



**ORIGINAL**

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF  
THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

IN RE THE MARRIAGE OF: )  
 )  
 JOEL M. DAVIS, )  
 )  
 Petitioner/Appellant, )  
 )  
 vs. )  
 )  
 SUSANNA S. DAVIS, )  
 )  
 Respondent/Appellee. )

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

DEC - 8 2023

JOHN D. HADDEN  
CLERK

Case No. 119,961

APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE GREGORY RYAN, TRIAL JUDGE

**AFFIRMED**

Rec'd (date)	12-8-23
Posted	<i>PE</i>
Mailed	<i>PE</i>
Distrib	<i>PE</i>
Publish	<input checked="" type="checkbox"/> yes <input type="checkbox"/> no

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OPINION BY STACIE L. HIXON, JUDGE:

¶1 Joel M. Davis (Husband) appeals the trial court's decree of dissolution of marriage filed September 30, 2021, and an order filed March 25, 2022, granting Wife attorney fees and costs. The issues properly perfected on appeal involve child custody and visitation, along with property division. Based on our review of the record and applicable law, we affirm the decree.<sup>1</sup>

**BACKGROUND**

¶2 Husband and Susanna S. Davis (Wife) married in 2001. They have one son, L.D. born 2007; and three daughters, E.D. born 2009; H.D. born 2010; and L.D. born 2015.<sup>2</sup> During the marriage, Husband was employed as an orthopedic surgeon. Wife worked primarily as a homemaker, who homeschooled the children and hosted church events in the home multiple times a week. She was also sometimes employed part time as an attorney.

¶3 Husband filed a petition for separate maintenance under a different case number in January 2018, which was dismissed. He refiled a petition for separate maintenance in February 2018, which was eventually converted to a divorce

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<sup>1</sup> As part of this appeal, Husband filed a motion to seal the decree and Wife's answer brief with the Oklahoma Supreme Court. The Court provisionally sealed both filings but deferred the ultimate decision to the decisional stage. After carefully considering this issue and the parties' arguments, we deny Husband's motions to seal.

<sup>2</sup> We indicate below when we are referring to the oldest child, son L.D., and when we are referring to the youngest daughter, L.D. We refer to son L.D., E.D., and H.D. collectively as the "eldest children."

proceeding. After a lengthy temporary order hearing in April 2018, Wife was awarded sole custody of the children, and Husband was awarded unsupervised visitation.<sup>3</sup> John Gile was appointed as the children's Guardian Ad Litem (GAL).

¶4 While the case was pending, worry arose about Husband's concerning behavior with the children, sexual and otherwise. The children's counselor and teacher made multiple referrals to the Department of Human Services (DHS), mainly regarding concerns about Husband behaving inappropriately with the children. Eventually, one of the referrals resulted in a DHS finding of substantiated child sexual abuse by Husband against E.D.

¶5 An 18-day trial was held. Regarding custody and visitation, the evidence focused on the allegations that Husband had committed domestic abuse against Wife and after separation sexually abused E.D. and otherwise behaved inappropriately with her and the other children. After hearing the evidence, the court found, *inter alia*, that Husband committed domestic abuse, stalking, and harassment against Wife; sexually abused E.D.; and otherwise acted concerningly towards her and the other children. Accordingly, the court awarded Wife sole custody of the children and denied Husband visitation or contact with them. The court also entered a

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<sup>3</sup> This temporary order was entered, not by Judge Ryan, but by a different Oklahoma County judge.

protective order for Wife and the children for five years, though no final protective order is included in the record.<sup>4</sup>

¶6 As for property division, the main issue on appeal is the valuation of Husband's interests in Orthopedic Associates, Inc. ("OA") and Orthopedic Associates Ambulatory Surgery Center, Inc. ("OAASC"), which were obtained during the marriage and sold after separation for nearly \$1 million. Husband wanted the interests to be valued at \$5,000, or the book value listed in the entities' respective governing agreements. The court valued the interests using the sales price.

¶7 The trial court pronounced its ruling on June 8, 2021, and stated each party was responsible for their own attorneys' fees and costs. On July 23, 2021, Wife filed a "motion to reconsider," asserting she was entitled to her fees and costs pursuant to 43 O.S.2021, § 112.6, given the court's finding of domestic violence and stalking. The decree, reflecting the initial pronouncement, was filed on September 30, 2021. Eventually, the trial court agreed Wife was entitled to an award, and the order awarding Wife attorney fees and costs was filed on March 25, 2022.

¶8 Husband appeals from the decree and from the order granting fees and costs.<sup>5</sup>

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<sup>4</sup> After the parties' separation, Wife sought and was granted an emergency protective order in Cleveland County Case No. PO-2018-113 on behalf of herself and the children after an incident occurred at a Dairy Queen. Wife also alleged Husband had committed domestic abuse against her in other ways in the months leading to the separation.

<sup>5</sup> The present appeal was originally assigned to the Court of Civil Appeals on December 29, 2022, and reassigned to this author on August 30, 2023.

## STANDARD OF REVIEW

¶9 An action for divorce, involving child custody and division of property, is one of equitable cognizance where the trial court's judgment will not be disturbed unless the trial court abused its discretion or unless the court's finding was clearly against the weight of the evidence. *Hough v. Hough*, 2004 OK 45, ¶ 9, 92 P.3d 695; *Mullendore v. Mullendore*, 2012 OK CIV APP 100, ¶ 3, 288 P.3d 948. An abuse of discretion occurs when a court's decision is based on an erroneous conclusion of law, or where there is no rational basis in evidence for the ruling. *In the Matter of BTW*, 2008 OK 80, ¶ 20, 195 P.3d 896. Issues of law, including whether Wife is entitled to recover a statutory attorney's fee, are reviewed *de novo*. See *State ex rel. Dep't of Transp. v. Cedars Grp., L.L.C.*, 2017 OK 12, ¶ 10, 393 P.3d 1095; *Christian v. Gray*, 2003 OK 10, ¶ 43, 65 P.3d 591.

## ANALYSIS

### A. Custody and visitation

#### 1. *The proper evidentiary standard and scope of review*

¶10 Husband alleges the trial court terminated his parental rights, and therefore, should have applied a clear and convincing evidentiary standard. He further argues the evidence at trial was insufficient to support the court's decision. We disagree.

¶11 Husband misrepresents the fact that his parental rights were terminated. Title 10A O.S.2021, § 1-4-906, states:

The termination of parental rights *terminates* the parent-child relationship, including:

1. The parent's right to the custody of the child;
2. The parent's right to visit the child;
3. The parent's right to control the child's training and education;
4. The parent's right to apply for guardianship of the child;
5. The necessity for the parent to consent to the adoption of the child;
6. The parent's right to the earnings of the child; and
7. The parent's right to inherit from or through the child.

(emphasis added).

¶12 Here, the trial court's orders in no way affect many of Husband's rights as a parent, such as the right to consent to the adoption and the right to the children's earnings. While the trial court made orders about custody and visitation, they are not permanent or irrevocable, given they are subject to modification. See 43 O.S.2021, § 112(A)(3) (providing custody orders are modifiable). Thus, there was no termination of rights that would require a heightened clear and convincing standard of proof. See *Santosky v. Kramer*, 455 U.S. 745, 747-48, 102 S.Ct. 1388, 1391-92 (1982) (explaining due process requires states to support allegations by at least clear and convincing evidence before it may "sever completely and irrevocably the rights of parents[.]"). Accordingly, Husband's parental rights were not

terminated, and the trial court was not required to apply a clear and convincing evidentiary standard on such basis.

¶13 Moreover, we decline to extend the “clear and convincing” standard to the trial court’s orders on custody and visitation in this divorce case. Husband cites no binding or persuasive authority requiring such decisions be based on a heightened clear and convincing evidence standard, rather than a preponderance of the evidence. The majority of cases Husband cites are parental termination cases and do not apply. *See, e.g., In the Matter of C.D.P.F.*, 2010 OK 81, ¶ 5, 243 P.3d 21. Husband also cites to dissenting opinions in *Matter of Termination of Parental Rights*, 1993 OK 10, ¶ 2, 847 P.2d 768 (Simms, J., dissenting), and *A.E. v. State*, 1987 OK 76, ¶¶ 11-16, 743 P.2d 1041 (Opala, J., dissenting), expressing concerns about disparate treatment on the right to a jury trial for parents in termination proceedings brought by the State versus those brought by another party. Neither dissent expressed concerns about there being a different evidentiary burden when parental rights are being terminated as opposed to when a court enters custody and visitation orders in a divorce proceeding but leaves parental rights unsevered.

¶14 Husband also cites *In re McMEnamin*, 1957 OK 67, 310 P.2d 381, and *Clark v. Clark*, 1936 OK 478, 61 P.2d 28. In *McMenamin*, the Court explained that the non-custodial parent’s right to visit the child should not be denied unless the evidence conclusively shows the parent’s conduct “is of such nature that he has

forfeited the right of access to the child.” *Id.* at ¶ 9. In *Clark*, the Court ordered the trial court to enter visitation orders where the record did not show why the father should not be allowed reasonable visitation with the child, and there was a lack of evidence tending to show the child would suffer any detriment by visiting him. *Id.* at ¶ 3. The Court emphasized that the child’s welfare was the “paramount consideration.” *Id.* Thus, those cases simply show if a court does not award a parent visitation, the record must indicate the decision was in the child’s best interests. Neither case discussed nor applied a heightened evidentiary standard or treated the visitation orders the same as a termination of parental rights.

¶15 Regarding custody and visitation orders in divorce proceedings, the Court has consistently held the trial court is “vested with discretion in awarding custody and visitation,” with the children’s best interests being the paramount consideration. *See, e.g., Rowe v. Rowe*, 2009 OK 66, ¶ 3, 218 P.3d 887. The Court has consistently applied a “clear-weight-of-the-evidence” standard when reviewing such orders and placed the burden on the appellant to show the trial court’s orders were erroneous and contrary to the children’s best interests. *See, e.g., Duke v. Duke*, 2020 OK 6, ¶ 8, 457 P.3d 1073; *Daniel v. Daniel*, 2001 OK 117, ¶ 21, 42 P.3d 863. When articulating such standard, the Court has not indicated the trial court’s underlying decision must rest on clear and convincing evidence. *See id.* Thus, we find the trial court did not err by applying a preponderance of the evidence standard in this case.



Accordingly, we apply well-established precedent and consider whether Husband met his burden of showing the trial court's orders were against the clear weight of the evidence or contrary to the children's best interests, as required for reversal.

## *2. Review of the evidence*

¶16 Wife presented a litany of evidence to support the trial court's decision to award her custody of the children and to deny Husband visitation. We do not attempt to include every piece of evidence in the lengthy record that supports the trial court's decision. Yet, a detailed recounting is necessary to fully understand the trial court's decision. The evidence showing Husband's abuse of Wife is necessary to fully understand the case and the concerns about Husband's post-separation sexual behavior towards the children, which ultimately resulted in a DHS finding of substantiated child sexual abuse. The trial court's finding of domestic violence is also significant because in every child custody dispute, the court's determination that domestic violence, stalking, or harassment has occurred:

raises a rebuttable presumption that sole custody, joint legal or physical custody, or any shared parenting plan with the perpetrator of domestic violence, harassing or stalking behavior is detrimental and not in the best interest of the child, and it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic violence, harassing or stalking behavior.

43 O.S.2021, § 109(I).<sup>6</sup> Further, 43 O.S.2021, § 109.3, states if the occurrence of domestic abuse, stalking, and/or harassing behavior is established by a preponderance of the evidence, “there shall be 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.”

¶17 Wife presented evidence that Husband engaged in a course of domestic violence and coercive control from the very beginning of their relationship.<sup>7</sup> Moreover, as the trial court found, the record “is replete” with evidence of Husband’s

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<sup>6</sup> Section 109(I)(2) defines domestic violence, stalking, and harassment as follows:

a. “domestic violence” means the threat of the infliction of physical injury, any act of physical harm or the creation of a reasonable fear thereof, or the intentional infliction of emotional distress by a parent or a present or former member of the household of the child, against the child or another member of the household, including coercive control by a parent involving physical, sexual, psychological, emotional, economic or financial abuse,

b. “stalking” means the willful course of conduct by a parent who repeatedly follows or harasses another person as defined in Section 1173 of Title 21 of the Oklahoma Statutes, and

c. “harassment” means a knowing and willful course or pattern of conduct by a parent directed at another parent which seriously alarms or is a nuisance to the person, and which serves no legitimate purpose including, but not limited to, harassing or obscene telephone calls or conduct that would cause a reasonable person to have a fear of death or bodily injury.

<sup>7</sup> Wife’s expert witness in domestic violence, Lauren Garder, testified that coercive control is the central figure of domestic violence and is a pattern of behaviors typically exhibited by one partner over the other that takes someone’s autonomy, social support, dignity, and self-esteem from them and isolates the victim from internal and external resources necessary to live an autonomous life or to leave the relationship.

apparent “obsession with sex.” Wife testified she met Husband at a young age, and both were part of “The Church” or the “Lord’s Recovery” movement. While dating, Husband began pressuring her to have sex, which was against their religion. In response, they moved up the wedding, only dating for six months. Even so, Wife testified he ultimately used church teachings to coerce her into having pre-marital sex. After marriage, Husband wanted sex multiple times a day. If Wife declined, she testified he cried and made accusations. It was a constant issue until she agreed to have sex at least once a day without argument. Eventually, Husband conceded to having sex every other day but told her “it was his last concession” and “never to ask again.” This arrangement continued without exception (even for illness) other than right after each childbirth. Wife and her mother who lived in the home, Jeanne Hearne, both testified the children were put to bed early, so the parties could be alone in their bedroom.<sup>8</sup>

¶18 Wife testified in detail about Husband raping her throughout the marriage, beginning days after the wedding. When Wife was pregnant with E.D., she had a heart condition, which exhausted her along with caring for then infant son L.D. and working part time. She testified she explained to Husband why she did not want to have sex every day in this situation. His response was to push her onto the bed, hold

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<sup>8</sup> Wife testified that Husband considered around 7:00 p.m. onward to be their “time.” She explained that he discouraged her from taking phone calls and did not even allow her to read a book during this time because he wanted their “minds on the same thing.”

her down, and rape her. Throughout the pregnancy, Wife made many unsuccessful attempts to prevent Husband from raping her by physically fighting him. She stopped fighting him when she fell off the bed during one of his attacks and grew afraid of hurting the baby. Wife also testified in detail about Husband raping her multiple times with a device, despite her cries and pleas to stop.

¶19 In addition, Wife; Hearne; and her sister, Sarah Stiltner, provided examples of how Husband controlled Wife in many aspects of life, including her career and financial decisions, her appearance, how she acted in public, her house-cleaning and meal preparation habits, and who she was allowed to have in their home. Wife also presented evidence that Husband prevented her from having close relationships with friends and family. In particular, Husband disliked Stiltner because she was not a “submissive wife.” Stiltner and Hearne both testified about how their relationships with Wife changed shortly after the marriage; they knew not to attempt personal conversations with her. When trying to make new friends, if Wife said anything personal and Husband found out, he reprimanded her. Wife and Hearne explained that Husband’s view was that all Wife’s needs should be met within the marriage, and he was to be the sole recipient of her confidences, feelings, and thoughts. Husband’s goal was for Wife to be under his “headship” and to have a perfect marriage in the church’s eyes. Husband continually used the Bible and church teachings to coerce her into compliance, which became easier than fighting or

arguing. Though Wife asserted she largely capitulated and tried to be a “perfect wife,” she became increasingly unhappy.

¶20 A turning point came around Labor Day in 2017. Wife testified she began confiding in a friend from church, Berta Bermudez. Wife told her that Husband had forged her name to buy a hunting lease despite her disagreement with the purchase. Husband learned Wife said this by reading her text messages. He screamed at her and accused her of “uncovering” him.<sup>9</sup> Wife also shared information with Bermudez about her past dating experiences and a childhood incident with a boy. When Husband learned Wife shared this information, she testified he became enraged and accused her of committing adultery merely by confiding in her friend.

¶21 Husband was reportedly in a tailspin. From around Labor Day until December 2017, Wife and Hearne testified he constantly interrogated Wife about the past activities she discussed with her friend. He wrote down the details, expressing them as if he were writing a romance novel; repeated them back to Wife; and made her confirm the accuracy. He also threw objects. Hearne testified Husband became “extremely abusive” during this time. He only allowed Wife a couple hours of sleep a night, barricading her in the bedroom (sometimes not even leaving for dinner), and was constantly crying and shouting. Husband told Hearne, and Husband also

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<sup>9</sup> “Uncovering” is a term used in the church. It essentially means to make one’s faults known to another.

admitted at trial, that he linked Wife's phone to his work computer so he could read her text messages as they were sent and received. He was also monitoring her phone calls, tracking her via GPS, questioning her about her comings and goings, and wanting more frequent sex.

¶22 Wife testified that Husband wanted Wife to see a therapist, who was not a "mandatory reporter," to discuss the childhood incident. Wife called a Christian counselor, who advised her she had the right to decline sex. When Wife began doing so, Hearne testified that Husband became depressed, cried a lot, and wanted to talk to her about his need for sex, which made her uncomfortable as his mother-in-law. Husband admitted to Hearne that he had been smelling and fondling Wife's clothes.

¶23 Husband also made suicide threats. Once, he stood over Wife with a gun to his head so she would realize "how desperate he was to have sex." Another time, Hearne testified she observed Husband looking distraught while sitting next to an open safe where he kept his multiple loaded guns. Husband told Hearne life was not worth living, and he could not go on without sex. He then held out a life insurance policy and told her he was leaving his suicide note on the page of the policy stating it was still payable in the event of suicide. Hearne then called an elder from the

church, who was on alert about the situation, to speak with Husband.<sup>10</sup> Husband also admitted at trial that he “threatened” Wife with suicide.

¶24 During Hearne’s many conversations with Husband about Wife declining sex, he said something particularly concerning: if Wife would not meet his “needs,” then the children were going to start having to meet them. Thereafter, Hearne testified she observed Husband holding and clinging to E.D. in a long, intense embrace, which was “shocking” and “disturbing.”

¶25 These events, and others in the record, resulted in Wife leaving the home with the children in January 2018. Wife testified that Husband continued to track her with her phone and laptop and tracked the children with their iPads. Pending the entry of temporary orders, Husband’s visitation with the children was arranged through their attorneys and was supervised by his parents. Though Wife requested Husband not contact her other than through counsel, she testified he still used his and others’ phones to contact her.

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<sup>10</sup> Hearne was afraid Husband would hurt himself, others, or the children and was concerned about his firearm usage. For instance, she testified Husband had a vendetta against squirrels, and every time he saw one, he shot it with his gun. He then threw the dead body into the neighbor’s yard because he was angry at his neighbor. Husband killed around 60 squirrels in an approximately 18-month period. The children not only observed these killings, but Husband enlisted their help in throwing the dead bodies in the neighbor’s yard. At his insistence, E.D. even kept a chart tracking the number of dead squirrels.

¶26 Meanwhile, Wife's evidence showed Husband told the people in the church that Wife was "mentally ill" and having a "lesbian affair."<sup>11</sup> He offered to donate to the church if anyone could convince Wife to return to him. Hearne testified Husband had obtained a state of "perfection" in the church, which in the elders' eyes, meant Wife's accounts of abuse and rape could not be true. Wife received a letter from church elders stating they did not believe her rape allegations, and they wanted her to be a good wife and return home. Husband then became an elder in the church, further insulating him against any allegations. As a result, Wife was shunned. Any church member who believed her was called a "minion" by the church's leading elder.<sup>12</sup>

¶27 On February 14, 2018, Wife testified she and her daughters were at a Dairy Queen when she saw Husband entering the restaurant. Husband said he was there "to take the children," and began going towards one of them. When Wife stepped

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<sup>11</sup> Husband's evidence focused on showing Wife and Bermudez were having an "affair." The trial court found this accusation was not proven. Though Husband claimed Wife and Bermudez had sent each other thousands of text messages, which he alleged showed an inappropriate relationship, not one was offered or admitted as evidence at trial.

<sup>12</sup> Wife's extended family was also shunned. For instance, Stiltner testified that her children lost their friend group after the men in the church told their friends the family were "poisonous rebels" and "liars." Additionally, Hearne was fired from her employment as a church missionary after she testified on Wife's behalf at the temporary order hearing, which several men from the church attended. Church elders began referring to her as "Satan's sister."

Stiltner also testified that Husband began showing up at meetings at the Norman church location where they attended, though he did not normally attend that location. He also went to the same youth group meetings as Stiltner's children, though there was no reason for him to be there. Stiltner's children were afraid of Husband and stopped attending those church functions.



between them, he grabbed her arms to try to move her, but she resisted. After she yelled for someone to call the police, Husband let go and stepped around her, apparently attempting to get the children from another angle. When Wife again stepped between the children and him, he grabbed her and pushed her backward onto a table. Husband was told he needed to leave. The officer who later arrived on the scene noted the children were scared and crying, and Wife was shaking. Two days later, Wife was granted an emergency protective order for herself and the children in Cleveland County Case No. PO-2018-1134, based on this encounter along with the events that occurred in the fall. The protective order case was then transferred to Oklahoma County, where the separate maintenance proceeding was pending. A Summary Order entered in the Cleveland County case stated the emergency protective order remained in effect as to the parties, but the order related to the children was subject to revision by the judge in Oklahoma County after hearing evidence at the temporary order hearing.

¶28 The temporary order hearing was held in April 2018. Wife was awarded custody of the children, and Husband was awarded unsupervised visitation. Given the emergency protective order remained in effect for Wife, her family members exchanged the children with Husband. Hearne testified though she initially attended the exchanges alone, she ultimately had others accompany her to due to Husband's anger. She testified he wore sunglasses to the exchanges that appeared to have a

built-in camera. The children also reported he was “always videotaping them.”<sup>13</sup> Son L.D. expressed concern about Husband telling him he had “detectives,” so he always knew what they were doing.

¶29 In the summer of 2018, Husband’s visitation was increased to week on/week off, though the GAL testified that the elder children, particularly E.D., were anxious about the additional visitation. During the summer, Wife testified that E.D., then about nine years old, was concerned about Husband insisting on helping her with her bathing suit and his right to do so. E.D. told Hearne that she hid in the closet to change her swimsuit, but Husband came looking for her. E.D. raised these concerns to the GAL during a meeting in June 2018, and Wife also later raised these concerns with him.<sup>14</sup>

¶30 In October 2018, E.D. disclosed to Wife that “daddy tricked me to see me naked.” She proceeded to describe Husband running her a bubble bath and lighting candles, leaving, and then returning and looking at her naked. The evidence at trial

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<sup>13</sup> Husband had three videos of him with his daughters admitted into evidence. The trial court was particularly concerned about one video depicting the children and him acting out a courtroom scene where he, acting as the judge, sided for the “petitioner” and instructed the “bailiff” to take the other party to jail for lying.

<sup>14</sup> Additionally, Wife presented evidence that Husband was having inappropriate conversations with the children during his visitation. For instance, she testified she had to address son L.D.’s concerns about her going to hell, and that the Bible teaches the man is in charge of the woman, and therefore, she should be doing what Husband wanted her to do. L.D. also said that Husband would only allow him to get money from his bank account if Wife resumed communication.

showed this incident occurred in the middle of the day during a family birthday party. E.D. also mentioned that Husband had made her uncomfortable on one occasion by carrying her into the playroom, though she could not remember what happened because she was “sleepwalking.” The following Monday, E.D. had a panic attack. She was hyperventilating and sobbing. She expressed fear of Husband, saying he was going to be mad because she had told a “daddy/daughter” secret, and she was afraid he was going to come get her.

¶31 The next day, E.D. went to a previously scheduled appointment with therapist Chris Johnson, whom she had already been seeing. Johnson testified that E.D. made similar disclosures to him, in addition to voicing concerns about Husband shaving her arm pits, removing the locks from the bathroom doors, and touching her breasts. E.D. was also afraid he was going to hurt her and kill Johnson. In response, Johnson made a referral to DHS. Husband’s visitation with E.D. was suspended during the investigation, and his visitation with the other children was supervised. However, Wife testified about a time when E.D. came home from school scared and crying because she had received a message through a classmate, who attended the church, that Husband missed her. Johnson testified this incident set E.D. back in her treatment. He also testified that she and H.D., who he also saw, reported their concerns about seeing Husband driving around their house.

¶32 As part of the first DHS investigation, forensic interviews were conducted of the elder children. E.D. repeated similar disclosures to those made to Wife and Johnson. Of note, she described Husband looking at her while naked and shaving her armpits while naked instead of allowing her to cover up in a towel. She also described an incident where Husband carried her from her bed to the playroom during the night. In the morning, her legs hurt, and it stung when she went to the bathroom. When she asked him what happened the next morning, he told her she had been “sleep walking,” and he was “taking care of her.”<sup>15</sup> At the end of its investigation, DHS found the alleged abuse to be unsubstantiated.

¶33 Around this time, E.D. began having panic attacks and nightmares. Wife testified that E.D. would sometimes wake up crying and screaming and then would run out of her bedroom. Hearne also testified about E.D. vomiting when she saw Husband’s vehicle in the parking lot on the way to tae kwon do and about her having a panic attack a different time when she thought she saw Husband’s vehicle on their way home. Johnson testified that E.D. experienced stress, stomachaches, anxiety, and sleeping issues.<sup>16</sup> In November 2018, Johnson referred E.D. to Commander

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<sup>15</sup> During son L.D.’s interview, he said E.D. feared Husband and that Husband did not care about privacy as much as Wife. L.D. also described Husband hitting daughter L.D. with a wooden spoon when she did not want to cuddle. Stiltner provided similar testimony about Husband physically punishing the children on prior occasions for not showing him physical affection.

<sup>16</sup> E.D. also made concerning statements to Wife and Johnson during this time, such as “I don’t think he would do it to my sisters now, but I’m afraid he will later” and questioning if “dad knows what he did was wrong.”

Counseling to have a psychological evaluation performed. She was diagnosed with Post-Traumatic Stress Disorder (PTSD).

¶34 On December 25, 2018, Wife testified E.D. was upset and provided a detailed and tearful account of Husband taking her into the playroom, sitting her on a couch, and performing a specific act of sexual abuse. The next day, Wife arranged for E.D. to attend an unscheduled session with Johnson. E.D. tearfully repeated the disclosure to him. In response, Johnson made a second referral to DHS. In January 2019, Johnson testified he had a session with son L.D., who was angry because E.D. had told him she “did it with dad,” as in “how you make babies.” L.D. also discussed his concern about Husband making him and his sisters bathe together and get into the hot tub naked. Johnson then made a third DHS referral.<sup>17</sup> In making the referral, he voiced concerns about Husband grooming the children because L.D. reported Husband talking to him about wanting sex, his “penis being hard,” and “moms needing to be at service of dad.”

¶35 A second DHS investigation commenced, and Husband’s visitation with all the children ceased. Wife was already in the process of locating a female counselor for E.D. at the time she disclosed to Johnson, and shortly thereafter, she began seeing

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<sup>17</sup> Johnson further testified that throughout his sessions with son L.D., he shared that Husband talked badly about Wife to him and told him she was going to burn in hell.

During Johnson’s sessions with H.D., she said that during visits with Husband she felt like she was being “pumped for information about mom.” She also said that he “creeps [her] out” and “feels weird to be around.”

counselor Anita Sweetland. Sweetland provided individual counseling to E.D., and she also attended group therapy at Bethesda, which provides trauma-based therapy for children.<sup>18</sup> Sweetland testified in detail about disclosures E.D. made to her, which were similar to those she made to Wife and Johnson. Sweetland also provided an exhaustive account of E.D.'s symptoms, which were consistent with her PTSD diagnosis, and testified in detail about the treatment she provided.

¶36 The children were forensically interviewed again. During E.D.'s interview, she provided a detailed account of Husband sexually abusing her in the playroom on a couch.<sup>19</sup> She also said mom gave her a "diaper" the next day because she was bleeding.<sup>20</sup> Additionally, the elder children made other concerning disclosures about Husband's behavior, including making them get into the hot tub and shower together naked while he watched, rubbing E.D.'s and H.D.'s breasts, washing daughter L.D.'s private parts when she did not need help doing so, requiring son L.D. to wash daughter L.D.'s private parts "really well," and having inappropriate conversations with the children about sex. The trial court viewed the recordings of these

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<sup>18</sup> The other children also received services at Bethesda.

<sup>19</sup> At trial, Husband attempted to discredit E.D.'s account by trying to show he had given away the couch before the time the sexual abuse occurred. However, Wife's evidence, including photographs and text messages, showed it was still in the playroom around the time in question.

<sup>20</sup> E.D. described bleeding from where she goes to the "bathroom" and getting a "diaper" from Wife upon returning home. Wife recalled that in September 2018, after E.D. returned home from visitation, she was bleeding between her legs. Wife gave her a pad to wear overnight, thinking she was having her first monthly period, but she was not bleeding the next morning.

interviews, noting son L.D. became emotional at the end of his interview and sobbed when the interviewer left the room. Ultimately, DHS found Husband's sexual abuse of E.D. was substantiated.

¶37 Concerns also arose about Husband and daughter L.D. For example, while Husband still had unsupervised visitation, Wife thought it was odd when he returned L.D. in new pajamas after a short, Wednesday evening visit. The next day as Wife was changing her diaper, L.D. was trembling, crying, and acting like something was wrong. Wife grew concerned when she saw L.D.'s vaginal area was red and irritated and took her to the doctor. L.D. was diagnosed with acute vulvovaginitis, or severe vaginal irritation. Throughout the 2018-2019 school year, L.D.'s teacher, who was trained in child abuse, grew worried when she began regressing in her potty training, groping her genital area in the bathroom and giggling, touching her genital area in class as if she was uncomfortable, and being fearful of men. The teacher ultimately made a DHS referral that was screened out. An intern working with L.D. at Bethesda also made a DHS referral after L.D. disclosed that Husband hit her in the face. She also identified "Dad" as an unsafe person. Due to these concerns, L.D. was also in counseling with Sweetland.

¶38 In addition to the above evidence, Wife's expert witness Garder testified about domestic violence, child sexual abuse, and the link between the two. She provided examples of how Husband's actions as described by Wife, Stiltner, and Hearne were

consistent with coercive control, including through sexual, spiritual, financial, and emotional abuse.<sup>21</sup> She also testified about the lethality factors present in the case, which indicate the likelihood of an abuser using lethal violence against a victim and the children. These factors included the suicide threats, presence of firearms, abuse while pregnant, using sex as a weapon, and high levels of morbid jealousy. Garder also testified that the post-separation reports of child sexual abuse were consistent with the escalating violence that occurs when an abuser loses control. Garder also explained that Husband was stalking E.D. by sending a message to her through a classmate; this conveyed that he could always find her no matter where she went.

¶39 Moreover, the GAL testified the children did not want to visit Husband and recommended no visitation. Multiple other witnesses testified it was not in the children's best interests to force them to have visitation. For instance, Patrick Moore, son L.D.'s counselor at Bethesda, did not know how it would benefit L.D. to go into a situation where he feels unsafe. Moore testified that though L.D. knew how to report an unsafe situation, it was not his job as a child to prevent the unsafe incident from happening. If put in an unsafe situation, he would have no protection other than to report after something already occurred. Sweetland testified she had

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<sup>21</sup> Wife also presented evidence that Husband's attempted control over her continued after separation, including by withholding court-ordered child support and support alimony payments and trying to usurp control of decisions about the children's education, despite the court's order giving her decision-making authority.



never done reunification work between a sexually abused child and her perpetrator and did not see how this would benefit the child. Garder also testified about the serious risk of harm to the children by forcing them to visit an abusive parent.

¶40 In view of the evidence, we find the trial court's determination that Husband committed domestic violence, stalking, and harassment against Wife was supported by a preponderance of the evidence, and therefore, a presumption arose that he should not be awarded custody. We further find the trial court's determination that Husband failed to rebut such presumption was supported by the evidence. A presumption also arose that Husband should not be awarded non-supervised visitation. Additionally, Wife presented ample evidence showing it was not in the children's best interests to have any visitation with him. Thus, we find the trial court did not abuse its discretion by awarding Wife custody and not awarding Husband any visitation or contact with the children.

¶41 Husband continues to assert the children were "coached," and continues to blame Wife for the deterioration of his relationship with them, rather than his own actions. Husband's theory was well-explored at trial and explicitly rejected. For instance, Husband denied the child sexual abuse allegations and offered alternative explanations. DHS worker Jordan Ackerman also testified about her personal

concerns about the validity of E.D.'s disclosures. The court, however, specifically found both lacked credibility.<sup>22</sup>

¶42 Contrastingly, Wife presented her own testimony, testimony from family members, and testimony from multiple other witnesses, indicating the children were not coached, manipulated, or disclosing false memories. For instance, Wife, Hearne, and Stiltner all testified about the family policy of not discussing the divorce case in front of the children. Furthermore, Johnson, Sweetland, Moore, Garder, and the GAL, each indicated the children's accounts and behavior were consistent with the occurrence of abuse. For example, Johnson testified that the fact that a child reveals additional details over time did not raise for him a concern about untruthfulness but attributed it to the child getting more comfortable with the clinician. He also testified E.D.'s symptoms were consistent with abuse. Sweetland testified about indicia that E.D.'s account of abuse was not the result of coaching or manipulation, including her demeanor when discussing the abuse and the high level of detail she provided. She described E.D. as having a "very specific, invasive, [and] traumatic memory." Sweetland also testified that E.D.'s detailed memories of the abuse were inconsistent with sleepwalking, as Husband suggested. Moore testified that son L.D. expressed

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<sup>22</sup> Husband's expert witness, forensic psychologist Marsha Hendrick, also testified about her concerns with the disclosures, particularly about the counselors' handling of them. However, she admitted the forensic interviews themselves were "really well done," and agreed that some of Husband's behavior, as the children described, was concerning and necessitated investigation.

genuine emotions that do not occur with a coached or made-up story. Moore also described L.D. as “walking [on] eggshells” around Husband, which is consistent with abuse. Garder testified that false memories cannot trigger PTSD as seen in E.D. and provided statistics about false reports of abuse. Moreover, the GAL testified he did not think E.D.’s disclosures were a result of suggestibility.

¶43 The trial court found Wife’s witnesses credible. Husband is essentially asking us to reweigh the evidence and resolve the conflicts in his favor. However, it is not our role to reweigh the evidence presented to the trial court acting as the trier of fact, and we defer to the court’s credibility determinations. *See Million v. Million*, 2012 OK. 106, ¶ 8, 292 P.3d 21; *Mueggenborg v. Walling*, 1992 OK 121, ¶ 7, 836 P.2d 112. Thus, Husband fails to show an abuse of discretion occurred.

### 3. Evidentiary issues

¶44 Husband also alleges the trial court erred by not allowing Dr. Robert Danaher and Dr. Richard Kishur to testify as expert witnesses. We disagree.

¶45 Dr. Danaher was court-appointed as an expert to conduct a custody evaluation. Unbeknownst at the time, he was unqualified as such pursuant to 43 O.S.2021, § 120.7(D), which requires an expert to have 16 hours of domestic violence training in any case involving domestic violence, stalking, or harassment. Thus, the court did not allow him to testify as an expert but did allow him to testify as a fact witness. Husband cites no authority to show this decision was erroneous, and we deem this

issue waived. *See* Okla. Sup. Ct. R. 1.11(k)(1); *Lee v. Bueno*, 2016 OK 97, ¶ 37, 381 P.3d 736.

¶46 Dr. Kishur performed Husband's psychosexual evaluation during the pendency of the case. Wife filed a motion in limine to exclude his expert testimony pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), which the court granted. However, rulings on a motion in limine are advisory and preliminary. *Badillo v. Mid Century Insurance Company*, 2005 OK 48, ¶ 57 n.16, 121 P.3d 1080. A party aggrieved by such a ruling must raise the issue during trial, "either by objecting when the challenged evidence is admitted or by making an offer of proof if the question involves excluded matter." *Id.* (citing *Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc.*, 1985 OK 66, ¶ 12, 713 P.2d 572). Given Husband failed to make an offer of proof, this issue is unpreserved.

¶47 Assuming Husband is attempting to raise an issue of fundamental error reviewable absent proper preservation, he maintains the burden of showing both that an error occurred and that it was prejudicial. *See Duke*, 2020 OK 6, ¶ 27. Husband's arguments are insufficient to establish error. He cites no authority showing the testimony was admissible under the Oklahoma Evidence Code, but rather attempts to distinguish one case Wife cited in the proceedings below. *Id.* ("[T]he burden includes the application of the appropriate provisions of the Oklahoma Evidence

Code in the context of showing a violation of a substantial right.”). Thus, we find he has not shown any error occurred.

¶48 Moreover, Husband must establish the alleged error “creates a probability of change in the outcome of the lawsuit.” *Taliaferro v. Shahsavari*, 2006 OK 96, ¶ 13, 154 P.3d 1240; *see also Public Service Company v. Brown*, 1998 OK 121, ¶ 7, 972 P.2d 354. He was required to explain how the challenged evidence caused a prejudicial result without relying on a “*post hoc ergo propter hoc* analysis,” which merely asserts the evidence was excluded followed by a judgment contrary to his requested relief. *See Duke*, 2020 OK 6, ¶¶ 27, 27 n.42. Rather, he was required to explain “the weight of the alleged prejudicial error in relation to the rest of the evidence.” *Id.* Husband merely argues Dr. Kishur’s testimony and report would have gone to the issue of the prospective risk Husband posed to the children. Given Husband failed to make an offer of proof, we do not know the substance of the evidence or exactly how beneficial it would have been to him, if at all. Furthermore, there was a mountain of evidence presented at trial, through multiple witnesses and exhibits, about the issue of what risk Husband posed to the children, and the trial court’s custody and visitation decisions were supported by an overwhelming amount of evidence. Thus, we find Husband has not shown any prejudice resulted from the

exclusion of Dr. Kishur's testimony.<sup>23</sup> Accordingly, we find no abuse of discretion.<sup>24</sup>

## **B. Final protective order**

¶49 Husband makes multiple arguments regarding the trial court's entry of a final protective order for Wife and children against him. The Protection from Domestic Abuse Act, more specifically 22 O.S.2022, § 60.4(D), mandates that "[f]inal protective orders authorized by this section shall be on a standard form developed by the Administrative Office of the Courts." Husband has not perfected a timely appeal from a final protective order that comports with this statutory requirement, nor is such order in the appellate record. Thus, we do not consider the issues pertaining to the issuance of a final protective order. *See* 12 O.S.2021, § 990A.

## **C. Property division**

### *1. Valuation of OA and OAASC*

¶50 Husband claims the trial court erred by classifying his interests in OA and OAASC as marital property and by valuing the interests using the amounts he received from the sale of the entities. We disagree.

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<sup>23</sup> Though Husband waived his arguments regarding Dr. Danaher, the same considerations as to prejudice apply to his expert testimony.

<sup>24</sup> In one sentence, Husband alleges the trial court erred by disallowing him the opportunity to question the GAL about the relationship between Wife and Bermudez. The citation to the record he provides is erroneous and does not contain the GAL's testimony. He also provides no argument or authority to support his claim. Thus, the issue is waived. *See* Okla. Sup. Ct. R. 1.11(k)(1).

¶51 The evidence showed that during the marriage, Husband was a shareholder in OA (a physician practice) and OAASC (a surgery center), along with several other physicians. After the parties' separation, the entities began talking to Mercy about selling the entities. The sale was completed in January 2019.<sup>25</sup> Husband undisputedly received around \$66,877 from the sale of OA and around \$852,207 from the sale of OAASC.<sup>26</sup> As Wife requested, the trial court valued Husband's interests in the entities based on the amounts he received from the sales.

¶52 It is well-established that property acquired during the marriage is presumed to have been jointly acquired, and the party seeking to have the property categorized as separate has the burden of proof. *Standefer v. Standefer*, 2001 OK 37, ¶ 15, 26 P.3d 104. Moreover, the trial court is vested with considerable discretion in valuing marital property and determining the cut-off time for the valuation of marital assets. *See Childers v. Childers*, 2016 OK 95, ¶ 12, 382 P.3d 1020; *Colclasure v. Colclasure*, 2012 OK 97, ¶ 18, 295 P.3d 1123.

¶53 Husband's interests in OA and OAASC were indisputably obtained during the marriage. Wife presented evidence that the sales proceeds represented the fair

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<sup>25</sup> The conversations about the sale occurred while the separate maintenance proceeding was pending. By the time the sale was final, divorce proceedings had commenced.

<sup>26</sup> Husband also received around \$537,565 from the sale of Orthopedic Associates Professional Building, LLC, which is not at issue on appeal. At trial, Husband conveniently admitted *that* entity should be valued using the lower amount of the sales proceeds, rather than the higher book value amount.

market value of Husband's interests as it was the price paid for the entities between a willing buyer and willing seller. *See Howell v. Texaco, Inc.*, 2004 OK 92, ¶ 17, 112 P.3d 1154 (defining "fair market value"). Even though it was Husband's burden to establish the proceeds of the sale of his interests (or a portion thereof) were his separate property, Wife presented uncontroverted evidence showing that none of Husband's post-separation efforts enhanced the purchase price. Specifically, Cynthia Thompson, the entities' former manager who was involved in negotiations, testified the purchase price was derived from a valuation Mercy obtained using the entities' 2017 financials, which was before the parties' separation, and that none of the individual physicians' post-separation efforts enhanced the purchase price. Given such evidence, the trial court did not abuse its discretion by finding the sales proceeds were marital and by valuing the interests using the sale proceeds.

¶54 Husband essentially wants to be awarded the sale proceeds as a windfall. Despite receiving nearly \$1 million from the sale, he argues his interests in each entity should be valued at \$5,000, which is the book value of his interests listed in the entities' respective governing agreements. Husband misconstrues *Mocnik v. Mocnik*, 1992 OK 99, 838 P.2d 500.

¶55 In *Mocnik*, to value the goodwill in the husband's radiology practice, the trial court adopted a certain capitalized excess earnings method proposed by the wife, which her expert admitted would not be used when selling the practice (i.e., not its



fair market value). *Id.* at ¶ 11. The Court explained that if goodwill is divided as a marital asset “its value should be determined either by an agreement or by its fair market value.” *Id.* at ¶ 21. The Court noted that the husband’s interest in the practice was governed by a stockholder’s agreement, which plainly stated what value was recoverable if he withdrew from the practice. *Id.* at ¶ 17. The agreement also required the husband to sell his stock back to the practice for its book value if he left. *Id.* Given these provisions, there was no way for the husband to recoup the value of his personal goodwill, except by continuing to provide professional services in the practice. *Id.* at ¶ 18. The Court held that based on these facts, the trial court erred in valuing and including any goodwill of the radiology practice as divisible marital property. *Id.* at ¶ 22. We also note that in *Carpenter v. Carpenter*, 1983 OK 2, ¶ 32, 657 P.2d 646, the Court held the trial court did not abuse its discretion by relying primarily on book value when valuing a spouse’s stock in a medical practice because the interest was subject to a contractual obligation to sell it for book value upon death, disability, retirement, or termination of employment.

¶56 Together, *Carpenter* and *Mocnik* provide the value of an interest in a closely held entity may be controlled by an operating agreement, assuming it sets the value of the interest and precludes a spouse from realizing the fair market value of the interest if employment is ended or otherwise. *See McCabe v. McCabe*, 575 A.2d 87, 89 (Pa. 1990) (cited by *Mocnik*, finding that valuing a divorcing-spouse’s stock

based on the business's "going concern" value is inequitable when the partnership agreement precludes the spouse from ever realizing such value).

¶57 Here, Husband was not precluded from realizing the fair market value of his interests; rather, a third-party sale of the entities occurred. His own expert, Kenneth Klingenberg, admitted the provisions in the agreements setting the book value at \$5,000 only applied upon his retirement, death, or voluntary withdrawal—none of which happened. Thus, Husband's reliance on *Mocnik* is incorrect.

¶58 Husband also argues the sale proceeds already received were transformed into his separate "future earnings," because he entered certain non-compete agreements with Mercy.<sup>27</sup> He relies on *McQuay v. McQuay*, 2009 OK CIV APP 59, 217 P.3d 162, where the trial court valued the personal goodwill in a husband's concrete business, a sole proprietorship, at \$350,000 and included such amount in the marital property division. In reversing the trial court's decision, the Court noted Wife's expert witness attributed the value of the goodwill solely to Husband's reputation as a cement mason. *Id.* at ¶ 12. The expert also admitted that such value depended on Husband not competing with the business and continuing to participate after the sale.

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<sup>27</sup> Specifically, Husband became Mercy's employee after the sale, and his employment agreement contained a non-compete provision. The sales agreement for OAASC also contained a restriction on Husband's ownership in another surgery center. As Wife notes, the non-compete provision in Husband's employment agreement was not in effect when the decree was entered because Mercy terminated him during the pendency of trial. Husband presented no evidence that the termination required him to pay back any portion of the sale proceeds.

*Id.* at ¶ 11. The Court also noted its previous holding that a court cannot impose a non-compete provision to enhance the value of a marital asset and explained the husband had no way of realizing the goodwill value without continuing to work in the business, essentially meaning the value included his future earnings. *Id.*

¶59 Unlike in *McQuay*, Husband cites nothing in the record showing what, if any, part of the sale proceeds from OA and OAASC represented the value, if any, of Husband's personal goodwill, i.e., that attributed solely to his reputation as a physician. This is significant because in valuing medical practices in divorce cases, Oklahoma law distinguishes the goodwill of the medical practice itself, which is divisible as a marital asset, from the personal goodwill of an individual physician attributable to his or her personal reputation, which is not a marital asset. See *Traczyk v. Traczyk*, 1995 OK 22, ¶¶ 14-15, 891 P.2d 1277. Indeed, Wife's evidence showed there was no value for *any* goodwill (much less Husband's personal goodwill) included in either the purchase price of the entities.<sup>28</sup> Wife's expert witness, Forrest Olson, testified that OAASC was a passive entity, indicating a lack of personal goodwill, and that OA's value was established by valuing the furniture, fixtures, and equipment owned by the entity and did not include any goodwill value. Also unlike in *McQuay*, neither entity was a sole proprietorship, but rather had

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<sup>28</sup> The Court defines the goodwill of a business as "the expectation of continued public patronage" or the "probability that old customers will remain with the establishment after its sale." See *Traczyk*, 1995 OK 22, ¶¶ 11, 15.

multiple other physician-shareholders. Husband argues the non-compete agreements were a contingency of the sale but does not show that his personal participation in the sale affected the purchase price. In fact, Husband's testimony indicated that if he had not participated, the other shareholders would have simply bought out his interests and proceeded with the sale. Such testimony tends to show his participation in the sale did not affect the purchase prices. Thus, we find no abuse of discretion.

## 2. 529 plans

¶60 In one paragraph devoid of citation to the record, Husband alleges that after the entry of the decree, the trial court erred by entering an order on August 4, 2022, regarding the 529 College Savings Plans for the children. Such order is not included in the appellate record. Moreover, Husband has not perfected an appeal from the August Order. Thus, we do not consider the alleged error contained in the August Order. *See* 12 O.S.2021, § 990A.

### **D. Alleged due process and speedy trial violations**

¶61 Husband alleges the trial court violated his due process and speedy trial rights by holding the trial over multiple settings. We disagree.

¶62 Husband relies on *Flandermeyer v. Bonner*, 2006 OK 87, 152 P.3d 195. In *Flandermeyer*, the husband filed an application for the Oklahoma Supreme Court to assume original jurisdiction and petition for writ of prohibition and/or mandamus

after his divorce trial, estimated to take one day, was rescheduled, heard in a piecemeal fashion, and still pending over a year's time. *Id.* at ¶¶ 0-1, 6. The Court agreed that holding a trial in a serial manner implicates fundamental fairness, due process, and right to a speedy and certain remedy enumerated in the United States and Oklahoma Constitutions. *Id.* However, the Court denied the husband's application and petition because it appeared the delays were more attributable to his own actions rather than the trial court. *Id.* In reaching its decision, the Court noted the factors the United States Supreme Court applies when addressing the right to a speedy trial in criminal cases: 1) length of the delay, 2) the reason for the delay, 3) the defendant's assertion of his right, and 4) prejudice to the defendant. *Id.* at ¶ 12 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192) (1972)). The Court also noted it previously applied similar factors in a civil case involving a hearing before the Tulsa Civil Service Commission. *Id.* (citing *Civil Service Com'n of City of Tulsa v. Gresham*, 1982 OK 125, 653 P.2d 920).

¶63 In the present case, Husband is correct that trial occurred in a piecemeal fashion. Trial was held December 9-13<sup>th</sup>, 2019; December 16-17<sup>th</sup>, 2019; March 2-3<sup>rd</sup>, 2020; September 21-25<sup>th</sup>, 2020; and September 28-October 1<sup>st</sup>, 2020. However, the *Barker* factors do not weigh in his favor.

¶64 As for the length of delay, the 18-day trial in this case occurred over the course of about 11 months. Although *Flandermeyer* disapproved of the serialization of

divorce proceedings, and we agree this is not an ideal practice, that case involved one day of trial as opposed to 18 days. We appreciate there are different realities and considerations when a trial court with a crowded docket is tasked with scheduling one day of trial as opposed to 18 days.

¶65 As for the reasons for the delays, the entire trial was estimated to take only the seven days held in December, but Husband's case-in-chief consumed all those days (and more), necessitating the scheduling of additional trial dates in March 2020. There is nothing in the record indicating Husband objected to setting the trial in March 2020. Though five trial dates were originally scheduled in March, the trial judge became ill after the first two days of trial, and an additional 14 days of trial dates were scheduled in June 2020. The record also does not show Husband objected to this delay. In June 2020, a Court Minute was entered evidencing Husband's agreement to continue the trial to September 21, 2020 through October 2, 2020, due to the COVID-19 pandemic.<sup>29</sup> Moreover, on the same day the Court Minute was filed, Husband filed a motion seeking additional discovery from Mercy due to the termination of his employment. Not only did Husband agree to delaying the conclusion of trial until September, but multiple other courts have found

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<sup>29</sup> The fact the trial court scheduled a solid two weeks of trial shows it was attempting to limit the piecemeal fashion of trial.

that pandemic-related delays are valid delays for purposes of a constitutional speedy trial analysis. *See, e.g., Cornelius v. State*, 2023 OK CR 14, ¶ 11, 534 P.3d 715.

¶66 As for the assertion of his right to speedy trial, the *Barker* Court emphasized the “failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.” *Barker*, 407 U.S. 514 at 532. Significantly, in *Flandermeyer*, the husband was asserting his right to speedy trial while the trial was still pending as part of his application for the Court to assume original jurisdiction and issue a writ of prohibition and/or mandamus directing the trial court act. Here, Husband never raised his speedy right to the trial court, and he never sought relief from the Oklahoma Supreme Court or requested the Court take any action over the trial court’s docket. We do not believe *Flandermeyer* stands for the proposition that a litigant in a divorce case may never allege a speedy trial violation either to the trial court or the Supreme Court at a time when the situation could have been remedied by rearranging the docket, and only after receiving an adverse result, obtain a new trial by claiming a speedy trial violation for the first time on appeal.

¶67 As for prejudice, Husband alleges the trial delays prejudiced him by diminishing his relationship with the children. Again, the record and the trial court’s credibility determinations show Husband’s own actions, rather than trial delays in which he capitulated, caused the deterioration of his relationship with the children.

Moreover, Husband's requested remedy of a new trial will not address his complaint of prejudice; granting a new trial would only result in further delay.<sup>30</sup>

¶68 For the above reasons, we find no violation of Husband's due process and speedy trial rights.

#### **E. Attorney fees and costs**

¶69 Husband alleges the trial court erred by finding Wife was entitled to an award of attorney fees and costs pursuant to 43 O.S.2021, § 112.6. He does not argue the amount of the award was unreasonable.

¶70 Section 112.6 states:

In a dissolution of marriage or separate maintenance or custody proceeding, a victim of domestic violence or stalking shall be entitled to reasonable attorney fees and costs after the filing of a petition, upon application and a showing by a preponderance of evidence that the party is currently being stalked or has been stalked or is the victim of domestic abuse. The court shall order that the attorney fees and costs of the victimized party for the proceeding be substantially paid for by the abusing party prior to and after the entry of a final order.

¶71 As noted, the trial court specifically found Wife is a victim of domestic violence and stalking. After making such findings and upon Wife's request, the

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<sup>30</sup> Notably, in a criminal appeal, a speedy trial violation results in the reversal of a conviction. Such remedy is obviously not available in a divorce appeal involving minor children where two parents' rights are implicated, and custody and visitation decisions must be made considering the best interests of the children. As noted above, in the case before us remedying a proven speedy trial violation by granting a new trial would only result in further delay of proceedings and the issuance of a decision, which is the very thing the right is designed to prevent. Thus, at least in the divorce context, it is imperative for a party alleging a speedy trial violation because of the serialization of trial to raise the issue while the case is pending in the trial court, rather than waiting to assert the right for the first time on appeal.



award of fees under section 112.6 is mandatory. *Roodzant v. Roodzant*, 2020 OK CIV APP 50, ¶ 13, 476 P.3d 938.

¶72 Husband alleges Wife was not entitled to her attorney fees and costs, because she presented evidence of domestic violence at the temporary order hearing, but the court did not make a finding of domestic violence or stalking at that time. He cites no authority, and we find none, prohibiting a trial court from making a finding of domestic violence or stalking after hearing all the evidence at trial merely because such a finding was not made at the temporary order hearing. Temporary orders are exactly that—temporary. *See* 43 O.S.2021, § 110(C) (stating any temporary orders “may be vacated or modified prior to or in conjunction with a final decree on a showing by either party of facts necessary for vacation or modification.”). Moreover, the plain language of section 112.6 does not support Husband’s interpretation. We find no error.

### CONCLUSION

¶73 Thus, we affirm the September 30, 2021 decree and the March 25, 2022 order.

¶74 **AFFIRMED.**

BARNES, V.C.J., and WISEMAN, P.J., concur.

December 8, 2023