**CHILDREN'S PREFERENCES IN CUSTODY CASES**

Title 43 O.S. Section 113 allows the Court to consider the preference of a child in awarding custody.

"A. In *any* action or proceeding in which a court must determine custody or limits to or periods of visitation, the child *may* express a preference as to which of the parents the child wishes to have custody or limits to or periods of visitation.

B. The court *shall* first determine whether the best interest of the child will be served by allowing the child to express a preference as to which parent should have custody or limits to or periods of visitation with either parent. If the *court so finds*, then *the child may express such preference* or give other testimony.

C. There shall be a rebuttable presumption that a child who is twelve (12) years of age or older is of sufficient age to form an intelligent preference.

D. *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. Interviewing the child does not diminish the discretion of the court 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.

E. If the child is allowed to express a preference or give testimony, the *court may conduct a private interview with the child in chambers without the parents*, attorneys or other parties present. However, if the court has appointed a guardian ad litem for the child, the guardian ad litem shall be present with the child in chambers. The parents, attorneys or other parties

may provide the court with questions or topics for the court to consider in its interview of the child; however, the court shall not be bound to ask any question presented or explore any topic requested by a parent, attorney or other party.

F. At the request of either party, a record shall be made of any child interview conducted in chambers. If the proceeding is transcribed, the parties shall be entitled to access to the transcript only if a parent or the parents appeal the custody or visitation determination." (Emphasis supplied).

Following the primary law set forth in 113, the Court must first determine whether the best interest of the child will be served in allowing the child to express a preference, but then, if the child is of sufficient age to form an intelligent preference the court shall consider that preference in making its custody determination.

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.

If you read *Ynclan* carefully and its footnotes, it can in good faith be used to try to persuade the trial court that despite the discretionary language in subparagraph D. ("the court *may* conduct a private interview with the child in chambers without the parents, attorneys or other parties present) that the court really does not have discretion to put a

child on the witness stand. Nevertheless, if the legislature ever considers revising the preference statute, it should consider expressly removing the possibility that a judge will put a minor child on the witness stand to testify in front of her or his parents. This suggestion pertains only to the issue of preference. Children as "fact witnesses" will, in most cases, have to testify in open court.

*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.*

*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.

Custody litigation relating primarily to a child's preference in Tulsa County is like all other litigation in family law court, which is to say that it requires a motion to modify, a scheduling order, a mediation, a pre-trial conference and a trial. It takes, on average, six to eight months (often longer) to go through that process and have the child's preferences actually heard by a court. Pre-filing and prior to trial, opportunity arises for both parents parent to affect or influence a child's preferences.

Regardless of our skill level as attorneys, we are not trained in interviewing children. Likewise, we are not trained in determining whether a child has been subjected to brainwashing, programming, alienation, bribery or intimidation. Nevertheless, the role of a Guardian Ad Litem requires the conduct of thorough interviews with children, who may or may not tell the truth.

One consequence of allowing children's preferences to decide custody is that our children are discussing their "right" to decide where they live. Another consequence is that our courts are refusing to force older children to see a parent, even when there is no abuse or trauma. Yet another consequence is that the children involved in preference issues are subject to browbeating, fear, bribery and patterned alienation over their "preference".

These consequences should cause us to reconsider Section 113, and whether the legislature should consider modifying Section 113.

As of 2002, thirty-nine states, the District of Columbia and Puerto Rico consider the preference of a child of sufficient age and maturity when trying to determine the child's best interest.[1] Oklahoma is among this majority of jurisdictions.

When do we allow a child's preference to result in a parentectomy? In absence of abuse or trauma to the child demonstrably caused by a parent to a child, is it ever appropriate to allow a child to divorce a parent? When, if ever, developmentally, is it in a child's best interest to: 1) believe that their preference has weight in the court's determination of custody; 2) for the child to express that preference to a Guardian Ad Litem or the Court; 3) for the child's preference to result in a total cessation of contact with one of his or her parents? What are the long term effects of a total cessation of contact with a parent based on the child's involvement in litigation? What are the long term effects of giving children the impression that they possess the power to decide where they live?

These questions are best resolved by our mental health professionals. And for that reason, I have brought Dr. Daniel Stockley to assist in resolving some of these questions.

Nevertheless, I will quickly venture here out into the realm beyond competence:

The "standard solution" to the issue of a child not wanting to see a parent is now what we call "reconciliation therapy". The Courts, at least in Tulsa County, have begun to routinely appoint a therapist to attempt to reconcile the objecting child to the objectionable parent. Depending on the age of the child, and other factors, when reconciliation therapy does not work, the Court generally shrugs its shoulders and moves on with the case.

[1] Vol. 18, 2002, Interviewing Children in Child Custody Cases, Journal of the American Academy of Matrimonial Lawyers.

Richard A. Warshak, in a Family Court Review article, Vol 48 No. 1, January 2010, finds, based on research, that reconciliation therapy is most likely successfully in early stages with less severe problems associated with alienation.

One question I wish to pose is whether it is in the best interest of a child to "force" or coerce by some means a minimal relationship between the objecting child and the objectionable parent.

If there is proven alienation by a parent which created the child's objection to visitation, then we should consider some radical solutions. First, as Richard Gardner once proposed, the court should consider transferring custody to the alienated parent. If that appears to risky to the court, depending on the reports of mental health experts, then the court should strongly consider a third party placement, with a nurturing close relative and provide the alienating parent with the same level of visitation as the alienated parent.

If parental alienation is not an issue, the court should consider an interdisciplinary approach where the court lets the child know that the court will require a minimum of visitation, even if the child objects. This approach would entail having a therapist for the child, a juvenile authority who can be used to threaten and/or impose relative sanctions on the child, and, if possible a Guardian Ad Litem to make recommendations to the court.

These radical solutions are not intended for cases where the objectionable parent has been found to have traumatized the child, harmed the child, or done something to legally justify the absence of contact. They are intended, however, to prevent a child from being allowed to divorce a parent, and deprive a parent of his or her constitutional right to have contact with their child.

If we give up on re-unification efforts entirely "the child and favored parent may interpret this as parental abandonment; the child is encouraged to avoid rather than manage conflict' the child's irrational beliefs about the rejected parent could be reinforced; and the child receives no help to better understand the relationship with each parent and to reduce the likelihood of future problems related to a loss of such magnitude." *Richard A. Warshak, Family Court Review, Vol 48 No. 1, January 2010, pages 52 and 53*.

If children of non-intact families can banish a parent, how will they deal with a future primary relationship with their mates, spouses and children. Is the law on preference helping to create an expectation that if you dislike a relationship you ignore it or throw it away? Are we fostering attachment disorders in children and adults? Has the law become a reflection of society?

Mr. Warshak, based on research, states that "rejected parents suffer a searing pain described as worse than the grief associated with the death of a child, because it is an ambiguous loss that does not allow the closure of a normal grieving process". S*upra at 53*. Likewise, Mr. Warshak thinks that the "favored" parent might risk future enmity if and when the children ultimately come to understand how they have been exploited." S*upra at 53.*

So, if allowing a child to express a preference creates the potential for loss to the favored parent, the rejected parent, and the subject minor child, how should the court regard that preference? When must the court rise above what the child wants and compel the continuation of a parent child relationship?