THE COUNTOURS OF BEST INTERESTS
THE LAW

Parents have a fundamental constitutional right to have the care, custody and control of their child, unless or until they violate basic civic expectations or norms or put their child in harm's way.

43 O.S. Section 109 requires that the Court, in awarding custody to a parent or a third party, "consider what appears to be in the best interests of the physical and mental and moral welfare of the child."

Our statutes, however, contain no definition of the term "best interests of the physical and mental and moral welfare of the child." Case law and common sense give us some notion of what is "not" in a child's best interest.

Preliminary Considerations

The best case law to give meaning to the term "custody" is found in *Spencer v. Spencer, 1977 OK CIV APP 23, ¶¶ 5,6, 567 P.2D 112,114,115:*

"¶5… The term "custody" is one of art and carries various definitional nuances to accommodate a variety of contexts. In the area of domestic relations it has acquired a generally understood, though unarticulated, meaning with reference to care and control of children. Even in this

restricted area the courts have found themselves struggling with efforts to devise a comprehensive definition. For instance, it has been said that "[c]ustody embraces the sum of parental rights with respect to the rearing of a child, including its care. It includes the right to the child's services and earnings . . . and the right to direct his activities and make decisions regarding his care and control, education, health, and religion." *Burge v. City & County of San Francisco, 41 Cal.2d 608, 262 P.2d 6 (1953)*. And it is distinguishable from the right of visitation usually granted the noncustodial parent in that visitation privileges do not carry with them the earlier mentioned rights inherent in the child custodial status. *McFadden v. McFadden, 206 Or. 253, 292 P.2d 795 (1956)*. "

Section 109 allows the Court discretion to award the care, custody and control of a child to "either parent or to the parents jointly." Section 109 B defines joint custody and "joint care, custody and control" to "mean the sharing by parents in all or some of the aspects of physical and legal care, custody and control of their children."

Custody Determinations

A. Temporary Custody

Temporary custody and visitation determinations in dissolution actions are governed by Title 43 O.S. Section 110 and 110.1.

Section 110 allows the parties to request temporary orders for child custody, support or visitation. (B. 1.). The application is required to "set forth the factual basis for the application" and shall be verified by the party seeking relief. After notice and hearing, a Court may issue a temporary order granting temporary custody and visitation.

Title 10 O. S. Section 7800 provides that "except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction."

In a paternity proceeding under Title 10, the court, once paternity is established, "shall issue a temporary order for support of a child if the order is appropriate" and such a temporary order "… may include provisions for custody and visitation as provided by other law of this state." See, Title 10 O.S. Section 7700-624. So a court may grant either party a custody or visitation order in a paternity case.

Title 43 O.S. Section 109.1 provides that "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. " Thus, separated married couples may pursue a temporary order for custody of their children,.

Ex parte temporary restraining orders, (emergency orders) may be issued on the basis of a "verified application and testimony of witnesses that irreparable harm will result to the moving party, or a child of a party if no order is issued. Section 107.4 now requires independent reports that demonstrate that the "child is in surroundings which endanger the safety of the child and that if such conditions continue, the child would likely be subject to irreparable harm." If no such report is available, then a notarized affidavit by a person with knowledge that the child is in circumstances which endanger the safety

of the child, and that not granting the motion would likely cause irreparable harm to the child".

Outside of an emergency order, temporary orders for custody and/or visitation are mandated to comply with Title 43 O.S. Section 110.1. Status quo prior to the institute of a child custody action is no longer the guiding principle of temporary custody orders.

Section 110.1 states that "it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage, provided that the parents agree to cooperate and that domestic violence, stalking, or harassing behaviors as defined in Section 109 of this title are not present in the parental relationship. To effectuate this policy, if requested by a parent, the court *may provide substantially equal access* to the minor children to both parents at a temporary order hearing, *unless the court finds that shared parenting would be detrimental to the child*." (Emphasis supplied).

Redmond v. Cauthen, 2009 OK CIV APP 46, 211 P.3d 233, clarifies that this statute only pertains to temporary custody determinations. "Although the plain language of §110.1 provides it is the policy of the State of Oklahoma to assure minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children, the "substantially equal access" language unambiguously applies only to the temporary order hearing phase of a case. It is clear the Legislature intended to provide both parents "substantially equal access" during only the temporary order hearing, if requested by a party." *Redmond v. Cauthen, supra, @ ¶6*.

B. <u>General Considerations</u>

Advisory guidelines were created by the Administrative Director of the Courts, and this document provides broad but useful guidelines on visitation, by age, from birth to teen years. Some courts employ these, some ignore them. *See, Title 43 O.S. Section 111.1 A*. They are worth considering and arguing to the Court when useful to your client. And at least one case, has stated that the guidelines are "existing law"; see, *Harrison v Morgan, 2008 OK CIV APP68, 191 P.3d 617, ¶44*.

These guidelines are based on stated principles:

1. Children do best when both parents have a stable and meaningful involvement in their children's lives.
2. Each parent has different and valuable contributions to their children's development.
3. Absent a showing of harm, children should have structured routine time as well as unstructured time with each parent.
4. Parents who mutually agree on visitation schedules, and who can agree to be flexible, should be given a preference over court-imposed solutions.
5. Divorced/separated parents have inherent obligations towards their children, including:

   Avoiding open conflict with each other in the presence of their children;

   Helping their children maintain positive existing relationships, routines and activities;

   Communicating and cooperating with each other in arranging children's activities;

   Maintaining and sharing full and complete access to all medical and school records and maintaining direct contact with personnel working without caring for their children;

Maintaining consistent rules and values in both households to create a sense of security for children of any age;

Allowing children to bring personal items back and forth between homes, no matter who purchased the items; and

Adjusting visitation schedules over time as each family member's needs, schedules and circumstances change.

The guidelines provide progressive, moral and social science based prescriptions for visitation schedules from birth to seventeen years of age. They also attach standard visitation schedules, gathered by Doug Loudenback's survey work of visitation schedules.

Title *43 O.S. Section 112* requires the Court, in domestic cases where children are involved, to make provision for their guardianship and custody, medical care, support and education. (A. 1.) and for visitation in the children's best interests. (A. 2.)

Section 112 requires that a court's custody determination be guided by the provisions of 112.5.

When it is in the best interests of a minor 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.

Section 112, C. 2. makes clear that there shall be neither a legal preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody.

Section 112 C. 3. Provides that "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.

Pursuant to Section 112 C. 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."

Additionally, Section 112 C. 6 mandates compliance with the relocation statute when the Court issues a custody order.

Title 43 O.S. Section 111.1 provides that any order for custody or visitation of a "noncustodial parent" shall provide a specified minimum amount of visitation between the noncustodial parent and the child unless the court determines otherwise. (A. 1.)

111.1 A. 2., provides that except for good cause shown, and when it is in the child's best interests, 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. 111.1 also provides for safety provisions for children when domestic violence, stalking or harassment is involved.

D. Child Preference

Children may express a preference "as to which of the parents the child wishes to have custody or limits to or periods of visitation," if the

Court determines that the best interest of the child will be served by allowing the child to express such a preference. Section 113 A. and B.

Title 43 O.S. Section 113 C. provides that there is a rebuttable presumption that a child who is twelve (12) years of age or older is of a sufficient age to form an intelligent preference. Subsection D. provides that if the child is of a sufficient age to form an intelligent preference, the court shall consider the expression of preference or other testimony of the child in determining custody or limits to or periods of visitation. However, the Court's discretion is in no way diminished by the child's expression of preference in determining the best interest of the child. The court "shall not be bound by the child's choice or wishes and shall take all factors into consideration in awarding custody or limits of or period of visitation."

Case law and statute are consistent in this regard. The Supreme Court has addressed preference twice, both in 2010. According to the Supreme Court in *Ynclan v. Woodward, 2010 OK 29,¶ 13, 237 P.3d 145,* the preference of the child is only one of many factors to be considered when determining the child's best interest, and, , it should never be the *only* basis for determining custody. *Ynclan* primarily addresses

guidelines for the trial courts to conduct in in camera interview of children, and the due process rights of parents to have access to the transcript of the *in camera* interview.

Foshee v. Foshee, 2010 OK 85, 247 P.3d 1162 addresses the preference issue tangentially, only to say that the children's preference has no bearing on whether a court should maintain joint custody or award sole custody. The Court in *Foshee*, in footnote 7 of its opinion, notes that "we have not addressed the appropriate weight to be given to a child's preference when the child's change in preference is the only change which as occurred, nor do we do so today."

Nazworth v. Nazworth, 1996 OK CIV APP, 931 P.2d 86, holds that 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 reasons for it, and in depth judicial assessment of the current custodial arrangement. *Nazworth, supra, ¶ 4* states that "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."

Whether a child's preference can justify a change in physical or

legal custody without meeting Gibbons requirements has not been addressed by the Supreme Court, and Courts of Appeal decisions go both ways. *See, Oklahoma Family Law, The Handbook, 2014-2015, Robert G. Spector, page 351-353.*

Cases that support preference as a stand alone basis for modification of custody are *Nelson v. Nelson, 2004 OK CIV APP 6, 83 P.3d 911, Eimen v. Eimen, 2006 OK CIV APP 23, 131 P.3d 148 and Hogue v. Hogue, 2008 OK CIV APP 63, 190 P. 3d 1177. In Nelson v. Nelson, 2004 OK CIV APP 6, 83 P.3d 911, ¶ 4*, the Court of Appeals holds that "a well-founded custody preference by a child will support a change of custody without proof of any other change of circumstance." Likewise, *Eimen v. Eimen, 2006 OK CIV APP 23, 131 P.3d 148 and Hogue v. Hogue, 2008 OK CIV APP 63, 190 P. 3d 1177*, stand for the proposition that preference alone, when appropriate, is sufficient to support a change of custody without proof of any other change of circumstance.

E. Joint Custody- See Title 43 O.S. Section 109

Parents seeking joint custody are required to file a plan with the court. Said plan may be submitted jointly or each parent may submit their own plan to the court. "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." See, *Title 43 O.S. Section 109.*

The plan must be accompanied by an affidavit signed by each parent stating that said parent agrees to the plan and will abide by its terms.

The Court must issue a final plan for the exercise of joint care, custody and control of the child or children, based on the parties' plan, with such changes as the Court determines to be in the best interests of the child.

The Court may also reject a request for joint custody and proceed to make a sole custody determination. *See, Title 43 O.S. Section 109, subparagraph D*.

Parties who have a joint custody plan, may modify the terms of their plan by agreement, and file an amended plan with the court. If the court finds that the modifications are in the child's best interest it shall approve the modifications. *Subparagraph E. Section 109*.

The Court may modify a joint custody plan *on the request of either parent*, *providing the modifications requested are in the child's best interests*. *Subparagraph F., Section 109*. (Emphasis supplied).

The Court may terminate a joint custody plan, at the request of either party or "whenever the court determines said decree is not in the best interests of the child. *Subparagraph G, 1., Section 109*.

The Supreme Court clarifies the trial court's burden in deciding when and under what circumstances joint custody should be terminated in the cases of *Daniel v. Daniel, 2001 OK 117, 42 P.3d 863, 72 OBJ 3708 and in Rice v. Rice, 1979 OK 161, 603 P.2d 1125.*

The Court in Daniel states at ¶17 "Ordinarily, 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 unknown, and could not have been ascertained with reasonable diligence when the final divorce decree was entered. When a change in custody is requested based on a change of circumstances, 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 to the other parent as requested. Here, *however, there is no change in custody from one parent to the other because both parties were awarded custody of the child pursuant to a court ordered joint custody arrangement*". (Emphasis supplied).

Daniel then cites to section 109, and the provision stating that the court can terminate joint custody upon the request of one or both of the parents or whenever the court determines that joint custody is not in the best interests of the child. *See, Daniel, supra @ at ¶18*.

"Rice teaches that a change in custody from joint to one parent differs from a change in custody from a one custodial parent to a non-custodial parent. Joint custody will not succeed without the cooperation of the parties. When it becomes apparent to the court that joint custody is not working and it is not serving the child's best interests, then a material and substantial change of circumstance has occurred and the joint custody arrangement must be vacated." *See, Daniel, supra @ at ¶20*.

If the Court terminates a joint custody plan, "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. Subparagraph G., 2, Section 109.

This is what we refer to as a *de novo* and/or original determination of custody, in which the court must consider all relevant facts, and without any evidentiary curtains in the way of such determination. See, *Daniel v. Daniel, 2001 OK 117, 42 P.3d 863, 72 OBJ 3708,* @ at ¶21. *See, also, Lyons v. Lyons 1998 OK CIV APP 153*.

If the parties have a dispute as to "the interpretation" of a provision of a joint plan, the Court may appoint an arbitrator to resolve said dispute. Subparagraph H, Section 109. Failure to participate in such arbitration may result in termination of the plan.

43 O.S. 109, as discussed earlier, allows a court to terminate a joint custody arrangement whenever the court determines it is not in the best interests of the child.

Strangely, a Court is not required to terminate joint custody if the parents can't cooperate in making decisions in rearing their child. See, *Kilpatrick v. Kilpatrick, 2008 OK CIV APP 94*, which held that despite

significant evidence the parties were unable to get along for their child, and despite both parents requesting termination of their joint custody plan, that the child was doing well. This conclusion was based on the mental health professionals who testified in regard to their opinion of the child's best interests.

Kilpartrick, supra, @ ¶13 states that "joint custody is usually not appropriate where both parties object, because joint custody depends upon the agreement of the parties and their mutual ability to cooperate in reaching shared decisions affecting the child's welfare. *Anderson v. Anderson,* 1990 OK CIV APP 23, 791 P.2d 116. A party's opposition to joint custody indicates his or her lack of willingness to cooperate, and "[t]o force joint custody on an unwilling parent should give a trial court pause." *Fast v. Fast,* 1989 OK CIV APP 31, ¶ 4, 787 P.2d 1288, 1290. Nevertheless, consideration must also be given to the positive effect, if any, that a joint custody plan has had on a child. Section 109(G) does not require termination of joint custody merely because one or both parents request it; it provides that a trial court "may" terminate joint custody in such event. Ultimately, custodial decisions, even those involving termination of joint custody, are dependent upon the best

interests of the child. Only when "joint custody is not working and it is not serving the child's best interests" is termination a "must." *Daniel* at ¶ 20, 42 P.3d at 870."

F. Modifications of Custody

Title 43 O.S. Section 112, Subsection D provides that 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."

Section 112 authorizes the Court to modify or change any order "whenever circumstances render the change proper either before or after final judgment."

Title 43 O.S. Section 107.3 provides that if a person "intentionally made a false or frivolous accusation to the court of child abuse or neglect against the party" that the Court may "consider the false allegations in determining custody."

Title 43 O.S. Section 111.3 D. 6. authorizes the Court to modify a prior custody order if the visitation rights of a noncustodial parent have been unreasonably denied or otherwise interfered with by the custodial parent.

In Oklahoma, in most instances (the exception being newly discovered evidence) we are going to look to the requirements of *Gibbons v. Gibbons, 1968 OK 77, 442 P.2d 482*, to determine whether to modify a custody determination.

The burden of a party seeking to modify a sole custody determination is the test of "changed circumstances". "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." *See, Gibbons, supra @ ¶ 12*.

The change in circumstances required by *Gibbons* must occur in the custodial parent's circumstances. *See, Pirrong v. Pirrong, 1976 OK 36, 522 P. 2d 383, Johnson v. Wingert, 2011 OK CIV APP 128, 268 P.3d 145*.

The required change in circumstances must have occurred after a previous custody determination. (Pre-decree evidence may not be

considered in modifying a sole custody determination. *See, Ness, v. Ness, 1960 259, 357 P.2d 973, Weatherall v. Weatherall, 1969 OK 22, 450 P.2d 497 and Stewart v. Stewart, 1980 OK 160, 619 P.2d 606*.)

Once a custody determination is made, unless an appellate court determines that the trial court's decision is clearly against the weight of the evidence so as to constitute an abuse of discretion, it will not be disturbed. *Ness v. Ness, 357 P.2d 973 (Okla. 1960)*. Spector notes in his treatise that it is very nearly a waste of time to appeal a custody determination. On issues regarding the best interest of the child, the standard of review is whether the decision of the trial court is against the clear weight of the evidence or an abuse of discretion. *Wood v. Redwine, 2001 OK CIV APP 115, 33 P.3d 53*.

G. In Loco Parentis

The first case to recognize the right of custody where a non-parent functions *in loco parentis* was *Taylor v. Taylor, 182 Okla 11, 75 P.2d 1132, 1938 OK 77*. Custody was retained in this case by someone unrelated to either parent who cared as parent for the child for a long period of time, before father sought to get custody of the child.

The next case of significance on this issue was *Eldredge v. Taylor, 2014 OK 92, 339 P.3d 888*. It holds that the non-biological mother, and former partner in a same sex civil union may seek to enforce a written co-parenting agreement.

Ramey v. Sutton, 2015 OK 79, 362 P.3d 217, holds that a person not related to a child by blood may seek custodial rights with a child. "This case is intended to recognize those unmarried same sex couples who, prior to *Bishop and Obergefell*, entered into committed relationships, engaged in family planning with the intent to parent jointly and then shared in those responsibilities after the child was born. Public policy dictates that the district Court consider the best interests of the child and extend standing to the nonbiological parent to pursue hearings on custody and visitation. This decision does not extend any additional rights to step-parents, grandparents or others." *Ramey @ ¶ 19*.

H. Preferences, Presumptions and Prohibitions on Custody

In its infancy, Title 43 O.S. 112.5, was part of Title 10 (formerly Section 21.1). Prior to is inclusion in Title 43, I viewed it as a list of priorities for placements of children. In Title 43, 112.5 has become, a bedrock statute. It tells us who may be awarded custody and when,

which parents may rebuttably but presumptively disqualified from having custody and which parents must be entirely disqualified from exercising custody of their child. It also speaks to when a third party placement is appropriate.

43 O.S. 112.5 provides that custody or guardianship of a child may be awarded to:

1. A parent or to both parents jointly;
2. A grandparent;
3. A person who was indicated by the wishes of a deceased parent;
4. A relative of either parent;
5. The person in whose home the child has been living in a wholesome and stable environment including but not limited to a foster parent; or
6. Any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Consistent with guardianship law, 112.5 requires the court to award custody or guardianship of a child to a parent, "unless a nonparent proves by clear and convincing evidence that:

1. For a period of at least twelve (12) months out of the last fourteen (14) months immediately preceding the commencement of the custody or guardianship proceeding, the parent has willfully failed, refused, or neglected to contribute to the support of the child:

a. in substantial compliance with a support provision or an order entered by a court of competent jurisdiction adjudicating the duty, amount, and manner of support, or

b. according to the financial ability of the parent to contribute to the support of the child if no provision for support is entered by a court of competent jurisdiction, or an order of modification subsequent thereto.

For purposes of this paragraph, incidental or token financial contributions shall not be considered in establishing whether a parent has satisfied his or her obligation under subparagraphs a and b of this paragraph; or

2. a. the child has been left in the physical custody of a nonparent by a parent or parents of the child for one (1) year or more, excluding parents on active duty in the military, and

b. the parent or parents have not maintained regular visitation or communication with the child."

"For purposes of this paragraph, incidental or token visits or communications shall not be considered in determining whether a

parent or parents have regularly maintained visitation or communication."

A parent who has not abandoned or failed to support their child, as provided above, may otherwise lose custody to a non-parent based on the presumptions set forth in Section 112.5.

Section 112.5 C provides that there shall be a rebuttable presumption that a parent is *affirmatively unfit* if the parent:

"1. Is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state, except as provided in subsection D of this section;

2. Has been convicted of a crime listed in Section 582 of Title 57 of the Oklahoma Statutes;

3. Is an alcohol-dependent person or a drug-dependent person as established by clear and convincing evidence and who can be expected in the near future to inflict or attempt to inflict serious bodily harm to himself or herself or another person as a result of such dependency;

4. Has been convicted of domestic abuse within the past five (5) years;

5. Is residing with a person who is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state;

6. Is residing with a person who has been convicted of a crime listed in Section 843.5 of Title 21 or in Section 582 of Title 57 of the Oklahoma Statutes; or

7. Is residing with a person who has been convicted of domestic abuse within the past five (5) years."

Subsection E. of 112.5, provides that a custody determination based on provisions of sub-section B (failure to support and/or failure to have contact) and C (rebuttable presumptions from bad conduct) "shall not be modified unless the person seeking the modification proves that: 1. since the making of the order sought to be modified, there has been a permanent, material, and substantial change of conditions that directly affects the best interests of the child; and 2. that as a result of such change of circumstances, the child would be

substantially better off with regard to its temporal, mental, and moral welfare if custody were modified.

Subsection F. provides that if the custody determination made in accordance with subsections B and C of this section indicates that custody is temporary, the determination may be modified upon a showing that the conditions which led to the custody or guardianship determination no longer exist.

43 O.S. Section 109.3 establishes a rebuttable presumption that "it is not in the best interest of the child to have custody, guardianship, or unsupervised visitation granted to the person against whom domestic abuse, stalking or harassing behavior has been established.

I. Tools to resolving a determination of custody

The Court, advocates and clients have tools to assist in the determination of custody. If there is evidence of physical abuse in a child custody or visitation action, the Court must appoint an attorney to speak for the child from the public defender's office. See, Title 10 A. O.S. Section 1-4-102 B. C.

Attorney's for minor children are required to advocate for what they want, and not for what is in the children's best interests.

The Court may appoint a guardian ad litem, as the Court's expert, pursuant to the provisions of Title 43 O.S. 107.3. 107.3 provides that "In any proceeding when the custody or visitation of a minor child or children is contested by any party, the court may appoint an attorney at law as guardian ad litem upon motion of the court or upon application of any party to appear for and represent the minor children."

"The guardian ad litem may be appointed to objectively advocate on behalf of the child and act as an officer of the court to investigate all matters concerning the best interests of the child. In addition to other duties required by the court and as specified by the court, a guardian ad litem shall have the following responsibilities:

a. review documents, reports, records and other information relevant to the case, meet with and observe the child in appropriate settings, and interview parents, caregivers and health care providers and any other person with knowledge relevant to the case including, but not limited to, teachers, counselors and child care providers,

b. advocate for the best interests of the child by participating in the case, attending any hearings in the matter and advocating for appropriate services for the child when necessary,

c. monitor the best interests of the child throughout any judicial proceeding,

d. present written factual reports to the parties and court prior to trial or at any other time as specified by the court on the best interests of the child, which determination is solely the decision of the court, and

e. the guardian ad litem shall, as much as possible, maintain confidentiality of information related to the case and is not subject to discovery pursuant to the Oklahoma Discovery Code."

Title 43 O.S. Section 107.3 was amended on November 1, 2017. The old version allowed the GAL to "present written reports to the parties and court prior to trial or at any other time as specified by the court on the best interests of the child that include conclusions and recommendations and the facts upon which they are based".

Professor Spector has stated that the change in statute unavoidably prevents GAL's from expressing a recommendation as to the best interests of children. *See, Recent Statutory Update, Robert G.*

Spector, attached hereto. Spector's interpretation has been adopted by many of our judges, but not all. Phillip Tucker has suggested that the parties may agree to allow a GAL to express best interest recommendations. *See*, attached email. *See, also, Changes to Guardian Ad Litem Reporting, Michelle K. Smith, Oklahoma Bar Journal, OBJ 89 page 22, (March 2018).*

Either way, the GAL is a very useful tool for the court to develop facts that will assist it in deciding custody. Suprisingly or not, unshaded or unbiased facts are what courts need to hear in deciding custody. We can expect parents to be wanting to win, and, in all likelihood in fight or flee mode during their custody battles.

The appointment of a GAL also assists the trier of fact in developing the necessary facts in a more organized and better presentation. The GAL can eliminate the necessity of eliciting substantial testimony from the parties, and thereby efficiently control the presentation of evidence.

It is convenient for counsel to use the GAL as a fact finder and to present their testimony for the essential facts related to the parents and which parent is a better fit for the child as a custodial parent.

Another useful tool for the Court is for one of the parties or both to pay for a child custody evaluation. A custody evaluation is another way to gather important facts about the parents, the children, the needs of the children, and which parent may be the best fit to provide primary care and custody of a child. It is also a way to assist the court in determining whether joint custody is in the best interests of a child. "Issues that are central to the court's ultimate decision-making obligations include parenting attributes, the child's psychological needs and the resulting fit." "The most useful and influential evaluations focus upon skills, deficits, values and tendencies relevant to parenting attributes and a child's psychological needs." See, American Psychological Guidelines for Child Custody Evaluations in Family Law Proceedings.

Authority for a custody evaluation or psychological evaluation may be found in Title 12 O.S. Section 3235. "When the physical, including the blood group, or mental condition of a party … is in controversy in any proceeding in which the person relies upon that condition as an element of his claim or defense, and adverse party may take a physical or mental examination of such person. "Generally, mental conditions are at issue in custody matters. 43 O.S. 110.2 also

provides authority when it states "any other test deemed necessary by the court in determining that the custody of or visitation with the child will be in the best interests of the child."

It has been many years since many of our practitioners have had to try a custody case. However, the basic contours of laying a foundation for the Court to decide custody, outside of obvious reasons to award one party or the other primary physical or legal custody (drugs, bad acts in presence of children, domestic violence, mental illness, all with nexus to children), are the facts of the parents lives , the quality of their lives and the intersections of those qualities with parenting. Values, background, religion, orientations, views of parenting, nutrition, health, education, training, experience, judgment, intelligence, ability to nurture, ability to make good choices, family of origin issues, resources, employment, truthfulness, etc., all have to be taken into account when a custody determination must be made. That means putting facts into evidence about all such matters as they relate to the care, education, training and rearing of children.

Title 43 O.S. Section 110.2 provides a tool to test for drugs or other relevant conditions in parents. "In any action in which the custody of or the visitation with a child is a relevant fact and at issue,

the court may order the mother, the child or father to submit to blood, saliva, urine or any other test deemed necessary by the court in determining that the custody of or visitation with the child will be in the best interests of the child."

Parenting Coordinators can be useful for the court to monitor the progress of a joint custody plan, or in assuring a non-custodial parent of some voice in decision making process. Their primary purpose is to assist the parties in resolving differences on major issues, improving communication between the parents, and thereby perhaps improving the life of the children involved.

Title 43 O.S. Sections 120 et. seq., govern the creation and authority of a parenting coordinator.

Section 120.3 provides that "A. In any action for dissolution of marriage, legal separation, paternity, or guardianship where minor children are involved, the court may, upon its own motion, or by motion or agreement of the parties, appoint a parenting coordinator to assist the parties in resolving issues and decide disputed issues pursuant to the provisions of the Parenting Coordinator Act related to parenting or other family issues in the case except as provided in subsection B of this section, and subsection A of Section 120.5 of this title.

B. The court shall not appoint a parenting coordinator if any party objects, unless:

1. The court makes specific findings that the case is a high-conflict case; and

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

C. 1. The authority of a parenting coordinator shall be specified in the order appointing the parenting coordinator and limited to matters that will aid the parties in:

a. identifying disputed issues,

b. reducing misunderstandings,

c. clarifying priorities,

d. exploring possibilities for compromise,

e. developing methods of collaboration in parenting, and

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

2. The appointment of a parenting coordinator shall not divest the court of its exclusive jurisdiction to determine fundamental issues of custody, visitation, and support, and the authority to exercise management and control of the case.

3. The parenting coordinator shall not make any modification to any order, judgment or decree; however, the parenting coordinator may allow the parties to make minor temporary departures from a parenting plan if authorized by the court to do so. The appointment order should specify those matters which the parenting coordinator is authorized to determine. The order shall specify which determinations will be immediately effective and which will require an opportunity for court review prior to taking effect.

D. The parties may limit the decision-making authority of the parenting coordinator to specific issues or areas if the parenting coordinator is being appointed pursuant to agreement of the parties."

Unresolved dislikes, hurts, inability to control impulses, power plays are the playground for the parenting coordinator. The parenting coordinator, as a result, frequently works with therapists to try to assist the family in raising successful children. The impulse to assist is a good

one, and sometimes works over time. There are, however, parents whose issues are not resolvable outside of litigation. It is for those parents that our labors in regard to custody are necessary.

A twilight thought, but useful, GAL's and PC's are "court experts" See, Title 43 O.S. Section 120.7. Expert's can rely on heresay, and use of such an expert is a good tool to get evidence in that otherwise could not.