okl.App. 1977) that split custody on a weekly basis in this case is impractical, logistically and emotionally, if not impossible. Modification of custody is affirmed.

Hornbeck v. Hornbeck, 1985 OK 48, 702 P.2d 42 (still the only Supreme Court decision addressing post-statute joint custody, joint custody was modified to change the initial custody award to the mother to the parties jointly on the father's motion and in the absence of the parties' agreement; since it remains the only Oklahoma case having precedential effect, it is quoted from at length; also, see Move of Custodial Parent, below):

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¶2 Appellant mother and appellee father were granted a divorce when their son was seven months old. The divorce decree granted custody of the child to appellant with visitation to appellee on alternating weekends. Although appellant and child had moved from their Johnston County home to Tulsa, appellee never failed to exercise his visitation rights at every opportunity over the next year and a half.

¶3 Following the announcement of appellant's plan to remarry and move with the child to appellant's new husband's home near St. Louis, Missouri, appellee initiated the present action seeking a modification of the original custody provisions. Accompanying his motion to modify, appellant included a proposed plan for sharing custody.

* * *

¶15 The final proposition presented by appellant concerns the second stage of the Gibbons two stage burden of proof, i.e. whether the child would be substantially better off if the requested modification of custody were ordered. In this regard appellant argues that her evidence showed that she had established a stable new "family unit" and that the disruption of that stability would only have a detrimental effect upon the child. Appellee's counter-argument on this point is that the detriment from depriving the child of a beneficial relationship with either parent outweighs the benefit to be gained from a stable physical environment where only one parent is allowed to truly develop a relationship with the child. Appellee's argument is supported by recent studies indicating that the best alternative for a child in a post-divorce situation is to be able to maintain a meaningful relationship with both parents.

¶16 Appellant's argument is founded upon the more traditional approach favored by courts in the past, which in turn still has its supporters, that the interest of the child is best served by seeking to establish physical stability for the child. It has traditionally been felt that from this physical stability flows emotional stability, and that the maintenance of relationships with both parents is of lesser value. As with all theories regarding the development of the human psyche this theory too is subject to change as new information is gained.

¶17 We are now at the point where policy arguments both in favor of and opposed to joint custody arrangements may be presented to the trial court. Both sides may cite factors affecting the interests of the child. But the very existence of these conflicting viewpoints demonstrates the desirability of leaving the resolution of these matters in the sound discretion of the trial court to be decided on a case by case basis.

¶18 As appellant points out, the divorce itself produces the primary traumatic effect upon a child of a divorce. The questions before the trial court in the decisions affecting the custody of the child after this point are strictly limited to seeking the best interests of that child. Seeking to minimize the effects of the trauma of divorce and to heighten the child's chances for a happy and psychologically healthy childhood is clearly a path which the court may consider to advance those interests. We therefore conclude that where the factors affecting the child's welfare favor the allowance of a joint custody arrangement, which will further a meaningful relationship with both parents, this arrangement may be found to substantially advance the child's welfare.

¶19 However, even as pointed out by those in favor of a joint custody arrangement, joint custody should only be considered where certain circumstances are present. These circumstances boil down to the presence of factors showing 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 child's life, such as schooling.

¶20 In the present case the evidence clearly indicates the positive presence of these factors. The parties had, up until the point of the modification proceedings, shown an ability and a desire to cooperate regarding the child. Even during the hearing they made it evident that they held the best

interests of the child of primary concern, and that they would cooperate to advance those interests.

¶21 As to the quality of home life, both parties admitted that the other was capable of providing an excellent home environment for the child. Appellant, who was not employed outside the home, was available to be with the child throughout the day. Appellee, who is an attorney, also demonstrated that he could spend considerable periods of time with the child, and that when he could not, the child would have the care and companionship of his paternal grandfather, a man of sixty-five and in excellent health.

¶22 Joint custody in the present case avoids the disruption of other institutionalized aspects of socialization through the fact that the child is now too young to be taking an active part in such programs. The trial court further provided that the entire custody scheme would be reconsidered at the point at which the child was to begin such programs.

¶23 Upon review it appears that the evidence clearly supports the trial court's exercise of discretion in this case. A custody scheme was fashioned and ordered implemented which allows the child to fully develop relationships with both of his parents while at a young and impressionable stage. The order is also supported by evidence showing that the development of such relationships is to the benefit of the child. Those factors which might normally contraindicate joint custody also appear not to be present.

For the fourteen years that have past since 1985, the Supreme Court has not again spoken to joint custody and the various divisions of the Courts of Civil Appeal have developed all case law on this topic. Immediately after *Hornbeck*, three decisions written by Court of Appeals Judge Carol Hansen quickly followed and those decisions have defined the tone and nuance of the *Hornbeck* decision which determined that (1) joint custody could be ordered in a post-decree circumstance and (2) that both parents' agreement to a joint custody order was not a condition precedent to its entry by a trial court. Judge Hansen's trilogy of cases is *Fast*,*Dunham* and *Anderson*, below.

Fast v. Fast, 1989 OK CIV APP 31, 787 P.2d 1288 (the original joint custody plan was agreed to by both parties; the mother's post-decree custody motion alleged that the parents weren't communicating and requested termination of the plan and a custody award to the mother; the trial court's order not doing so was reversed on appeal):

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¶4 The Oklahoma Supreme Court has not generated any specific policies governing the future of the very sensitive area of joint custody. In *Hornbeck v. Hornbeck*, 702 P.2d 42 (Okla. 1985), the Court made it clear that a trial court does have the power under 12 O.S. 1983 Supp, §1275.4 3 to order joint custody even though one parent does not agree to abide by the plan. However, many other jurisdictions have found that a cardinal criterion for an award of joint custody is the agreement of the parties and their mutual ability to co-operate in reaching shared decisions in matters affecting the child's welfare. 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 give a trial court pause.

¶5 *Hornbeck* involved a motion to modify a divorce decree to impose a joint custody agreement. The present case differs from *Hornbeck* only in that it involves a motion to modify and terminate a joint custody arrangement. *Hornbeck* provides guidance as to the elements the Supreme Court considers to be factors in determining whether custody should be shared jointly. We hold these same factors must be considered in determining whether a movant is entitled to a termination of a previous joint custody arrangement.

¶6 *Hornbeck* tells us 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 child's life. The Supreme Court therein recognized other factors as set out previously in *Rice v. Rice*, 603 P.2d 1125, 1129 (Okla. 1979) (footnote 9).

¶7 A review of the transcript of testimony of the hearing on Mother's application reveals an atmosphere of hostility and uncooperative behavior as well as a lack of agreement between the parties as to proper discipline and behavior of the child. Religious and philosophical differences exacerbate

the already schismatic relationship. In fact, Father's brief does not direct our attention to any area of harmony whatsoever. It appears to this Court that this custody arrangement is a textbook example of the impropriety of a joint custody order.

¶8 Certainly the best interests of the child are paramount. Mother presented the testimony of a psychologist who believed Mother was attuned emotionally, and very sensitive to the child's needs. She felt the situation as it stood was very stressful to the child, and that if it continued, he could have a severe personality disorder. There was no showing on behalf of Father that the best interests of the child dictate continuance of the joint arrangement.

Dunham v. Dunham, 1989 OK CIV APP 44, 777 P.2d 403 (the mother's appeal from the trial court's award of sole custody to the father, over her request that joint custody be awarded, was affirmed):
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¶4 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. *Hornbeck v. Hornbeck*, 702 P.2d 42 (Okla. 1985). 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 A.L.R.4th 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.

¶5 Appellant points to nothing evidencing the above factors necessary for a court to give custody of the children to both parties jointly. A review of the record reveals no testimony or evidence of the superiority of a joint custody arrangement over sole custody with Appellee. In fact a review of the record and testimony shows a pattern of acrimony and hostility between the parties, not cooperation. Additionally neither party requested joint custody.

¶6 One who challenges the determination of custody must put forth evidence presented below upon which he relies to establish the trial court's error, and must affirmatively demonstrate how such evidence shows the trial court's decision to have been contrary to the children's best interests. *Gorham v. Gorham*, 692 P.2d 1375 (Okla. 1984). We have reviewed the transcript and record in this matter and cannot say the trial court's determination of custody to be contrary to the best interests of the children. The trial court's rulings are presumptively correct and not against the clear weight of the evidence. We find no abuse of discretion warranting reversal.

***Anderson v. Anderson*,** 1990 OK CIV APP 23, 791 P.2d 116 (initial custody decree awarded custody to the mother; then the father's post-decree awarded custody to him; finally, the mother's subsequent request for custody resulted in a *sua sponte* joint custody order, from which the father's appeal resulted in reversal):
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¶7 Although the above order is clearly not a true joint custody order, Father being given primary custody, such *sua sponte* action on behalf of the trial court is an abuse of discretion. 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 child's life. *Dunham v. Dunham*, 777 P.2d 403 (Okla. App. 1989).

¶8 The Oklahoma Supreme Court in *Hornbeck v. Hornbeck*, 702 P.2d 42 (Okla. 1985) made it clear that a trial court does have the power to order joint custody even though one parent does not agree to abide by the plan. However, in this case neither party requested joint custody. A cardinal criterion for an award of joint custody is the agreement of the parties and their mutual ability to co-operate in reaching shared decisions in matters affecting the child's welfare. 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 unwilling parents should give a trial court pause. *Fast v. Fast*, 787 P.2d 1288 (Okla. App.

1989).

¶9 A parent seeking to modify a custody order must show the court that there has been a substantial change in circumstances since the making of the order sought to be modified. However, it must also be shown that this change of circumstances substantially and materially affects the welfare of the child. *Gibbons v. Gibbons*, 442 P.2d 482 (Okla. 1968). This same standard must be used when changing custody from one parent to both parents jointly.

¶10 In the present case neither party submitted a joint custody arrangement. There was no evidence presented by either party in support of a joint custody order. Further, there is no testimony showing a history of cooperation by Mother and Father respecting decisions governing the well-being of the child. To the contrary, the parties' motions to modify coming on the heels of one another, show a lack of unified concern for the best interests of the child and more likely reveal an atmosphere of hostility and uncooperative behavior on behalf of both parents.

¶11 The trial court denied Mother's motion to modify the decree to give her sole custody. Mother does not appeal that portion of the order, and it is affirmed. However, we reverse that portion of the order awarding joint custody of the child to both parties. In effect, this reversal restores the status quo present in the earlier modification order wherein Father is given sole custody of the child.

Ford v. Ford, 1992 OK CIV APP 123, 840 P.2d 36 (the trial court's denial of joint custody, award of custody to the mother, but coupled with joint decision making to the father, was affirmed):
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¶8 During the trial, Appellee requested joint custody of the children, but the trial court awarded sole custody to Appellant. Both parties appeal this decision. Appellant alleges error because the trial court ordered the parties to share equally any decisions affecting the education, major medical, dental, and surgical need of the children. Appellant claims this ruling is tantamount to an order of joint custody and therefore constitutes an abuse of discretion. Appellee claims the trial court abused its discretion in failing to grant him joint custody or more liberal visitation rights. During the hearing on Appellant's Motion for New Trial, the Court explained its rationale for ordering the Appellee to participate in decisions affecting the children, Because Appellee was ordered to assume sole responsibility for all tuition, fees, books, supplies, provide all uniforms in public or private schooling of the children, all medical and dental insurance, and to pay all non-covered medical, dental and related expenses, "it would be equitable to allow him to have some aspect of decision-making in the incurring of those particular expenses." If Appellant intends to benefit from Appellee's assumption by these major obligations, she must abide by the Court's ruling, even though this arrangement could blur some of the attributes of sole custody. If, as Appellant contends, the court's order is overly burdensome and contrary to the best interests of the children, then any discussion with Appellee to procure payment for any related expenditures would also entail the same burden, and she should have requested the entire order relating to the education and major medical of the custody order be stricken. The Court's granting equal decision-making authority in light of the circumstances was not an abuse of discretion.

¶9 The Appellee's claim that he should have been awarded joint custody contains no grounds for reversal. The immense hostility between the parties emerges from the pages of the voluminous trial transcripts and the briefs. If the parties have not been able to cooperate to some extent during this divorce proceeding, it would be highly imaginative to assume that they would now begin to cooperate to the extent necessary to jointly manage the interests of the children. Custody arrangements must be made with the objectives of doing what is in the best interests of the child and to ensure maximum parental contact. The trial court has achieved that goal to the extent possible in this case.

Brown v. Brown, 1992 OK CIV APP 125, 840 P.2d 46 (in the initial custody decree, the mother was awarded custody but on an agreed post-decree order, the father was awarded custody; in the mother's subsequent custody modification, custody was awarded jointly though requested by neither party):
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¶10 Finally, Appellant contends that it was error for the trial court to grant joint custody when it was not requested by either party and is not in the best interests of the child. 43 O.S.Supp. 1989 §109 provides for joint custody where there is a request by either or both parents. There was none here. While there is no legal preference or presumption for or against joint custody, as a practical matter it is unworkable between parents who have a great deal of distrust and animosity. In *Dunham v. Dunham*, 777 P.2d 403, 404 (Okl.App. 1989) the court said:

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. *Hornbeck v. Hornbeck*, 702 P.2d 42 (Okl. 1985). Other jurisdictions have found a cardinal criteria 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 A.L.R. 1013 4th (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 custody on an unwilling parent should always give a trial court pause.

¶11 Beyond the fact that there was no request for joint custody and there is hostility between the parties, there was no evidence before the trial court that joint custody is in the best interests of this child. Further, by the calculations of this Court, the child is now of school age which makes joint custody even less feasible.

¶12 The judgment of the trial court awarding custody of the child to the parties in a joint custody arrangement is reversed. This case is remanded to the trial court for further proceedings to determine whether the child's best interests are served by custody being placed with Appellant or with Appellee. Such visitation shall be granted to the non-custodial parent as is determined by the court to be in the child's best interest.

Boyd v. Boyd, 1993 OK CIV APP 196, 867 P.2d 492 (the trial court's refusal to terminate a prior joint custody order was reversed and remanded for further hearing):

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¶3 Here, the record shows that both parties opposed joint custody, and there was an atmosphere of hostility and uncooperative behavior. It was an abuse of discretion to refuse to terminate joint custody where both parents opposed it; and, they are unable to cooperate in continuing the arrangement.

¶4 Mark also contends it was error for the Court to exclude testimony regarding possible violent propensities of Sami's new husband. The Court sustained an objection to testimony by a witness that the new husband had raped and stalked her. The Court also made reference to the fact that the rape/stalking incident was prosecuted as a rape. An offer of proof was made. There was testimony by the new husband regarding his drinking habits, his use of illegal drugs prior to the marriage, his pulling a gun on his ex-wife within a year prior to trial, and his conviction of assault with a dangerous weapon. A psychologist, called as an expert witness, testified regarding new husband's violent propensities. However, the Court disallowed the rape/stalking testimony because the incident occurred ten years ago, and was too remote in time.

¶5 A Court has wide discretion in determining whether evidence is lacking in probative value due to remoteness. *Oklahoma City v. Moore*, 491 P.2d 273 (Okl. 1971). However, the rape/stalking evidence did not show an isolated instance of possible violent behavior. There was other evidence before the Court on this subject. The issue to be determined was the child's best interest and the fitness of the family with which the child would live. Evidence of the history and continuing nature of new husband's conduct was relevant to that issue. 12 O.S. 1991 §2609 relates to "attacking the credibility of a witness", and is inapplicable.

¶6 Even though the Court has broad discretion in determining the admissibility of evidence and the testimony of witnesses, probative evidence should be admitted and considered by the Court. The excluded evidence should have been admitted and given such weight as the Court determined to be proper.

Newell v. Nash, 1994 OK CIV APP 143, 889 P.2d 345 (the trial court's order modifying an earlier custody award to custody with the father was affirmed):
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¶4 Appellant's first proposition contends the original joint custody plan was void because it was not accompanied by the parties' affidavits stating that they would abide by the plan's terms. When this defect in the joint custody plan was brought to the trial court's attention, it was ordered that an amended joint custody plan be filed to correct the defect pending the outcome of the motions to modify. Mother claims this was an abuse of discretion and that the trial court should rather have considered the joint custody plan as one which actually gave exclusive custody to her since under that "joint plan" the children resided with her more than with Appellee.

¶5 Appellant also claims this error in turn caused another. When custody was ordered modified in favor of Appellee, the trial court applied the "best interests of the child" test as it would in determining custody in the first instance. The parties did not dispute that this is the proper test where joint custody is being modified to exclusive custody. Appellant argues, however, that the proper test was the required showing of a "permanent, substantial and material change of condition" as would be required where the noncustodial parent is seeking custody from the custodial parent. E.g. *Gibbons v. Gibbons*, 442 P.2d 482 (Okla. 1968).

¶6 We have reviewed the joint custody plan and find that it substantially complied with the requirements of 43 O.S. 1991 §109(C). Although affidavits were not attached, the parties did sign the plan itself with their signatures being notarized. Even if technically defective, the parties for two years treated the joint custody plan as precisely that. The trial court logically and properly maintained the plan until the modification issues could be determined. Had the trial court construed the joint custody plan as something other than what it obviously was, it would have been disingenuous and a clear abuse of the trial court's discretion. This first proposition of error is without merit.

Meigs v. Meigs, 1996 OK CIV APP 76, 920 P.2d 1077 (the mother's post-decree motion to terminate joint custody and award sole custody to her was affirmed):
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¶2 As his primary ground for reversal, Appellant argues there was insufficient evidence of a material and substantial permanent change in circumstances to justify the trial court's order. According to Appellant, before the trial court could place custody with Appellee, Appellee was required to show a permanent and material change in *circumstances relating to the Appellant's "physical custody" of the child*, citing *Gibbons v. Gibbons*, 442 P.2d 482 (Okla. 1968). However, Appellant's argument in this regard overlooks the effect of 43 O.S. 1991 §109 (G)(2) . Under that section, where the initial custody order provides for joint custody, and the court determines joint custody is no longer in the best interest of the child, "the court shall proceed and issue a modified decree for the care, custody, and control of the child *as if no such joint custody decree had been made*." (Emphasis added). The *Gibbons* test must be applied to the decision whether to end joint custody, but once that decision has been properly made placement of the child with either parent is based solely on the best interest of the child.

¶3 The record contains ample evidence that acrimony had arisen over the custody arrangements and that the parties were unable to agree and cooperate with each other. Even during the pendency of the hearings there were instances of hostility and uncooperativeness, including instances in front of the child. The trial courts determination that the continuation of joint custody was not in the child's best interest is clearly supported by evidence in this record. That being so, the trial court was required to proceed as in any initial custody determination.

Shaw v. Hoedebeck, 1997 OK CIV APP 69, 948 P.2d 1240 (about one and one-half years after entry of the agreed joint custody order, the mother followed by the father moved to terminate the same and obtain sole custody; the trial court's custody award to the father was affirmed):
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¶3 First, we point out that this is not the usual case involving a divorce decree which contained a judgment awarding custody of minor children to one party, and, at a later time, the other party moves to modify the order by changing the custody of the child or children. Here, both parties were awarded custody of the children pursuant to an agreed joint custody plan. It is obvious that the usual rule requiring a substantial change of conditions does not apply. 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 is back to "square one" and must enter a custody order which is in accord with the best interests of the children. 43 O.S. 1991 §109 G. It matters not what the reason was for the failure of the joint custody plan. The fact that Lisa had remarried and had changed her residence to another school district, and joint custody was no longer satisfactory to her, constituted problems. Also, it appears that the religious beliefs of the parties caused disputes. 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. Incidentally, neither party was charged or determined to be an unfit parent.

¶4 The evidence showed that Lisa and Raymond were raised in the tradition of a Southern Baptist Church; since birth the children have been raised in that religious tradition; during their marriage, Lisa and Raymond were active in the Southern Baptist Church, and their children were active as well; the extended families of both Lisa and Raymond practice Southern Baptist traditions and are a close-knit extended family; Lisa has remarried and has accepted the religious tenets and beliefs of the Seventh Day Adventist Church; she denied all the grandparents the right to visit the children without her being present because she believed her new beliefs were being disparaged by the grandparents to the children; prior to the divorce the children had enjoyed an active relationship with both sets of grandparents, particularly the maternal grandmother, who had assisted in rearing both children. Also, contrary to the joint custody agreement, Lisa attempted to transfer the children from the Madill School to the Dickson School without Raymond's consent.

¶5 The Court found that the children, particularly Jennifer, have no difficulty in adjusting to Lisa's religious beliefs. To the contrary, the children enjoy participating in the religious lives of both parties 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.

¶6 Lisa contends the court erred in awarding custody to Raymond based on her religion because there was no finding that her religious beliefs were harmful to the children. She contends her freedom of religious rights under the First Amendment to the United States Constitution have been violated by placing custody with Raymond. She contends the portion of the order which prohibits either parent from interfering with the children participating in the religious life and worship of the other parent is merely superficial.

¶7 However, the record contains evidence about how the children's lives had been altered by Lisa's remarriage and subsequent change of religion. The children had become detached, weepy; they missed visiting their extended families; the children were used as messengers by Lisa because she would not personally communicate with Raymond. Lisa moved away from the extended families and she deferred decisions regarding the children to her new husband; she put pressure on the children to keep certain matters from Raymond; all witnesses, including Lisa's mother and sister, testified they believed Raymond should be the custodial parent. The evidence also showed: Raymond wanted the children to be involved with both their maternal and paternal grandparents; they had care of the children at least one-half of the time during the time of joint custody; he did not believe the children should be "placed in the middle" and forced to choose sides.

¶8 While Lisa characterizes the placement of the children with Raymond as religiously motivated, the evidence showed the children were being emotionally harmed by the actions of Lisa in ways which did not include the religion matter. 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. This religious argument is neither new nor rare. Any time 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.

¶9 Lisa contends the court impermissibly found that her violation of the divorce decree in attempting to remove the children from their current school system was a ground for awarding custody of the children to Raymond. The record does not reflect this was the only basis for the court's decision. It was part of the evidence. The court properly considered the evidence in this respect along with the other evidence presented by the parties.

¶10 43 O.S. 1991 §112 (C)(3) provides that when in the best interests of the children, frequent and continuing contact of the children with both parents should be assured. Which parent is most likely to allow the children to have frequent and continuing contact with the non-custodial parent is a matter which may be considered by the courts. *Newell v. Nash*, 1994 OK CIV APP 143, 889 P.2d 345 . Also, the *Newell* Court [page 350] said:

Because both parties sought termination of the joint custody arrangement, and because the joint custody arrangement was, in fact, terminated, the trial court was obligated to award primary custody as if custody was being awarded in the first instance. See 43 O.S. 1991 §109 (G). In reviewing such custody orders, deference will be given to the trial court since the trial court is better able to determine controversial evidence by its observation of the parties, the witnesses and their demeanor. *Manhart*, supra, at 1237.

Lyons v. Lyons, 1998 OK CIV APP 153, 970 P.2d 200 (in a post-decree proceeding to terminate an agreed joint custody order six months after its entry, the trial court's refusal to terminate the joint custody award was reversed and remanded for new trial with instructions to receive pre-decree evidence):
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¶1 * * * During these proceedings, the inquiry was limited to the circumstances occurring after the date of the divorce, July 25, 1996. The trial court entered an order denying Mother's Motion to Modify, but required, inter alia, Father to obtain an alcohol evaluation and both parents to attend anger control sessions and divorced parent classes. Mother appeals.

* * *

¶6 Furthermore, the trial court's own statements after the parties' closing arguments support Mother's argument that his decision against terminating joint custody was not in the children's best interest and was against the clear weight of the evidence. In reference to the testimony he heard during the two day hearing, the trial court first stated, "[i]ts the worst I've heard since I started practice in '69." Then, after announcing there had been no substantial change of conditions and the reason for that conclusion, the trial court explained "[t]he Joint Custody Plan contemplates two reasonable parents working together. Since reasonable parents do not exist I am going to make reasonable parents out of both of you." (Emphasis added). He thereafter ordered the assessment and counseling previously discussed.

¶7 As the Court noted in *Stewart v. Stewart*, 1980 OK 160, ¶8, 619 P.2d 606, 607, citing with approval the United States Supreme Court speaking through Mr. Justice Douglas in *People of the State of New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 612, 67 S.Ct. 903, 905 91 L.Ed. 1133 (1947):

"the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, *if such facts were not presented or considered at a former hearing*." . . . a custody decree "is not to be materially amended or changed afterward, unless on altered conditions shown to have arisen since the decree, *or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the court*, and then only for the welfare of the child." (Emphasis added; citations omitted.)

This record also contains evidence of several matters affecting the best interest of the children which was not considered by the trial court in the recent hearings and which, because of the agreed nature of the divorce and initial custody arrangements, was not previously brought to the attention of the trial court.

¶8 The trial court's conclusion that the *Gibbons* test had not been met for terminating the joint custody plan was clearly against the weight of the evidence and must be reversed. Based on that conclusion, all evidence relevant to the best interest of the children, including evidence of acts by the parties which would have been admissible if presented at the time of the divorce, must be considered

on remand. The trial court's order is reversed, and the case is remanded for new trial in accordance with this opinion.

Modification Standards & Requirements

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Gibbons v. Gibbons, 1968 OK 77, 442 P.2d 482 (the father, the decretal custodial parent, lost custody to the mother at a time that the "tender years doctrine" remained Oklahoma's law; on appeal, the trial court is reversed in this long-standing primary authority concerning post-decree custody modification actions):

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¶1 This appeal involves an order, made in a divorce case subsequent to the final decree of divorce, modifying the last preceding order concerning the custody of the minor child of the parties, a boy who was twelve days less than ten years of age at the time of the making of the order in question. The order in question herein, made September 1, 1967, changed full custody of the boy (subject to the other parent's right of visitation) from the father to the mother, and as an incident thereto, required the father to make certain monthly payments to the mother as and for child support. The mother's motion for such an order was based upon a change in her situation since the making of the last preceding custody order.

¶2 The father contends, in substance and effect: (a) that the trial court failed to exercise any discretion in the matter because it expressly based its order upon the erroneous theory that, under the decisions of this court, there is no alternative but to award the custody of a child of tender years to the mother in the absence of a clear showing that she is not a fit person to have the custody of the child; and (b) that, to the extent that the trial court exercised any discretion in the matter, it abused its discretion because the evidence adduced at the hearing was not sufficient to sustain the order in question herein.

* * *

¶12 Under these basic rules, the burden of proof is upon the parent asking that custody be changed from the other parent to make it appear: (a) that, since the making of the order sought to be modified, there has been a permanent, substantial and material change of conditions which directly affect the best interests of the minor child, and (b) that, as a result of such change in conditions, the minor child would be substantially better off, with respect to its temporal and its mental and moral welfare, if the requested change in custody be ordered. It follows that, if the burden of proof be sustained, things are not equal and, therefore, paragraph 2 of 30 O.S. 1961 §11, supra, which is expressly conditioned upon "other things being equal," would have no application; or, if the burden of proof not be sustained, things would be equal, and for that very reason, the custody could not be changed from one parent to the other.

* * *

¶15 To the extent that any prior decision of this court is to the contrary, the same hereby is overruled.

Wells v. Wells, 1982 OK 83, 648 P.2d 1223 (the father's post-decree custody motion failed upon the mother's demurrer to his evidence; on appeal, that decision was reversed and remanded):

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¶3 At the hearing, Louis Wells testified that he filed this motion to regain custody because his

ex-wife was living with another man out of wedlock. He also stated that he and his ex-wife had discussed the matter and in these conversations Doris Wells informed the appellant that her living arrangements were not his concern. She also stated that she favored this living arrangement because in the event the relationship did not last there would not be any problems with divorce. Appellant also testified that his children objected to the arrangement and were dissatisfied with their residence.

¶4 After this evidence was presented the appellee demurred to the evidence. The trial court sustained the demurrer and appellant appeals from that order.

¶5 Appellant's first proposition of error is that the trial court erred when it sustained appellee's demurrer. This is an action of equitable cognizance and in such an action a demurrer to plaintiff's evidence will be treated as a motion for judgment, and in passing on such demurrer, the trial court should weigh and consider all the evidence submitted, whether favorable to plaintiff or not.

¶6 Changes in custody must be justified on the basis of the best interests of the child. The burden of showing such interests is on the party seeking change.

¶7 In past cases we have stated that one of the factors to be considered in determining a child's best interest is the moral environment.

¶8 We find that the appellant made a prima facia case for change of custody. Since no further testimony was offered by the parties the trial court erred in granting appellee's motion for judgment as such judgment was clearly against the weight of the evidence. We find the proof called for an in-depth judicial assessment of the fitness of the mother's home which the children were compelled to share with her nonspousal mate. Since appellee has had no opportunity to present her evidence, we reverse and remand with instructions to grant a new trial and proceed in accordance with the views herein expressed.

Boatsman v. Boatsman, 1984 OK 74, 697 P.2d 516 (see note under Fact Patterns Affecting The Decision - The Usual Suspects, above, discussing the "permanent" element of *Gibbons*.)
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Johnson v. Johnson, 1984 OK 19, 681 P.2d 78 (a precedent not reckoned with in *McDonald v. Wrigley*, 1994 OK 25, 870 P.2d 777 and *Guardianship of M.R.S.*, 1998 OK 38, 960 P.2d 357 which express a sans-*Gibbons* standard for a parent's reacquisition of custody; hence, its mention here):
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¶7 The case of *Potter v. Potter*, 203 Okl. 236, 219 P.2d 1011 (1950) is a case factually similar to the case at bar. There, as here, custody of minor children was transferred to their grandparents by parental acquiescence resulting in court decree award of custody to the grandparents in the divorce proceedings. Approximately one year later, the father filed a motion to modify the custody order seeking to regain custody because of a change in conditions. The mother and custodial grandparents sought restoration of custody to the mother or affirmance of the previous custody award.

¶8 In *Potter*, this court gave full recognition to the parental preferential right of custody of the children as followed and reaffirmed in *Grover*, supra. But we further said (1014): "The weight of authority is that when a parent has, either by abandonment or contract, surrendered his present legal right to the custody of his child, in all controversies subsequently arising respecting its custody, the matter of primary importance is the interest and welfare of the child. To this the right of the parent must yield." (Citations omitted).

¶9 In *Gibbons v. Gibbons*, Okl., 442 P.2d 482, (485) (1968), we gave recognition to and followed the following basic rules where a parent seeks a court decreed custody change: the burden of proof is upon the person seeking a change in the court decreed child custody to make it appear: "(a) that, since the making of the order sought to be modified, there has been a permanent, substantial and material change of conditions which directly affect the best interests of the minor child, and (b) that, as a result of such change in conditions, the minor child would be substantially better off, with respect to its temporal and its mental and moral welfare, if the requested change in custody be ordered."

¶10 In *Carpenter v. Carpenter*, Okl., 645 P.2d 476 (480) (1982), we said: "While an appellate court may and will 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."

¶11 In the case before us, the mother was destitute, unemployed and living with a brother with no financial or home resources with which to care for her children at the time of the divorce decree. During the approximately four years intervening between the granting of the divorce and the filing of the motion to modify, she has remarried to a man who is gainfully employed; she is also gainfully employed; she and her husband have established a suitable home; and she and her husband have maintained a relationship with the children under her visitation rights established by the divorce decree. Thus she had demonstrated a change in her condition since the entry of the previous custody order, i.e., her fitness to be a custodial parent.

¶12 Under the record before us, the mother has wholly failed to meet her additional burden, that the change in conditions directly affect the best interests of the children, and that as a result of such change in conditions, the children would be substantially better off with respect to their temporal, mental and moral welfare if the requested change in custody be ordered.

¶13 The record is devoid of any showing that the custodial grandparents are unfit, that they have not furnished a proper home and family atmosphere, or that the welfare of the children would be better served by removing them from the home and family where they have resided for approximately four years.

McDonald v. Wrigley, 1994 OK 25, 870 P.2d 777 (grandparent intervention in child's parents' divorce litigation to seek custody/visitation permitted, overruling *Logan v. Smith*, 1979 OK 148, 602 P.2d 647; in important dicta, the opinion suggests a sans-*Gibbons* standard, inconsistent with *Johnson v. Johnson*, 1984 OK 19, 681 P.2d 78 (the immediately prior case, above), for a parent to regain custody from a non-parent):

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¶12 To obtain custody in a divorce proceeding, even on a temporary basis as is sought here, over the objection of a parent, a grandparent must show the parents' unfitness by evidence that is clear and conclusive, and makes the necessity for doing so appear imperative. *Gibson v. Dorris*, 386 P.2d at 188. The unfitness may not be demonstrated by a mere comparison between what is offered by the competing parties, *Haralson*, supra,*Marshall*, 555 P.2d at 599, but only by a showing that the parents cannot reasonably be expected to provide for the child's ordinary comfort or intellectual and moral development. *Gibson v. Dorris*, supra at 188;*Marshall*, supra at 600. Such order must be the product of a hearing of which the parent had noticed with the opportunity to be heard. The order must include the conditions found by the trial court to constitute the parental unfitness. This is so that the parent knows what, if corrected, would amount to a change of condition in the eyes of the court.

¶13 All grandparental custody, absent a final termination order under Title 10, may properly be considered temporary. In *Phillips v. Phillips*, 267 P.2d 597 (Okla. 1954) we said:

"Court did not abuse its discretion by placing child of divorced parents in custody of its maternal grandparents, but upon application for change of custody, court could then consider whether either of child's parents were fit custodians for the child." (Quoted with approval in *State v. Lohah*, 434 P.2d at 931).

¶14 During the child's minority the doors of the courthouse will remain open to the parent who would show that the conditions underlying the declaration of unfitness have been corrected. To the extent that *Logan v. Smith* disallows the adjudication of grandparental custody in a divorce proceeding it is disapproved.

Matter of Guardianship of M.R.S., 1998 OK 38, 960 P.2d 357 (a reaffirmation of the sans-*Gibbons* dicta in *McDonald v. Wrigley*, 1994 OK 25, 870 P.2d 777 (the immediately preceding case, above); although a guardianship decision, no reason is apparent to distinguish it from a pure child custody context such as *Johnson v. Johnson*, 1984 OK 19, 681 P.2d 78, above):

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¶1 The issue before us is the standard of proof required in a proceeding to terminate the guardianship of a minor under 30 O.S. 1991 §4-804. The natural father of a six-year-old daughter sought to terminate her guardianship for the reason that the guardianship was no longer necessary. The trial judge denied the application, finding that the father had failed to prove substantial and material change of condition, and that therefore it was in the child's best interests to remain with the guardians.
* * *

¶5 The trial judge conducted the hearing to terminate the guardianship as if it were a change of custody matter in a divorce action and placed on the father the burden of showing by clear and convincing evidence a substantial and material change in circumstances and that the best interests of the child would be served by terminating the guardianship, even though the father never had been found unfit. In effect, the trial court required the father to prove by clear and convincing evidence that he could provide a better home for M. than could the Navejars. The trial court held that the best-interests-of-the-child test controlled and that there was overwhelming proof that it would be in M.'s best interests to remain with the Navejars. The trial judge denied the application to terminate the guardianship.

¶6 The father appealed, arguing that the trial court erred by placing on him a burden of proof that applies only in post-decree custody contest between a child's natural parents. David Schneider argues that because he never has been found to be unfit, an impermissible burden of proof was placed on him to show material and substantial change of circumstances, and to prove that change of custody would be in the child's best interest, which ignored his preferential right to custody as the child's natural father. He argues that the burden of proof placed on him for termination of the guardianship was the same burden he would face if he had been found unfit as a matter of law. He argues that Oklahoma case law repeatedly has held that parents must affirmatively be found unfit in order to be denied custody of their children, and that in the absence of unfitness, the parental preference doctrine applies.

¶7 The guardians argue that the "best interests of the child" test is the proper test to be applied in all cases involving children, and that where the trial judge has found that it is in the child's best interest to remain under guardianship, this Court may not overturn the decision unless there has been abuse of discretion.
* * *

¶12 The trial court in the case at bar used the post-decree change of custody standard of proof set forth in*Gibbons v. Gibbons*, 442 P.2d 482 (Okla. 1968), as the proper standard to be applied in this guardianship termination proceeding. *Gibbons* involved a mother's motion to modify a divorce decree to change custody from the father to herself. The mother sought to modify the decree by showing a change in her condition. We placed the burden of proof on the party seeking the change of custody to show: 1) material and substantial change in circumstances, and 2) that modifying the court's previous order would be in the best interests of the child. *Gibbons* was a contest between the natural parents for custody of their children.**
* * *

¶13 The natural father in the case at bar argues and we agree, that the *Gibbons* test applies to contests between the natural parents for custody of their children. Our review of the record in the case at bar indicates that the burden of proof placed on the natural father, who had not been found to be unfit at any time, was that he must show, by clear and convincing evidence, 1) that he could provide for M. more than the guardians were currently providing her, 2) that a material and substantial change of condition had occurred, and 3) that it would be in M.'s best interests to terminate the guardianship. The trial judge found that the father had not met his burden of proof to show a change of condition "sufficient to change custody of M." Although recognizing that the father was not unfit, the trial judge found that "by clear and convincing evidence there is no evidence of material or substantial change since the entry of this Court's Order in 1993." The trial judge believed that the best interest of the child outweighed any "rights" of the natural parent to her custody and control, and he found that there was "overwhelming evidence that M.'s moral, temporal and physical welfare are provided by the Guardians and that it is in the best interests of the minor child that she remain with the Guardians." This was error.
* * *

¶26 It is clear, both by statue and by case law, that the guardianship may be terminated when the reasons for which the guardianship was established no longer exist. The guardianship will deemed "no longer necessary" when the impediment to the natural parent's custody has been removed, unless to

> do so would be inimical to the welfare of the child. *In re Guardianship of Hatfield*, 492 P.2d 819 (Okla. 1972); *Grose v. Romero*, 193 P.2d 1014, 1015 (Okla. 1948). The burden of proof for termination of a guardianship as "no longer necessary" is on the person seeking termination to show by clear and convincing evidence that the conditions that led to creation of the guardianship have been corrected. If that person is a parent who has been found unfit, then fitness must be established. If the parent has not been found unfit, then the parent must show that the conditions which resulted in the guardianship being established have changed and that the parent is now able to take care of his children. The parent in the case at bar has proved by clear and convincing evidence that he has had a change of circumstances which render the guardianship no longer necessary. The child's best interests are presumed to be with the natural parent and there is no evidence in this case that terminating the guardianship would be inimical to the child's welfare. It was error for the trial judge to refuse to terminate the guardianship.

Also, see *Lively v. Lively*, 1993 OK CIV APP 62, 853 P.2d 787 (approved for publication by the Oklahoma Supreme Court) which permits an action for custody by grandparents and others against a parent under 10 O.S. §9.

Morality Issues

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Brim v. Brim, 1975 OK CIV APP 4, 532 P.2d 1403 (lifestyle; live-in lovers; the father's post-decree custody award is affirmed; see Fact Patterns Affecting the Decision - The Usual Suspects, above)

Brady v. Brady, 1979 OK CIV APP 60, 603 P.2d 361 (the trial court's custody modification order to the father was sustained):

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> ¶3 After reviewing the record we think a sufficient showing was made and that the trial court's order is not clearly against the weight of the evidence. The mother admitted a live-in intimacy with a 16-year-old boy and expressed no concern about the shocking indiscretion of permitting her young girls to find him in bed with her upon awakening of a morning. Was the mother aware of any adverse effect this might have had on, say, her now 11-year-old girl? "Well," she said, "it didn't seem to have anything, it didn't bother her or come (sic) to me and say anything about it."
>
> ¶4 The father in the meantime achieved stable employment with an electronics firm, remarried and established what he described as a suitable "Christian" home near Dallas, Texas. The children, it appears, got along well with his wife and her nine-year-old daughter.
>
> ¶5 Though the mother said her young lover had moved out of her house she still saw him occasionally. And though she said she no longer had the boy "baby-sit" the children, he was with them in her lawyer's office at the very moment she so testified.
>
> ¶6 Conditions had indeed changed.
>
> * * *
>
> ¶8 Of course, the ultimate criterion in child custody cases is always that which serves the youngsters' best interest. *Miracle v. Miracle*, Okl., 388 P.2d 9 (1964). Here the mother's lack of concern

for or awareness of minimal standards of morality coupled with the grossly immoral example she had been setting for her little girls leaves scant room for doubt that the best interest of the children will be served by placing them in the charge of their father.

Wells v. Wells, 1982 OK 83, 648 P.2d 1223 (live-in lover; the father's post-decree custody motion failed upon the mother's demurrer to his evidence; on appeal, that decision was reversed and remanded; see Modification Standards and Requirements, above)
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Boatsman v. Boatsman, 1984 OK 74, 697 P.2d 516 (see note under Fact Patterns Affecting The Decision - The Usual Suspects, above, discussing the "permanent" element of *Gibbons*)
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Gorham v. Gorham, 1984 OK 90, 692 P.2d 1375 (after taking the divorce case under advisement, the trial court awarded custody to the mother, after which the father filed a new trial motion based on newly discovered evidence; the trial court's denial of the motion was affirmed):
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¶9 Subsequently, on March 24, 1982, appellant filed a motion for new trial before the trial court, on the basis of newly discovered evidence. The evidence, presented in the form of affidavits attached to the motion for new trial, came as statements from the family with whom appellant and the child had been living between the time of separation and the date of the trial in the case. These statements alleged that appellee had engaged in what appellant would characterize as serious moral transgressions.

¶10 In connection with these affidavits, appellant deposed appellee on April 26, 1982. In the course of this deposition, appellee admitted having had a brief affair prior to the separation and to having been involved in relationships with two men other than her boyfriend while he was in the Army. One of these men, she admitted, had been the husband of the family she had lived with during the separation.

¶11 The trial court issued an order denying appellant's motion for new trial on July 19, 1983. The court stated in this order that the matters raised in the motion for new trial would not have changed the court's decision on placement of custody if they had been presented at trial. Appellant has also appealed from this order of the trial court.

* * *

¶14 A review of the record before the trial court fails to lend any credence to appellant's assertions. Appellant appears to be requesting a judgment based solely on appellee's moral conduct. This is not the only factor on which a determination may be based. It is not the function of this Court or the trial court to impose judgment based solely upon individualized conceptions of morality. The determinative factor in this case, as in all such cases, must be the effect of the questioned behavior on the welfare of the child. To establish an abuse of the trial court's discretion, there must be a showing that this requisite nexus is present and that the effect of the behavior is detrimental to the best interests of the child.

¶15 The evidence in the present case established that appellee did leave the child in custody of others at times in order to work or to go visit her boyfriend in California, or to go out for an evening. However, the evidence also establishes that the child was well cared for by those with whom she was left at these times.

¶16 The evidence also established that appellee had been involved in several relationships. It, however, fails to connect this behavior to the possibility of detriment to the child. On the contrary, the evidence tends to establish that appellee was rather discrete as regards these aspects of her personal life, and generally shielded the child from direct exposure to her personal activities.

¶17 These factors clearly distinguish this case from the cases which appellant cites and relies on to establish an abuse of the trial court's discretion. In each of those cases the requisite nexus between the behavior and detriment to the child was clearly extant. Here appellant asks, in effect, that we assume this detriment to exist from the mere presence of what he characterizes as immoral behavior.

M.J.P. v. J.G.P., 1982 OK 13, 640 P.2d 966 (lesbian mother's modification custody loss to father affirmed):

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¶0 Child custody proceeding. Mother granted custody of two and one-half-year-old son upon divorce. Father filed for modification, contending mother lived in an open homosexual relationship with another woman. Mother admitted the lesbian relationship. Trial court modified custody to father on grounds of best interests of the child.

* * *

¶2 The protagonists were divorced in August 1978. Custody of two-and-one-half-year-old son (J.) was given to mother. Within several months mother moved in with a female lover and her twelve-year-old son, C.; the two women established an acknowledged homosexual relationship, and went so far as to invite forty friends to a "Gay-la Wedding" in a church, performed by a minister. J. sleeps in the same room as his mother and her lesbian lover, although his bed is separated from theirs by a screen. The women admit to engaging in certain lovers' caresses (e.g. holding hands, kissing, touching) in J.'s presence. Mother testified she had talked to C. about her relationship with her lover and told him there was nothing immoral about two women being lovers and living together, that it is not immoral for two men to have a homosexual relationship, and that one day she would express those same thoughts to her own son, J. She said an explanation to J. of the strong commitment and love she and her lover have for each other would be in J.'s best welfare. She testified that if J.'s development was stifled in any way by her relationship with her lover, she would discontinue the relationship, that J. is "the most important thing" to her should it come down to a choice.

* * * [several non-Oklahoma cases are reviewed]

¶11 A study of the record reveals to us that the trial judge had a plethora of evidence upon which to ground his decision to modify custody of J. The witnesses at trial included the participants, members of their families, and Dr. Betsy Walloch who, as a psychiatrist specializing in child and adolescent psychiatry, had observed J. and his parents. Dr. W., in support of her opinion, testified to a study involving homosexual and heterosexual mothers which found "essentially no difference in the development of the children or the relationships between mothers and their children or generally the problems that the mothers were having in raising their children." She opined a son raised in a homosexual home is not more likely to become a practicing homosexual than a son raised by a single woman living alone. She said children usually make their sexual identity between the ages of three and five, and J.'s is masculine. She said early adolescence is the next critical period for children and predicted that "in this case it would probably be twelve to fourteen years and this would be the difficult period for J." While she testified it would be in J.'s best interests to be left with his mother, she added: "I cannot predict whether or not there might be problems later on relating to mother's homosexuality. That would depend largely on how much friends are aware of it and whether or not he has problems from outside in relation to being teased by people making comments about it." She said if J. were questioned about his mother's homosexuality by his grandparents or his father, it would be "very detrimental" to him.

¶12 On cross-examination, Dr. W. acknowledged that it is in a child's best interests to be taught the prevailing morals of society, and that it is generally considered immoral for two women to engage in a homosexual life-style. She testified parents play an important role in teaching and inculcating in children the values of society. She said living with his mother in her present relationship, J. would have no idea that that behavior was not normally accepted by society, but that the example he sees at home is "very important" in his life.

¶13 She testified that homosexuals frequently combat the disapproving glances of others, and "very definitely" encounter prejudices against homosexuals, and that the children of homosexuals come into contact with these same feelings. She said these children are "felt sorry for and they would probably wind up in a position of having to defend the homosexual parent, which could get them into some difficulty with their peers and others. She agreed that one of the manifestations of defending his mother's homosexuality would be to indicate that there is nothing wrong with it, that there is nothing immoral with it, and that there sometimes occurs a time in the life of such a child where society's morals collide with what he thought was right at home. Ultimately J. will have to make "a choice between his

mother and society and somehow reconcile it within himself . . . ."

¶14 Dr. W. concluded: "Probably the greatest problem with it will be in early adolescence when he is very much aware of society's feelings. If he has been taught in some way that it is very sinful and he becomes aware of it, that could be as traumatic as growing up with it being somewhat normal and then finding out that society considers it wrong, but he is going to have to deal with it at that point either way. If he strongly believes that it is sinful and wrong, then he is going to be put in a position of rejecting society's rules, possibly his religion or his mother's, either of which is going to cause severe problems. "

¶15 We find the above evidence of sufficient quality to sustain the trial court's decision that a change in conditions had resulted mandating a change in custody, in the best interests of the child.

Fox v. Fox, 1995 OK 87, 904 P.2d 66 (the father's post-decree custody award, largely based upon issues relating to the mother being lesbian, was reversed):

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¶2 The parties were divorced in August of 1988. The divorce decree placed custody of the two children, born November 9, 1983 and December 10, 1985, with the mother and granted reasonable visitation to the father. In May of 1989, the father requested joint custody and, upon hearing, the district court refused to modify the custody. In February of 1992, the father requested that custody be placed with him, alleging that the mother is a lesbian which is contrary to the children's moral and religious values and to their psychological and emotional stability. The trial court granted the father's motion and entered an order changing custody to the father. The Court of Appeals affirmed. We previously granted certiorari.

* * *

¶5 The father's motion to modify custody was heard in a two-day hearing on April 22 and 23, 1992. The trial court received testimony from numerous witnesses, including opinion testimony from experts, psychological reports evaluating the children, and school records. The trial judge also spoke with each of the two children separately in chambers. The trial court changed custody, finding that: 1) the children were not of sufficient age or understanding to either express a preference or be of aid to the court in determining the issues presented; 2) the mother is unfit, constituting a material change of condition; and 3) custody should be changed. We have thoroughly reviewed the trial court record. We find neither an allegation that the mother is unfit nor any relevant evidence which establishes the unfitness of the mother as a custodial parent. The trial court's finding that the mother is unfit is wholly without evidentiary support and clearly erroneous.

* * *

¶7 The evidentiary requirements for a change of a permanent custody order are well established. In *Gibbons v. Gibbons*, 442 P.2d 482 (Okla. 1968), we held that the parent asking for modification must establish: 1) a permanent, substantial and material change in circumstances; 2) the change in circumstances must adversely affect the best interests of the child; and, 3) the temporal, moral and mental welfare of the child would be better off if custody is changed. Finding that the paramount consideration in awarding custody on a motion to modify is what appears to be in the best interests of the child in respect to its temporal, mental and moral welfare, and the entire determination must be in light of what is in the child's best interest, *Gibbons* was reaffirmed in *David v. David*, 460 P.2d 116 (Okla. 1969). In *David v. David*, 460 P.2d 116, 117 (Okla. 1969), we said "The law is clear that in a hearing upon a motion to modify the burden is upon the applicant to show a substantial change in conditions since the entry of the last order or decree which bears directly upon the welfare and best interest of the child." And more recently in *Gorham v. Gorham*, 692 P.2d 1375 (Okla. 1984), we emphasized the necessity to show a direct and adverse effect on the child's best interests. Recognizing that it is not the function of this Court to enter a judgment based solely upon individualized conceptions of morality, *Gorham v. Gorham* concluded that, in considering a parent's behavior and a child's best interests, the determinative factor is always the effect of the parent's behavior on the child.

¶8 We have carefully examined all the evidence to determine whether such proof was presented. We find that it was not. A detailed recitation of all the evidence presented in the two-day trial is not necessary. In summary, the evidence shows that the children are emotionally tied to both their mother

and father; that the mother has a loving, nurturing relationship with the children; that the father cares about the children and genuinely desires to have a role in their upbringing; and, that the children are satisfactorily progressing in their social and academic endeavors and they are well-adjusted and happy. There is no evidence that the mother's behavior has any adverse effect on the children.

¶9 The father's custody motion was grounded in his assertion that the mother's sexual proclivities are immoral and in contradiction of religious values. However, the father testified that he is not aware of any direct harm to the children and that there are no signs that the children's school performances and behavior patterns or their relationships with the immediate and extended family, peers, and community have been adversely affected by the mother's behavior. And, the father did not present any evidence to prove the essential determinative factor - a significant change of circumstance that directly and adversely affects the children. Hence, we find that the father failed to meet his burden of proof as established in *Gibbons v. Gibbons*, *David v. David*, and *Gorham v. Gorham*, supra.

¶10 The Court of Appeals determined that there is no evidentiary support for the district court's finding that the mother is unfit. However, the Court of Appeals affirmed the change of custody, concluding that *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982), "allows a change of custody based not on evidence of any present detrimental effect a custodial parent's sexual orientation has on his or her child, but rather on the trauma which may result in the future because of community members' disapproval of or disagreement with the parent's sexual orientation." We do not agree. In *M.J.P. v. J.G.P.*, this Court affirmed the change of custody, finding the evidence to be "of sufficient quality to sustain the trial court's decision that a change of conditions had resulted mandating a change in custody, in the best interests of the child." As we have already determined, the evidence in this case is not of sufficient quality to prove the essential determinative factor - a significant change of circumstance that directly and adversely affects the children.

Move of Custodial Parent, Visitation Denial & Orders Not To Move Children

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Doubt about Oklahoma's ideation on this issue may have been put to rest in 2001 with two back-to-back post-decree cases in April 2001 by the Oklahoma Supreme Court, *Kaiser v. Kaiser*, 2001 OK 30, 28 P.3d 279, and *Abbott v. Abbott*, 2001 OK 31, 25 P.3d 291. Both those cases involved post-decree contexts and neither involved a prior joint custody order. Should doubt exist in those contexts, pre-existing cases are stated below, as well. For extensive non-Oklahoma authorities, see *Elrod*, To Move Or Not To Move, *Oklahoma Family Law Journal*, Vol. 13, No. 4, p. 5 (December 1998).

Stanfield v. Stanfield, 1960 OK 55, 350 P.2d 261 (the trial court's decision to leave the children with the custodial father was affirmed as modified; the mother had moved to California):

¶8 In the present case there has been a showing that defendant is now in a position to provide a home for these children in a good environment. However, there has been no showing that such home and environment is better than that provided by plaintiff and that a change would be of greater benefit to the children and their welfare. The only evidence as to these children's present surroundings is testimony of one witness that plaintiff is now living with his third wife, and that the children in former years did as they wished most of the time. Defendant's change of conditions alone is not sufficient reason, in our opinion, to require that these children be removed from their present surroundings and transplanted into an entirely new environment. We believe that the trial court's denial of a change of custody was proper, absent a showing of their present circumstances, and such action will not be disturbed on appeal unless so clearly against the weight of the evidence as to show abuse of discretion. *Blake v. Blake*, 182 Okl. 123, 76 P.2d 904; *Culbertson v. Jones*, 201 Okl. 341, 205 P.2d 878.

¶9 Near the end of the hearing of motion to modify, the mother's attorney suggested that she be granted "partial split custody" of the children "at least". The decree of divorce provided that defendant should have the right of visitation. Plaintiff, by removing the children to California, has rendered that

right virtually meaningless. In determining the question of custody of children, the courts shall give due consideration to the rights of the parents. *Bradford v. Bradford*, Okl., 327 P.2d 684. We believe that the trial court should have modified the decree to provide that defendant may have custody and care of the children during the summer vacation period of each year from June 15 to August 15, either transporting such children or paying the expense of their transportation from their home in California to her home in Oklahoma and plaintiff either transporting them or paying the expense of their return home after each such visit.

Fletcher v. Fletcher, 1961 OK 129, 362 P.2d 691 (see quotation in *Hornbeck*, below)

Hoog v. Hoog, 1969 OK 174, 460 P.2d 946 (the mother's post-decree custody modification award is sustained):

¶11 In this case there were a number of witnesses who testified to the effect that the defendant's present home is the kind of home generally thought to be suitable in which to rear children. There was considerable evidence undisputed, as a matter of fact that regardless of what the defendant's problems may have been earlier with regard to her emotional stability or maturity, she has overcome these difficulties and is a good mother and homemaker. There was further evidence that the boy has been drifting away from his mother in recent months. This is indicated by the evidence that the boy's mother was not permitted by the plaintiff to call the boy on his birthday, or upon other occasions for that matter; that the plaintiff told the defendant that if she wished to send the boy a birthday card she would have to first send it to him, the plaintiff, at his store and he would see that the boy received it. On other occasions, when the defendant would purchase clothes for the boy and send them to him, she testified, without contradiction, that they were returned unused with the tags still attached. The defendant testified that the boy had suddenly started calling her by her first name, rather than "mother" or "mommy," as she testified he had previously referred to her. The plaintiff testified that the boy now referred to his step-mother as "mother." There was also testimony that the plaintiff's present wife was too ill to come to the hearing and that, although her last miscarriage had occurred several months previously, she was, according to the plaintiff, still under the care of a doctor.

¶12 We have carefully reviewed the entire record before us and while we agree that there was no evidence adduced that the plaintiff was not also a fit and proper person to have the custody of his son, or that the plaintiff's home was anything other than a comfortable, stable, and entirely proper place in which to rear a youngster, we must, at the same time, as we have said in many other cases, consider the better position of the trial court who observes first hand the parties and their witnesses as they testify. There are many things which do not appear in the printed record, but which undoubtedly have their impact upon the determination of a question such as existed here. We refer to the mannerisms of the parties; to their attitude toward the child, toward each other and to other people, all of which are bound to have an effect upon the sensitive awareness of a young and impressionable boy. We cannot say that the defendant failed to sustain the burden of proof required by Gibbons and cases of like import, nor can we say, under the circumstances, that the trial court abused its discretion in entering the order complained of. That order should be affirmed.

Pirrong v. Pirrong, 1976 OK 36, 552 P.2d 383 (the father's post-decree modification succeeded as to one child but was reversed on appeal):

¶15 The modification apparently resulted from altercations between the parties when the father attempted to visit the children. He was told by their mother that the children could go with him if they wanted, but she would not force them to go if they did not want to. As a result, the appellant and her parents were cited for contempt.

¶16 The trial court found the mother's statement to the children, "You may go if you want to, but you don't have to go," when making reference to the father's visits was "merely a subterfuge aimed into coercing the children into staying with her and avoiding the visitation privileges ordered by the court."

¶17 The trial court should not award nor change custody of children to punish a parent for contemptuous conduct. It may, however, consider such conduct in determining the welfare of the

children. *Young v. Young*, 383 P.2d 211, 214 (Okl. 1963).

¶18 Assuming arguendo, the conduct of the appellant and her parents was contemptuous, we find such conduct does not presently warrant a basis for modification of the custody decree. It was only a short period of time from the divorce hearing to the modification hearing, which oftentimes we regrettably find the bitterness of the parties continues. Perhaps now a sufficient time has elapsed in which the parties can put their feelings in the proper perspective and consider the important issue - the welfare of the children. If the trial court in a subsequent hearing finds the appellant has continued to violate its orders on visitation, and such persistent violations have affected the welfare of the children, then, in that event, we would have no hesitancy in approving a change of custody.

¶19 A divorce decree fixing custody of children is final on the conditions then existing and the facts known to the trial court. In order for the other parent to gain custody it must be shown that he or she is a fit person and there must be a showing of material, permanent, and substantial change in the circumstances or conditions of the parties which affect the children to a substantial or material extent. *Lynn v. Lynn*, 443 P.2d 106 (Okl. 1968); *Gilbert v. Gilbert*, 460 P.2d 929 (Okl. 1969); *Walker v. Walker*, supra.

¶20 The trial court should give paramount consideration to the best interest of the children in determining custody. Where it affirmatively appears, as it does in the case before us, that the trial court has failed to do so, the Supreme Court will rectify the judgment. *Baker v. Bursch*, 374 P.2d 31 (Okl. 1962).

Taylor v. Taylor, 1984 OK CIV APP 2, 676 P.2d 867 (the father's post-decree motion for custody succeeded, largely based on denial of visitation rights):

¶7 The general rule has been that the failure of a mother to permit visitation by a father will not in itself warrant a change of custody. 24 Am.Jur.2d Divorce and Separation, §811. Nevertheless, an early Oklahoma case held that the divorce court may change the custody of the child in an extreme case of denial of visitation rights. *Copeland v. Copeland*, 58 Okl. 327, 159 P.2d 1122 (1916). The Court considered the issue again in*Pirrong v. Pirrong*, 552 P.2d 383 (Okl. 1976). The Court noted the modification hearing was held shortly after the divorce hearing. The Court held:

If the trial court in a subsequent hearing finds the appellant has continued to violate its orders on visitation, and such persistent violations have affected the welfare of the children, then, in that event, we would have no hesitancy approving a change of custody.

¶8 Recent cases from other jurisdictions recognize the importance of protecting and nurturing familial relationships in post divorce cases through visitation, so long as the visitation is not detrimental to the child's welfare. See *Courten v. Courten*, 92 A.D.2d 579, 459 N.Y.S.2d 464 (1983); *Frail v. Frail*, 54 Ill. App.3d 1013, 12 Ill. Dec. 680, 370 N.E.2d 303 (1977); *M.L.B. v. W.R.B.*, 457 S.W.2d 465 (Mo. App. 1970). In protecting these visitation rights, courts have recognized that the custodial parent's recalcitrance alone may be founds for changing custody. *Lopez v. Lopez*, 97 N.M. 332, 639 P.2d 1186 (1981); *Marriage of Ciganovich*, 61 Cal. App.3d 289, 132 Cal. Rptr. 261 (1976). The custodial parent's refusal to positively cooperative with visitation has been characterized as an act "inconsistent with the best interest of the child." *Entwistle v. Entwistle*, 61 A.D.2d 380, 402 N.Y.S.2d 213 at 215-216 (1978).

¶9 In the case at bar, we find a four and one half year period between the divorce and modification hearings. The evidence showed the trouble started about two years after the original custody order when Carla moved from Oklahoma City to Colorado without notifying Jay. Jay learned of her move when he came to Oklahoma City for his usual visitation. When "reasonable visitation" became impossible, Jay filed his first motion to modify. Despite the agreement for specific visitation, memorialized by the May 8, 1981 Journal Entry, trouble persisted. Communication was impeded by a variety of variables including Carla's remarriage. Jay then filed his second Motion to Modify and Citation in December 1981. The record contains a letter dated June 1, 1982 from Judge Manning to Carla strongly urging her to comply with the visitation arrangements of the May 8, 1981 Journal Entry. Even after that, Jay had to obtain a court order in Colorado to obtain Cerita for his visitation.

¶10 Though there was conflicting evidence presented at the hearing by the parties, we find the passage of time, the parties' change of living arrangements and their patterns of conduct established a change of circumstances. We conclude that the evidence showed an extreme case of denial of

visitation rights. The trial court's decision that it would be in Cerita's best interests to change custody of her to her father was not against the weight of the evidence. Thus, no grounds for disturbing the court's judgment is manifest. *Carpenter v. Carpenter*, 645 P.2d 476 (Okl. 1982).

Hornbeck v. Hornbeck, 1985 OK 48, 702 P.2d 42 (the non-custodial father's motion for joint custody was sustained where the mother was preparing to move from Tulsa to near St. Louis with her new husband; see note under Joint Custody, above):

¶12 Appellant's second proposition raises the question of whether her remarriage and subsequent relocation out of state would support a modification of custody. In the case of *Fletcher v. Fletcher* [1961 OK 129, 362 P.2d 691], we stated:
The record reflects a change of circumstances or conditions. The plaintiff has remarried and has moved with the children and her new husband from the State of Oklahoma and from the continental limits of the United States to Bermuda. For all practical purposes the defendant has been deprived of his right of visitation as provided in the divorce decree. This is not to say that such change of circumstances require the trial court to modify the divorce decree as to custody or child support. The changes and related circumstances are matters for the trial court to consider in determining whether any modification is justified or required. No rigid formula exists by which to measure the nature of proof sufficient to justify a revision of the custody of the children. In arriving at any conclusion in the matter the trial court should consider whether such changed conditions affect the welfare of the children and what the children's best interests demand and giving due consideration to the rights of the parents. (Citations omitted)

¶13 The relocation of appellant, effectively depriving appellee of meaningful contact with the child, would thus constitute a change of condition sufficient to permit an inquiry by the trial court as to the effect of such a change on the child's best interest. This is the first level of the two stage burden of proof imposed by this Court in *Gibbons v. Gibbons* on one moving for a change in custody provisions.

¶14 The trial court in this case found that the change in circumstances did detrimentally affect the best interests of the child. This effect arose from the consequent deprivation of the developing relationship between the child and appellee. The evidence before the trial court supported a finding that an excellent relationship did exist between both parents and the child and that the relationship between appellee and the child would suffer from a deprivation of contact. Additionally, the evidence supported the finding that the relationship was beneficial to the child.

Fox v. Fox, 1995 OK 87, 904 P.2d 66 (the father's post-decree custody award, largely based upon issues relating to the mother being lesbian, was reversed - see Morality Issues, above):

¶11 The trial court's order of modification, filed on May 18, 1992, must be reversed except, the following portion shall remain in effect:
IT IS FURTHER ORDERED BY THE COURT that both parties are specifically enjoined and prohibited from removing the minor children from the State of Oklahoma without Court permission, except for two week periods for vacation or holiday.

Kaiser v. Kaiser, 2001 OK 30, 23 P.3d 279 (the custodial mother's post-decree request to take a job in the Washington D.C. area, denied by the trial court (even with the blessing of the guardian ad litem), was reversed:

¶0 Mother and custodial parent of child brought motion in trial court to modify visitation schedule of father necessitated by her intended employment-related relocation with child to new residence out of state. Trial court denied mother's motion and refused to allow her to leave the state with the child. Mother appealed.
* * *
¶17 As mother correctly argues, in Oklahoma we have a statute which specifically addresses the subject of relocation. Title 10 O.S.1991 §19 provides:

> "A parent entitled to the custody of a child has a right to change his residence, subject to the power of the district court to restrain a removal which would prejudice the rights or welfare of the child."

¶18 This provision came to us from the Dakota Territory in 1887, but its construction has never been at issue in a parental relocation case. Nearly identical provisions were adopted by California, (Cal. Fam. Code §7501), South Dakota, (S.D. Codified Laws Ann. §25-5-13 (1992), and Montana,(Mont. Code Ann. §40-6-231 (1993), and the courts of those states have interpreted their provisions as giving the custodial parent a statutory presumptive right to relocate. The meaning of the statute is plain and unambiguous, and we likewise find that in the absence of a showing of prejudice to the rights or welfare of a child, a custodial parent has a statutory presumptive right to change their child's residence.

* * *

¶24 The subject of relocation of a custodial parent has become a very popular topic in writings by scholars in family law in recent years and, while this court has not had occasion to pass on the issue, it has been extensively litigated elsewhere. The burgeoning number of decisions should not be surprising, since half of all marriages end in divorce, and many of those parents who are awarded custody will, for a variety of reasons, desire to move their children to a different geographical location. The interests of the custodial parent who desires to relocate and take the child to a new location and a new life are often in sharp conflict with those of the noncustodial parent who wants visitation and contact with the child to remain frequent and constant. Speaking to this point, the Supreme Court of California observed in *Burgess*, 913 P2d at 480, that:

> [O]urs is an increasingly mobile society. .. approximately one American in five changes residences each year. Economic necessity and remarriage account for the bulk of relocations. Because of the ordinary needs for both parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so.

¶25 The majority of jurisdictions which have considered this subject have adopted approaches which favor the custodial parent's right to move away from the state with their child even though they do not have a presumptive right to relocate statute such as 10 O.S. 1991 §19. While the relevant statutory enactments which are placed at issue in those cases vary widely from state to state and some states have no applicable statues, the decisions are generally based on judicial recognition of the post-divorce new family unit, and stability and continuity of the child's relationship with his primary custodian as the most important factor affecting the child's welfare. These courts also recognize that the well-being of the child is fundamentally interrelated with the well-being of the custodial parent, and that parent is the best person to make decisions affecting the child and the new family group, such as where they will reside. The courts therefore accord those childrearing decisions deference, and hold that judicial intervention in that decision making process should be limited to only the most extreme circumstances. We find the reasoning of these courts persuasive in our effort to establish a standard for determination of relocation actions.

* * *

¶29 The fact that father's visitation would be altered by the mother's relocation is understandably difficult and upsetting for him, but maintaining his existing visitation schedule did not justify the trial court's order restricting mother's ability to leave Oklahoma to pursue her career opportunity and attempt to find better life for herself and Warren. The cases uniformly hold that visitation rights alone are an insufficient basis on which to deny relocation and thereby change custody of a child. A custodial parent's relocation should not be disallowed solely to "maintain the existing visitation patterns". *Auge v. Auge* 334 N.W.2d at 398. See also e.g. *Long v. Long*, 381 N.W.2d 350 (Wis. 1986); *Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993).

* * *

¶32 The test for modifying custody based on a change of circumstances is set forth in *Gibbons v.*

Gibbons, 1968 OK 77, 442 P.2d 482, and that test and its allocation of the burden of proof applies here. A custody order may not be modified unless the applicant parent establishes a permanent, substantial and material change of circumstances which directly and adversely affects a child in such a material way that as a result the child would be substantially better off if custody were changed to the other parent as requested.

¶33 In a relocation case the noncustodial parent seeking to restrain the custodial parent from moving must meet a heavy burden to show that circumstances justify reopening the question of custody. The custodial parent's decision to move from Oklahoma to a different location with the child is not in itself a change of circumstances which will justify a change of custody. The dispositive issue is not the decision to relocate, for the custodial parent has the presumptive right under 10 O.S.1991 §19 to move with the child. The dispositive issue is the fitness of the custodial parent and whether the child will be placed at risk of specific and real harm by reason of living with the custodial parent in the new location.

¶34 Limiting judicial intervention in post-divorce decision making is an overriding goal of the relocation cases from other jurisdictions discussed above. We join in that view. It does not serve the interests of the parties, the judiciary or the public to require "trial courts to 'micromanage' family decision making by second -guessing reasons for everyday decisions about career and family." *Burgess*, 913 P.2d at 481.

* * *

¶40 No facts were presented below which showed prejudice to Warren in moving with his mother to Washington, D.C. Appellant is, without challenge, a fit mother, and her decision to relocate with Warren was a childrearing decision which was well within her right to make as his custodial parent. The trial court erred in denying her motion and restricting her statutory right to relocate and change the residence of her child. The cause is reversed and remanded for proceedings consistent with this decision.

Abbott v. Abbott, 2001 OK 31, 25 P.3d 291 (the custodial mother's post-decree request to move to Michigan, granted by the trial court, was affirmed:

¶1 This is an appeal by a noncustodial father from the trial court's granting of custodial mother's motion allowing her to relocate to Ann Arbor, Michigan with their son. The court also modified father's visitation schedule to accommodate changes necessitated by the move. The father contends that the trial court erred in allowing the move, and argues that the trial judge applied the wrong standard in reaching his decision. Mother brings a counter-appeal challenging attorney fee and cost awards entered by the trial court. We affirm the trial court's judgment in favor of mother on the issue of relocation. We modify the trial court's award of attorney's fee and costs, and reverse the trial court's judgment regarding transportation costs and the abatement of child support during summer visitation.

* * *

¶5 The trial court first announced its decision in favor of father, granting his motion to modify custody if indeed mother relocated to Michigan. The court denied mother's motion to reconsider, finding that it was in Kyle's best interests to stay in Oklahoma City because it was the place of stability for him, it was the only home he had ever known and he was flourishing here. The court accordingly ruled if mother moved to Michigan, Kyle's custody would be changed to his father. The court found that mother's proposed move met the custody modification standards set out in *Gibbons v. Gibbons*, 1998 OK 77, 442 P.2d 482, and mother was enjoined from moving him to Michigan.

¶6 The trial court later vacated this ruling on its own motion pursuant to 12 O.S. 1991§1031.1 . The court announced to the parties that upon reviewing case law and family law treatises, it had determined that the decision announced earlier was wrong. * * *

* * *

¶8 We find the trial court correctly analyzed its duty as being a determination of the issue of Kyle's custody, and reached the correct result in allowing mother to relocate. We affirm that decision. In *Kaiser v. Kaiser*, 2001 OK 30, 23 P.3d 279, decided April 3, 2001, we held that in the absence of evidence showing prejudice to the child, a custodial parent has a presumptive right under 10 O.S. 1991 §19 to move with the child and establish a new residence. We found there that a custodial parent's

decision to move to a new geographic location with the child is not in itself a change of circumstances which will justify a change of custody. We also found that maintaining father's existing visitation schedule is not a sufficient basis for denying the custodial parent's right to relocate. Under *Gibbons*, supra, a custody order may not be modified unless the applicant parent demonstrates a permanent, substantial and material change of circumstances which directly and adversely affects a child in such a material way that as a result the child would be substantially better off if custody were changed to the other parent. In a relocation case the burden is on the noncustodial parent to show that the child will be placed at risk of specific and real harm by reason of living with the custodial parent in the new location and, if so, that he would be substantially better off if his custody were changed to the other parent.

Paternity Custody

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Miles v. Young, 1991 OK CIV APP 101, ¶14, 818 P.2d 1258 (the father's custody award was affirmed):

¶26 The court may award custody to either parent, or both parents jointly, according to the best interests of the child. 10 O.S.Supp. 1988 §21.1 . There was no requirement here for the trial court to base its judgment on a finding of unfitness.

¶27 Similarly, Young's next proposition, which relies on the statutory preference for the mother of a child born out of wedlock,3 is ill-founded. Upon Miles' compliance with 10 O.S. 1981 §55, Tiffany was by law no longer treated as if born out of wedlock. In such case, the trial court may not prefer a parent as custodian because of gender. 43 O.S.Supp. 1987 §112 (C)(3)(b).

Department of Human Services v. Chronister, 1997 OK CIV APP 50, 945 P.2d 511 (the father's custody award was affirmed):

¶3 Martin contends the court used the wrong standard of proof in awarding custody to Chronister. She contends the court awarded custody using "the best interests of the child" standard, as if custody were being awarded for the first time, when in fact, he should have been required to prove a change in circumstances for a modification of custody. She contends that, under 10 O.S. 1991 §6, she, as the natural mother, was the custodial parent, and any change in that arrangement is a modification. Section 6 provides:

§6. Custody of child born out of wedlock

Except as otherwise provided by law, the mother of an unmarried minor child born out of wedlock is entitled to the care, custody, services and earnings and control of such minor.

¶4 Chronister contends §6 is inapplicable to this case, and instead, contends 10 O.S. Supp. 1994 §70 applies. Subsection C provides:

C. Proceedings to establish paternity may be brought in the appropriate district court or through the Department of Human Services, Office of Administrative Hearings: Child Support, by the mother, the father, guardian or custodian of the child, the Department of Human Services, the district attorney, a public or private agency or authority chargeable with the support of the child, or by the child. The court, after determining paternity in a civil action, shall provide for the support and maintenance of the child. The court shall further make provision for custody and visitation based upon the best interests of the child. [emphasis supplied].

¶5 Clearly, §70 provides a statutory mandate for the use of the best interests of the child standard in the instant case. Moreover, it has been held many times the best interests of the child is a paramount issue in any custody proceeding. See *Mueggenborg v. Walling*, 1992 OK 121, 836 P.2d 112, citing *Rice v. Rice,* 603 P.2d 1125 (Okl. 1979). Section 6, cited by Martin as the reason for requiring a higher standard of substantial change in circumstances, provides for custody in the mother except as otherwise provided by law. Therefore, where, as here, the paternity of a child born out of wedlock has been established, the court has discretion to award custody to either parent, but it must be based on the best interests of the child pursuant to §70. Chronister was not required to prove a substantial

change in circumstances.

Procedural Fairness/Due Process

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Malone v. Malone, 1979 OK 21, 591 P.2d 296 (private reports to the court):

¶0 Appellant appeals from the order of the trial court which modified a decree of divorce changing child custody. Custody was modified after the court ordered an "inhome" study report of appellee's home. Appellant was not given an opportunity to examine the report or to cross-examine its author, or to defend against its contents.

* * *

¶1 This appeal involves the modification of the custody of two minor children of the litigants and the procedures utilized by the trial court in reaching its decision. Custody of the children was changed from the father-appellant to the mother-appellee, after the trial court took the matter under advisement and ordered an in-home study report of the mother's home by the Department of Institutions and Social and Rehabilitative Services [DISRS] after the trial proceedings had been concluded.

¶2 The determinative question on appeal is whether the trial court erred in entering its order modifying child custody without receiving the in-home study report in open court. Appellant argues that he was denied due process of law because he was not permitted to examine the report, or to confront and cross-examine the investigator who prepared it; and that the judgment must be reversed because it was based in part on a report which was never received in evidence or made a part of the record in the case. In as much as the trial judge ordered the in-home study report, we must assume it was received and considered, thus projecting the possibility of some reliance upon it by the trial court.

¶3 Although this is a case of first impression in Oklahoma, it has been considered by many jurisdictions. The overwhelming majority of the states have held either expressly or by necessary implication that an order or decree awarding or modifying custody must be based on evidence heard in open court in observance of the requirements of due process. With the exception of certain matters of which the court may take judicial notice, the decision of the trial court is limited to the record made before it in open court.

¶4 Due process requires an orderly proceeding adapted to the case in which the parties have an opportunity to be heard, and to defend, enforce and protect their rights. An action involving the change of custody of minor children from one parent to another is a judicial proceeding and must be conducted in a strictly judicial manner. The decision is to be rendered by the judge only upon evidence properly before him. An investigator stands in no better position than an ordinary witness, and must be available for complete cross-examination on any matter which he may report to the judge. An investigator may not make a secret report. There is no back door to the courts for witnesses, investigators, or litigants. Reports of experts are aids to the court in contested custody matters. However, it must be borne in mind that they are only aids, and, if they are not woven into the fabric of the record, they should not form the basis for a decision. If such reports are taken into consideration by the trial court, they must be made available to counsel, and the preparers thereof subject to cross-examination.

¶5 The same question was considered in *In Re Brown*, 246 So.2d 166, 168 (Fla.App. 1971) citing *McGuire v. McGuire*, 140 So.2d 354, 356 (Fla.App. 1962) wherein the Court said:

"It seems to the Court that when a written report is considered by the Court in connection with any ruling or judgment, it should be filed in evidence the same as any other writing the court may consider. It is error for the Court to consider any writing or anything else that is not in evidence."

¶6 The admissibility of the report of an independent investigator in a custody modification proceeding presupposes that the ordinary rules of evidence have been complied with. It is an immutable principle of jurisprudence that where the reasonableness of an action depends on findings of fact, the evidence utilized to prove the case, consisting of testimony and documentary evidence, must be disclosed to the litigant so that he may have an opportunity to show that it is untrue. The right of a litigant to in-court presentation of evidence is essential to due process. Where important decisions turn on questions of fact, due process requires an opportunity, in almost every situation, to confront and cross-examine adverse witnesses.

¶7 When a court of competent jurisdiction has awarded custody of children in a divorce proceeding, there must be substantial evidence of new facts and changed conditions to authorize any modification of the original decree. The burden of proof rests upon the moving party. This burden cannot be met without a regular hearing with notice to the parties. The ex parte utilization of any private or outside investigation to prepare in camera orders constitutes a denial of the constitutional guarantee of due process of law.

¶8 It is a recognized and established practice in this state to request DISRS to make an unbiased examination of the qualifications and circumstances of those seeking custody, and the best interests of the children. However, it has never been, nor should it be, the practice to receive such reports after trial. There is a fundamental unfairness in the reception of evidence in this manner. It amounts to a private investigation by the court in assembling and receiving evidence, out of the sight and hearing of the parties who are deprived of the opportunity to defend, rebut, or explain it.

¶9 The trial court had an ex parte report from DISRS before it concerning an investigation of the adequacy of appellee's home. Although there might have been sufficient evidence of record to justify the court's finding, the denial of access to appellant of information relevant to the trial court's decision is violative of the process due to all litigants.

¶10 This Court does not condemn the practice of utilization of DISRS reports on custody questions. Where the sole issue is what will best serve the welfare of the child, such reports are an invaluable aid to the court in determining the question. Their use should be encouraged, but care should be taken to give fair notice of the contents of the reports to the parties involved to afford them every opportunity to test the credibility of the investigator through cross-examination and confrontation, and to meet or answer every adverse fact or inference included therein.

¶11 REVERSED AND REMANDED.

Carter v. Carter, 1989 OK 153, 783 P.2d 969

¶1 Defendant/petitioner (father) sought modification of a child support and custody decree. After he testified that he owed accrued child support payments, plaintiff/respondent (mother) moved to strike from the record his entire testimony because he did not come into court "with clean hands." She argued he "was not entitled to . . . invoke the [trial court's] jurisdiction" to make child support and custody changes. The judge agreed and the father timely appealed.

* * *

¶2 The mother now presses for dismissal of the father's "appeal," arguing that the ruling sought to be reviewed lacks the attributes of appealability. We need not pass on her dismissal motion and decide whether the midhearing decision constitutes a final order within the meaning of 12 O.S. 1981 §953.3. This court will treat a case brought before it in accordance with its intrinsic characteristics; it will not be governed by slavish obedience to the name or title given to the proceeding by the instrument's author. While the postdecree decision now tendered for review occurred at midhearing, its effect on the father's litigation is crystal-clear: the ruling bars him from that measure of unimpeded access to court which is essential to the pursuit of the relief he seeks. This court has expressly held that excluding a defendant from participation in any part of a divorce case for failure to pay child support constitutes a denial of due process. We hence recast this case from an appeal into a Rule 378 proceeding to assume original jurisdiction under Art. 7, §4, Okl. Const., take cognizance and grant a writ prohibiting the trial judge from enforcing his midhearing ruling that bars the father from invoking the relief sought below and from pressing his demand to a point of conclusion according to the ordinary course of procedure prescribed by law for that proceeding.

¶3 Original jurisdiction assumed; writ of prohibition granted.

Smith v. Smith, 1992 OK CIV APP 121, 839 P.2d 685 (decisions based on statements of lawyers):

¶0 Post-divorce proceeding for modification of child support and visitation, and enforcement of other decretal provisions. Trial court entered judgment after hearing opening statements of counsel. VACATED AND REMANDED.

* * *

¶10 It is necessary, as a preliminary matter, to determine the legal consequences flowing from several significant irregularities in the proceedings and the adjudication on September 8, 1989.

¶11 To begin with the trial judge signed a "Journal Entry" in which he recited that he "examined the file and records in this case and [heard] the oral testimony of witnesses examined in open Court" and then proceeded to adjudicate certain matters being heard. (Emphasis added.)

¶12 Feeling aggrieved, the man filed this appeal October 9, 1989. On October 27, 1989, the woman filed a response to the petition in error in which she said the appeal should be dismissed because: "Both parties waived jury trial and stipulated all matters be tried to the court. All matters were thereafter tried upon counsel's [sic] statements and testimony of both parties."

¶13 On November 19, 1989, however, the man, with leave of the trial court, filed a narrative statement of trial court proceedings pursuant to Civil Appellate Procedure Rule 1.22, 12 O.S. 1991, ch. 15, app. 2. In it the man narrated the argument of counsel which he referred to as an "offer of proof." No actual testimony of any witness was narrated.

¶14 On December 6, 1989, the woman filed her objections to the statement along with various "amendments." Among other things the woman said (1) none of the exhibits attached to the man's statement were ever offered or admitted into evidence; and (2) the "court heard this matter upon oral argument of the parties only." Following this the woman sets out some nineteen amendments which, like the man's "narrative," are based upon statements of counsel made during oral argument which she likewise characterizes as "offers of proof."

¶15 Following this, on February 9, 1990, the trial court signed an order "of Narrative Statement of Proceedings." The order recited that four exhibits had been admitted at "trial" and then proceeded to "incorporate" both the man's "Narrative Statement" and the woman's "Amendments" in full. The most that can be made out of this confusing order is this: It affirmatively reflects that both parties and the judge agree that (1) no evidence, other than four exhibits, was admitted or heard by the court (and the woman denies that even four exhibits were admitted or considered by the court), (2) the parties did not enter into any stipulation regarding evidence to be considered by the court, and (3) without the express consent of the parties the trial court decided to resolve the factual issues raised by the pleadings on the basis of the opening statement or "argument" of counsel.

III

¶16 Under the facts and circumstances detailed above the only issue for this court to decide is whether the trial judge fostered a fatal irregularity in the proceedings below which resulted in the parties being deprived of a fair trial and caused the man to be the recipient of a court order unsupported by any competent evidence.

¶17 We hold he did and grant a new trial.

¶18 The law is that a new trial is the proper remedy if the substantial rights of a party have been materially affected by (1) any irregularity in the proceedings of the court which has prevented him from having a fair trial; or (2) a decision of the trial judge which is not sustained by sufficient evidence. 12 O.S. 1991 §651 (First) and (Sixth); *Ingram v. Dunning*, 60 Okl. 233, 159 P. 927 (1916). The trial court has a duty to safeguard litigants' rights to a fair trial. *Barnhart v. International Harvester Co.*, 441 P.2d 1000 (Okl. 1968).

¶19 The trial judge should not coercively persuade or encourage, or for that matter permit, the parties to submit their lawsuit for adjudication merely on opening statements of counsel where material issues of fact exist. To do so is a fatal irregularity and is disapproved. Before a judge may validly decide an issue of fact; his decision, like that of a jury, must be based on competent evidence received by the court during a hearing, trial of the issues, or on facts stipulated to by the parties. *Butler v. Prokop*, 321 P.2d 400 (Okl. 1958). See also, *Knell v. Burnes*, 645 P.2d 471 (Okl. 1982). The parties ought not to be made to feel that it is an imposition on the court to insist on their constitutional right to present supporting evidence or cross-examine an opponent.

IV

¶20 The journal entry appealed is vacated and the cause is remanded for a new trial on all issues including the man's request for judgment against the woman for her share of the medical expenses - an issue which was not ruled upon in such journal entry.

Harmon v. Harmon, 1997 OK 91, 943 P.2d 599 (incarcerated father had requested a writ of habeas corpus ad testificandum but the same was never acted upon; in the husband's absence, the mother was awarded divorce, child custody, the father was awarded no visitation; pro se father obtains reversal):

¶1 The dispositive issue in this appeal is whether the rights of, Sonny L. Harmon (husband), an incarcerated prison inmate and a party to a divorce suit, were violated by the trial court's conducting the trial of the matter in husband's absence. In that husband's absence was due to his incarceration and he adequately requested to be present at the trial, we hold it was error to proceed with the trial without making some type of arrangement(s) for husband's participation because he had constitutional and statutory rights to an opportunity to be heard at the trial.

* * *

¶8 The divorce trial/hearing was held on January 6, 1995 in husband's absence. A court minute signed by Judge Hart reflects that a witness was sworn and evidence heard. The court minute also shows that husband's motions to disqualify the trial judge and to reinstate his divorce suit were denied. The divorce decree journal entry filed the same date reflects husband's failure to appear, that he had notice of the hearing and that he was wholly in default. The decree goes on to, among other things: grant wife's counterclaim for divorce; give custody of the party's minor child to wife; deny husband all visitation with the child during the period of his imprisonment; make a property division; and order husband to pay an amount of child support to begin ninety (90) days after his release from incarceration.

* * *

¶12 The COCA was also incorrect in apparently ruling that husband's application was somehow deficient because it failed to contain strict proof of the materiality of his testimony and the necessity of his attendance, citing *Long v. State*, 561 P.2d 991 (Okla. Crim. App. 1977). To us, some testimony from husband would plainly be material - at a minimum concerning the visitation issues that were before the trial court. In fact, when the issue of visitation with a minor child is involved in a divorce case, the parties to the case have been granted a statutory right to notice and an opportunity to be heard.

* * *

¶13 Even if we could assume husband's own testimony would not have been material to any issue in the divorce case, the manner in which this matter was handled in the trial court deprived him of a meaningful opportunity to respond to any evidence actually presented at the January 6, 1995 hearing. Where a judicial ruling turns on questions of fact and evidence is utilized to prove certain facts, such evidence must normally be disclosed to a party litigant so that he/she has an opportunity to test the evidence and show it is untrue.*Malone v. Malone*, 591 P.2d 296, 298 (Okla. 1979). Thus, without making some type of arrangement(s) for husband's participation at the January 6 hearing, he was not only denied a meaningful opportunity to present evidence or testimony on his own behalf, he had no opportunity to cross-examine or confront the evidence that was actually presented on the issues involved in the case.

¶14 Furthermore, this Court has ruled that the natural right of a divorced parent to visit his/her minor child should not be taken away unless the evidence shows the parent has forfeited this right or the exercise of it would be detrimental to the child's welfare. *In Re McMenamin*, 310 P.2d 381 (Okla. 1957). Only in exceptional cases should a parent be denied the right to visit their minor child after a divorce. *Clark v. Clark*, 177 Okla. 542, 61 P.2d 28 (1936). Although, in our view, a parent has no absolute right to visitation with a minor child in a correctional facility, each case involving visitation issue(s) must be made on the factual situation involved on a case-by-case basis, always keeping in mind the paramount importance of what is in the best interests of the child. Our statutory law [43 O. S. Supp. 1996, §112(C)] is quite specific in setting out the legislative policy of providing a modicum of protection to a non-custodial parent's continuing contact with his/her minor child(ren). * * *

¶15 Other courts have recognized that in situations involving questions of the potentiality for visitation with a minor child where a parent is incarcerated, the primary concern should be the best interests of the child.*Matter of Marriage of Brewer*, 13 Kan. App. 2d 44, 760 P.2d 1225 (1988); *Nielsen v. Nielsen*, 217 Neb. 34, 348 N. W. 2d 416 (1984); *Casper v. Casper*, 198 Neb. 615, 254 N. W. 2d 407

(1977); *Etter v. Rose*, 454 Pa. Super. 138, 684 A. 2d 1092 (1996). *Etter* set out, at least, some of the factors to be considered in deciding a question of visitation when the parent is incarcerated: age of the child; distance and hardship to the child in traveling to the visitation site; the type of supervision at the visit; identification of the person(s) transporting the child and by what means; the effect on the child both physically and emotionally; whether the parent has and does exhibit a genuine interest in the child; and whether reasonable contacts were maintained in the past. Id. at 1093. Of course, another consideration would be the nature of the criminal conduct which culminated in the parent's incarceration.

¶16 As can be seen, the above factors, to a large degree, involve evaluation of factual matters. Husband was entitled to some type of meaningful opportunity to present his side as to what would be in the best interests of the parties' minor child, as well as on the other issues that might be involved in this divorce case. In that the trial court denied husband such a meaningful opportunity to be heard we hold reversible error occurred in the lower tribunal.

Nelson v. Nelson, 1998 OK 10, 954 P.2d 1219

¶0 The plaintiff/appellee, Debbie D. Nelson (wife/mother), filed for divorce seeking custody of two minor children with the defendant/appellee, Richard E. Nelson (husband/father), to have reasonable visitation. In a default proceeding, the trial judge, Honorable James L. Sontag, granted the parties a divorce, set child support, divided marital property and awarded the wife $5,000 in lieu of alimony as a property division. Custody of the children was placed with the wife. Because the father had not followed the mandate of Administrative Rule CV-95-1 requiring him to complete a course, Helping Children Cope with Divorce, he was denied visitation. The husband filed a motion to vacate the judgment. After a hearing, the trial court required that an order nunc pro tunc be entered to conform payment of child care expenses with the Oklahoma Child Support Guidelines, 43 O.S. Supp. 1995 §118, et seq., and it overruled the husband's motion to vacate. In a motion to retain, the husband requested that we consider the constitutionality of Administrative Order CV-95-1 and of 43 O.S. Supp. 1997 §107.2 which require the divorcing parents of minors to attend educational courses intended to help their children cope with divorce. We find that: 1) Administrative Order CV-95-1 and 43 O.S. Supp. 1997 §107.2 do not deny divorcing parents with minor children equal protection or due process nor do they constitute a prohibited delegation of the legislative authority; and 2) under the facts presented, the trial court abused its discretion by failing to vacate a default judgment entered without notice to the father that his visitation rights were in jeopardy.

* * *

¶2 Two issues are presented: 1) whether Administrative Order CV-95-11 and 43 O.S. Supp. 1997 §107.2 which require divorcing parents with children to attend classes intended to help minors to cope with divorce are constitutional; and 2). whether, under the facts presented, the husband was entitled to have his timely-filed motion to vacate sustained. We find the administrative order and the statute do not violate constitutional standards of equal protection or due process nor do they constitute a prohibited delegation of the legislative authority. However, the cause must be reversed in part, because the father did not have notice that his rights to visitation were in jeopardy. Under the facts presented, the trial court abused its discretion by refusing to vacate the default judgment. The cause is remanded and the trial court is ordered to consider the father's application for visitation.

Psychological Evaluations

Topic Contents General Contents Prior Topic Next Topic

Case law discussing entitlement to a child custody evaluation concerning a party is virtually non-existent, with no published decisions known to this writer.***Slape v. Kelley***, No. 71,386 (Okla. 1988) [unpublished] involved an Oklahoma County post-decree custody proceeding in which the trial court initially granted a motion for such an evaluation. The full text of the Order issued by the Supreme Court on October 18, 1988, follows:

ORDER
Original jurisdiction is assumed. The trial court's order for mental examination of a non-party, Orville "Pat" Slape is permanently stayed.
The trial court's order for mental examination as to Nancy L. Slape and the children involved in the custody proceeding pending in cause No. JFD-84-3667, District Court of Oklahoma County, is permanently stayed, until such time as, upon remand, good cause is demonstrated to the trial court for issuing an order for a mental examination under 12 O.S. Supp. 1987 §3212(C). *Goodner v. Lindley*, Okl., 721 P.2d 801 (1986).
By the terms of this order, temporary stay order previously issued by this Court is dissolved.
DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 17th DAY OF OCTOBER, 1988.
s/James B. Doolin
DOOLIN, C.J., SIMMS, WILSON, KAUGER and SUMMERS, J.J., Concur.
HARGRAVE, V.C.J., HODGES, LAVENDER and OPALA, J.J., Dissent.

§3212(C) is now codified as 12 O.S. §3235 and provides:

C. ORDER FOR EXAMINATION. When the physical, including the blood group, or mental condition of a party, or a person in the custody or under the legal control of a party, is in controversy but does not meet the conditions set forth in subsection A of this section, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for such examination the agent, employee or person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties. The order shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

Concerning entitlement to evaluation concerning a non-party, ***Newell v. Nash***, 1994 OK CIV APP 143, 889 P.2d 345 states:

¶19 The eighth alleged error briefed by Appellant is that the trial court abused its discretion in refusing to order a psychological evaluation of Appellee's mother, Shirley Newell. Ms. Newell was not a party to the case and we know of no authority, nor is any cited, that would require such non-party to submit to a medical or psychological examination ordered by the trial court. It can hardly be an abuse of discretion for the trial court not to order an unenforceable examination.

Race

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Palmore v. Sidoti, 466 U.S. 429 (1984):

When petitioner and respondent, both Caucasians, were divorced in Florida, petitioner, the mother, was awarded custody of their 3-year-old daughter. The following year respondent sought custody of the child by filing a petition to modify the prior judgment because of changed conditions, namely, that petitioner was then cohabiting with a Negro, whom she later married. The Florida trial court awarded custody to respondent, concluding that the child's best interests would be served thereby. Without focusing directly on the parental qualifications of petitioner, her present husband, or respondent, the court reasoned that although respondent's resentment at petitioner's choice of a black partner was insufficient to deprive petitioner of custody, there would be a damaging impact on the child if she remained in a racially mixed household. The Florida District Court of Appeal affirmed.
Held:
The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother. The Constitution cannot control such prejudice, but neither can it tolerate it. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Pp. 431-434.

See *Brim v. Brim*, 1975 OK CIV APP 4, 532 P.2d 1403 (see note under Fact Patterns Affecting The Decision - The Usual Suspects, above).

Religion

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If you doubt that religion or church has played a quiet but significant role in Oklahoma child custody cases, particularly as evidence of the affirmance of a trial court's decision to award custody to one parent or another, try searching for "custody and church" or "custody and Sunday School" sometime on your WestLaw or LOIS CD-Roms and see what you get with such couplings of words/phrases. The coupling and results are fair and should not be surprising given our cultural/religious heritage and the values associated with our local culture - we live where we live. Generally, differences in religion as they might impact on a child are reasonably benign - they affect the values a child might learn but they don't typically affect the child's life or death. But, what if church/religious issues interface with a child's health, possibly death, in a child custody context between parents? If I may be so presumptuous to say, for most of us, it would matter. And, then, if it matters, what do we do with the constitutionally mandated separation between church and state?

To set the stage, consider that a custodial parent generally has the right the make decisions concerning a child's health/medical decisions.

Then, consider that 21 O.S. §852 provides that:

§852. Omission to Provide for a Child-Penalties

> * * *
> C. Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent, guardian or person having custody or control of a child, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child; provided, that medical care shall be provided where permanent physical damage could result to such child; and that the laws, rules, and regulations relating to communicable diseases and sanitary matters are not violated.
> [Emphasis supplied]

The statute might give rise to a non-custodial parent's action to protect the child from the custodial parent's decision not to provide medical treatment *where permanent physical damage could result to such child* but not otherwise. Oklahoma's decisions along these lines are considerably incomplete.

In ***State v. Lockhart***, 1983 OK CR 76, 664 P.2d 1059, a prosecution against the custodial parent under an earlier version of §852 occurred:

> ¶1 On June 16, 1982, Jason Dean Lockhart, age nine (9) years, died as a result of peritonitis. His parents were subsequently charged in the District Court of Garfield County with Manslaughter in the First Degree, the pertinent part of the information alleging that the defendants did, while engaged in the commission of a misdemeanor, "willfully and wrongfully, without lawful excuse therefore, omit to furnish necessary medical attention" for their minor child, the deceased, directly causing his death. (Or. 1) A jury trial was conducted in the District Court of Garfield County, at the conclusion of which Judge James S. Bryant instructed the jury the following, over the objection of the District Attorney:

> INSTRUCTION NO. 7
> A person is justified under the law of this state in not providing medical treatment for his child if instead that parent in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease of such child.

The defendants were acquitted, and the State has perfected this appeal on a question of law reserved.

¶2 The State contends that the trial court erred in instructing the jury as above set forth. We disagree. The State's contention would have been correct prior to the 1975 amendment of Title 21, Section 852, in force at the time of the child's death, which provided in part:

> Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child; provided, that the laws, rules, and regulations relating to communicable diseases and sanitary matters are not violated. (Emphasis ours)

We believe that the statute is clear and unambiguous, and expresses a legislative intent that those parents who rely in good faith upon the tenets of their religious belief for the care and protection of their children be allowed a defense to a misdemeanor charge subsequently arising from their failure to obtain medical assistance for their children. If, of course, the underlying misdemeanor cannot be proved, a charge of Manslaughter in the First Degree will not stand. We note here that death caused by peritonitis resulting from perforation of a gangrenous vermiform appendicitis cannot be construed to fall within the communicable disease provision of the statute.

That's pretty much the stage. Under such types of circumstance, what would a non-custodial parent non-believer be able to do? What ought the believer be able to do? To the knowledge of this writer, neither the Oklahoma Statutes nor Courts have addressed such an inquiry. The answer is to be determined by you, in your litigation efforts on behalf of your clients.

In a less life threatening circumstance, *Shaw v. Hoedebeck*, 1997 OK CIV APP 69, 948 P.2d 1240, provides some guidance where life/death issues are not involved. About one and one-half years after entry of the agreed joint custody order, the mother followed by the father moved to terminate the same and obtain sole custody but the trial court's custody award to the father was affirmed (see note under Joint Custody, above).

Temporary Relinquishment of Custody

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Owens v. Owens, 1972 OK 26, 494 P.2d 318 (although the mother was the decretal custodial parent and had acted as such, being short of funds [the father was substantially in arrears on his child support], the father had physical possession of the children at the onset of the post-decree litigation by informal agreement; the mother's citation for non-support was responded to by the father's motion for custody, which was granted by the trial court but reversed on appeal):

> ¶6 When, by the end of that month, plaintiff was delinquent in her payments on the Bethany home for a period of four months, and, according to defendant's testimony, garnishment of his salary and foreclosure of the home mortgage were threatened (because of this $348.00 indebtedness), he borrowed sufficient funds to pay it, and paid some other expenses connected with the delinquency, as well as utility bills plaintiff had incurred, and moved into that home [wife's property] with his present family about the same time (February 2 or 3, 1969), plaintiff, with Laura and Billy, Jr., moved out of it into a house trailer which rented for $75.00 or $80.00 per month.

¶7 During the first two days and nights plaintiff and her children lived in the trailer, she discovered its heater was faulty and would not keep the trailer warm. Accordingly, she took the children to defendant to keep for about two weeks, until she could get located in another abode. When plaintiff had thereafter moved into an apartment shared by two other young women, defendant allowed plaintiff to visit the children at his residence, but would not allow her to take them away from those premises and refused her demands to return them to her.

* * *

¶10 At the trial, defendant admitted he had refused to return the children to plaintiff and that he and his present wife had refused to let her visit them away from their residence, stating that he feared she would regain their possession. It did not appear exactly how defendant had been able to dispossess plaintiff of this home and its furnishings, which, as aforesaid, had been awarded to her by the divorce decree. One statement in her testimony indicated that when she moved out of it, she may have left the furnishings there for him and his present wife, by agreement; but other than his mention of foreclosure proceedings and defendant's testimony that the house needed repairs before he took possession of it, the record does not show the present status of the homeowners' equity in that property.

¶11 At the close of the trial, the court, in announcing his decision, indicated his disapproval of the way defendant had assumed custody of the children (in violation of the divorce decree), but expressed the belief that it was to the children's best interest to leave them with him, and entered an order which, among other things, modified the divorce decree by granting him the children's custody. This is the only portion of the trial court's order and/or judgment challenged in the present appeal lodged by plaintiff after she was denied a new trial.

* * *

¶12 In *Gibbons v. Gibbons*, Okl., 442 P.2d 482, we described the burden of proof a father or mother must discharge in order to obtain a post-divorce change of their children's custody. We have thoroughly examined the evidence in this case and find that it does not discharge defendant's burden under the rule there. On the contrary, it appears that the changes of condition herein have largely been brought about by defendant's wrongful conduct in that:

(1) He established his present marriage only a week after the divorce was granted;

(2) He failed to pay all of his child support the first four months after his divorce, which obviously caused part of plaintiff's inability to pay her bills;

(3) He obtained temporary possession of the children by agreement with plaintiff, but, instead of complying with said agreement and the divorce decree, he withheld custody of the children from plaintiff, making it necessary for her to file an application with the court for their return, and not until he was obliged to answer plaintiff's citation did he seek the children's legal custody by any process of law. If the trial judge was of the opinion that, since the divorce decree, plaintiff has become unfit to have her children's custody, or for any justiciable reason it was for their best interest to divest her of such custody, the record contains insufficient evidence to support such a determination.

¶13 The order and/or judgment appealed from is therefore reversed, and this cause is remanded to the trial court with directions to sustain plaintiff's motion for a new trial.

Carter v. Carter, 1982 OK 123, 653 P.2d 207 (the mother's post-decree attempt to regain her child failed at trial court but succeed on appeal, following a temporary relinquishment to the father for the purpose of dealing with a medical procedure needed by the child):

¶1 The dispositive novel question presented is: What effect does a temporary conditional relinquishment of custody, entered into by the parties and approved by the court, have on a subsequent action by the mother to regain custody of her infant?

* * *

¶3 The father exercised his visitation rights, and by October of 1980, the child's time was divided equally between the parties. The child began living with the father, and spending every other weekend with the mother in November, 1980. In January, 1981, the mother moved to Florida to seek employment. The child was left with the father in Tulsa. A few weeks later, the mother returned to Tulsa, and took the child to Florida without informing the father of her plans to do so. While she was in Florida, the child developed medical problems which required surgery. The mother contacted the

father and requested that he temporarily take custody of the child. An order changing custody was drafted by the father's lawyer, and after some telephonic discussion between the mother in Florida and the father in Tulsa, in which the order was read to the mother, the mother agreed to the verbiage. It is uncontroverted by the father that the mother insisted that the word temporary be included in the order. The order states that the "temporary care, custody and control of the minor child of the parties be awarded to the defendant." The father flew to Florida on February 13, 1981; the order was signed at the airport; and the father took the child back to Tulsa. Approximately two weeks later, the mother returned to Tulsa, and was present at the hospital when the child's surgery was performed. The mother asked the father to return custody of the child to her pursuant to their agreement. When he refused to do so, she filed a motion to modify the temporary order and to reinstate the terms of the original divorce decree.

¶4 Although the facts reveal that the mother and the father each could provide a proper home for the child, the trial court specifically found that it was in the best interest of the child that custody be reposed in the mother. The court also found that the previous modification was on an agreed temporary basis, and that the mother was currently in a position to give full-time care to her daughter.

¶5 The father appealed from the decision of the trial court; he asserts that: the trial court erred in overruling his demurrer because the mother failed to show a substantial change of condition which would justify transference of custody; and that the trial court abused its discretion in awarding custody to the mother.

¶6 Apparently the issue of temporary conditional relinquishment of custody has not been addressed in Oklahoma. The general rule is that, as a matter of public policy, a parent who, in the best interest of the child, relinquishes custody in good faith because he/she is temporarily unable to provide for the child should be able to regain custody by proving that the condition which required relinquishment has been resolved. A parent who is unable to care for his/her children should be encouraged to relinquish custody if he/she is unable to adequately provide for the child. A mother/father would be most reluctant to give up his/her child if he/she knew that custody could not be regained.

¶7 An exception to the rule may be applied if interim custody results in the child becoming totally integrated into the home of the parent with temporary custody. Integration may arise either because of the nature or duration of the provisional custodial arrangement. Determinative factors are: the duration of the temporary custody; the inclination of the parties as to the permanency of the custody; and the age of the child. Custodial environment of the child is established if over an appreciable time the child naturally looks to the custodian for guidance, necessities of life, and parental comfort.

¶8 The case before us does not fall within this exception. Even if the time the child lived with the father prior to the actual relinquishment is considered, the duration of the custody was minimal. The record clearly indicates the parents agreed the custody change was temporary and conditioned upon the mother's being able to properly care for the child. That condition has been met.

¶9 The practice of temporary and voluntary relinquishment of custody to protect the best interest of the child should be encouraged by returning custody upon the resolution of the condition which precipitated the relinquishment. The best interest of the child is the paramount consideration in determining the custodial parent. We do not find that the trial court abused its discretion and in the absence of such, the award will not be reversed on appeal.

Also, see *Olinghouse v. Olinghouse*, 1995 OK CIV APP 104, 908 P.2d 280 (mother reobtains custody from the child's aunt following the mother's [and the father's] execution of a document called, "Relinquishment of Care, Custody and Control of Minor Child", apparently done so that the child would receive care and treatment for his hemophilia condition).

Visitation, Orders Denying or Restricting

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In re McMenamin, 1957 OK 67, 310 P.2d 381

¶2 This appeal is from an order and judgment of the District Court of Oklahoma County in habeas corpus proceedings sustaining the mother's application for the revocation of the father's right to visit

his seven-year old daughter, Patricia Jean, whose custody by a previous order had been awarded to her mother, Norma Jean McMenamin, now Taggart, with father's right of reasonable visitation of the child in the Oklahoma City home, and forbidding petitioner to take the child out of the state, unless authorized by some future order of the court to that effect, which right of visitation the mother contended, and the trial court found, had been forfeited by appellant's conduct.

* * *

¶4 The single issue is whether or not the appellant has, by his conduct, forfeited his right to visit his child, or that the exercise of such right would be detrimental to the child's welfare.

¶5 Neither the father nor mother testified in this case. Only the evidence of two bystanders is adduced, and that was only to the actuality and manner of the taking of the child, which had allegedly been done in a cruel and unusual manner. But the evidence failed to disclose such cruelty. However, it was stipulated and agreed that the father did take the child back to Pennsylvania by plane; that the mother had child stealing charges filed against the father and his sister who admittedly helped him get his child, as outlined by the testimony of the bystanders. Also, an application for citation of contempt of court was filed by the mother in the habeas corpus proceedings for the father's violation of the order awarding custody of the child to the mother. Both the child stealing cases and contempt proceedings were dismissed at the mother's request in accord with a previous agreement, and because she did not want her child's father to be a felon. The mother alleged that the father did not love the child, never wanted it and had not contributed to its support, but no evidence was adduced to that effect. Other than the removal of the child from Oklahoma and the father's admitted failure to contribute to its support, the father's reputation is not attacked.

¶6 It appears from the record that the father was a young law student. He had continued to live in Pennsylvania after the divorce from his wife. His wife and child came to Oklahoma to live and have continued to live here. She remarried and is now Mrs. Taggart. From the father's actions the conclusion must be drawn that he had affection for his child, else he would not have been interested in seeing her under the prevailing circumstances.

¶7 The record shows that within 36 hours after removing the child, the father agreed to and did return her to her mother in Oklahoma, where she now is. The evidence discloses that the father was repentant.

¶8 The record does not demonstrate that it would be detrimental to the welfare of the child for its father to visit it.

¶9 A parent possesses certain natural rights with respect to his child whose custody is given to the other parent. The right to visit the child is one. This natural right should not be denied him unless the evidence conclusively shows that his conduct is of such nature that he has forfeited the right of access to the child.*Clark v. Clark*, 177 Okl. 542, 61 P.2d 28; *Bussey v. Bussey*, 148 Okl. 10, 296 P. 401; *Roshto v. Roshto*, 214 La. 922, 39 So. 344; *McGetrick v. McGetrick*, 1955, 204 Or. 645, 284 P.2d 352; *Zechman v. Zechman*, 391 Ill. 510, 63 N.E.2d 499; *Commonwealth ex rel. Turner v. Strange*, 179 Pa.Super. 83, 115 A.2d 885.

¶10 Though the father was grievously in error in taking his daughter in the manner he did, yet the evidence does not warrant the conclusion that he has forfeited the right to visit his child under reasonable circumstances.

¶11 However, there was no evidence introduced with reference to a reasonable time and a proper place for the father to visit his child. The convenience of the parties should be considered in fixing the time and place.

¶12 For the reasons given herein, the judgment is reversed and set aside; the case is remanded to the lower court to be proceeded with in accordance with the views herein expressed.

Bradford v. Bradford, 1958 OK 84, 327 P.2d 684

¶1 This action involves an order denying the natural mother of certain children whose parents are divorced the privilege of visitation requested by her in a motion to modify a pre-existing order concerning the custody of the children, who are a boy, age 15, and a girl, age 11.

¶2 The mother and father of the children were married in 1940. In December, 1952, the father instituted an action for divorce which was granted him in March, 1953, by reason of the misconduct of

the mother. Custody of the children was awarded the father upon stipulation of the parties, with the mother being given "the right to visit said children at reasonable times and at reasonable hours." In January, 1954, the father filed a motion to modify the decree by restricting and "completely" restraining the mother from visiting the children. The allegations of this motion were that the mother had come to visit the children in an intoxicated condition which they were old enough to observe and which upset them. This motion was not resisted by the mother, whereupon the court entered the following order in February, 1954:

"* * * That the defendant is an alcholic and has visited said children in a state of intoxication, and that she is not a fit person to visit said children. "It Is Therefore, Ordered, Adjudged and Decreed that the said defendant, Bonnie Blanche Bradford, be and is hereby restrained, enjoined and excluded from visiting said minor children, * * *."

¶3 In May, 1957, the mother filed this motion to modify the previous order to permit her to visit the children and have them visit her in her home which is located in another city from that of her former husband. From the order denying this motion, she has appealed.

* * *

¶7 It is conceded by all that the primary consideration in a matter of this nature is to serve the best interests of the children. For this purpose, based upon our consideration of all the evidence, much of which it is unnecessary to relate, we do not believe that there should be any change of custody of these children at the present time, and to this extent the order of the court denying the motion to modify is correct. At the same time, we are of the opinion that sufficient change of condition has been established to authorize reasonable visitation and associational rights to the mother. We reach this conclusion notwithstanding our great respect for the opinion of the learned trial judge.

¶8 In addition to the paramount consideration to be given to serving the best interests of children innocently involved in these unfortunate situations, the courts must also give due consideration to the "natural and inherent rights" of parents. *Gilcrease v. Gilcrease*, 176 Okl. 237, 54 P.2d 1056. *Alford v. Thomas*, Okl., 316 P.2d 188. On the particular problem at hand we have been cited no case from this jurisdiction in which the total deprivation of visitation rights has been approved where such rights were denied the mother. This is not to say that such a circumstance could not exist. However, it is only in exceptional cases that a parent should be denied the right to visit his or her minor children after their custody has been awarded to the other parent in a divorce proceeding. *Bussey v. Bussey*, 148 Okl. 10, 296 P. 401; *Clark v. Clark*, 177 Okl. 542, 61 P.2d 28. The corollary of that proposition is that where visitation has once been properly denied, the court should not be unduly cautious in the restoration of that right upon a showing of an actual change of condition. In the instant action the change of condition was established even in view of the few isolated instances of intoxication. Certainly the petitioner is no longer an "alcoholic," which was the basis of the original modification order, or else her reputation for sobriety in her present home town, a small county seat community, would not be "very good." The petitioner has commenced to build a new and better life. In this she should be encouraged by the court so long as the children will not be harmed thereby.

¶9 The judgment of the trial court is reversed and the case is remanded with directions to grant the mother reasonable visitation and association rights with her children.

Gamble v. Gamble, 1970 OK 150, 477 P.2d 383

¶24 Under the first "PROPOSITION" in her initial brief, defendant contends that the decree's provision allowing plaintiff "unsupervised" visitation with the couple's minor child, David, is contrary to the weight of the evidence and constitutes an abuse of the court's discretion. Taking the position that some of plaintiff's past conduct shows his disregard for court orders, his inclination to "poison" David's mind against her, and to do things detrimental to this boy's mental and moral welfare (contrary to previous decisions of this court), defendant quotes certain excerpts from the record of various court hearings in this case to support her position. In one of these excerpts, taken from plaintiff's testimony at the May, 1968, hearing, he admitted that, on one occasion, he changed baby-sitters for David explaining that he didn't want defendant to know where the boy was. In another, he admitted that he had David baptized without informing defendant of his intention to do so in advance. In others, he admitted that he had told the boy that his mother was possessed of the devil, who made her do what

she did; and that the two (father and son) prayed for her to be given Divine help. Defense counsel also points to other testimony concerning plaintiff's attitude toward David, which counsel terms an "abnormal fixation", including the adopted daughter Linda's above mentioned testimony about plaintiff sleeping with David.

¶25 This Court has followed the rule, applied in *Bradford v. Bradford*, Okl., 327 P.2d 684, that only in exceptional cases should a parent be denied the right to visit his or her minor child, or children, where custody is awarded to the other parent. And in *In Re McMenamin*, Okl., 310 P.2d 381, we held that the natural right of a divorced parent to visit his child, where the child's custody is awarded to the other parent, should not be taken from him unless the evidence conclusively shows that, by his conduct, he has forfeited his right of access to the child. Before this Court disturbs a trial court's ruling awarding a father, who has cared for his son, as the evidence tends to show plaintiff has cared for David, unsupervised visits with a son of David's age, it should also clearly appear, by convincing evidence, that the trial court has abused his discretion. In view of the strained relations between plaintiff and his adopted daughter, Linda, and her very human basis for revenge against him, after his hereinbefore described injury of her, for her to testify concerning plaintiff's sleeping with David, in such a way as to make his conduct appear questionable, or abnormal, would be understandable, as would a tendency on the part of the trial judge to consider her testimony as coming from an "interested" witness. As to the testimony of "interested" witnesses, see*Alexander v. Gee*, Okl., 352 P.2d 915. Also, we know, as a matter of rather common knowledge, that very often young children, because of so-called "bad dreams", fear of the dark, or a feeling of insecurity, want to sleep with a parent; and the easiest way to keep them from being thus troubled is to let them do it. We have little doubt, considering his parents' marital situation, that young David had some basis for such a feeling of insecurity. Insofar as the evidence shows, defendant was not concerned with any claimed "unnatural" relationship between plaintiff and David, until she and plaintiff had become deeply embroiled in the present litigation, and plaintiff had sought court aid in depriving her of the boy's custody. From observation, we know the truth of the remark the trial judge made from the bench at the hearing November 25, 1968, on plaintiff's citation for contempt, as follows:

"The Court is also aware I run into it all the time in these divorce cases each parent likes to use the children to get back at their husband or wife. In other words, if everything else fails, they will go to that angle. * * *"

¶26 By plaintiff's own admission, he and David "love each other a little more than ordinary." But in view of plaintiff's testimony that the boy was "quite sick" when he was a baby, three or four weeks old, and the evidence tending to show the necessity of plaintiff's acting as both father and mother to the boy, during defendant's absences from the home, we do not think it clearly appears that plaintiff's relationship with David is an unnatural one. Knowing of this affection, and with defendant's demonstrated ingenuity in attempting to discredit, and gain advantage over, plaintiff in the parties" bitter struggle, it is conceivable that she would try to prove that the father's and son's relationship was an abnormal one, in the hope of restricting the father's association, and influence, with this son. Without detailing all of the evidence, and arguments, defendant relies upon to support her position, we think it is sufficient to say that we have thoroughly examined the record and are unable to hold that the trial court's ruling as to plaintiff's visitation privileges with David is contrary to the weight of the evidence, or constitutes an abuse of said court's discretion. That portion of the divorce decree granting plaintiff such privileges is therefore affirmed.

Stewart v. Stewart, 1980 OK 160, 619 P.2d 606 (see note under pre-decree evidence, above)

Birdsell v. Birdsell, 1983 OK CIV APP 41, 671 P.2d 80

¶0 Husband appeals the denial of his motion to modify visitation privileges and the introduction of certain books and pictures as evidence in the hearing on his motion.

* * *

¶4 The evidence in support of the father's motion to modify was as follows: The father had remarried, was gainfully employed and current in his child support payments. However, his ex-wife made it difficult and unpleasant for him to visit his children, both girls whose ages now are

approximately fifteen and six. A pornography charge had been filed against the father seven years earlier and dismissed. In this regard a doctor who specialized in psychiatry testified that the father and his new wife had come to him for premarital counseling and that the father had a slight interest in pornography that caused no difficulty. The doctor was asked the following questions and made the following responses:

> "Q Is there anything, or any doubt in your mind whatsoever from your discussions over seven months with these people that the child would in any way be exposed to an unhealthy situation by visitation with him?"
> "A I'm not aware of any harm to the child that would result as a result of her being with Mr. Birdsell. . . ."
> "Q Has he ever indicated to you any form of perverted attitude, perverted behavior?"
> "A No, sir."
> "Q Has Mrs. Birdsell ever indicated to you that she had any form of perversion or unusual behavior?"
> "A No, sir, she has not."

¶5 The mother testified that after the father had moved out she found some photographs and books which she considered pornographic. She testified she felt the father had taken the pictures himself, however, she admitted that this was only opinion and that she had no personal knowledge of who the photographer was. She further testified that the children had found some of the photographs earlier in the marriage and brought them to her. She apparently left them in the house after she found them.

¶6 It is the appellate court's duty under these circumstances, to weigh the evidence and, unless there has clearly been an abuse of discretion, affirm the judgment of the trial court. *Story v. Hefner*, Okl., 540 P.2d 562 (1975); *King v. Rainbolt*, Okl., 515 P.2d 228 (1973). In this case there has been a clear abuse of discretion. We therefore reverse the judge on the father's motion to modify the divorce decree.

¶7 In making a determination on the father's motion to modify the trial judge had before her supporting evidence uncontroverted by the mother. However, the evidence used by the mother to defeat the motion consisted of some photographs and paperback novels which the mother felt were pornographic. The mother was unable to say with any certainty that she knew the source of these materials. Her only evidence of the source was negative in nature. This is demonstrated by the following testimony elicited from her during cross-examination:

> "Q Do I understand that not a single picture that is produced here in court today, that you're asking the Court to accept as an Exhibit, that you, yourself, know for a fact that Mr. Birdsell took himself. As far as you know, other people gave them to him, is that not correct?"
> "A That's what he states."
> "Q You don't know any different, do you? For a fact, do you know any different?"
> "A I feel I do."

¶8 The mother then testified how she came into possession of the exhibits she offered:

> "Q Where did you find these ten photographs, or where did you acquire these?"
> "A In a box in his closet."
> "Q When?"
> "A Right before he left, moved out of the house."
> "Q I'll hand you what has been marked previously as Plaintiff's Exhibit Two, and ask you what this is."
> "A These are some more pornography that was found in books that he had."
> "Q When did you find those?"
> "A After he had moved out."
> "Q Where did you find Plaintiff's Exhibits Three and four?"
> "A Last Christmas during the school break my children wanted to put together a race car

set. When Lesha, the oldest daughter, got it down, they emptied it all out. She picked up the Polaroid box, and saw what was in it, and brought them to me. And then Ashley pulled out the negatives and was running through the house with those."
"Q The children found these hidden in their toys, did they?"
"A Yes, they did."
"Q I'll hand you Plaintiff's Exhibit Number Seven, and ask you what that is please?"
"A It's a bunch of his books."
"Q Where did you find these books?"
"A In a bottom dresser drawer."
"Q This was after he moved out?"
"A Yes."

¶9 The mother's proof of the source of these materials was completely negative. She admitted that she was aware of these items being in her home before the divorce. Assuming the father put the pictures where they were found, or even that he took one or more of them, there is absolutely no showing of any relationship between that and the father's fitness to have custody. For some reason the mother kept them and presented them long after the father was gone in order to defeat his motion.

¶10 It is therefore ironic that the very material relied upon to defeat the motion had not been in the father's possession since he moved out of the home. Moreover, this pornography, which the mother wished to protect her children from, had been retained by her, in the family home, for several years. Regardless of the mother's motive for retaining these materials, none of them should have been introduced as evidence. If we examine 12 O.S. 1981 §2401, we find that these materials are unable to pass the threshold of relevance. Title 12 O.S. 1981 §2401, states that:
"`Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

¶11 The pictures and books cannot meet the test. The term "relevant" is frequently made to appear more complex than it really is. It simply means that which has a tendency to prove a proposition if that proposition has probative value as to an issue in the case. This evidence has a tendency to prove one thing: The mother has in her possession pictures and books which deal with sex. The source of these pictures or the photographer was never established, nor was the source of the books. There is just as much circumstantial evidence that they originally belonged to the mother as the father.

¶12 We are unable to find any probative value in these exhibits.

¶13 All of the mother's exhibits one, two, three, four and seven should therefore not have been admitted. Their admission constituted a clear abuse of discretion by the trial judge.

III

¶14 We find from the evidence that there was a substantial change of condition to support modification of the divorce decree, and that it would be in the best interests of the children to do so. The failure of the trial court to so find was a further abuse of discretion. The father has faithfully paid his child support. However, he has been prevented from having a parental relationship with his children. This cannot be tolerated.

¶15 We order the divorce decree be modified as follows: The father is to have custody on the first and third weekends of each month from Friday at 6:00 p.m. to Sunday at 6:00 p.m. The mother and father are to alternate Christmas and Thanksgiving. The father is to have custody on Christmas Day from 9:00 a.m. to 7:00 p.m. in odd years beginning this year, Christmas Eve from 6:00 p.m. to 10:00 p.m. on even years, and Thanksgiving Day on even years. In addition the father will have custody two weeks in each summer at a time not to interfere with school. The father must give 30 days written notice of the date of the two weeks he desires custody. Child support shall be suspended during this two week period.

Petty v. Petty, 1995 OK CIV APP 12, 890 P.2d 1364

¶3 In July, 1993, Appellee filed a motion to modify the Arkansas decree seeking to restrict Appellant's visitation rights. She alleged the children had been subjected to physical and mental abuse

by Appellant while they were with him in Arkansas during periods of visitation. This motion was filed in Mayes County, Oklahoma, the domicile of Appellee and the children. Jurisdiction of the Oklahoma court was sought under the provisions of the Uniform Child Custody Jurisdiction Act, 43 O.S. 1991 ' 501 et seq. Ultimately, after an evidentiary hearing, the trial judge held that it had jurisdiction; found that physical and emotional abuse had occurred during the summer of 1993 on at least three occasions and declared that Appellant should not have "unlimited care and contact with the children at the present time." The trial court restricted Appellant's visitation in several ways. Most significant, visitation was restricted to every third Saturday, and then only at the home and in the presence of the children's paternal grandmother. Appellant was further ordered to attend and successfully complete a parenting class, obtain an alcohol dependency assessment, to not consume alcohol in the presence of the children, and to refrain from any corporal punishment of the children. A review hearing was additionally set for May, 1994.

* * *

¶8 The second error alleged by Appellant was that the evidence was insufficient to justify the modification order. We disagree. There was evidence of physical abuse by Appellant, of excessive alcohol consumption by Appellant in the presence of the children and of his drinking while driving with the children in the car. There was also evidence that the children had been adversely affected emotionally. Although this evidence was not undisputed, we cannot say the modification order was against the clear weight of the evidence so as to constitute an abuse of the trial court's discretion.

Kahre v. Kahre, 1995 OK 133, 916 P.2d 1355 (only opinion excerpts which discuss the role expert testimony in a case involving alleged sex abuse will be given here; see note under Guardians Ad Litem)

The Controversy Over the Reliability of Expert Testimony that Sexual Abuse Has, or May Have, Occurred and the Attitude of the Courts Toward Such Testimony

¶38 In order to assess fairly whether the trial court's decision to disregard Ms. Owens-Beckham's opinion was reasonable, we will look at how such opinions have been regarded by other courts. In recent years controversy has swirled around whether clinical social workers, and other mental health counselors, should be allowed to testify that young children they are treating have, in their opinion, been sexually abused. In the case at bar we need not concern ourselves with the admissibility of such testimony, as the trial court admitted it, but chose to disregard it. Nonetheless, an examination of the conclusions of the courts and commentators who have dealt with the issue is useful to our inquiry here, as it aids us in assessing whether Greg Kahre was unreasonably prejudiced by the trial court's decision to disregard Ms. Owens-Beckham's testimony.

¶39 In *State v. Wright*, 116 Idaho 382, 386, 775 P.2d 1224, 1228 (1989), aff'd. *Idaho v. Wright*, 497 U.S. 806, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), an appeal of a child abuse conviction, the Idaho Supreme Court noted the opinions of many experts that children below the age of five years may lack the ability to distinguish between the memory of a genuine event and the memory of something they imagined happening. "Once this tainting of memory has occurred the problem is irremediable. That memory is, from then on, as real to the child as any other." [Emphasis added.] Id. The chilling possibility that a child may be remembering fantasy, not fact, has caused many courts to require satisfactory proof that the child was not improperly led into making accusations of sexual abuse, such as videotapes of the counseling sessions, before allowing the admission of such testimony. For an expression of these concerns see *State v. Michaels*, 264 N.J.Super. 679, 626 A.2d 489 (1993), aff'd. 136 N.J. 299, 642 A.2d 1372.

¶40 The concerns about expert testimony that sexual abuse has occurred has not been limited to the criminal arena. Two recent civil cases have rejected such proof, too. *Gier By and Through Gier v. Educational Service Unit No. 16*, 846 F.Supp. 1342 (D.Neb. 1994), was a civil damage suit brought against a state-established school on behalf of mentally retarded students for alleged sexual, physical, and emotional abuse. The court held that child abuse cannot be proved solely by the child's allegations, and granted a pretrial motion in limine excluding from trial any testimony of experts that the plaintiffs had been abused, or that the children's conduct was consistent with abuse. The *Gier* court was particularly concerned with the psychological evaluation of a seven year old boy who functioned at the

level of a four year old. The court observed that writers in the child mental health field have warned of the potential for unreliability of such testimony: "[A child aged three to five] frequently lacks the verbal and conceptual skills required for investigative interviewing to have validity." 846 F. Supp. at 1346, quoting from Sgori, Porter & Blick, Validation of Child Sexual Abuse in Handbook of Clinical Intervention in Child Sexual Abuse (S. Sgori ed. 1982). The psychologist in *Gier* used dolls and interpreted the children's drawings in her counseling sessions, as Ms. Owens-Beckham did in the case at bar. The *Gier* court, quoting from *State v. Cressey*, 137 N.H. 402, 628 A.2d 696, 700 (1993), said it agreed with the concern that "the evaluations of the children deal almost exclusively in vague psychological profiles." 846 F. Supp. at 1348. The problem with this, said the court, again quoting from *Cressey*, is that "in such a case the expert's conclusions are as impenetrable as they are unverifiable." Id.

¶41 *In re Gina D.*, 138 N.H. 697, 645 A.2d 61 (1994), was a child abuse proceeding, begun by a mother while she and her husband were going through a divorce. The child abuse proceeding was a civil matter. The mother's claim of child abuse of a child less than three years old was based on the opinion of a child and adolescent therapist that the child had been abused. The guardian ad litem in the case reported to the trial court that he could find nothing to substantiate the therapist's opinion that the child had been sexually abused. The guardian ad litem further reported that the child's mother made a variety of "wild and exaggerated allegations" about the father and his family, and that he was concerned about the way the mother had handled the divorce so that "events seem to coincidentally fit into an abuse-and-neglect case for some benefit at the divorce court level." 645 A.2d at 66. The trial court admitted the therapist's testimony and relied on it in finding that the husband had abused the child. The New Hampshire Supreme Court reversed, holding that under *Cressey*, 137 N.H. 402, 628 A.2d 696 (1993), the trial court had committed reversible error in admitting the therapist's testimony and relying on it. The New Hampshire Supreme Court concluded that because the trial court could not "determine and assess the bases for the expert's opinion, it also cannot accord the proper weight, if any, to [be given] the testimony." Thus, the court held the expert's opinion that the child had been abused by her father "was not relevant, and the trial court erred as a matter of law" in admitting and relying on it. 645 A.2d at 65.

¶42 A growing body of scholarly writing has concluded that young children are highly susceptible to influence through coercive questioning, and that small psychological rewards will prompt children to lie about events. Other scholars suggest that increasing media coverage of sexual abuse allegations tends to make child health care professionals more likely to suspect sexual abuse as the cause of symptoms in the child. For a discussion of the literature in this area see *State v. Michaels*, 264 N.J.Super. at 622-28, 626 A.2d at 511-15.

¶43 While society has an obligation to prevent child abuse, expert testimony of the kind offered by Ms. Owens-Beckham here must nevertheless be carefully considered before it is acted upon. If the expert is mistaken, a parent's reputation, access to the custody of her children, and even liberty, may be lost over a false accusation. See L. Berliner, Deciding Whether a Child has been Sexually Abused, in Sexual Abuse Allegations in custody and visitation Cases, 48 (B. Nicholson & J. Bulkley eds. 1988). Thus, we cannot say that the trial court erred in rejecting Ms. Owens-Beckham's testimony. We are buttressed in this opinion by Ms. Owens-Beckham's puzzling refusal to allow the guardian ad litem to review the videotapes of her counseling sessions with the Kahre children.

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