

No. _____

In the
Supreme Court of the United States

FRANCK WILLIAM YAO,
Petitioner,

v.

TAMARA YAO,
Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of the State of Missouri**

PETITION FOR WRIT OF CERTIORARI

Robert L. Sirianni, Jr.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, FL 32790-2047
Telephone: (407) 388-1900
Facsimile: (407) 622-1511
robertsirianni@brownstonelaw.com

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the state courts erred in using Petitioner's dual citizenship status as consideration in their final judgment.

Whether the state courts properly considered the best interest of the child as a necessary component In evaluating the efficacy of the expert witness's testimony.

Whether the expert witness properly testified to facts and testimony provided by another witness.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Franck William Yao

Tamara Yao

LIST OF PROCEEDINGS

COURT OF APPEALS OF MISSOURI FOR THE EASTERN DISTRICT

Case No. ED99387

YAO V. YAO

Judgment affirmed in favor of Respondent.

Judgment reported as *Yao v. Yao*, 412 S.W.3d 915 (Mo. Ct. App. 2013) and reproduced in the Appendix.

Judgment dated November 5, 2013.

COURT OF APPEALS OF MISSOURI FOR THE EASTERN DISTRICT

Case No. ED104105

YAO V. YAO

Judgment AFFIRMED in favor of Respondent.

Judgment reported as *Yao v. Yao*, 523 S.W.3d 489 (Mo. Ct. App. 2017) and reproduced in the Appendix.

Judgment dated March 28, 2017.

SUPREME COURT OF MISSOURI

Case No. SC96473

YAO V. YAO

Petitioner's application for transfer from the Missouri Court of Appeals was DENIED.

Judgment reported as *Yao v. Yao*, No. SC96473, 2017 Mo. LEXIS 363 (Aug. 22, 2017) and reproduced in the Appendix.

Judgment dated August 22, 2017.

COURT OF APPEALS OF MISSOURI FOR THE
EASTERN DISTRICT

Case No. ED111315

YAO V. YAO

Judgment AFFIRMED in favor of Respondent.

Judgment reported as *Yao v. Yao*, 681 S.W.3d 586 (Mo. Ct. App. 2023) and reproduced in the Appendix.

Judgment dated October 10, 2023.

SUPREME COURT OF MISSOURI

Case No. SC100357

YAO V. YAO

Petitioner's application for transfer from the Missouri Court of Appeals was DENIED.

Judgment reported as *Yao v. Yao*, No. SC100357, 2024 Mo. LEXIS 43 (Jan. 30, 2024) and reproduced in the Appendix.

Judgment dated January 30, 2024.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
LIST OF PROCEEDINGS.....	ii
INDEX OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT.....	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Concise Statement of Facts Pertinent to the Question Presented.	3
B. Procedural History.	5
REASONS TO GRANT THIS PETITION	6
I. PETITIONER'S DUAL CITIZENSHIP WAS USED AGAINST HIM TO STRIP AWAY HIS PARENTAL RIGHTS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.	6
II. THE BEST INTEREST OF THE CHILD IS A NECESSARY COMPONENT OF A CUSTODY EXPERT'S TESTIMONY AND COURT'S DETERMINATION.	10
III. WITNESS TESTIMONY CHALLENGING THE CREDIBILITY OF ANOTHER WITNESS IS INADMISSIBLE.	15

CONCLUSION	17
------------------	----

APPENDIX

Appendix A	Mandate in the Supreme Court of Missouri (January 30, 2024)	App. 1
Appendix B	Order in the Missouri Court of Appeals, Eastern District (October 10, 2023)	App. 3
Appendix C	Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b) in the Missouri Court of Appeals, Eastern District (October 10, 2023)	App. 5
Appendix D	Appellant Franck William Yao's Motion for Rehearing in the Missouri Court of Appeals, Eastern District (October 25, 2023)	App. 38
Appendix E	Order Denying Motion for Rehearing in the Missouri Court of Appeals, Eastern District (November 20, 2023)	App. 50
Appendix F	Appellant's Application for Time Extension and Transfer to Missouri Supreme Court in the Missouri Court of Appeals, Eastern District (November 2, 2023)	App. 51

INDEX OF AUTHORITIES

Cases

<i>Buchanan v. Buchanan</i> , 167 S.W.3d 698 (Mo. banc 2005).....	11, 12
<i>Cleveland Board of Education v. LaFleur</i> , 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) ..	7
<i>Cunningham v. Cunningham</i> , 143 S.W.3d 647 (Mo. App. 2004).....	12
<i>Dobbs v. Jackson Women's Health Org.</i> , 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022)	6
<i>Hendry v. Osia</i> , 337 S.W.3d 759 (Mo. Ct. App. 2011).....	13, 14
<i>Huber v. Huber</i> , 174 S.W.3d 712 (Mo. Ct. App. 2005).....	14, 15
<i>Kovacs v. Cooper</i> , 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949)	7
<i>Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.</i> , 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)	7, 8
<i>Little v. Streater</i> , 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981)	6
<i>May v. Anderson</i> , 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953)	6
<i>Meyer v. Nebraska</i> , 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) ..	6

<i>Moore v. East Cleveland</i> , 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)	7
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) ..	7
<i>Prince v. Massachusetts</i> , 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944)	6
<i>Quilloin v. Walcott</i> , 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978)	7
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	7
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)	7, 8
<i>Skinner v. Oklahoma</i> , 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942)	6
<i>Smith v. Organization of Foster Families</i> , 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977)	7
<i>Speer v. Colon</i> , 155 S.W.3d 60 (Mo. 2005)	12, 13, 14
<i>Stanley v. Illinois</i> , 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)	6, 7, 8
<i>State v. Churchill</i> , 98 S.W. 3d 536 (Mo. Bank 2003).....	15

<i>State v. Ferguson</i> , 568 S.W.3d 533 (Mo. App. E.D. 2019)	15
<i>State v. Rogers</i> , 529 S.W.3d 906 (Mo. Ct. App. 2017)	15
<i>State v. Taylor</i> , 663 S.W.2d 235 (Mo. 1984)	16
<i>State v. Williams</i> , 858 S.W.2d 796 (Mo. Ct. App. 1993)	15, 16
<i>Washington v. Glucksberg</i> , 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)	6
Statutes	
28 U.S.C. § 1331	2
28 U.S.C. § 1367	2
Mo. Rev. Stat. § 452.375.2	11, 12, 14
Constitutional Provisions	
U.S. Const. amend XIV, § 1	2, 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner Yao respectfully requests that a Writ of Certiorari be issued to review the Supreme Court of Missouri's denial of Petitioner's application for transfer.

OPINIONS BELOW

The January 30, 2024, order denying Petitioner's application for transfer from the Missouri Court of Appeals by the Supreme Court of Missouri is reproduced in the Appendix ("Appendix A").

BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Missouri entered judgment on January 30, 2024. This Court has jurisdiction under 28 U.S.C. § 1331. This Court has supplemental jurisdiction over the remaining state law claims under 28 U.S.C. § 1367.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

No person shall be deprived of life, liberty,
or property without due process of law.

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Question Presented.

Petitioner was denied parental rights of his minor child as the result of the extensive and litigious custody battle with Respondent.

Petitioner was educated in London, England. In 2010, Petitioner came to the United States on a fiancé visa and received a green card. Petitioner is a permanent resident of the United States. Prior to becoming a father, and throughout the custody battle, Petitioner lived in California. Respondent lived in Missouri.

In 2012, Petitioner's marriage with Respondent was dissolved and Respondent was awarded sole physical custody in Missouri. During the custody determination, there were questions regarding Petitioner's immigration status. Respondent feared Petitioner would leave the country with the minor child. However, Petitioner has never been at risk of fleeing the United States with the minor child.

When Petitioner sought a modification for physical custody and requested that his minor child be relocated to California, Petitioner was prohibited from removing the minor child from Missouri without Respondent's consent and was prohibited from applying for a passport for the minor child. Respondent maintained sole physical custody.

Petitioner sought a second modification for physical custody and requested that his minor child be relocated to California. Petitioner also sought to

remove restrictions on his ability to obtain a passport for his minor child to travel internationally. Instead, the trial court issued a preliminary injunction and two temporary restraining orders over the course of two years. None of the temporary restraining orders were ever supported by the evidence. In issuing the temporary restraining orders, the trial court largely eliminated Petitioner's parental rights.

On September 27, 2022, the trial commenced. Petitioner and Respondent testified, along with several witnesses. Specifically, Dr. Daniel Levin conducted a court-ordered custody evaluation to evaluate the best interests of the minor child. Dr. Levin conducted the Minnesota Multiphasic Personality Inventory (MMPI) exam. Dr. Levin determined that the minor child experienced depression from the divorce and high conflict custody disputes.

Dr. Nancy Willinger testified regarding the credibility of Dr. Levin's findings. Dr. Willinger testified that the MMPI was no longer used and noted several additional concerns with testing methods and interview techniques. However, at no point did Dr. Willinger address the best interests of the minor child.

In December 2022, the trial court entered its modification judgment which maintained Respondent's sole custody of the minor child, continuing to largely eliminate Petitioner's parental rights.

Since Petitioner's parental rights over his minor child were largely eliminated, Petitioner brings this due process claim in his individual capacity as the

father of his minor child, seeking to hold Respondent liable for violating his Fourteenth Amendment substantive due process parental rights.

B. Procedural History.

On January 30, 2024, Chief Justice Mary R. Russell for the Supreme Court of Missouri denied Petitioner's application for transfer from the Missouri Court of Appeals.

Now, this Petition for Writ of Certiorari follows.

REASONS TO GRANT THIS PETITION

I. PETITIONER’S DUAL CITIZENSHIP WAS USED AGAINST HIM TO STRIP AWAY HIS PARENTAL RIGHTS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Due Process Clause of the Fourteenth Amendment provides that no person shall be deprived of “life, liberty, or property, without due process of law.” U.S. Const. amend XIV, § 1. To determine whether a right falls within one the categories, the right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Dobbs v. Jackson Women’s Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2243 (2022) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)).

The Supreme Court has long “emphasized the importance of the family.”¹ For over half a century, the

¹ *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *see also Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923) (The Court has frequently emphasized the importance of the family); *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942) (The rights to conceive and to raise one’s children have been deemed “essential,” “basic civil rights of man”); *May v. Anderson*, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953) (“(r)ights far more precious . . . than property rights”); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder”); *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 2209, 68 L.Ed.2d 627 (1981) (the importance of familial bonds demands

Court has consistently recognized the deeply rooted right of a parent “in the companionship, care, custody, and management of his or her children.” *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, N. C., 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

In *Stanley v. Illinois*, the Court held that “[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come(s) to this Court with a momentum for respect . . .’” 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring)). In *Stanley*, the petitioner lived with Joan Stanley for eighteen years but never married. During their relationship, the couple had three minor children. *Id.* at 646. Unfortunately, Joan would eventually pass away. *Id.* As a result, the petitioner not only lost her, but, due to an Illinois law, his children. *Id.* The Illinois law required children of unwed fathers to become wards of the state. *Id.* “Accordingly, upon Joan Stanley’s death,

procedural fairness); *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) (human relationships are “an intrinsic element of personal liberty”); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639–640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535, 45 S.Ct. 571, 573–574, 69 L.Ed. 1070 (1925).

in a dependency proceeding instituted by the State of Illinois, Stanley's children were declared wards of the State and placed with court-appointed guardians.” *Id.*

While the case primarily dealt with petitioner’s rights to equal protection and procedural Due Process, the Court relied on previous substantive Due Process cases to note that “[t]he Court has frequently emphasized the importance of the family.” *Id.* at 651. As a result, “[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” *Id.*

Since *Stanley*, the Court continues to acknowledge the interest of a parent in the companionship of her child. In *Santosky v. Kramer*, the Court similarly held that it was “plain beyond the need for multiple citation” that a natural parent’s right to “the companionship, care, custody, and management of his or her children is an interest far more precious than any property right.” 455 U.S. 745, 758-759 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). In doing so, the Court highlighted its “historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.” *Id.* at 753.

Similarly, in *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C.*, the Court held that a parent’s right to “the companionship, care, custody and management of his or her children” is an important interest that “undeniably warrants deference and, absent a powerful countervailing interest, protection.” 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (quoting *Stanley*, 405 U.S. at 651). The

continued acknowledgement of a parent's right is due to the fact that such a right is deeply rooted in our history and tradition and is essential to our Nation's scheme of ordered liberty.

Petitioner's dual citizenship was used against him to strip away his parental rights in violation of the Due Process Clause of the Fourteenth Amendment.

Petitioner was educated in London, England. In 2010, Petitioner came to the United States on a fiancé visa and received a green card. Petitioner is a permanent resident of the United States. Prior to the custody battle, Petitioner became a father. During the custody battle, Petitioner moved to California. Respondent lived in Missouri.

During the custody determination, there were questions regarding Petitioner's immigration status. Respondent feared Petitioner would leave the country with the minor child. However, Petitioner has never been at risk of fleeing the United States with the minor child.

When, Petitioner sought a modification for physical custody and requested that his minor child be relocated to California, Petitioner was prohibited from removing the minor child from Missouri without Respondent's consent and was prohibited from applying for a passport for the minor child.

Petitioner sought a second modification for physical custody and requested that his minor child be relocated to California. Petitioner also sought to remove restrictions on his ability to obtain a passport for his minor child to travel internationally. Instead,

the trial court issued a temporary restraining order and preliminary injunction. The trial court issued the temporary restraining order which largely eliminated Petitioner's parental rights. The practical result of such deprivation was that the minor child experienced depression from the divorce and high conflict custody disputes. The minor child attempted suicide on numerous occasions, all while in the custody of Respondent. Petitioner also lost valuable time and custody with his minor child that is guaranteed under the Due Process Clause of the Fourteenth Amendment.

The trial court illegitimately factored Petitioner's dual citizenship into its initial travel restrictions and such restrictions are still in place. The trial court also illegitimately and improperly determined Petitioner's immigration status was uncertain in 2013, even while Petitioner continuously paid federal and state taxes since becoming a permanent resident in 2010. Despite the fact that Petitioner is re-married to a school superintendent and in specialized work for multiple technology companies in California, Petitioner is still prohibited from traveling abroad with the minor child. Petitioner's dual citizenship was therefore used against him to strip away his parental rights.

II. THE BEST INTEREST OF THE CHILD IS A NECESSARY COMPONENT OF A CUSTODY EXPERT'S TESTIMONY AND COURT'S DETERMINATION.

The best interest of Petitioner's minor child was a necessary component of a custody expert's testimony and the trial court's determination. However, no such

consideration existed. Mo. Rev. Stat. § 452.375.2 provides that “[t]he court shall determine custody in accordance with the best interests of the child.” To determine the best interests of the child, “the court *shall* consider all relevant factors and enter written findings of fact and conclusions of law.” Mo. Rev. Stat. § 452.375.2 (emphasis added). Among the factors that the court must consider, the court must consider “[t]he unobstructed input of a child, free of coercion and manipulation, as to the child’s custodial arrangement.” Mo. Rev. Stat. § 452.375.2(8).

In *Buchanan v. Buchanan*, 167 S.W.3d 698, 702 (Mo. banc 2005), “the parties had agreed that father and mother should have joint custody, [but] they did not agree on the residence address for the child or on a parenting plan.” The Supreme Court of Missouri held that, “[w]hile these may be sub-issues of custody, they were contested and required the court’s resolution.” *Id.* Accordingly, [s]o long as any issue or sub-issue of custody is subject to contest between the parties and resolution by the court, written findings that include discussion of the applicable factors from section 452.375.2 are required. *Id.* The court therefore reversed the judgment and remanded the case for findings. *Id.*

Like in *Buchanan*, there exists several contested sub-issues of custody that required the court’s resolution. The trial record is silent regarding the best interests of Petitioner’s minor child. Specifically, no evidence exists Petitioner’s minor child wished to remain in Missouri with Respondent. Instead, the trial court simply assumed that

Petitioner's minor child wished to remain in Missouri with Respondent.

However, such assumption fails to comply with § 452.375.2(8). § 452.375.2(8) provides that the court must consider "[t]he unobstructed input of a child, free of coercion and manipulation, as to the child's custodial arrangement." Mo. Rev. Stat. § 452.375.2(8). As the court articulated in *Buchanan*, the trial court was required to provide written findings that included discussion of this factor. The trial court's failure to do so constituted reversible error.

In *Speer v. Colon*, 155 S.W.3d 60, 61-62 (Mo. 2005), the Supreme Court of Missouri similarly held that where the parties "had not agreed to [the] custodial arrangement, the trial court was required include in its judgment a *written finding* based on . . . the factors listed in section 452.375.2(1) to (8) detailing the specific relevant factors that made the chosen arrangement in the best interest of the [child]." (Quoting *Cunningham v. Cunningham*, 143 S.W.3d 647, 650 (Mo. App. 2004)). In *Speer*, the appellant sought, among other things, primary physical custody of his child. *Id.* at 61. However, the trial court entered a modification judgment that awarded primary physical custody of the appellant's child to the respondent. *Id.* Since the relevant factors were not detailed, the Supreme Court of Missouri reversed and remanded the judgment for the trial court to make the required findings. *Id.* at 62.

Like in *Speer*, Petitioner sought a modification for physical custody of his minor child. Like the court in *Speer*, the trial court awarded physical custody of the child to the respondent. Also like the court in

Speer, the trial court failed to detail the relevant factors in its analysis. As demonstrated above, no discussion of the minor child's input was considered. The trial court's failure to do so requires that this Court reverse the judgment and remand the case for the requisite findings.

In *Hendry v. Osia*, 337 S.W.3d 759, 761 (Mo. Ct. App. 2011), the appellant challenged the trial court's determination that a proposed relocation was not in the best interests of the children. The Court of Appeals of Missouri, Eastern District, relied on "testimony that relocation would diminish [the respondent's] contact with the children outside his regular visitation." *Id.* at 762. There was also evidence that "the children [were] well adjusted to their home, school, and community." *Id.* As a result, the court held that "there was substantial evidence to support the trial court's conclusion that relocation was not in the best interests of the children." *Id.*

Like in *Hendry*, Petitioner challenged the trial court's determination that a proposed relocation was not in the best interests of the child. However, in *Hendry*, substantial testimony and evidence existed to demonstrate that the relocation was not in the best interests of the child. Here, no such testimony exists. In fact, to the extent that there was testimony regarding the best interest of the child, such testimony demonstrated that relocation *was* in the best interest of Petitioner's minor child.

Specifically, Dr. Daniel Levin conducted a court-ordered custody evaluation to evaluate the best interests of the minor child. Dr. Levin conducted the Minnesota Multiphasic Personality Inventory (MMPI)

exam. Dr. Levin determined that the minor child experienced depression from the divorce and high conflict custody disputes. Unlike in *Hendry*, Petitioner's minor child was not adjusting well to his home, school, and community, but was instead experiencing depression. Additionally, the minor child attempted suicide on numerous occasions, all while in the custody of Respondent

Dr. Nancy Willinger, on the other hand, testified regarding the credibility of Dr. Levin's findings. Dr. Willinger testified that the MMPI was no longer used and noted several additional concerns with testing methods and interview techniques. However, at no point did Dr. Willinger address the best interests of the minor child. Therefore, the evidence supports the conclusion that relocation to California was in the best interests of Petitioner's minor child.

In *Huber v. Huber*, 174 S.W.3d 712, 717 (Mo. Ct. App. 2005), the Court of Appeals of Missouri, Western District, held that the trial court erred when it failed to make any findings of fact related to custody when the transcript was filled with witness testimony regarding the best interest of the child. In reliance on *Speer*, the court held that "[t]he trial court was required to include in its judgment a written finding based on . . . the factors listed in section 452.375.2(1) to (8) detailing the specific relevant factors that made the chosen arrangement in the best interest of the child." *Id.* (quoting *Speer*, 155 S.W.3d at 61). The judgment was therefore reversed and remanded to the trial court to make the required findings. *Id.*

Like the trial court in *Huber*, the trial court in this case failed to make any findings of fact related to the best interest of Petitioner's minor child. As demonstrated above, to the extent that witness testimony exists, such testimony demonstrates that the best interests of Petitioner's minor child supported relocation. The trial court therefore erred when it failed to detail the specific relevant factors in its analysis.

III. WITNESS TESTIMONY CHALLENGING THE CREDIBILITY OF ANOTHER WITNESS IS INADMISSIBLE.

The Missouri Court of Appeals, Eastern District, erred when it affirmed the trial court's finding that Dr. Levin's testimony was not credible. "Expert testimony that comments directly on a particular witness' credibility . . . should not be admitted." *State v. Williams*, 858 S.W.2d 796, 800 (Mo. Ct. App. 1993).²

In *Williams*, the Missouri Court of Appeals, Eastern District, the court addressed whether a doctor in a sex abuse case was allowed to testify that "sexually abused children generally do not lie, and to directly comment on the complaining witness' credibility." *Id.* at 798. The court provided that "[e]xpert testimony should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to

² See also *State v. Ferguson*, 568 S.W.3d 533, 541 (Mo. Ct. App. 2019); *State v. Churchill*, 98 S.W. 3d 536, 539 (Mo. Bank 2003); *State v. Rogers*, 529 S.W.3d 906, 911 (Mo. Ct. App. 2017).

draw correct conclusions from the facts proved. *Id.* at 798 (citing *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. 1984). According to the court, opinion testimony concerning a particular witness' credibility was "precisely the kind of evidence that the court in *Taylor* found to be an invasion of the jury's province to make credibility determinations." *Id.* at 799.

In response to the doctor's testimony, the appellant "contend[ed] that the testimony improperly vouched for the witness' credibility and usurped the function of the jury as the ultimate finder of fact in the case." *Id.* Importantly, the Missouri Court of Appeals, Eastern District, agreed. The court held that the doctor's testimony "supplied improper verisimilitude on the issue of whether the appellant was guilty." *Id.* at 801. Additionally, the doctor's testimony "included improper quantification of the probability of the complaining witness' credibility." *Id.*

Here, the trial commenced on September 27, 2022. Petitioner and Respondent testified, along with several witnesses. Specifically, Dr. Daniel Levin conducted a court-ordered custody evaluation to evaluate the best interests of the minor child. Dr. Levin conducted the Minnesota Multiphasic Personality Inventory (MMPI) exam. Dr. Levin determined that the minor child experienced depression from the divorce and high conflict custody disputes. Additionally, the minor child attempted suicide on numerous occasions, all while in the custody of Respondent

Dr. Nancy Willinger, on the other hand, testified regarding the credibility of Dr. Levin's findings. Dr. Willinger testified that the MMPI was no

longer used and noted several additional concerns with testing methods and interview techniques.

Dr. Willinger's testimony was improper because it served to directly comment on Dr. Levin's credibility. Additionally, regarding the testimony on MMPI, Dr. Willinger's testimony served to distract the trial court of the wellbeing of Petitioner's minor child. Case law in Missouri is clear that the trial court should have limited Dr. Willinger's testimony to her understanding of the rules, standards, and proper procedures. Instead, Dr. Willinger attempted to discredit what was an objective report ordered by the court. As a result, Dr. Willinger's testimony and the trial court's finding worked to deemphasize the condition of Petitioner's minor child. The result of the trial hinged on the welfare of Petitioner's minor child, yet Dr. Willinger's testimony distracted the trial court from the main issue and produced inadmissible evidence.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Robert L. Sirianni, Jr., Esq.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
(o) 407-388-1900
robertsirianni@brownstonelaw.com
Counsel for Petitioner