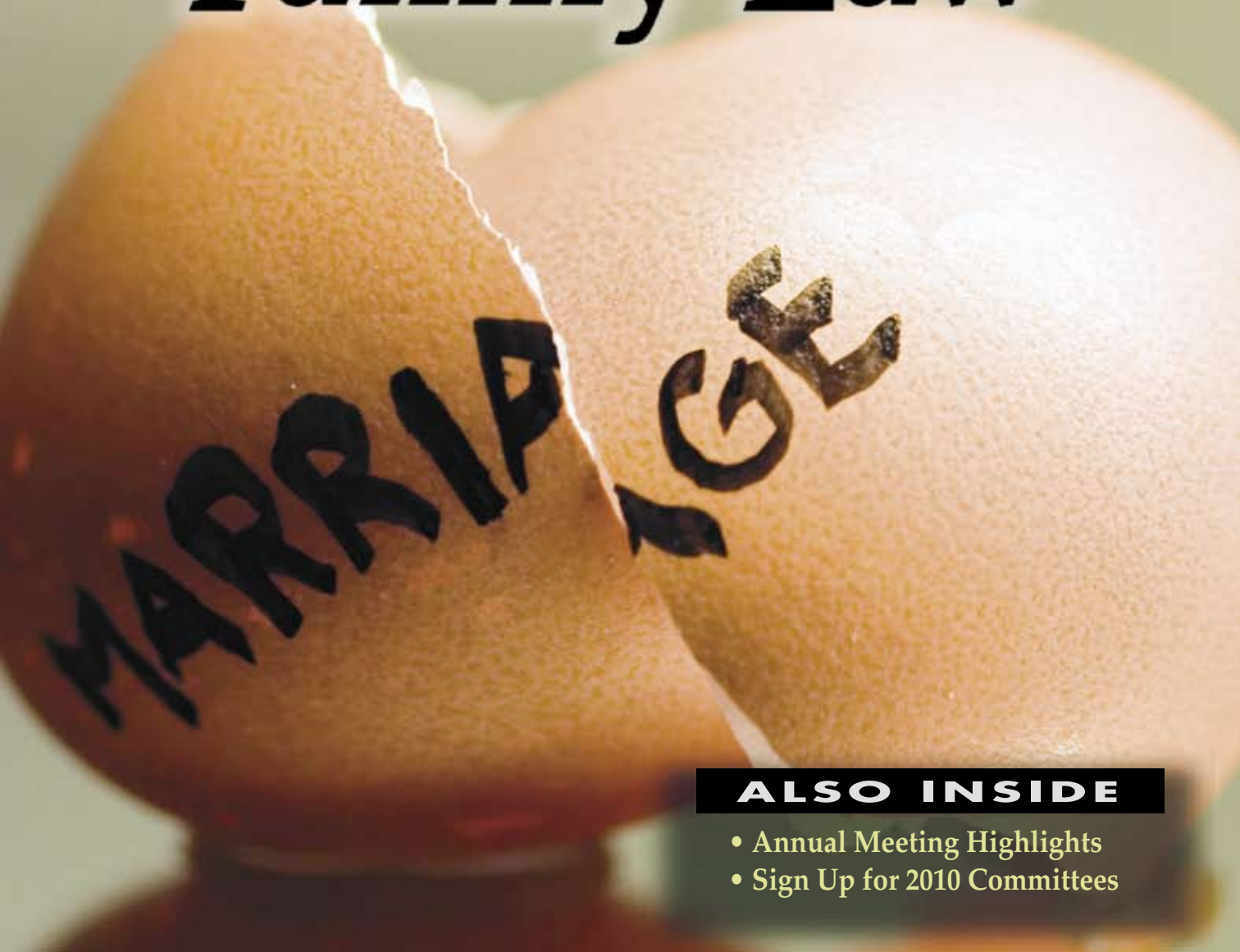


THE Oklahoma Bar JOURNAL

Volume 80 ♦ No. 31 ♦ November 21, 2009

Family Law



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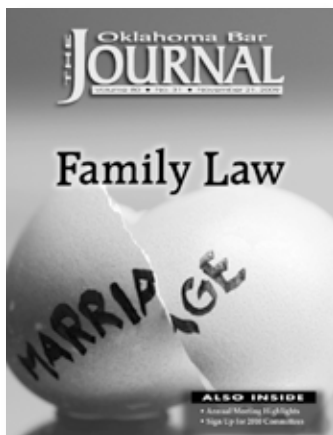
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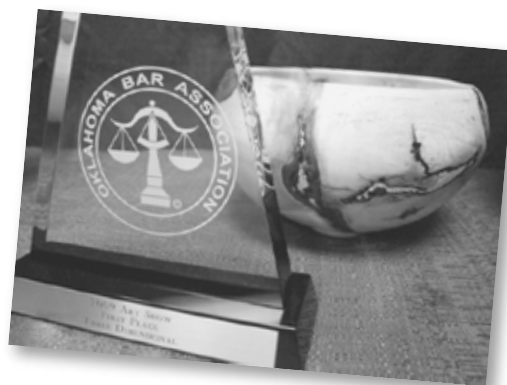
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Annual Meeting a Complete Success

By Jon K. Parsley

I am happy to report that the 105th Annual Meeting of the Oklahoma Bar Association was extremely successful! Those of you who were in attendance already know we had a great meeting. Those of you who could not make it missed out on a great event. Everyone should start planning early to attend the Annual Meeting next year in Tulsa.

The Annual Meeting was a complete success because of the OBA executive director, the other OBA directors and our wonderful staff. It is really easy to think that these types of meetings just happen or run themselves. To some extent, I always thought that in the past. This is simply not true. Now that I have seen behind the scenes, I know that every part of the meeting is the result of long hours of effort and dedication by our staff. I am proud of the work they do for us all year, but I am especially proud of the work they did on this year's Annual Meeting.

The Annual Luncheon was the highlight of the meeting. We were honored by the presence of the governor, lieutenant governor, attorney general and many distinguished members of the state and federal judiciary. We recognized the achievements of our OBA award winners. I presented president's awards to Gary C. Clark, Stephen Beam, Melissa DeLacerda, Bill Grimm, David K. Petty, Linda Thomas and John Morris Williams for the immense amount of help they have given me and our association this year. Then our keynote speaker took the podium. Gene Kranz, who was the NASA Apollo 13 flight director, gave one of the best luncheon speeches I have ever heard. Everyone in the crowd was quiet and listened to his every word. He used his experiences to teach a great lesson about teamwork, trust, loyalty and competence. The luncheon was a complete success.



Jon K. Parsley

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*Those of you
who could not
make it missed
out on a great
event.*



The Plenary Session dedicated to Abraham Lincoln celebrating the 200th anniversary of his birth was another highlight of the meeting. The first (and maybe annual) OBA Comedy Club was a hit. Henry Cho performed a hilarious set, and all in attendance got a great dose of laughter – the best medicine. The Lawyers Helping Lawyers Assistance Program was wonderful. The other CLE sessions and section meetings were great. The YLD Casino Night was another successful event. The President's Prayer Breakfast featuring Bill Paul was also a meeting highlight.

Overall, I can't say enough about the quality of this year's meeting. If you missed the meeting, I can't encourage you enough to try to attend next year. The date will be Nov. 17-19, 2010, at downtown Tulsa's Crowne Plaza Hotel. It is a great time for the lawyers of Oklahoma to come together and meet, learn and fellowship with our colleagues who are also in the business of pursuing liberty and justice for all.

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EVENTS CALENDAR

NOVEMBER 2009

26-27 **OBA Closed** — Thanksgiving Holiday

DECEMBER 2009

3 **OBA Legal Intern Committee Meeting**; 3 p.m.; Sneed Lounge; OU College of Law, Norman; Contact: H. Terrell Monks (405) 733-8686

OBA Law-related Education Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack G. Clark Jr. (405) 232-4271

8 **Death Oral Argument**; Alfred Brian Mitchell; D-2008-57; 10 a.m.; Court of Criminal Appeals Courtroom

Workers' Compensation Public Hearing; 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tish Sommer (405) 522-8710

10 **OBA Bench & Bar Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211

11 **OBA Board of Governors Meeting**; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

Oklahoma Council of Administrative Hearing Officials; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212

OBA Family Law Section Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424

12 **OBA Young Lawyers Division Committee Meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose (405) 236-0478

18 **OBA Appellate Practice Section Meeting**; 11:45 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Brian Goree (918) 382-7523

25 **OBA Closed** — Christmas Holiday

JANUARY 2010

1 **OBA Closed** — New Year's Day

For more events go to www.okbar.org/news/calendar.htm

The Oklahoma Bar Association's official Web site: **www.okbar.org**

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The New Child Support Guidelines What You Need to Know about Changes to the Guidelines Statute

By Amy E. Wilson

Few issues are as heavily litigated in family law courts as child support, and lawyers across Oklahoma should be aware that new child support guidelines enacted in June of 2008 became effective July 1, 2009. This article serves as a guide to the changes for practitioners, as well as providing background on why such changes were necessary.¹

43 O.S. §118

One of the main goals of the new legislation was to reorganize the monstrous amount of law stuffed into 43 O.S. §118. This was achieved, as it is now much easier to navigate through the guidelines and pinpoint particular citations during an actual case.

This section, which previously² contained the entirety of the guidelines, now contains only two provisions. Subsection A contains the “rebuttable presumption” language from the previous statute, and states that a child support calculation based on the guidelines is rebuttably presumed to be the correct amount. New language in subsection B lists the assumptions of what is covered by a basic child support obligation. The statute “assumes that all families incur certain child-rearing expenses.” The base child support obligation includes housing, food, transportation, basic educational expenses, clothing and entertainment.

Most of the other language from 43 O.S. §118 has been moved into the sections below.

43 O.S. §118A – DEFINITIONS

This section gives definitions that control common terms throughout the guidelines statutes.

Many of the definitions are intuitive, while others were found in the previous statutes.

- 1) **Adjusted gross income.** This term means the net income of a parent comprised of the gross income of the parent (discussed in 118B), plus any Social Security benefit paid on behalf of that parent (discussed further in 118B(G)), minus: support alimony actually paid in another case, deductions for other children (discussed in 118C), and deduction for debt service on the pre-existing, jointly acquired debt of the parents.
- 2) **Base child support obligation.** The amount from the guidelines schedule found in 43 O.S. §119 for the parents’ income and the number of children in the case. This amount is rebuttably presumed to be appropriate and does not include other expenses, such as medical and child care costs.
- 3) **Current monthly child support obligation.** This is the base child support obligation plus the proportional share of medical insurance and child care costs. Note that this includes “annualized” (or averaged) child care costs. Medical insurance and

child care are covered in more detail in subsequent sections.

- 4) **Custodial person.** This is the parent or third party who has physical custody of the child for more than 182 days per year.³
- 5) **Noncustodial parent.** This is the parent who has physical custody of the child for 182 or fewer days per year.
- 6) **Obligor.** The person who is ordered to pay child support.
- 7) **Obligee.** The person to whom child support is owed. This may include DHS or another person designated by the court.

It should be noted that due to the parenting time adjustment formula, it may be possible for a noncustodial parent to be an obligee, and for a custodial parent to be an obligor. These definitions do not address legal custody of a child, but attempt to ensure that the child receives equivalent or proportional support regardless of with which parent he or she is residing.

- 8) **Other contributions.** These are expenses not included in the current monthly child support obligation, such as recurring monthly medical and visitation transportation costs. These are not commonly included in a child support order, but the statutes make allowance for them.
- 9) **Overnight.** This is the trigger for the shared parenting (now “parenting time adjustment”) calculation. While shared parenting in Oklahoma has always been triggered by the number of overnights spent with a parent, the definition has been tightened up to require that the “overnight” be for a period of at least 12 hours and that the parent exercising the overnight must make a “reasonable expenditure of resources for the care of the child.” Shared parenting is discussed further in 118E below.
- 10) **Parent.** This definition, which cross-references the Uniform Parentage Act,⁴ may seem unnecessary and self-explanatory. In some cases, however, it might avoid litigation. For example, in cases where one parent is deceased and the child is in the custody of a third party, the noncustodial parent may attempt to argue that the custodial person’s income should be used in place of the deceased parent’s income. Under this definition, however,

it is clear that a “parent” for the purposes of the guidelines is a legal parent, not a third-party custodial person. Only the gross income of parents is used in the guidelines. (43 O.S. §118D(A)). Therefore, the income of a third party custodial person is not included for child support purposes unless that person has become a parent (presumably by adoption) under the UPA.

- 11) **Parenting time adjustment.** This term replaces “shared parenting” and refers to the credit to the child support obligation based on an increase in parenting time with the noncustodial parent.

- 12) **Payor.** This is a person or entity paying money to an obligor. If the obligor is self-employed, the obligor is also the payor.

The intent of the definitions is to ensure that terms are used consistently throughout the guidelines. There is likely some room for clarification and perhaps further definitions. Further clarification or examination is especially appropriate with regard to the term “physical custody.” The intent is to take the child support calculation out of the realm of legal custody. The term “custody” is loaded with meaning in Oklahoma law, meaning both physical possession and control of the child and the bundle of legal rights associated with parenthood.

Unless Oklahoma is willing to take on the Texas model of “managing conservator,” etc., there must be some other distinction between legal custody and physical custody. Input from private practitioners indicated they were no longer comfortable discussing parents in terms of “custodial” and “non-custodial.” In the way of compromises, this portion of the final product was not entirely satisfactory to any of the participants and could likely be improved with some clarification.

43 O.S. §118B - DEFINING ‘INCOME’

While the definition section above attempts to define terms that should be used consistently throughout the statutes, the definition of income is such a complex and integral part of calculating child support that it was given its own section.

Subsection A discusses income included for the purpose of child support. Gross income for purposes of child support is comprised of earned and passive income. “Earned income” is, intuitively, any income earned by a parent,

unless specifically excluded. The statute gives an inclusive list of types of earned income, and includes salaries, wages, tips, commissions, bonuses, severance pay and various types of military pay.

Passive income is any other type of income and includes dividends, pensions, rent, interest and trust income, support alimony from another case, annuities, Social Security and workers' compensation benefits, unemployment and disability benefits, gifts, prizes, gambling and lottery winnings, and royalties. Again, this list is inclusive, and there may be other types of passive income that can be included for the guidelines.

Subsection B discusses income excluded from the guidelines. Excluded income is an exclusive list, meaning that if a type of income is not included in the list, it is not excluded from use in the guidelines. Excluded income is money received for the benefit of a child (child support for children not before the court, adoption assistance subsidy, the child's income, foster care payments), or is means-tested, or received due to some hardship on the part of the parent (TANF, SSI, food stamps, disability payments).

Subsection C discusses the computation of gross income. The court may use the most equitable of four options:

- 1) actual monthly income (plus overtime and supplemental income as deemed equitable);
- 2) average gross monthly income for time actually employed during the previous three years;
- 3) minimum wage for a 40-hour work week; or
- 4) imputed income as discussed in subsection (D).

As under the previous statute, if the parent is permanently disabled, the court must use actual monthly gross income.

Subsection D discusses imputing income. This section allows the court to use an amount other than the actual earned income of a parent when the actual amount does not reflect the parent's true earning ability or the funds available for the support of the child. The court may use the actual or average income, or may instead impute gross income. The court must choose one method.

While the court has always had the power to impute income, this section provides clarification by giving the court guidance as to factors that may make imputation appropriate in a particular case. In considering whether or not to impute income, the court may determine if a parent is willfully or voluntarily underemployed or unemployed. The court may consider such facts as:

- Whether a parent's un- or underemployment is willful or voluntary, including whether the parent is unemployed due to training or education that will ultimately benefit the child.
- Whether there is no reliable evidence of income.
- The earning ability of the parent (past employment, education, training, ability to work).
- The lifestyle of the parent, including assets and resources owned by the current spouse that appears unreasonable for the income claimed by the parent.
- Whether the parent is a caretaker of a handicapped or seriously ill child or relative, if the care required reduces the parent's ability to work outside the home.

The court may also consider other case-specific factors as appropriate. It should be noted that these factors can be used both ways, that is, the presence of a particular factor may make it appropriate for the court to impute higher than actual income (for example, if a parent is able, by training or education, to earn more), or to impute lower than actual income, or perhaps no income at all (for example, if a parent lacks training or the ability to work and earn money). The court has great discretion on the issue of income imputation and can tailor a gross monthly income that is most appropriate in the case before it.

Subsection E discusses self-employment income, mostly in the context of what should be excluded from the gross income of the self-employed parent. Self-employment income includes income from business operations, independent contracting or consulting, sales of goods or services, and rental property income. The self-employed parent is entitled to subtract the "ordinary and reasonable expenses necessary to produce such income." The statute retains the language that clarifies that a determination of

income for tax purposes does not control for child support purposes. Accelerated depreciation, in particular, is not considered a reasonable expense and should not be deducted.⁵

Subsection F discusses the inclusion of fringe benefits as income. If a parent receives fringe benefits or in-kinds remuneration that significantly reduces personal living expenses, those benefits shall be counted as income. Fringe benefits may include company car, housing, or room and board. The statute specifically includes basic allowance for housing, basic allowance for subsistence and variable housing allowances for service members.⁶

Subsection G discusses the interaction of Social Security disability benefits and the child support guidelines. The new statute attempts to codify Oklahoma case law regarding the treatment of Social Security benefits when calculating the guidelines,⁷ and also to clarify the treatment of Social Security benefits paid directly to the obligee or minor child as a credit against child support arrears.⁸

SSA Benefits and Ongoing Support

First, the statute sets out the calculation method for setting child support when the child receives Social Security benefits based on the death or disability of a parent. The benefit amount is included as income “to the parent on whose account the benefit of the child is drawn.”

In other words, if the father is disabled and the child receives a disability benefit based on father’s disability, the child’s benefit is included in father’s income:

Father’s actual monthly income (from SSA benefit):	\$1,000.00
Amount paid by SSA to mother on child’s behalf:	\$ 500.00
Father’s total monthly gross income for child support:	\$1,500.00

The calculation continues as in any other case, through the calculation of medical insurance and child care costs. After the calculation is complete, the current monthly child support amount is compared to the amount of the benefit paid on the child’s behalf. If the guideline amount is less than the SSA benefit, no further amount is assessed to father and he owes no current monthly child support:

Child support guideline amount:	\$ 450.00
SSA benefit:	\$ 500.00
Net child support amount:	\$ 0.00

If the guideline amount is greater than the SSA benefit, father owes the difference between the amounts:

Child support guideline amount:	\$ 600.00
SSA benefit:	\$ 500.00
Net child support amount:	\$ 100.00

Any “excess” SSA benefits paid for the child over and above the guidelines amount are retained by the child’s caretaker and cannot be used to decrease the child support order or reduce arrearages. The child support form must include a notation about the use of SSA benefits.

SSA Benefits and Past Support

The formula above is to be applied to ongoing support only. It can only be applied to child support from the date a motion to modify was filed. However, the court may determine whether or not to give credit for SSA benefits paid to the child’s caretaker prior to a modification. Credit can be given for monthly payments or for lump sums. The payments must have been made to the caretaker rather than to the child, and credit can only be given for the time period of the noncustodial parent’s disability, as determined by the SSA.

43 O.S. §118C – CREDIT FOR OTHER CHILDREN

The previous guidelines statute allowed the court to consider the obligations of parents for children not before the court, and the court retains that power. Formerly, the statute required that the amount of a court order for child support, to the extent actually paid, be deducted from the parent’s gross monthly income. The previous statute allowed consideration of children in a parent’s home, but did not provide any guidance as to how that consideration would work in the guidelines.⁹

In order to qualify for the credit, the children must be:

- 1) The biological, legal, or adopted child of the parent;
- 2) born prior to the child in the case before the court;
- 3) actually supported by the parent; and
- 4) not be a child of the parents before the court.

The child must satisfy all of these criteria, or no credit may be given. The statute continues

to exclude from credit step children and other children for whom the parent has no legal obligation.

This section provides credit for two types of children who are not the children of the parents in the case before the court. Under this statute, the court will continue to credit the court ordered amount from the parent's income. Now, the court must also set an amount for in-home children according to the parent's income and the guidelines.

"Out of home children" refers to children not living in the parent's home, but who are the subject of a court order for support. Once the parent proves the existence of a support order and compliance with the order, the parent may deduct from his income the actual court-

ordered amount, "averaged to the amount actually paid over the most recent twelve month period."

"In-home children" refers to children who live in the parent's home. In order to calculate the credit for these types of children, the court determines the number of children entitled to the credit, then uses the guideline amount for the parent's income for that number of children. That amount is used as a credit from the parent's gross income in the same way that a court-ordered amount is credited.

In the example below, father is requesting credit for one child living in his home. Assuming father's monthly gross income is \$1,000, the following calculation would apply:

	Father	Mother
Parent Income Information	\$1,000	\$0.00
Number of Qualified children living in parent's home	1	
Hypothetical child support order. Apply Line 1 to Child Support Guideline Schedule for number of children in Line 2	\$206	
75% of Hypothetical child support order Line 3 x .75	\$154.50	

In this case, father is entitled to a credit of \$154.50 from his gross income, leaving him with an adjusted gross of \$845.50. The Department of Human Services is charged with preparing a deduction worksheet that will be part of the child support guidelines computation form. This calculation can be done automatically as part of a guidelines calculator.

43 O.S. §118D – THE COMPUTATION

This section contains the formula and mechanism of the guidelines. It is the "meat and potatoes" of the child support guidelines and sets out how the actual computation is to be done. As under the previous statute, child support is computed by determining the gross income of both parents and then combining the income. The combined monthly income is used to determine each parent's share of the cost of raising their child and to determine the appropriate amount of support for the child. Each parent pays his or her proportionate share of the guideline amount from the chart in 43 O.S. §119.

“The combined monthly income is used to determine each parent’s share of the cost of raising their child and to determine the appropriate amount of support for the child.”



This section also clarifies that child support is based on physical custody. In cases where the parents have split custody (that is, each parent has at least one child for whom the parents are responsible), the guidelines are calculated for each child, and then the amounts are offset. The parent owing the larger child support amount becomes the obligor and the difference between the two amounts is the child support obligation.

Much language from the previous statute has been carried over into this section.

- 1) The court may make provision for a prospective adjustment to address any foreseen changes, including changes in medical or child care costs.
- 2) The court can provide for the cost of transportation between the homes of the parents (with a new requirement that the allocation of these costs cannot significantly reduce the ability of the custodial parent to provide for the basic needs of the child).
- 3) The Summary of Support Order form (SOSO) must be prepared and presented to the judge in any case where DHS is not a necessary party. The SOSO must contain the Social Security number of the parents and the children.

It should be noted that due to privacy concerns, Social Security numbers are generally not included in the body of pleadings and orders. Instead, the SOSO allows the capturing of that data in cases where DHS is not providing services. This ensures that payments through the centralized support registry can be identified and distributed in a timely fashion. Like the district court cover sheet, the SOSO form is not filed with the court and the sensitive information contained on the form does not become part of the public court record.

43 O.S. §118E – PARENTING TIME ADJUSTMENT

This section replaces the shared parenting section in the previous statute. Much of the actual calculation remains unchanged, with a few important exceptions. The trigger for the parenting time adjustment (PTA) is 121 overnights exercised by the noncustodial parent. Once that threshold is reached, the parenting time adjustment is presumed.

Changes to the PTA:

- The PTA is presumptive, not mandatory. The presumption may be rebutted if the adjustment is not in the best interest of the child or if the increased parenting time does not result in greater expenditures.
- The formula now uses a sliding scale to determine the adjusted combined child support obligation. The adjusted child support obligation is found by multiplying the guideline amount (based on the combined gross monthly income of the parents) by a varying factor. The statute sets the factors as follows:

“(a). one hundred twenty-one (121) overnights to one hundred thirty-one (131) overnights, the factor shall be two (2),

b. one hundred thirty-two (132) overnights to one hundred forty-three (143) overnights, the factor shall be one and three-quarters (1.75), or

c. one hundred forty-four (144) or more overnights, the factor shall be one and one-half (1.5).”¹⁰

Under this scheme, the credit off the base child support more closely corresponds to the amount of time spent with the child. For example, if the incomes of the parents are equal, the noncustodial parent who spends one-third of the time with the child will receive a 33 percent reduction in child support.

- The provision prohibiting a child support award against the custodial person has been removed. Instead, the statute forbids the payment of child support “by a parent having more than two hundred five overnights,” or roughly 60 percent of the time with the child. Under this section, if the split is 59/41 or above, the custodial person may be a child support obligor. Of course, this will only occur if the custodial person is a parent and has a larger gross monthly income than the noncustodial parent.

The statute also adds a built-in protection in subsection E for the custodial person who is facing having the child support obligation lowered by the application of the PTA. First, failure to exercise the number of overnights upon which the PTA is based is a material change of circumstances that would justify a modification. Second, if the obligor fails to exercise the

number of overnights, the court can establish the amount of the PTA as a judgment, which is then enforceable like any other child support judgment. Finally, an obligor who fails to exercise the overnights faces losing the PTA for a prospective 12-month period. If that occurs, the obligor may only petition the court for reapplication of the PTA after a 12-month period of exercising the overnights without receiving the adjustment.

For example, consider the case where a mother is given a \$100 reduction in child support based on her exercising 121 overnights per year. If she fails to keep the child for 121 overnights for a period of 12 months, the following can occur:

- 1) Father can file a motion to modify to calculate the child support without the PTA.
- 2) The court can grant a judgment against mother for \$1,200 ($\100×12 months). Father can then enforce that judgment.
- 3) The court can order that even if mother begins to exercise the 121 overnights, she will not get the credit back for 12 months. So, in the modification proceeding, the court will calculate the child support without the PTA.

The changes to shared parenting set out in this section should act as assurance to custodial parents first, that the child support will not be slashed, as the “cliff effect” has been ameliorated by the variable rate set out in (D)(2), and second, there will be meaningful recourse if the PTA is granted and the noncustodial parent fails to live up to his or her side of the bargain.

43 O.S. §118F – MEDICAL SUPPORT

The new statute, based on changes to the federal regulations governing child support and Medicaid,¹¹ requires courts to go further in establishing meaningful medical support orders for children. Under this statute, the court is required to enter an order for medical support “in any case in which an ongoing child support order is entered or modified.” Medical support is defined as health insurance, cash medical support or a combination of the two. The court must make specific orders regarding how health insurance is to be provided and must require the parent ordered to provide coverage to provide proof that the health care coverage has been provided as ordered.

Medical Support Orders - Requirements

The statute sets out two requirements for medical support. The medical support order must be: 1) reasonable in cost, and 2) accessible. The statute defines “reasonable in cost” as an actual premium cost (for the child(ren) only) that does not exceed 5 percent of the gross income of the responsible parent. “Accessible” is defined as a plan with available providers that meet the child’s health care needs located no more than 60 miles one way from the primary residence of the child.

The statute also sets out a hierarchy for the court to use if multiple options are available. The court should look first for health insurance available through the parents’ employers. If both parents have this type of plan available, the court must give priority to the preference of the custodial person. If no employer-sponsored plan is available, the court next looks to other sources of private health insurance. This may include insurance available through a spouse’s employer, or a private insurance plan, such as those offered by Blue Cross/Blue Shield. If this option is not available, the court must order the parents to apply immediately for government medical assistance. In Oklahoma, this would be the SoonerCare program.

Cash Medical Support

The statute enacts a new principal in Oklahoma child support, that of “cash medical support.” Cash medical support is defined as:

- a. an amount ordered to be paid toward the cost of health coverage provided by a public entity or by a person other than the parents through employment or otherwise, or
- b. fixed periodic payments for ongoing medical costs.

43 O.S. §118F(A)(2). Cash medical support is calculated as the obligor’s pro rata share of the actual monthly medical expenses, or 5 percent of his/her monthly gross income, whichever is less.

The cash medical order can be calculated using a chart promulgated by OCSS with assistance from the Oklahoma Health Care Authority. Under this chart, if the combined income of the parents is at or below 185 percent of the federal poverty guidelines for the number of children in the case, the cash medical order is zero. If the income exceeds that amount, the cash medical order is calculated by multiplying \$115 by the number of children in the case, then

pro rating it between the parents according to their share of the combined income. The obligor's portion is added to the monthly child support amount. The cash medical order may also be used by pro rating the actual monthly medical expenses for the child if the parents have information as to those costs.

The statute allows the discontinuation of cash medical support if health insurance becomes available for the child, provided that the obligor has enrolled the child and provided notice to the obligee and DHS (as appropriate) of the enrollment.

Medical Costs and the Guidelines

As under the previous statute, the health insurance cost for the child(ren) is allocated between the parents according to their respective percentages of the combined gross income. Either the obligor's portion of the insurance amount is added to the obligor's base child support – in cases where the obligee provides the insurance – or the obligee's portion is subtracted from the obligor's base child support – in cases where the obligor provides the insurance. In the case of a cash medical support order, the cash medical support is added to the obligor's base child support without further pro rating, as the amount already represents the obligor's portion of the "actual medical cost." The parent providing health coverage must furnish proof of the insurance and documentation of any change in the cost, carrier or benefits within 30 days of the date of change.

If the medical cost changes, the court may adjust the past due or ongoing child support in accordance with the changes. This is shown in the examples below.

Example 1: Custodial person (CP) provides medical coverage at a cost of \$100 per month. The base child support is \$400 per month and the parents are each responsible for 50 percent of the child support.

- Obligor's child support order: \$200 base child support + \$50 medical insurance = \$250 total monthly amount.
- After 10 months, the coverage lapses and no coverage is in force. The CP has no cost for insurance. Eight months after that, the obligor files a motion to modify.
- During the modification, the court can find that for eight of the 18 months the order was in effect, the CP had no insurance cost.

The court can grant a credit of \$500 (\$50 x 10 months) off of obligor's past support, or give the obligor a reduction of \$500 off of the ongoing child support, at the rate of \$13.88 per month (36 month payout).

Example 2: NCP provides medical coverage at a cost of \$100 per month. The base child support is \$400 per month and the parents are each responsible for 50 percent of the child support.

- Obligor's child support order: \$200 base child support - \$50 obligee's portion of the medical insurance = \$150 total monthly amount.
- After 10 months, the coverage lapses and no coverage is in force. The obligor has no cost for insurance. Eight months after that, the obligee files a motion to modify.
- The court can find that obligor owes \$500 (\$50 x 10 months) in additional child support, since he did not actually pay the insurance for those 10 months. The \$500 can be set as a judgment and enforced like any other child support judgment.

Other Expenses and Exchanging Information

The new statute builds in some protection for parents paying out-of-pocket medical expenses. As before, uncovered expenses are paid proportionately between the parents. However, proof of those expenses must be exchanged within 45 days of receiving the explanation of benefits or other proof of the expense. If the parent incurring the expense fails to exchange the information within this time frame, or a parent fails to notify the other parent of a change in coverage or cost, the court may deny credit or reimbursement for the expense or increased premium.

Changes in insurance costs should be addressed in a review of the order for modification as set out in Section 118I.

43 O.S. §118G – CHILD CARE

As before, the new guidelines statute allows the court to make provision for child care expenses. This section provides that child care expenses must be "reasonably necessary to enable either or both parents to: 1) Be employed; 2) Seek employment; or 3) Attend school or training to enhance employment income."¹² The child care costs should be annualized (or averaged), allocated between the parents according to their percentages, then added to

the base child support, becoming part of the final child support order. While adding in the child care to the final amount is not always a popular policy, under Oklahoma case law, it is more appropriate.

Child Care When DHS is Not Providing a Subsidy

First and foremost of any discussion of child care expenses must be a consideration of *Barnes v. Barnes*, 2005 OK 1. In that case, the Oklahoma Supreme Court ruled it was error when a trial court did not include a determination as to the amount of child care expenses.¹³ The court found that “[u]nder Oklahoma statute, child care expenses are to be considered a part of the total child support due to the mother, and it is also collectable in an income assignment...”¹⁴ Guided by this unambiguous statement by the Supreme Court, the statute includes child care amounts as part of the final monthly child support order.

Again, standard fluctuations in child care amounts are often a known quantity at the outset of a case. For example, it is common knowledge that child care costs are higher in the summer than during the school year. Child care is often abated during extended visitation periods with the non-custodial parent. These issues can be taken into account during the process of annualizing or averaging. During negotiation, discovery and sometimes trial, evidence is accrued with regard to the cost of child care, when it will be used and when the costs will change. The order can reflect those changing circumstances without bringing the parties back to court with each fluctuation.

Changes occurring outside of the expected pattern, like any other change in the expenses or income of the parties, are best handled by a motion to modify. Participants in a DHS child support case can use the administrative process to file for modification free of charge. Standard forms (available at www.okdhs.org/library/forms/default.htm) enable most parents to file for modification pro se and avoid attorney’s fees.

Child Care When DHS is Paying a Subsidy

This language has been in the statute since 2006. The intent of the section is to quantify the child care co-payment paid by an obligee who receives a child care subsidy from DHS. This gives the court a specific way of dealing with a foreseeable change of circumstances in the immediate future. See e.g., 43 O.S. §118(E)(21) (as currently in effect) and 43 O.S. §118D(F). In

the situation where DHS is providing a child care subsidy, the co-payment amount fluctuates as the parent’s income increases or decreases. Child support is considered income when determining qualification and amount of a child care subsidy. The calculation is as follows:

- 1) Take the base child support obligation of the parent who is not paying the child care expense and add it to the custodial parent’s actual income.
- 2) Refer to the chart showing child care subsidy co-payment amounts. (The chart is available at tinyurl.com/yz9qjfk) Find the appropriate co-pay for the obligee’s new income (*i.e.*, income after child support is received).
- 3) That co-pay is used on the guidelines chart as the child care amount. The noncustodial parent is responsible for his or her pro rata share of the co-pay amount.

In a nutshell, the child care co-payment is a known quantity that will change shortly after child support is ordered. Therefore, it is appropriate for the court to make provision for it in the child support order, rather than forcing the obligee to move for modification.

As required by statute, DHS has promulgated administrative rules to provide clarification and fill in the gaps for real-world scenarios. The policy for DHS in general and for child support in particular can be found at www.okdhs.org/library/policy/ and at the Oklahoma Secretary of State’s Web site. Specific child support policy is included in the “Oklahoma Laws and Administrative Code Relating to Child Support” booklet distributed free of cost throughout the year.

Parents Providing Child Care

The statute continues to allow parents to provide child care while the other parent is at work or attending school or training “if it would lead to a significant reduction in the actual annualized child care cost.”

43 O.S. §118H – DEVIATIONS

As under the previous statute, the court may find that the child support guidelines amount is inappropriate under the facts of a particular case and may deviate from that amount, either increasing the child support order or decreasing it. The new statute bases all deviations on the best interests of the child involved, and

allows the court to deviate only after meeting the best interests test. Additionally, the court must find one of these factors is present:

- a. the amount of support so indicated is unjust or inappropriate under the circumstances,
- b. the parties are represented by counsel and have agreed to a different disposition, or
- c. one party is represented by counsel and the deviation benefits the unrepresented party.

43 O.S. §118H(B)(2). No deviation may be made that "seriously impairs the ability of the obligee in the case under consideration to maintain minimally adequate housing, food, and clothing for the children being supported by the order or to provide other basic necessities, as determined by the court."¹⁵

The court must support any deviation with specific findings of fact, which must include the reasons for the deviation, the guideline amount of child support, and a finding of how the deviation serves the best interest of the child and how the application of the guidelines would be unjust or inappropriate.

The statute allows for deviation:

- in cases of extreme economic hardship;
- if a child in a parent's home has extraordinary medical needs (the court must consider all other resources available for meeting those needs);
- in cases where the child is in foster care and the deviation will assist in returning the child to the parent.

The court may also add amounts to the child support obligation as a deviation where there are extraordinary education needs for a child with a disability, or for special expenses, such as music lessons, private school tuition, travel or other special expenses that the income of the parents will support.

43 O.S. §118I – MODIFICATION

This section combines all the modification language from the previous statute. Child support orders are modifiable upon material changes in circumstance, which include, but are not limited to:

- an increase/decrease in the needs of the child;
- increase/decrease in parental income;
- changes in annualized child care costs;

- changes in medical costs;
- one of the children ages out.

Bases for modification throughout the guidelines statutes:¹⁶

- 1) The number of overnights is below or in excess of the designated nights used to determine the PTA¹⁷
- 2) Change in the health insurance premium¹⁸
- 3) An increase or decrease in the child's needs¹⁹
- 4) An increase or decrease in the parties' income²⁰
- 5) Changes in actualized annual child care expenses²¹
- 6) When one of the children ages out or is no longer entitled to support.²²

Modifications continue to be effective based on the filing date, absent an agreement of the parties or a court finding that the material change of circumstances actually occurred later than the filing date. The statute also still prohibits retroactive modifications. In other words, a court can order that a modification is effective later than the filing date, but not *prior* to the filing date. Child support orders are aggregates and are not "per child" orders. A child aging out is not an automatic modification, but rather, the parents must seek a modification from the court. The statute does clarify that child support automatically terminates once the youngest child ceases to be entitled to support.

With regard to the informal review and adjustment process and the exchange of income information, the court can make provision or the parties can agree to the periodic exchange of information. If the order does not contain such a provision, either party can request the information and it must be provided within 45 days. This information can include verification of income, proof and cost of medical insurance of the children, and current and projected child care costs, as well as information regarding overnights for the PTA. Modification agreements must be in writing using the standard modification forms (available on the OKDHS Web site) and the child support computation form.

CONCLUSION

The changes to the guidelines statutes are not minor. However, due to the reorganization and clarification of different topics within the guidelines, the end result should be a product that is easier to access and use for practitioners and

the public alike. Updates to the automatic child support calculator will also help to ease the transition period.

1. *A note about the numbering:* The sections are number 43 O.S. §118, 118A, 118B, etc. The numbering scheme was determined by legislative staff. Citations will be a little unwieldy due to the use of this scheme. For example, a citation to the definition for “parent” will be 43 O.S. §118A(10). However, having the material broken down into separate statutory sections should still make using the guidelines easier for practitioners.

2. For the purposes of this article, references to the “previous” statute will be to the version of 43 O.S. §118 that was in effect through June 30, 2009. Reference to the “current” statute will reference the statutory changes in SB 2194, effective July 1, 2009.

3. The reference to “days” in this and in subsection (5) are believed to be a result of a scrivener’s error, according to the author of this article. The text should read “overnights.”

4. “Parent” means an individual who has established a parent-child relationship under Section 5 of this act.” 10 O.S. §7700-102(13). “Parent-child relationship” means the legal relationship between a child and a parent of the child. The term includes the mother-child relationship and the father-child relationship.” 10 O.S. §7700-102(14).

5. See e.g., *Fisher v. Fisher*, Court of Civil Appeals unpublished opinion #102,872 (Division 3, 2007).

6. See e.g., *Hees v. Hees*, 2003 OK CIV APP 103.

7. *Nazworth v. Nazworth*, 1996 OK CIV APP 134.

8. See e.g., *Merritt v. Merritt*, 2003 OK 68.

9. See 43 O.S. §118(C).

10. 43 O.S. §118E(D)(2).

11. See Federal Action Transmittal 08-08.

12. 43 O.S. §118G(A).

13. *Id.* at ¶ 16.

14. *Id.* at ¶ 18.

15. 43 O.S. §118H(A).

16. With thanks to Julie Rivers for her concise list in her paper “Child Support For The New Millennium: The Good, The Bad And The Ugly” presented on Sept. 10, 2008, during an OBA Webcast.

17. 43 O.S. §118E(E).

18. Located both at 43 O.S. §§118F(K) and 118I(A)(1).

19. 43 O.S. §118I(A)(1).

20. 43 O.S. §118I(A)(1).

21. 43 O.S. §118I(A)(1).

22. 43 O.S. §§118I(A)(1) and (C).

ABOUT THE AUTHOR



Amy E. Wilson graduated from the University of Tulsa College of Law in 2000, and was licensed to practice law in September 2000. She worked as an intern in the Public Defender’s Office for Tulsa County. She has been a state’s attorney for Oklahoma Child Support Services since February 2001.

Ms. Wilson presently serves as Appellate and Legal Research Counsel for OCSS. She is the 2009 chair of the OBA Family Law Section.

NOTICE OF PUBLIC HEARING on the SCHEDULE OF MEDICAL and HOSPITAL FEES

The Oklahoma Workers’ Compensation Court Administrator will hold a public hearing on **Tuesday, December 8, 2009 at 1:00 p.m. in Emerson Hall at the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, OK.** The purpose of the hearing is to receive public comments regarding revision of the workers’ compensation Schedule of Medical and Hospital Fees.

The proposed fee schedule changes are available online at:

www.owcc.state.ok.us/Whats_New.htm

Comments concerning the draft fee schedule are encouraged and requested to be submitted in writing at or before the public hearing. Submit comments to the Workers’ Compensation Court Administrator, 1915 N. Stiles Ave., Oklahoma City, OK 73105, or electronically to FeeScheduleComments@owcc.state.ok.us.



Is Common Law Marriage Here to Stay in Oklahoma?

By Michelle C. Harrington

Common law marriage (more properly referred to as a “pre-Tridentine canonical consensual marriage,” according to the venerable Justice Opala)¹ is a doctrine which existed in England prior to the colonization of America. The sole requirement for a common law marriage was an agreement to be married. The United States Supreme Court considered the validity of the common law marriage in 1843² and finally approved the doctrine in 1877. At that time the United States was barely 100 years old — there were vast stretches on the frontier where churches and courthouses were scarce and individuals with the authority to marry others were a rarity. Recognizing common law marriage allowed women the protections of marriage at a time when single women did not have property (or voting) rights, and further allowed for the protection of children who would otherwise be labeled “illegitimate” (children born outside of wedlock did not have rights for support or inheritance). The only difference between a common law marriage and a ceremonial marriage is the formality with which they occur. Both are equally valid in Oklahoma.

At the turn-of-the-century nearly two-thirds of the states recognized common law marriages. Today, Oklahoma is one of only a handful of jurisdictions which still recognize the doctrine³ — in spite of the fact that for decades opponents of the doctrine have tried to abolish it. Early in our history, statute required a marriage license be obtained prior to getting married.⁴ Nevertheless, the common law marriage doctrine prevailed with courts indicating the

statute is directory and not mandatory.⁵ Legislative opponents of common law marriage thought they had succeeded in their mission to rid Oklahoma of the doctrine when they added a term to the marriage license statute which stated that requirements therein are mandatory and not directory.⁶ However, that language was not strong enough to overcome Title 12 O.S. Section 2. That statute states:

The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.

In other words, if the Legislature wants to overcome a common law, it better be very specific. To date we do not have a specific statute that states common law marriage will no longer be recognized in Oklahoma. But not for lack of

legislative attempts — bills have been drafted over the years attempting to do just that — they just haven't made it through both legislative houses. So here we are, with common law marriage alive and well in Oklahoma.

COMMON LAW MARRIAGE REALITIES

*Estate of Phifer*⁷ summarized decades of case law to set forth necessary “elements” to determine if a common law marriage existed. The party asserting a common law marriage has the burden to prove 1) an actual and mutual agreement between the parties to be husband and wife; 2) a permanent relationship; 3) an exclusive relationship; 4) cohabitation as man and wife; and 5) the parties to the marriage must hold themselves out publicly as husband and wife.

Phifer should have used the word “characteristics” instead of “elements” because, as subsequent case law indicates, not all five items need to be present.⁸ By the time the matter comes before the court, one party is obviously denying there was mutual agreement to be husband and wife. “Permanent” is rather nebulous, too — the fact that they are before the court indicates that the relationship is not going to be permanent. Having sexual relations outside of marriage is not going to, on its own, defeat a common law marriage claim any more than adultery within a ceremonial marriage invalidates the marriage. And the same can be said for cohabitation — the parties do not have to actually reside together for a marriage to be proven. Evidence of the parties holding themselves out to the public to be husband and wife will be one of the strongest indicators of what the parties' intent was *at the time a common law marriage was created*.

Testimonial evidence from family, friends, professional acquaintances, neighbors and community members as to whether or not the parties behaved in a way that was consistent with being married is important — such as the parties referring to each other or introducing each other in spousal terms. Documentary evidence can range from something as seemingly minor as nametags declaring “Mrs. His-last-name” for a professional function, to listing the other party as a spouse for the purpose of obtaining a benefit, to the taken-under-oath documents such as income tax returns. The court can look to the totality of the circumstances. For instance, an income tax return wherein a party signs off as a single person

COMMON LAW MARRIAGE MYTHS

1. **Living together seven years (or any other magic number) creates a common law marriage.** There is not, nor has there ever been, a minimum time of cohabitation that automatically creates a common law marriage in Oklahoma.
2. **Filing joint tax returns is an admission of common law marriage.** Not necessarily — the court will look at the totality of the circumstances. For instance, whether or not the community believes the parties were married or if there is contradictory evidence such as real property deeded to a party as a “single person.” However, there is a caveat. Although signing the joint return does not automatically create a common law marriage, it does create an opportunity for opposing counsel to enjoy the rare Perry-Mason-moment where he can ask: “Were you lying to the United States government and attempting to commit fraud or are you lying today about the existence of a marriage?”
3. **Signing a hotel registry “Mr. and Mrs.” shows intent to be married.** Some years back this may have been persuasive. Today, without more substantiating evidence, the court may be very clear on the intent of the signing party and may conclude that the intent had nothing to do with marriage.

“With the plethora of churches,
courthouses and persons
authorized to marry couples,
does common law marriage still
serve a useful purpose?”

may not defeat a common law marriage claim when there is also real property deeded to the parties “as married persons” as well as testimonial evidence about the parties referring to each other as “husband” and “wife.” The party asserting the existence of the common law marriage has the burden to prove it by clear and convincing evidence.⁹

TERMINATING THE COMMON LAW MARRIAGE

There is no such thing as a common law divorce. Because a common law marriage is a valid marriage, it must be terminated the same way that a ceremonial marriage is ended — either by death, annulment or divorce. Many don’t think such formal actions are necessary when no formal action was taken to solemnize the marriage. So what if they filed joint income taxes for two years? So what if they had a bank account on which the female partner used her partner’s surname? Who will care if they just go their separate ways and start living as single persons if they are both in agreement to do so? Probably no one for a while. Until there is money to be had. The potential to receive alimony, property, inheritance, death benefits and other financial incentives can really jog a memory. Because a common law marriage is a valid marriage, any subsequent marriage entered into without terminating the common law marriage would be bigamous and, thus, void. Therefore, a common law spouse could actually receive benefits intended for a subsequent life partner.

If a party is denying that a common law marriage exists in response to a petition for dissolution of marriage, the court must conduct an evidentiary hearing to determine whether or not there exists a valid marriage before the divorce can proceed. If the court determines that the parties did indeed have an intent to be married and a common law marriage was established, the dissolution of marriage proceeding

can go forth and the court can award alimony, divide property and divide debts of the parties in an equitable manner. If it is determined no common law marriage exists, the parties must seek available relief through other civil actions such as paternity or contract suits.

Similarly, if a common law marriage is asserted at the time of a party’s death that was not previously acknowledged, the probate court must determine whether or not a common law marriage existed before it can properly distribute the estate of the deceased. In addition, entities disbursing death benefits, such as a workers’ compensation court, has the same duty to ascertain whether or not a common law marriage exists if a claim is made.

Not properly terminating a common law marriage at the time it physically ends can have significant repercussions — often years later. One of the harshest consequences is the voiding of a later marriage, thus resulting in a denial of inheritance or death benefits to an individual who lived as a spouse in good faith and had an expectation — and often a great need - for the financial protection.

THE DEBATE CONTINUES

With the plethora of churches, courthouses and persons authorized to marry couples, does common law marriage still serve a useful purpose? Many say no.¹⁰ Opponents of the doctrine argue that we are no longer a paternalistic society wherein women do not have education and property rights consistent with the male population; thus, women do not need the protection of the defacto marriage as they once did. Further, children’s rights to be supported and entitled to inheritance can be ascertained through paternity actions. And the morals of our society have shifted to the point where a child being born out of wedlock does not carry the dramatic stigma it once did. As a matter of fact, it is statutorily incorrect to refer to a child born outside of marriage as “illegitimate” or a “bastard”¹¹ (the statute does not address the use of the latter term to describe individuals when not referring to parentage).

Public policy arguments can be made to abolish common law marriage. If only ceremonial marriage was recognized, public records would be clear; citizens would not be able to avoid a jurisdiction’s statutory requirements; fraud in the transmission of property would be reduced; and the ability of the state to enforce health-related marital requirements through the licens-

ing process could be effectuated. One set of authors express concern about putting judges in the position of having to determine whether or not a marriage exists:

The “curative powers” of common law marriage can serve a double-edged sword. Important to the outcome in any case can be the proclivity of the particular court to try to find a socially desirable solution under the circumstances by manipulating facts in terms of rules of evidence, or by the presumption of validity of the most recent marriage, the probative value of the ceremony, the presumption of favoring legitimacy, or shifting the burden of proof. Significant in many cases is the context or proceeding in which the question is raised; the potential here is vast, including questions of the availability of the husband-wife privilege in criminal cases, whether a prior will was revoked, whether the appropriate action for dissolution should be divorce or annulment and what this will mean in terms of support, determination of an insurance beneficiary, or the ordering of heirs under intestacy law.¹²

Removing the obligation to have evidentiary hearings (regarding the proof needed to establish a common law marriage) in a myriad of legal actions would result in judicial efficiency.

On the other hand, there is support for common law marriage. One author states that failure to recognize the doctrine has a negative effect on women — especially those who are widowed, abandoned, victims of domestic violence, minorities and persons of color.¹³ Local proponents for common law marriage are concerned that innocent spouses would be denied rights and benefits they would otherwise be entitled to but for fraud or mutual mistake. A few states have “putative spouse” statutes that allow the court to declare a putative spouse status on one who had good-faith belief that he was married in spite of the fact that the marriage does not actually exist.¹⁴ Oklahoma does not have such a statute. At this time, it is possible that a party could think he was married for years and find out after the death of his spouse that, because of a technicality (such as the person who officiated the marriage did not have the legal authority to do so) he was not. Without the recognition of common law marriage, such a person would not be entitled to any death benefits or inheritance from his long-time partner.

CONCLUSION

In order for common law marriage to be abolished in Oklahoma there has to be a statute that is specific about doing so. The doctrine could be statutorily abolished entirely or prospectively, allowing recognition of the existence of a common law marriage created prior to the enactment date. But until that happens, people in this state can continue to create valid marriages by holding themselves out publicly to be married and behaving in a way that evidences intent to be married. And the debate about whether or not there is a valid purpose for the doctrine of common law marriage to exist in Oklahoma is sure to continue.

1. *Mueggeborg v. Walling*, 1992 OK 121, 836 P.2d 112 (S. Ct. 1992).

2. *Jewell's Lessee v. Jewell*, 42 U.S. (1 How.) 219 (1843).

3. The other states still recognizing common law marriage are Alabama, Colorado, Iowa, Kansas, Montana, Rhode Island, South Carolina, Texas, Utah and the District of Columbia. There are some additional states that recognize a common law marriage if it was established prior to a statutory date.

4. Title 43 O.S. Sect. 4.

5. See *Reaves v. Reaves*, 1905 OK, 15 Okla. 240, 82 P. 490 and *In re Love's Estate*, 1914 OK 332, 142 P. 305 (Okla. 1914).

6. Title 43 O.S. Sect. 5(E).

7. 1981 OK CIV APP 21, 629 P.2d 808.

8. *Standefor v. Standefor*, 2001 OK 37, 26 P.3d 104.

9. *Mueggeborg v. Walling*, 1992 OK 121, 836 P.2d 112 (S. Ct. 1992).

10. Numerous commentators have addressed arguments for and against the continued viability of the common law marriage doctrine. For a summary of arguments most often used by opponents to common law marriage, see McCormack, John L., “Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage,” 42 Valparaiso University Law Review 461, (Winter 2008).

11. Title 10 O.S. Sects. 1.1 and 1.2.

12. *Domestic Relations Cases and Materials*, Fifth Edition, by Wadlington and O'Brien (University Casebooks 2002).

13. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or.L.Rev. 709, 769-770.

14. Examples of Putative Marriage Statutes can be found in the state codes for California, Colorado, Illinois, Louisiana, Minnesota and Montana.

ABOUT THE AUTHOR



Michelle C. Harrington graduated in 1992 from OU. She is a solo practitioner whose practice is limited to family law and guardian ad litem representation. She has been an adjunct professor at OCU School of Law since 1999 teaching family law and ADR in family law. Additionally, she is on the teaching faculty for Interdisciplinary Training for Child Abuse and Neglect. She is a master member of the Ruth Bader Ginsburg Inn of Court and serves as president-elect for the OKC Downtown Chapter of the National Exchange Club.

**The Government and Administrative Law Section
presents**

Current Issues in Public Sector Law

Oklahoma History Center-Chesapeake Room
2401 N. Laird Avenue, Oklahoma City, Oklahoma 73105
Friday, December 11, 2009
9:00 a.m. to 5:00 p.m.

Morning Session

- | | |
|----------------|--|
| 9:00 to 9:20 | Registration- Continental Breakfast |
| 9:20 to 9:30 | Welcome and opening comments |
| 9:30 to 10:20 | David Lee, Esq.
An Update on State Court Litigation against Public Entities & Officials |
| 10:25 to 11:15 | Micheal Salem, Esq.
Current Trends in 1983 Litigation: New Pleading Requirements |
| 11:20 to 12:10 | Andrew W. Lester, Esq.
A Board Member's Perspective on Ethics for the Government Lawyer |
| 12:10 to 1:30 | <i>Lunch on your own</i> |

Afternoon Session

- | | |
|--------------|---|
| 1:30 to 2:20 | Garvin Isaacs, Esq.
Trial Techniques |
| 2:30 to 3:00 | Afternoon break |
| 3:10 to 4:00 | Mike Crawford, CPA.
Auditing Public Entities/ Legal Implications |
| 4:10 to 5:00 | Margaret Love, Esq.
Whistle blowers |

REGISTRATION: Section Members email Name and Bar Number to ppodolec@flash.net; non-members mail \$25.00 check payable to OBA c/o Treasurer Scott Boughton, Assistant Attorney General, 313 NE 21st St., OKC, OK 73105 before 12/1/09. (6 Hrs. CLE credit pending, including one hour of ethics.)



For Better or Worse: The Union of Family Law and ERISA

By Kenni B. Merritt

Family law frequently intersects with the federal law of ERISA¹ in a complex union. For better or worse, family law attorneys must often deal with employee benefits and ERISA issues, and benefits attorneys must often deal with family law matters. In this article, I will try to demystify ERISA for the family law practitioner. I will discuss the interplay of family law and ERISA and recent developments in some of the key employee benefit issues that typically arise in family law matters.

ERISA is a federal statute that governs employee benefit plans. Under ERISA, “plan” means an employee benefit plan, which can be either a welfare plan or a pension plan.² Employee *welfare* benefit plans are plans established or maintained by an employer that provide welfare benefits such as medical, disability and death benefits. Employee *pension* benefit plans, commonly referred to as retirement plans, are plans established or maintained by an employer that provide retirement income to employees or result in a deferral of income by employees for periods extending to the termination of employment or beyond. Employee benefit plans are governed by both ERISA and the Internal Revenue Code. The U.S. Department of Labor and the Internal Revenue Service have dual jurisdiction over the regulation of employee benefit plans.

QUALIFIED DOMESTIC RELATIONS ORDERS

Under ERISA and the Internal Revenue Code, the benefits of an employee pension plan participant generally may not be assigned or alienated. The law provides an exception for domestic relations orders that relate to child support, alimony payments or marital property rights of

a spouse, ex-spouse, child or other dependent of a plan participant. The exception applies only if the domestic relations order meets specific legal requirements that make it a *qualified* domestic relations order, or “QDRO.”³

A QDRO is a domestic relations order that gives a so-called alternate payee, *i.e.*, the retirement plan participant’s spouse, former spouse, child or other dependent, the right to receive plan benefits and that meets certain other requirements.⁴ A state authority, generally a court, must actually issue a judgment, order or decree or otherwise formally approve a property settlement agreement before it can be a domestic relations order under ERISA. The mere fact that a property settlement is agreed to and signed by the parties will not cause the agreement to be a domestic relations order. A domestic relations order may be issued by any state agency or instrumentality with the authority to issue judgments, decrees or orders, or to approve property settlement agreements, pursuant to state domestic relations law.⁵

In drafting a QDRO, the family law practitioner must provide the following required information: 1) the name and last known mailing address of the participant and each alternate

payee; 2) the name of each plan to which the order applies; 3) the dollar amount or percentage or the method of determining the amount or percentage of the benefit to be paid to the alternate payee; and 4) the number of payments or time period to which the order applies.

In addition, there are certain provisions that a QDRO must *not* contain. The domestic relations order must not require the plan to: 1) provide an alternate payee or participant with any benefit or option not otherwise provided under the plan; 2) provide for increased benefits; 3) pay benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO; or 4) pay benefits to an alternate payee in the form of a qualified joint and survivor annuity for the lives of the alternate payee and his or her later spouse.⁶ If an alternate payee is a minor or is legally incompetent, the order can require payment to someone with legal responsibility for the alternate payee, such as a guardian or a party acting *in loco parentis* in the case of a child, or a trustee as agent for the alternate payee.

The administrator of the employee benefit plan that provides the benefits affected by a domestic relations order is initially responsible for determining whether the order is a “qualified” domestic relations order. ERISA and the Internal Revenue Code impose specific responsibilities on the retirement plan administrator to determine whether a domestic relations order is a QDRO. Plan administrators, as plan fiduciaries, are required to discharge their duties prudently and solely in the interest of plan participants and beneficiaries. Among other things, plans must establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions pursuant to qualified orders. Administrators are required to follow the plan’s procedures for making QDRO determinations. Administrators also are required to furnish notice to participants and alternate payees of the receipt of a domestic relations order and to furnish a copy of the plan’s procedures for determining the qualified status of such orders.

Family law practitioners can use QDROs for a number of purposes. QDROs are used to give a divorced spouse his or her share of retirement plan benefits. Also, QDROs can be a valuable source for collection of overdue child support and maintenance obligations. Through the use of a QDRO, a spouse, former spouse, child or

other dependent of an employee or former employee who is a participant in an employee benefit plan may be able to collect up to 100 percent of all debt owed.⁷ In addition, for an obligor who is receiving benefit payments from a plan, by ordered periodic distribution of the obligor’s benefits, a QDRO can assure timely and consistent support payments until all minor children emancipate.⁸

To meet ERISA’s QDRO requirements, the language of a domestic relations order as part of a divorce decree must be unambiguous and must specifically reference the plan. It is important to recognize that ERISA preemption does not apply to QDROs. To avoid ERISA preemption, a domestic relations order as part of a divorce decree must substantially comply with ERISA’s requirement for QDROs, including specifically naming the alternative payee and specifically referencing the plan. In addition, family law practitioners should be aware that, even though ERISA’s QDRO rules apply by their terms only to employee pension plans, courts often require employee welfare plans to comply with QDROs.

The U. S. Department of Labor Web site⁹ has some helpful information about QDROs, including a set of FAQs.

QUALIFIED MEDICAL CHILD SUPPORT ORDERS

ERISA requires that a group health plan provide benefits in accordance with a qualified medical child support order (QMCSO).¹⁰ A QMCSO is a medical child support order that creates or recognizes the right of an “alternate recipient” to receive benefits for which a participant or beneficiary is eligible under a group health plan or assigns to the alternate recipient the right of a participant or beneficiary to receive benefits under a group health plan. Any child of a participant in a group health plan who is recognized under a medical child support order as having a right to enrollment under the plan with respect to such participant is an alternate recipient. A medical child support order must be recognized by the health plan as “qualified” if it includes certain information and meets other requirements of ERISA’s QMCSO provisions. ERISA also requires that a properly completed National Medical Support Notice must be treated as a QMCSO.

A medical child support order is not required to be issued by a state court. Any judgment,

decree or order that is issued by a court of competent jurisdiction or an administrative agency authorized to issue child support orders under state law (*i.e.*, a state child support enforcement agency) and that provides for medical support of a child is a medical child support order.

A medical child support order must contain the following information in order to be qualified: 1) the name and last known mailing address of the participant and each alternate recipient (the order may substitute the name and mailing address of a state or local official for the mailing address of any alternate recipient); 2) a reasonable description of the type of health coverage to be provided to each alternate recipient or the manner in which such coverage is to be determined; and 3) the period to which the order applies.¹¹

As with QDROs, there are certain provisions that a QMCSO must not contain. A medical child support order may not require an employee benefit plan to provide any benefit or option not otherwise provided under the plan, except to the extent necessary to meet the requirements of certain state laws.

The administrator of the group health plan is required to determine whether a medical child support order is qualified. The administrator is required to make this determination within a reasonable period of time, pursuant to reasonable written procedures that have been adopted by the group health plan. The administrator must first notify the participant and the alternate recipient of the receipt when the plan receives a medical child support order and must give them copies of the plan's procedures for determining whether it is qualified, and then the administrator must notify those parties of its determination whether or not the order is qualified.

Often, an employee named in a medical child support order is eligible to participate in the group health plan but is not enrolled in the plan. In this situation, the plan administrator must determine if the order is qualified and, if it is, the plan must provide coverage to the child. If the employee is eligible to participate

in the plan, the child must be covered. If, as a condition for covering his dependents, the employee must be enrolled, the plan must enroll both.

The U.S. Department of Labor Web site¹² has some helpful information about QMCSOs.

COBRA

“One of COBRA's qualifying events is loss of plan coverage due to the divorce or legal separation of an employee covered by a group health plan.”

COBRA¹³ allows certain individuals to extend employer-provided group health coverage if they would otherwise lose the coverage under a group health plan subject to COBRA due to certain qualifying events. One of COBRA's qualifying events is loss of plan coverage due to the divorce or legal separation of an employee covered by a group health plan. Entry of a divorce decree, rather than just filing for divorce, is the qualifying event for the spouse who

loses group health plan coverage. It's important to note that legal separation, which is not defined in COBRA, may not result in a loss of health plan coverage under the plan's terms, in which case there would be no COBRA qualifying event.

There are special COBRA rules that apply if an employee cancels the group health plan coverage of the employee's spouse in anticipation of divorce.¹⁴ A participant in a group health plan may decide to drop coverage for his or her spouse even before filing for divorce. COBRA is generally only available if the individual is covered by the plan on the day before the qualifying event. So, but for the application of special COBRA rules for this situation, the dropped spouse would not be entitled to COBRA. But under the special COBRA rule, the elimination or reduction in coverage in anticipation of divorce is disregarded in determining whether the divorce caused a loss of coverage. Under these special rules, upon receiving notice of a divorce or legal separation, a plan that is required to make COBRA continuation coverage available to the spouse must begin to make coverage available as of the date of the divorce or legal separation.

The Department of Labor Web site¹⁵ and the Internal Revenue Service Web site¹⁶ have helpful information about COBRA.

COMPETING CLAIMS FOR PLAN BENEFITS

Disputes often arise, *i.e.*, between the current spouse and the ex-spouse or between the ex-spouse and the participant's kids, as to who is entitled to payment of plan benefits upon the death of a participant in an ERISA plan. Competing claims may arise when a person other than the designated beneficiary asserts a claim to the plan benefits. Such claims asserted under state law or pursuant to a divorce decree or other state court order frequently raise difficult ERISA issues, including thorny ERISA preemption questions.

A basic rule in ERISA and the Internal Revenue Code is that an employee benefit plan must be operated in accordance with the terms of the plan document. The U.S. Supreme Court in its recent *Kennedy* decision¹⁷ adopted the "plan documents rule" in the context of beneficiary designation disputes. This rule requires plan administrators to act in accordance with the documents and instruments governing a plan when there are beneficiary designation disputes. In *Kennedy*, the court held that, upon the death of a participant in a pension plan, the plan administrator properly paid benefits to the participant's ex-wife who was designated as his beneficiary, but who had many years before waived her right to benefits in a divorce decree. The participant's daughter, as executrix of his estate, filed a claim for her deceased father's pension plan benefits. The court said that the plan administrator was not required to recognize the ex-wife's waiver because the administrator was required under ERISA to pay benefits to the participant's designated beneficiary in accordance with the documents and instruments governing the pension plan. The ex-wife's waiver in the divorce decree was determined not to be a QDRO. A QDRO by definition requires that it create or recognize the existence of an alternate payee's right to, or assignment to an alternate payee of the right to, receive benefits payable under a plan.

The *Kennedy* decision gives ERISA plan administrators more certainty in following plan participant directions on death benefits regardless of conflicting divorce decrees or state laws. Family law practitioners should be aware that, as a result of the *Kennedy* decision, employee benefit plans may ignore waivers that are not permitted by the employee benefit plan document and are not made in the manner required by the plan document. The lesson

here is that family law attorneys should make sure that they follow the employee benefit plan document, file the proper papers with the plan administrator and, for a domestic relations order, make sure it meets the QDRO requirements. It's important to note that the court in *Kennedy* did not express any view as to whether the decedent's estate could have brought an action in state or federal court against the ex-wife to obtain the pension plan benefits *after* they were distributed to the ex-wife.

Under many state statutes, including Oklahoma,¹⁸ a beneficiary designation naming a former spouse is automatically deemed revoked upon divorce. The U.S. Supreme Court in *Egelhoff*¹⁹ found that the direct application of such laws to ERISA plans is preempted. The court in *Egelhoff* held that ERISA preempts a Washington state statute providing that designation of spouse as beneficiary of nonprobate assets is revoked automatically on divorce. The divorced wife of a participant in a pension plan and life insurance plan, who was still the named beneficiary at time of participant's death, was held to be entitled to plan proceeds against a claim by the participant's children. The court said that the state statute has an "impermissible connection" with ERISA plans in that it binds ERISA plan administrators to a particular choice of rules for determining beneficiary status, and it interferes with nationally uniform benefit plan administration. The court held that, in the absence of a valid waiver by an ex-spouse, the designated beneficiary in the plan's records should be the proper beneficiary even if a state law would require a different result. Of course, after the court's 2009 *Kennedy* decision, employee benefit plans are generally only required to recognize those waivers that are permitted by and made in the manner required by the employee benefit plan documents. But it's important to note that the court in *Kennedy* expressly left open any questions about a waiver's effect in circumstances in which it is consistent with the benefit plan documents.

DOMESTIC PARTNER BENEFITS

Domestic partner benefits is a rapidly developing area involving issues of both federal and state law. Employers may, but are not required to, extend ERISA benefit plan coverage to unmarried same-sex and opposite-sex domestic partners of eligible employees. There are some difficult income tax issues, beyond the scope of this article, relating to an individual's eligibility for domestic partner benefits. Simply

being eligible for domestic partner benefits under an employer's benefit plans does not determine the tax treatment. A summary of current domestic partner benefits issues (updated February 2009) is available from The Employee Benefit Research Institute.²⁰

The definition of "spouse" for most ERISA and Internal Revenue Code purposes is determined by state and federal laws other than ERISA. An individual is generally considered to be an employee's spouse if recognized as a legal spouse under applicable state law. An important exception to the application of state marriage laws is the federal Defense of Marriage Act (DOMA).²¹ DOMA provides that in determining the meaning of any federal law, including ERISA, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. Therefore, same-sex domestic partners do not meet the DOMA definition of "spouse." DOMA provides that states have the right to refuse to recognize marriages between same-sex couples performed in other states.

Even if a domestic partner does not qualify as a spouse, a domestic partner, regardless of gender, may qualify as a dependent under a benefit plan if he or she satisfies the federal tax definition of "dependent."²² Generally, the federal tax definition of dependent includes an individual (other than a spouse) who has the same principal place of abode as the taxpayer, is a member of the taxpayer's household and receives more than half of his or her support from the taxpayer. However, an individual is not a member of the taxpayer's household and thus cannot be a dependent under the tax code if at any time during the year the relationship between such individual and the taxpayer is in violation of local law.²³ In addition to considering the federal tax definition of "dependent," it is also important to look to the benefit plan documents to determine the definition of "dependent" for benefit plan purposes.

CONCLUSION

A myriad of state statutes, procedural and substantive rules, conflicting case law and various competing claims, interests and emotions come into play in the family law arena. In addition, there is an astounding level of complexity in the laws and regulations governing employee benefit plans. In spite of the often complicated relationship between family law and ERISA, it appears that, whether we like it or not, family law attorneys are going to have to deal with employee benefits and ERISA issues, and benefits attorneys are going to have to deal with family law matters.

1. Employee Retirement Income Security Act of 1974 (ERISA), P.L. 93-406.
2. ERISA §3(1).
3. ERISA §206(d); Internal Revenue Code of 1986 (IRC) §414(p).
4. ERISA §206(d)(3)(B)(i); IRC §414(p)(1)(A).
5. ERISA §206(d)(3)(B)(ii); IRC §414(p)(1)(B).
6. ERISA §§206(d)(3)(D)(i)-(iii), 206(d)(3)(E)(i)(III); IRC §§414(p)(3)(A)-(C), 414(p)(4)(A)(iii).
7. Using QDROs to Collect Child-Support Payments, Schnuelle and Dufour, Washington State Bar News, May 2009.
8. *Id.*
9. www.dol.gov/ebsa/faqs/faq_qdro.html.
10. ERISA §609(a).
11. ERISA §609(a)(3).
12. www.dol.gov/ebsa/publications/qmcso.html
13. Consolidated Omnibus Budget Reconciliation Act of 1985; IRC §4980B and ERISA §602.
14. Treas. Reg. §54.4980B-4, Q/A-1(c).
15. www.dol.gov
16. www.irs.gov
17. *Kennedy v. Plan Administrators for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009).
18. 15 O. S. (2001) §178.
19. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).
20. www.ebri.org/pdf/publications/facts/0209fact.pdf.
21. 1 U.S.C. §7.
22. IRC §152(d)(2).
23. IRC §21(e)(1).

ABOUT THE AUTHOR



Kenni B. Merritt, an attorney with Crowe & Dunlevy, resides in Bellingham, Wash., and telecommutes to her office in Oklahoma City. She focuses her practice primarily on employee benefits law and ERISA, representing employers in the design, implementation and administration of all types of employee benefit plans and deferred compensation arrangements. She is a graduate of the OU College of Law and is admitted to practice in Oklahoma and in Washington state.



If Your Client Records, Do You Get to Press Play?

Wiretapping in Family Law

By John E. Barbush

Attorneys engaging in the practice of family law must familiarize themselves with the law concerning the recording, use and admissibility of phone conversations. Whether it is a client asking whether he or she should record a soon to be ex-spouse's phone calls, a client who brings you a tape recording of their ex-spouse admitting drug use, determining how to use a 911 phone call in a VPO hearing, advising a client that phone calls may be tape recorded and to act accordingly, or being confronted in discovery or a hearing with a tape recording of your client – the area of family law frequently involves wiretapping. Indeed, practitioners unfamiliar with some of the basics of wiretapping law not only do their clients a disservice, but also expose them to potential criminal and economic liability.

Every attorney should have at least a passing familiarity with the Oklahoma Security of Communications Act¹ (SCA). The SCA makes it a felony for any person to willfully intercept or procure any other person to intercept any wire, oral or electronic communication unless specifically allowed under §176.3. Thus, the ability to properly advise a client on when it is appropriate to tape record telephone conversations is imperative. The SCA also provides that no portion of an illegally intercepted communication shall be used as evidence in any trial, hearing or other proceeding before any court, grand jury, department, officer, agency or regulatory body.²

The SCA is Oklahoma's response to the Federal Wiretap Act³ which sets forth the minimum

protections citizens of the United States must be afforded while allowing states the freedom to enact laws which are not inconsistent and provide even more protection for its citizens. The Federal Wiretap Act also specifically provides for a private cause of action.⁴

In Oklahoma, any party to a conversation can tape record it as long as it is not being done to commit a criminal act. No permission, disclosure or consent is necessary from the other party or parties to the conversation. "It is not unlawful pursuant to the Security of Communications Act for:...a person not acting under color of law to intercept a wire, oral or electronic communication when such person is a party to the communication or when one of the parties to the communication has given prior

consent to such interception unless the communication is intercepted for the purpose of committing any criminal act.”⁵

However, recording telephone conversations to which one is not a party can have grave consequences. In *Heggy v. Heggy*,⁶ the 10th Circuit, in an appeal from the Western District of Oklahoma, held Title III applies to inter-spousal wiretapping within the marital home. In *Heggy*, the ex-spouse was awarded compensatory and punitive damages as well as attorney fees in a case against her ex-husband who had routinely tape recorded her telephone conversations for six months prior to their divorce without consent. The court specifically held that misunderstanding the law was no defense. As a result of *Heggy*, a family law practitioner must practice under the assumption that wiretapping laws apply to domestic relations cases in Oklahoma.

Most attorneys are familiar with the law on wiretapping when it comes to the recording of conversations to which one is a participant. The more troubling questions arise when a family lawyer is faced with a tape-recorded conversation involving a minor child recorded by a parent who was not a party to the conversation. Because there are no Oklahoma cases specifically addressing this scenario, there is little direct guidance on the legality or admissibility of the recording in such a situation.

EXTENSION TELEPHONE EXEMPTION

In *Newcomb v. Ingle*,⁷ the 10th Circuit, in an appeal from the Northern District of Oklahoma, held a parent’s taping of telephone conversations of a minor child and ex-spouse was not a violation of Title III due to the “extension telephone exemption” contained in 18 U.S.C. §2510(5)(a)(I). Although there are no Oklahoma decisions adopting the extension telephone exemption, Oklahoma’s SCA contains the exact same definition relied upon by *Newcomb*.⁸ Consequently, a very strong argument can be made that a parent is entitled to tape a minor child’s telephone conversations without violating

either federal or state law based upon *Newcomb*’s ruling on 18 U.S.C. §2510(5)(a)(I) and the same definition found at 13 O.S. §176.2(8). Such was the holding in *Wright v. Stanley*⁹ when the Mississippi court compared the federal act to its own SCA.

“...more troubling questions arise when a family lawyer is faced with a tape-recorded conversation involving a minor child recorded by a parent who was not a party to the conversation.”

With the exception of Michigan,¹⁰ every state that has addressed the issue of parental tape recording of minor children’s telephone conversations has allowed the practice either under the finding of an “extension telephone exemption,” the adoption of the theory of vicarious consent, or a combination of both. A lawyer must be familiar with the distinction between these justifications as the theory of vicarious consent imposes requirements which

are not applicable when an “extension telephone exemption” is adopted.

THEORY OF VICARIOUS CONSENT

The theory of vicarious consent is essentially the recognition of the fact that a parent is legally obligated to protect a child from harm and to provide for their best interests. Further, since a minor can only contract or give consent through a parent, the same parent may consent on the minor’s behalf — with or without their knowledge — to the taping of a phone conversation involving the minor.¹¹ *Thompson v. Dulaney* adopted vicarious consent giving the parent the right to consent to tape recording of a minor’s telephone conversations, even with the other parent, based upon *Newcomb* and Utah law. *Thompson* held that the vicarious consent doctrine is necessary for a parent to protect a child from abuse and harassment. However, *Thompson* also concluded that a parent could only intercept such communications when a good faith basis existed to justify invoking the consent. Thus, a parent who lives in a jurisdiction which has adopted the vicarious consent doctrine would have to be able to show a court a good faith basis that existed justifying the need to tape record the minor’s telephone conversation. Without such a “good faith basis” the interception would be deemed a violation, subjecting the parent to potential

criminal and economic liability as well as result in the court suppressing the recorded conversation from being used in any legal proceeding.

The majority of jurisdictions have adopted the vicarious consent doctrine and held that tape recordings of children's conversations by a parent are admissible evidence. See *Silas v. Silas*¹² (father could use an extension telephone to record the child's conversations with mother while child was under his custody under federal act and father was able to give vicarious consent on behalf of child as he had a good faith basis to believe the minor child was being abused, threatened, or intimidated by mother, avoiding a violation of state law); *Pollock v. Pollock*¹³ (as long as the guardian has a good faith, objectively reasonable basis for believing it necessary and in the best interest of the child to consent on behalf of the minor child to the taping of the telephone conversations, the guardian may vicariously consent on behalf of the child to the recording); *Cacciarelli v. Boniface*¹⁴ (tapes admissible on the theory of vicarious consent as the content of the tapes substantiate concern behind parent taping conversations of child with other parent); *Allen v. Mancini*¹⁵ (trial court did not err in admitting tape recording made by father of telephone conversations between minor and mother because father had the authority to consent on behalf of the child); *Apter v. Ross*;¹⁶ *Smith v. Smith*;¹⁷ *G.J.G. v. L.K.A.*¹⁸ (mother's recorded telephone conversations between father and daughter wherein father encouraged child to lie about mother were admissible because court adopted vicarious consent having found the majority of federal and state courts whom had addressed the issue had so held).

Vicarious consent has even been adopted in criminal proceedings. In *State of Iowa v. Spencer*,¹⁹ it was held that recordings made of a minor's conversations with defendant by father without consent should not be suppressed in a criminal trial if father could show a good faith, objectively reasonable basis for believing it necessary and in the best interest of child to record the conversations, relying upon vicarious consent.

As a result, an attorney who seeks to use a recorded telephone conversation made by a parent of a minor child would be wise to argue that such a recording is not a violation of either federal or state law based upon the holding of

Newcomb and the definition of 13 O.S. §176.2(8) setting forth the extension phone exemption argument. However, given the fact that the issue has not been formally addressed by an Oklahoma decision, a prudent lawyer will incorporate the "belt and suspenders" approach and also argue that the parent was able to give vicarious consent to record the conversation and be prepared to articulate the client's "good faith basis" for deeming it necessary to intercept the telephone call. Obviously, simply showing that a telephone conversation was not improperly recorded and therefore should not be suppressed is only the first step to utilizing the recording before a court. As set forth in the Oklahoma Evidence Code, issues concerning relevance, authenticity, and unfair prejudice must also be considered, as was addressed in *James v. State Farm Mut. Auto. Ins. Co.*,²⁰ to determine admissibility of the taped conversation.

ADVISING THE CLIENT

An Oklahoma attorney must strongly consider whether to advise a client to tape record their child's telephone conversations with the other parent as a matter of course. The taping of conversations by a parent between the other parent and the minor child can and has been viewed with great skepticism by the courts. Therefore, it should only be done when a well articulated reason supports it. In *Leisure v. Wheeler*,²¹ the court stated, "[t]he trial court, if it finds the recording was not done for the well being of the child but instead as a way to interfere with the other parent's relationship with the child, may consider this as a factor in modifying custody." In *Apter v. Ross*,²² the court stated, "[w]e caution that this type of unilateral action taken by a parent with joint legal custody, while legally authorized in certain situations, is anathematic to a successful joint custody arrangement and can be evidence that joint custody is not in the best interests of the child." This logical holding is already incorporated into Oklahoma law at 43 O.S. §112(C)(3)(a).

Knowing what to do with a taped conversation of a mother admitting to her ex-spouse that "she only uses meth while at work (as a stripper)", or a parent advising a child to lie to a guardian ad litem is an unfortunate requirement in the practice of family law. One can quickly turn a difficult case from a "she said/he said" to a "you said what!" from the court. As such, lawyers²³ who practice family law

should familiarize themselves with the basics of wiretapping.

1. 13 O.S. §176.1, et al.
2. 13 O.S. §176.6.
3. 18 U.S.C. §2519, Title III of Omnibus Crime Control and Safe Streets Act of 1968.
4. 18 U.S.C. §2520.
5. 13 O.S. §176.4(5).
6. 944 F.2d 1537, 1991 U.S. App. LEXIS 24388.
7. 944 F.2d 1534, 1991 U.S. App. LEXIS 19878.
8. See 13 O.S. §176.2(8).
9. 700 So. 2d 274, 1997 Miss. LEXIS 254.
10. *Williams v. Williams*, 229 Mich. App. 318, 581 N.W. 2d 777, 1998 WL 180849 (rejected vicarious consent doctrine, holding that the language of Title III gave no indication that Congress intended to create any such exemption).
11. See *Thompson v. Dulaney*, 838 F. Supp. 1535, 1993 U.S. Dist. LEXIS 17364.
12. 680 So. 2d 368, 1996 Ala. Civ. App. LEXIS 533.
13. 154 F.3d 601, 1998 U.S. App. LEXIS 21259.
14. 325 N.J. Super. 133, 737 A.2d 1170, 1999 N.J. Super. Lexis 308.
15. 170 S.W. 3d 167, 2005 Tex. App. LEXIS 5216.
16. 781 N.E. 2d 744, 2003 Ind. App. LEXIS 32.
17. 923 So. 2d 732, La. App. LEXIS 2116.
18. 2006 Del. Fam. Ct. LEXIS 92.
19. 737 N.W.2d 124, 2007 Iowa Sup. LEXIS 98.
20. 1991 OK 37.

21. 828 N.E. 2d 409, 416.
22. 781 N.E. 2d 744, fn.2.
23. The author would like to acknowledge the editorial assistance of attorneys Amy Pierce and Don Strong.

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The Division of Military Retirement Benefits in Oklahoma Divorce Proceedings

By A. Kyle Swisher

The Uniformed Services Former Spouse's Protection Act, recognizes the right of state courts to distribute disposable military retired pay to a spouse or former spouse and provides, through a myriad of federal regulations, methods for implementing its orders through the military's accountant *i.e.*, The Defense Finance and Accounting Service (DFAS).¹ However, while relatively straight forward in theory, applying current Oklahoma Statutes and jurisprudence, in combination with federal regulations, in order to effectively divide military retirement pay, is anything but simple.

THE VERY BASICS OF DIVIDING MILITARY RETIREMENT PAY

A Domestic Relations Order (DRO) is not required to divide military retired pay as long as a former spouse's award is clearly set forth in the decree or applicable court order.² Orders enforceable under the act include final decrees of divorce, dissolution, annulment, etc.³ The pertinent court order must also provide for the payment of child support, alimony or retired pay as property to a spouse/former spouse.⁴ The court order, when dealing with retired pay as a property award, must provide for the payment of an amount expressed in dollars or as a percentage of disposable retired pay.⁵ DFAS is the agency which processes the awards. The decree must contain specific information such as:

1) Statement that the member and former spouse have been married to each other for at least 10 years, during which the member performed at least 10 years of creditable military service *i.e.*, "the 10/10 rule."⁶

2) The state court must have had jurisdiction over the member by reason of 1) residence (other than just because military assignment), 2) the member's domicile located in the jurisdiction, or 3) the member's consent to jurisdiction.⁷

The maximum that can be paid to a former spouse under the act is 50 percent of a member's disposable retired pay.⁸

In order to apply for payments under the act, a completed application (DFAS Form 2293) signed by the former spouse, together with a certified copy of the divorce decree, dated within the last 90 days, should be served on the Defense Finance and Accounting Service, Cleveland Center, Code L, P.O. Box 998002, Cleveland, OH 44199-8002. Assuming the divorce decree is drafted properly, the only documents you should mail DFAS is the Form 2293 and a certified copy of the divorce decree. However, divorce decrees normally do not contain the requisite information required by the act and a separate DRO is required.

Be forewarned, the following award will not be processed by DFAS: "Ex-spouse is awarded 50 percent of employee's retired pay which is accrued as of the date of divorce." This is a customary way for practitioners to divide a benefit plan in a decree. Military benefits are paid on a monthly basis and it is not a fund that can be valued or divided as of some point in time. Thus, the practitioner must express the award in dollars or as a percentage of disposable retired pay. Your alternative is to obtain the services of a C.P.A. and/or J.D. who is familiar with military plans in order to obtain an account value as of the date of divorce, date of separation, etc.

This is not to say that DFAS will not accept a formula for determining the former spouse's benefits. With regard to an award expressed as a formula, the only number supplied by DFAS will be the number of years of creditable service once the member retires. All of the employee's information must be contained in a court-ordered formula. With regard to a hypothetical formula for payment of a retired pay amount, the award must be based on at least 15 years of creditable service, and the only information DFAS will supply is the date of retirement, or the total years of service.⁹ Information, such as the member's hypothetical rank or years of credible service at hypothetical retirement, must be contained in the court order.

A full discussion of even the basic principals behind dividing military retirement benefits could be the subject of numerous lengthy articles and would exceed the scope of this paper. However, for more information, forms, etc. on DFAS procedures and, in particular, the "Dividing Military Retired Pay" publication, go to www.DFAS.mil.

PITFALLS ASSOCIATED WITH THE DIVISION OF MILITARY RETIREMENT

There are numerous areas in which the practitioner should be wary when attempting to divide military retirement benefits. This section will attempt to alert you to several of those areas which are commonly problematic.

If Survivor Benefit Plan (SBP) coverage is ordered in favor of the non-military spouse (surviving spouse benefits in the military setting), an election must be made, on the applicable DFAS form, within one year from the date of the court order or agreement that requires the military retiree to provide the former spouse SBP coverage.¹⁰ If you miss the one year dead-

line, the non-military spouse will not receive SBP coverage upon the death of the military member and he or she will receive no further retirement benefits of any kind. It should be noted that only one spouse can receive SBP coverage.¹¹ In other words, it is not possible to divide SBP coverage between current and future spouses, etc. Also, unless the military retiree has elected coverage at retirement, former spouse benefits cannot be elected (*i.e.*, renewed) as part of a divorce proceeding.¹²

As to which party pays the costs for providing surviving spouse benefits, the military simply reduces the SBP coverage premium from the gross pay of the retiree, resulting in "disposable retired pay," which is the only retired pay figure the military will divide.¹³ In other words, the military will not honor an order that attempts to attribute the entire SBP premium to the former spouse, which often causes problems.

Another rule that must be observed is what is known as the "10/10 rule." In application, said rule means the parties must have been married to each other for at least 10 years during which time the member performed at least 10 years of creditable military service.¹⁴ If the parties were married less than 10 years and/or 10 years of service was not performed, your only option is to order the military member to pay the non-military member her share of the retirement out of his own pocket each month. Obviously, this situation should be avoided, and if additional property is available to award to the non-military spouse in lieu of the retirement benefits, this would be a preferable option.

Remarriage of a non-military spouse before age 55 forfeits his or her eligibility to SBP (*not* his/her share of the normal monthly retirement benefits).¹⁵ Furthermore, eligibility of a non-military spouse to obtain medical coverage under CHAMPUS/Tricare will be forfeited if the non-military spouse remarries before age 55. Although health care benefits are not court awarded, they are "applied for" by the non-military spouse. Generally speaking, military health care benefits are available to the non-military spouse as long as the member served at least 20 years and he was married to the non-military spouse for 20 years while creditable service was performed.¹⁶ If you are representing the non-military spouse, and the marriage is close to 20 years in duration, you should consider waiting to finalize the divorce until the 20 years is reached, if possible.

In the case of a disabled military retiree, it may be possible for said retiree to classify part of his military retired pay as a disability/VA benefit. If this occurs, it is very possible that the former spouse's award will be reduced. This is an area which has been the subject of numerous Oklahoma appellate decisions over the last few years. Division of military retirement is based on "disposable retired pay." Essentially, disposable retired pay is gross military retired pay, less the SBP premium and amounts reduced for disability/VA pay.¹⁷ Thus, when a normal military retirement benefit is reduced due to the service member's receipt of disability pay, his disposable retired pay is reduced and the former spouse's share is normally lowered proportionately.

Accordingly, if you represent the non-military spouse, it is advisable to attempt to include an indemnification provision in the decree indicating that if the military member does in fact receive disability pay, the military member will be required to pay the former spouse the amount his or her retirement award was reduced. In *Nelson v. Nelson*,¹⁸ the Court of Civil Appeals held:

The court did not abuse its discretion in dividing husband's military retirement pay by including indemnification provision in a divorce decree that required husband to make required payment to wife, or make up difference in amount of payment to wife, if husband reduced his military retirement pay by electing to increase his disability benefits; federal statute dealing with direct pay from appropriate military finance center did not forbid payments enforced by other means, including made directly by individual retired service member, and indemnification provision did not attempt to divide husband's current disability benefits, nor prohibit husband from receiving future disability benefits, but only prevented husband from unilaterally reducing wife's property award.

It is advantageous for a military member to receive a disability benefit in lieu of normal retirement primarily due to the fact that disability awards are not subject to income tax and, in the divorce setting, it reduces his disposable retired pay.¹⁹ A military retiree has every incentive to reclassify a portion of his benefits as disability. Accordingly, you should attempt to include the appropriate language in your decree so that the court will have the abil-

ity to order indemnification on behalf of the former spouse in the event the member elects disability. Otherwise, your client's benefits could be severely reduced, or eliminated altogether, if the member receives a high enough disability rating.

RECENT OKLAHOMA CASE LAW AND STATUTORY AMENDMENTS

In *Hayes v. Hayes*,²⁰ the parties were divorced Dec. 12, 2000, and wife was awarded 19.2 percent of husband's military retirement pay. Husband retired from the military in 2004 and began receiving VA disability retirement pay the same year. Pursuant to the VA's determination, husband was rated 80 percent disabled, consequently drastically reducing wife's share of husband's military retirement benefits. Arguing that husband's unilateral act of converting his retirement benefits to disability pay constituted an impermissible modification or invasion of the trial court's property division order, wife filed a motion to enforce the decree of divorce. The *Hayes* trial court denied wife's motion in finding that it lacked the authority to either prevent husband from converting his retirement benefits to disability or require husband to pay wife a portion of same.²¹

The *Hayes* court, citing *Mansell v. Mansell*,²² noted: "State courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay [including disability pay] as community property." However, the *Hayes* court at ¶¶ 16-17 held as follows:

The Trial Court was correct in holding that it could not require Husband to pay wife a portion of his federally protected disability benefits. However, that does not mean the Trial Court is precluded from granting wife any relief. Despite his 80% disability rating, Husband continued to work full-time after his retirement from the Army, a fact the Trial Court may consider along with all other aspects of Husband's financial condition.

The Trial Court's decree of divorce does not require Husband's payments to wife to come from any particular source. Rather, the decree provides that wife shall receive an amount equal to a pro-rata share of Husband's eventual military retirement. The decree memorializes Husband's legal obligation, which Husband may satisfy from whatever source of funds he chooses.

Our holding today, therefore, does not conflict with Oklahoma's policy against modification of a final property division.

In *In Re The Marriage of Guy*,²³ husband served in the military for over 20 years. Five months prior to his retirement, husband applied for disability compensation from the VA and was granted an 80 percent disability rating. The parties subsequently initiated a divorce proceeding. The trial court awarded wife an additional amount of money to make up for her share of the military retirement that was reduced due to husband's receipt of disability pay. Furthermore, wife was awarded SBP benefits and husband was ordered to pay for same.

The appellate court recognized that, per federal law, a state trial court cannot divide VA pay, however, a trial court can compensate a former spouse for the diminution of a marital asset. In this case, the court found that it was not necessary to award wife additional assets to make up for what she lost due to husband's receipt of VA because she otherwise received an equitable share of marital property. The court also found that the trial court abused its discretion when it ordered husband to pay the premium associated with providing wife SBP benefits, likening it to a support alimony award of an indefinite amount and term.

In *Hodge v. Hodge*,²⁴ wife was awarded "one-half Defendant's [husband's] retirement pay from the military" in the parties' decree. Subsequent to the decree, husband retired from the military and applied for and received an award of VA disability. A DRO was not entered at the time of the decree and the parties subsequently turned to the court for guidance and entry of same after at least two failed attempts to present DFAS with an acceptable order. At a hearing regarding the DRO, the court ruled that the wife's award should be reduced from the agreed 50 percent of the entire military retirement pay to a "proportionalized" amount based on the length of marriage (husband performed several years of service before and after the marriage).

Wife subsequently argued, on motion for reconsideration, that the court's modification of the agreed retirement award was impermissible and that the husband also impermissibly and unilaterally modified the property award due to his receipt of disability. The husband's receipt of disability reduced his disposable retired pay dollar for dollar, thus reducing the wife's award accordingly.

The Court of Civil Appeals held that the trial court improperly amended the agreed property award by reducing the 50 percent to a "proportionalized" amount. It also found that "The trial court abused its discretion in failing to find Husband's conversion of a portion of his retirement benefits to disability benefits impermissibly modified the consent decree by unilaterally reducing her award of one-half Defendant's retirement pay from the military." It should be noted that the Hodge decree contained no language requiring indemnification if the husband elected to receive disability. Instead, the court relied on the fact that wife was simply awarded 50 percent of the military retirement and husband impermissibly reduced same, thus violating the agreed property division.

Title 43 O.S. §134 was amended by Oklahoma Senate Bill 2194 and became effective July 1, 2009. Subsections E and F are relevant here and state as follows (new provisions underlined):

E. Pursuant to the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C., Section 1408, a court may treat disposable retired or retainer pay payable to a military member either as property solely of the member or as property of the member and the spouse of the member. If a state court determines that the disposable retired or retainer pay of a military member is marital property, the court shall award an amount consistent with the rank, pay grade, and time of service of the member at the time of separation.

F. The provisions of subsection D of this section shall have retrospective and prospective application with regards to modifications for the purpose of obtaining support or payments pertaining to a division of property on divorce decrees which become final after June 26, 1981. There shall be a two-year statute of limitations, beginning on the date of the final divorce decree, for a party to apply for division of disposable retired or retainer pay.

Oklahoma does not maintain records regarding the bill authors' intentions behind new law, therefore, interpretations of the legislation will occur by way of the court decisions which follow. The meaning of "...the court shall award an amount consistent with the rank, pay grade, and time of service of the member at the time of separation" will surely be the subject of litigation, as will the new language of subsection F regarding the two-year statute of limitations.

Pursuant to federal regulations, DFAS will only accept certain award language when dividing military retirement benefits whether it be by percentage, formula or fraction. Where the court is forced to divide the benefit by DRO, does the new provision require the court to actually place a dollar value on the monthly benefit? Do fraction awards based on length of marriage and total years of service at an eventual retirement date remain acceptable? Or, are the bill authors only attempting to remind divorce court judges and attorneys that in a disputed case, the court only has jurisdiction to divide the portion of the benefits accrued during marriage? If so, does this mean that all methods for dividing military benefits which attempt to follow the law are acceptable e.g., the aforementioned formulas? It should also be noted that the terms “consistent with” and “separation” are not further defined in the new passage.

As to the two-year statute of limitations, what is meant by the word “apply”? For example, if a former spouse of a military member mails a copy of her divorce decree to DFAS a week short of two years after her decree is entered, has she effectively “applied” for the benefit, even though she finds out a month later that the decree is not sufficient and that a DRO is required? What if trial counsel fails to ensure a DRO dividing military retirement is entered and accepted by DFAS prior to closing their respective files? Under the new provision, a client who assumes his or her case was properly handled will unknowingly be punished years later when the service member retires and the benefit is not divided. Can the former spouse come back after the service member personally for direct payments if her application is rejected and/or she misses the “application” period?

Pursuant to new legislation introduced this year (Oklahoma House Bill 1053, amending 43 O.S. § 134), the Oklahoma Legislature is interested in taking away the previously awarded monthly retirement benefits of a former spouse who cohabitates with a member of the opposite sex and/or remarries, regardless of the age or circumstances of the former spouse. The proposed law would also require the trial courts, at the time of determining whether the military retirement benefits are separate or marital property, to consider, among other things, the following: The ability of the former spouse to provide for herself; the service member’s length of services during the marriage and pay grade; the education the former spouse received dur-

ing the marriage; the “nonconformance to military lifestyle of the former spouse”; any disability of the military member (and that military disability income cannot be offset with any of the service member’s other assets), etc.

The rationale behind the new legislation apparently stems from the belief that military retirement benefits are unique due to the service member’s potential to be recalled out of retirement into active duty at any time.²⁵ However, a law which, due to a party’s remarriage, takes away a property right earned jointly by the former spouses during marriage is certain to be challenged. While the Uniformed Services Former Spouse’s Protection Act may give states the authority to pass laws consistent with said act, prescribing an “application” statute of limitations period, dictating methods for dividing benefits and taking away property rights seems to push the envelope of what was intended.

1. 10 U.S.C. §1408.
2. 10 U.S.C. §1408(a)(2).
3. 10 U.S.C. §1408(a)(2).
4. 10 U.S.C. §1408(a)(2)(B).
5. 10 U.S.C. §1408(a)(2)(C).
6. 10 U.S.C. §1408(d)(2).
7. 10 U.S.C. §1408(c)(4).
8. 10 U.S.C. §1408 (e)(1).
9. Fed. Reg. 17507, 17508 (1995).
10. 10 U.S.C. §1448(b)(3)(A)(iii).
11. U.S.C. §1448(b)(2)(C).
12. U.S.C. §1448(b)(3)(C).
13. U.S.C. §1408(a)(4).
14. 10 U.S.C. §1408(d)(2).
15. 10 U.S.C. §1450(b)(2).
16. 10 U.S.C. §1062.
17. 10 U.S.C. §1408(a)(4).
18. 2003 OK CIV APP 105, 83 P.3d 889.
19. 10 U.S.C. §1408(a)(4).
20. 2007 OK CIV APP 58, 164 P.3d 1128.
21. *Hayes* at ¶ 6.
22. 490 U.S. 581, 590, 109 S.Ct. 2023, 2029 (1989).
23. 2007 OK CIV APP 86, 169 P.3d 1218.
24. 2008 OK CIV APP 96; 197 P.3d 511.
25. 10 USC §688.

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‘The Times They Are a-Changin’ When and How to Modify Child Support

By Donelle H. Ratheal

This article is a brief overview of child support modification law since the enactment of the child support guidelines in Oklahoma in 1987, and the practical aspects of preparing a modification case on a client’s behalf. When the local economy fluctuates, the practitioner is faced with requests from clients to modify child support, based upon significant changes in income and employment. The scope of this article is limited to post-decree modifications of child support in a private domestic relations case, which includes marriage dissolution and paternity matters.

INTRODUCTION

In 1987, the Oklahoma Legislature adopted the child support guidelines, pursuant to federal mandate.¹ As a result of the child support guidelines, the parents’ respective incomes were used to compute child support, using a “shared income” model. Prior to the enactment of the statute, the trial court’s focus was the actual needs of the minor child, with the general directive that any award be in the child’s best interests.

BASIS FOR INCREASE OR DECREASE

Shortly after the enactment of the statute, the appellate court reviewed a case involving a request to modify child support, using the guidelines as its context.² The parents were divorced in 1983. In 1989, the mother filed a motion to modify child support, citing to several changes in circumstances. The mother’s request to increase child support was based upon a substantial change in the father’s income.³

The trial court sustained the father’s demurrer to the mother’s request to increase child support, citing to case law decided before the enactment of the statute. The cited case held that the sole factor of an increase in one parent’s earning capacity, without additional relevant evidence (*i.e.*, the needs of the child), was not sufficient to justify an increase in child support.⁴

The appellate court reversed the trial court. It found that the new statute shifted the trial court’s focus from the child’s needs to the parents’ respective incomes.⁵ It held that a substantial increase in the income of one or both parents constituted a sufficient material change of circumstances for a modification of child support.⁶ The appellate court has since reiterated that a “substantial” increase or decrease in the income of only one of the parents will satisfy the “material change” requirement for child support to be modified.⁷

As early as 1963, a parent’s decreased earning capacity justified a lowering of child support.⁸

After the guidelines were enacted, the appellate court held that when a parent's income decreases significantly, a downward modification of child support is justified, so long as two conditions are met: 1) the requesting parent must provide evidence of the decreased income-earning capacity to meet the necessary burden of proof; and, 2) the resulting child support amount must be fair and equitable under the circumstances.⁹

The recent amendment to the child support guidelines provides a more specific definition for the basis of a modification of child support. It is a:

material change in circumstances which includes, but is not limited to, an increase or decrease in the needs of the child, an increase or decrease in the income of the parents, changes in actual annualized child care expenses, changes in the cost of medical or dental insurance, or when one of the children in the child support order reaches the age of majority or otherwise ceases to be entitled to support pursuant to the support order.¹⁰

MODIFICATION OF A CONSENT DECREE OR ORDER

Many times the parties reach a settlement as to the original marriage dissolution or paternity case, including the issue of child support. Occasionally a litigant will argue that the trial judge does not have the authority to modify an agreed-upon child support issue.¹¹

The law, however, is clear: the trial court has the authority and discretion to set aside, modify or enforce an agreed-upon amount for child support.¹² The appellate court's reasoning in decisional law is that the trial court is not automatically bound by an agreement of the parties as to their property rights, alimony or child support.¹³

The parties to a consent decree may agree to child support obligations between themselves that exceed those required by law.¹⁴ The only limitation to a consent decree or order is that the agreement may not contravene public policy.¹⁵ An example of an agreement that contravenes public policy is when the child's right to enforce a child support obligation against the parent is compromised.¹⁶

EFFECTIVE DATE OF THE MODIFICATION

Modification of child support, whether downward or upward, is effective as of the fil-

ing of the motion.¹⁷ The only exception is when the trial court makes a specific finding that the change in circumstances did not occur at the time of the filing.¹⁸

THE THRESHOLD TO MODIFY CHILD SUPPORT

A change of 12 percent in one parent's income and 20 percent in the other parent's income has qualified as a "material" change in circumstances to justify a change in child support.¹⁹ Factors such as a change in employment or a change in financial status will qualify as a "material" change for a modification of child support.²⁰

MULTIPLE CHILD SUPPORT ORDERS

Sometimes a payor parent has more than one child support order under which he or she is obligated. The first child support order cannot

“The specific statute gives a parent the right to review the other parent's income every year.”



be modified when a subsequent child support order is entered.²¹

MODIFICATION OF CHILD SUPPORT IN UPPER INCOME CASES

When the increase in one or both parents' incomes results in combined income that is more than statutory cap,²² the trial court has the discretion to review the needs of the child to determine whether additional child support is warranted.²³

The presumption is that the statutory child support, as set out in the statutory chart, is sufficient.²⁴ The parent seeking the additional child support bears the burden of rebutting the presumption, and showing the need for the additional support.²⁵

If trial court orders additional child support, it cannot simply extrapolate an amount by the same percentage as the cap on the statutory chart.²⁶ The trial court must review the specific, actual needs of the child.

After determining the additional amount, the trial court must then apply the respective parents' percentages from the child support guidelines to determine the actual amount due from the payor parent for the additional support.²⁷ Otherwise, the child support award would result in a transfer of the payor parent's wealth to the payee parent, which is not the purpose of child support.²⁸

When addressing child support when the combined income exceeds the chart, the trial court is mandated to consider three factors. They are: 1) the child's needs; 2) the parents' ability to pay; and, 3) the prior standard of living.²⁹ When requesting an increase in child support, the requesting parent must present the child's projected needs as of the time of the modification request.³⁰

KNOWING WHEN TO FILE

The Legislature has provided parents with an inexpensive method to review their respective incomes to determine whether a modification request should be filed. The specific statute gives a parent the right to review the other parent's income every year.

The requesting parent may request the other parent's tax documents for the past tax year, on or after April 15 of the current year.³¹ The request must be in writing, and must be served upon the parent in a method that satisfies due process.³² The request must be filed in the court

case.³³ Certified mail is an acceptable method for service. However, the most effective method is by process server. It avoids the problem of improper service, which can then affect the requesting parent's attorney fee request at the end of the modification case.

The responding party must provide the requested information within 10 days of his or her receipt of the written request. If the responding party fails to provide the information, and the requesting party subsequently files a modification request which is granted, the trial court is required to award a "reasonable" attorney fee.³⁴

PRACTICAL CONSIDERATIONS

To be most effective, the practitioner should obtain the client's past three years' tax returns, to determine if the client's income alone qualifies as a "substantial" change to support a modification of child support. The practitioner should prepare the written request, according to the statutory parameters, to obtain the other parent's income information.

The practitioner, after reviewing the parents' combined income, can determine whether it exceeds the statutory cap of \$15,000 per month. If the income exceeds the statutory cap, then the practitioner should ask the client to prepare a proposed budget, with the child's projected needs, as of the current time frame.

The child's projected needs may include a percentage of the household expenses, including mortgage or rent, maintenance and repairs, and utilities. Car or transportation expenses, groceries, gifts and vacations should also be included, if they are a part of the child's lifestyle.³⁵

CONCLUSION

Parties have the right to modify child support whenever there is a "substantial" increase or decrease in the income of one or both parties. The definition of "substantial" is satisfied by a change in one parent's income of 12 percent or more, or a resulting change in the base child support amount of \$35 or more.

The requesting party bears the burden of proof regarding the "substantial" change, whether an increase or a decrease. If the modification involves a request for child support in excess of the statutory cap, the request must be supported by evidence of the child's projected costs, as of the time of the modification.

All motions to modify child support, whether a decrease or increase, will be effective as of the date of the filing of the motion to modify. The simplest method to determine whether to file a motion to modify child support is by making and filing the written request, in compliance with the statutory requirements.

The practitioner can assist the client in determining whether a motion is appropriate by: 1) reviewing the client's historical income; 2) filing the statutory request to review the other parent's income; and 3) preparing the client's case to meet the necessary burden of proof, including any request for additional child support. If the other party fails to comply with the statutory written request, it will enhance the client's request for attorney fees if the trial court grants the client's request to modify child support.

Author's Note: This article was prepared with assistance from Jamie N. Ortiz, licensed legal intern, and new OBA member. The headline "The Times They Are a-Changin'" is the title song on the album, with the same name, written by Bob Dylan in 1964.

1. 45 C.F.R. §302.56(c) (Oct. 1, 1985).
2. *McKee v. McKee*, 1991 OK CIV APP 116, 820 P.2d 1362.
3. *Id.*, ¶ 2.
4. *Id.*, ¶ 3 citing to, *Wells v. Wells*, 1982 OK 83, ¶ 11, 648 P.2d 1223.
5. *McKee*, ¶ 8.
6. *Id.*, ¶ 9.
7. *Pharaoh v. Pharaoh*, 1993 OK CIV APP 181, ¶ 8, 865 P.2d 1279.
8. *Miller v. Miller*, 1963 OK 167, 383 P.2d 873 (the appellate court noted the payor parent's earning capacity had decreased and that the prior child support amount had been an agreed-upon amount).
9. *Stephen v. Stephen*, 1997 OK 53, ¶ 12, 937 P.2d 92.
10. 43 O.S. §118I(A)(1) (Supp. 2009).
11. Such issues have included retroactive modifications, prospective increases, and payment of child support beyond the child's majority.
12. 43 O.S. §112(A)(3) (2001 & Supp. 2007); *Thrash v. Thrash*, 1991 OK 32, fn. 2, 809 P.2d 665.
13. *Read v. Read*, 2001 OK 87, ¶ 18, 57 P.3d 563; *Blount v. Blount*, 1967 OK 74, ¶ 18, 425 P.2d 474 (cited with approval by *Holleyman v. Holleyman*, 2003 OK 48, 78 P.3d 921, concurring opinion, fn. 18).

14. *Hodge v. Hodge*, 2008 OK CIV APP 96, 197 P.3d 511.
15. *Holleyman v. Holleyman*, 2003 OK 48, ¶ 8, 78 P.3d 921.
16. *Hedges v. Hedges*, 2002 OK 92, fn.3, 66 P.3d 364.
17. 43 O.S. §118I(A)(3) (Supp. 2009).
18. *Id.*
19. *Riedel v. Riedel*, 1992 OK CIV APP 166, ¶¶ 10-11, 844 P.2d 184 (the resulting change in child support was in the amount of \$35 per month).
20. *Pharaoh*, ¶ 8.
21. 43 O.S. §118C(A) (Supp. 2009) (this is commonly referred to as the "first mortgage" theory of child support).
22. *Id.*, §119 (2001) (the current maximum combined income is \$15,000 per month).
23. *Id.*, §119(B).
24. *Id.*, §118(A) (Supp. 2009).
25. *Archer v. Archer*, 1991 OK CIV APP 28, ¶ 15, 813 P.2d 1059.
26. *Smith v. Smith*, 2003 OK CIV APP 28, ¶ 15, 67 P.3d 351.
27. In *Arehart v. Arehart*, 2006 OK CIV APP 4, ¶ 8, 128 P.3d 1116, the appellate court noted that the trial court application of 4% over the cap amount, divided by the parents' respective percentages, was a reasonable computation for the additional support, citing to *Smith*, *supra*.
28. *Smith*, ¶ 12 (citing to the "three pony rule"; a child does not need three ponies, even if a payor parent can afford to buy them).
29. *Kerby v. Kerby*, 2002 OK 91, ¶ 7, 60 P.3d 1038 (also known as *Kerby I*).
30. *Kerby v. Kerby*, 2007 OK 35, ¶ 5, 164 P.3d 1049 (also known as *Kerby II*).
31. 43 O.S. §118.3 (2001).
32. *Id.*
33. *Id.*
34. *Id.*
35. In the *Smith* case, the mother used the percentage of 33% for the child's allocable share of the household expenses. When there are two or more children at issue, the author has seen a percentage of 50% used as the children's allocable share of the household expenses.

ABOUT THE AUTHOR



Donelle Ratheal is the CEO and lead attorney of Ratheal & Associates PC. She focuses her practice in family law. Experienced in complex domestic relations litigation, she is also a family law mediator and is trained in collaborative divorce. Her greatest accomplishment is having survived motherhood with humor and flexibility, with an adult son who is alive and actually likes her!

Chickasaw Nation Bar Association 2009 Fall Seminar

December 3, 2009

CLE CREDIT: APPROVED 8 HOURS (INCLUDED 1 HOUR OF ETHICS)

Riverwind Casino
Norman, Oklahoma

Registration Fee: Before December 2, 2009 – \$95.00

On site Registration – \$125.00

Bar membership requirements for new members may be met on day of Seminar.

For Registration information, Please contact The Chickasaw Nation Supreme Court at (580) 235-0281

Agenda

Master of ceremonies: Mr. Jeff Keel, Esq., Chair of the Chickasaw Bar Association

8:00 a.m. Continental Breakfast and On-Site Registration

8:20 a.m. Welcome

The Chickasaw Nation Supreme Court
Justices

- Hon. Barbara Ann Smith, *Chief Justice*
- Hon. Cheri Bellefeuille-Gordon, *Justice*
- Hon. Mark Colbert, *Justice*

8:30 a.m. Chickasaw Nation District Court Admission Requirements and Jurisdiction

- Hon. Aaron Duck – *District Court Judge for Chickasaw Nation*
- Hon. Dustin Rowe – *Special Judge for the Chickasaw Nation*

9:00 a.m. The Role of the Court Advocate

- Ms. Darlene Cheadle, Esq., *Court Advocate for the Chickasaw Nation District Court*

9:15 a.m. Child Welfare in Indian Country

- Ms. Kristine Huntsman, Esq. – *Assistant Attorney General for the Chickasaw Nation*

9:30 a.m. Update from the Chickasaw Nation Legislature

- Mr. Robert Cheadle, Esq. – *Legislative Counsel for the Chickasaw Tribal Legislature*

10:00 a.m. Break

10:15 a.m. Practicing Before Tribal Gaming Commissions

- Mr. Matthew L. Morgan, Esq. – *Chickasaw Nation Gaming Commissioner (Ada, Oklahoma) (Moderator)*
- Mr. Norman DesRosiers – *Vice- Chairman of the National Indian Gaming Commission (Washington, D.C.)*
- Ms. Elizabeth Lohah-Homer, Esq. – *former Vice-Chair of the National Indian Gaming Commission and founder of Homer Law, Chartered (Washington, D.C.)*
- Mr. Jamie Hummingbird, *Executive Director, Cherokee Nation Gaming Commission (Tahlequah, Oklahoma)*

- Ms. Robin Lash-Prairie Chief -- *Attorney, Miami Tribe of Oklahoma and Vice-Chairman of the Oklahoma Tribal Regulators Association (Miami, Oklahoma)*

- Mr. Bryan Morris, Esq. – *Braly, Braly, Speed & Morris (Ada, Oklahoma)*

- Ms. Nancy McAlister, Esq. – *The Green Law Firm, P.C. (Ada, Oklahoma)*

- Mr. Wallace Coppedge, Esq. – *Coppedge & Rowe (Tishomingo, Oklahoma)*

- Mr. Jim Wilcoxon, Esq. – *Wilcoxon & Wilcoxon (Muscogee, Oklahoma)*

12:00 p.m. Lunch – Provided at the Willows Buffet

1:00 p.m. Ethics

- Ms. Gina L. Hendryx, Esq. – *General Counsel for the Oklahoma Bar Association*

2:00 p.m. Oklahoma Compact Issues & the Impact of the Cossey, Dye, Griffeth, and Bittle—Oklahoma Supreme Court Cases

- Mr. Stephen Greetham, Esq., -- *Chief General Counsel for the Chickasaw Nation Division of Commerce (Ada, Oklahoma)*
- Mr. Jess Green, Esq., *The Green Law Firm, P.C. (Ada, Oklahoma)*

3:00 p.m. Break

3:15 p.m. Federal Criminal Law Jurisdiction in Indian Country

- Ms. Linda Epperley Esq. – *Assistant U.S. Attorney for the Eastern District of Oklahoma (Muscogee, Oklahoma) (Invited)*

4:00 p.m. Question and Answer Period

4:30 p.m. Swearing –In of New Bar Members

- Chickasaw Nation Supreme Court Justices
 - Hon. Barbara Ann Smith, *Chief Justice*
 - Hon. Cheri Bellefeuille-Gordon, *Justice*
 - Hon. Mark Colbert, *Justice*
- District Court Judges
 - Hon. Aaron Duck, *District Court Judge*
 - Hon. Dustin Rowe, *Special Judge*

5:00 p.m. Adjourn

Each CBA Member still in attendance at 5:00 will receive a \$10.00 Free Play Coupon from the Riverwind Casino.



Grandparental Visitation in Oklahoma: An Overview

By Allison A. Hart

At one time or another, those of us practicing law have had to say, “I’m sorry, under the Oklahoma statute you are not entitled to court-ordered grandparental visitation.” One would hope that grandparents would be welcomed into the family unit. However, on some occasions they may need to use the judicial system to establish time with their grandchildren. If a grandparent is requesting the court’s aid in ordering visitation, first the court will look to see if mother and father are married and can be determined to be fit parents. If both elements are found then the court will respect the parent’s decision that the visitation is not in their child’s best interest. However, the law is ever changing in an effort to accommodate a variety of fact patterns. What if parental rights are terminated; the parents were never married; or there is an adoption or divorce pending?

RECENT CHANGES TO TITLE 10 O.S. §5

To adapt to our evolving society, this statute has been amended 15 times since 1971. Just recently, on May 21, 2009, the statute was renumbered from Title 10 O.S. §5 to 43 O.S. §109.4. For those of you who are already familiar with the 2008 statute, the 2009 version adds the following two fact patterns: A grandparent can be ordered visitation if the intact nuclear family has been disrupted; the grandchild’s parent who is a child of the grandparent is deceased; the grandparent has a pre-existing relationship with the child that predates the death; unless the death of the mother was due to complications related to the birth of the child.¹ The second addition to the statute awards grandparental visitation if one of

the grandchild’s parents has a felony conviction and is incarcerated in the Department of Corrections and the grandparent had a pre-existing relationship with the child that predates the incarceration.²

CONSTITUTIONALITY OF THE STATUTE

Initially grandparents did not have standing to assert a claim to visitation with their grandchildren. Influenced by case law, the Legislature amended Title 10 O.S. §5 to include access if one natural parent was deceased and other parent remarried,³ when one or both parents were deceased⁴ or for the grandparent whose child’s parental rights had been terminated.⁵ *In re Herbst*⁶ was the first case that dealt with the constitutionality of the statute as the trial

court denied maternal grandfather's application for visitation, finding 10 O.S. §5(A)(1) was unconstitutional as applied to the facts of this case. Grandchild was in the custody and control of her married parents, both of whom objected to the applicant's proposed visitation. At that time the authority given in Title 10 O.S. §5(A)(1) allowed the district court to grant grandparental visitation if the court deems it *in the child's best interest*. (Emphasis added.) The statute did not provide for a showing of harm to the child before bringing the best interest of the child into the court's consideration. The court held:

The facts of this case involve no harm or threat of harm to S.D.S. and no unfitness on the part of the parents. As a result, there is no interest so compelling which could give the State of Oklahoma license to interfere with the decision of these parents whose care for their child has never been questioned or suspect. Herbst argues for an application of 10 O.S. §5(A)(1) which effectively strips parents of the right to make the decisions regarding grandparental visitation and their own children. Any conflict between the fundamental, constitutional right of parents to care for their children as they see fit and the statutorily created right of grandparental visitation must be reconciled in favor of the preservation of the parents' constitutional rights. The relationship between parent and child must be held paramount.⁷

The opinion in *Herbst* was greatly influenced by *Troxel v. Granville*,⁸ where the biological parents of two daughters were never married. Following separation, the father lived with his parents, and the daughters visited their paternal grandparents often. After the father committed suicide, the paternal grandparents petitioned the court for visitation with their granddaughters. Although the mother did not oppose visitation she wanted less time than the grandparents requested. The lower court granted grandparent visitation. The U.S. Supreme Court granted certiorari.

The U.S. Supreme Court addressed the constitutionality of the section of the Revised Code of Washington which allowed "any person" at "any time" to obtain visitation rights whenever the visitation was in the child's best interest. The U.S. Supreme Court invalidated the statute finding that it impermissibly interfered with "the fundamental right of parents to

make decisions concerning the care, custody, and control of their children."⁹

Influenced by *Herbst*, Title 43 §109.4 states that the grandparent has to establish harm or potential harm before the court can consider what is in the grandchild's best interest. A showing of harm is discussed at length, *In the Matter of the Guardianship of H.E.W.*¹⁰ J. Wyatt and A. Ailey were the unmarried parents of H.E.W. After the child's birth, father died while serving in the U.S. Navy. A guardianship proceeding ensued so that H.E.W. could receive his father's personal belongings. Mother was appointed guardian of their child. Paternal grandmother and great grandmother filed a petition in the guardianship action for visitation. The trial court granted visitation finding that harm occurred to H.E.W. because there had been visitation during the first seven months of H.E.W.'s life which was abruptly ended.

The appellate court reversed the order granting visitation stating that grandmother did not allege, and the evidence did not show, that mother was unfit. The opinion stated:

"If operating over the objection of fit parents, grandparental visitation may be imposed only upon a showing that the child would suffer harm without it." The grandparent seeking visitation bears the burden of proving harm to the child and harm must be shown before the court considers the child's best interests. Death of one of the parents does not change the surviving parent's fitness as a mother nor alter her constitutionally protected rights to rear her child without state interference. Because of the fit parents' constitutionally protected rights to rear their child, and the presumption that they make decisions in the child's best interests, the alleged harm to the child must be significant. More specifically, to succeed, the grandparents must allege and prove that the failure to grant visitation will cause the child *significant harm by adversely affecting the child's health, safety, or welfare*. (Emphasis added by author.)

"... a vague generalization about the positive influence many grandparents have upon their grandchildren falls far short of the necessary showing of harm which would warrant the state's interference with this parental decision regarding who may see the child."¹¹

ADOPTION

The leading case in addressing whether a grandparent has standing to intervene in an adoption is *In the Matter of Adoption of G.D.L.*¹² Both the unwed mother and father of G.D.L. consented to her adoption by petitioners, an unnamed couple, who filed their petition to adopt. The maternal grandmother sought to intervene to secure visitation rights in the event an adoption was granted by the court, or, in the alternative, to adopt the child herself. The district court denied grandmother's motion to intervene, finding that the grandmother had no standing to intervene because there is no specific statutory authority allowing such action. The court states:

We note there is presently a thread of consistency woven through the statutes. Both §5 and 60.16(3) allow grandparent's visitation in adoption cases only when the adoption results in the child remaining with at least one blood relative as a parent."¹³

*Leake v. Grissom*¹⁴ was decided when the statute only allowed grandparental visitation when the consent for adoption was given to a blood relative, not the mother's new husband. In denying grandparental visitation the court said:

Where the adoption statute accords the adopted child the status of a natural child, the court, in the absence of statutory authority to the contrary may not grant visitation privileges.¹⁵

However, two dissenting justices noticed a legislative "thread" referred to above, and stated,

Those statutes [§5 and 60.16(3)] should be construed together in light of the objective doubtless intended by the Legislature... The post decree adoption was not intended as a barrier (to grandparental visitation) so long as the child remained with at least one blood relative as a parent. The obvious intent of the cited enactments, read together, was to prevent alienation from grandparents in all those instances in which the post-death or post-decree adoption has not placed the offspring beyond the circle of the child's consanguinity.¹⁶

The purpose of adoption proceedings is to terminate all legal relationships in rights between a minor child and its natural parents and to establish these rights in the adoptive parents... A decree of adoption severs the child from its own family tree

and engrafts it upon that of the new parentage. Public policy requires the severance of all old ties... Where the adoption statute accords the adopted child the status of a natural child and frees the natural parents of legal obligations toward it a court in granting an adoption decree is without authority to include a grant of visitation privileges to the parent or members of the parent's family in the decree."¹⁷

The facts in *In Application of Walker*¹⁸ resulted in an interesting legal decision. Mother grew up in Georgia and gave birth to K.P.H., born out of wedlock in 1958. At the time of his birth, mother agreed to let her parents adopt him. Requesting the court to grant her grandparental visitation, the court held that the previous adoption legally severed her rights to visitation, regardless of the fact that she eventually lived with and raised her son.

Neither K.P.H.'s post-adoption residence with Appellant, nor any relationship in fact which may have developed between Appellant and Brandy, created the legal relation of grandparent and grandchild required by the visitation statute.¹⁹

Currently 43 O.S. §109.4.(3) states that the district court shall not grant to any grandparent of an unmarried minor child visitation rights to that child subsequent to the final order of adoption. However, if there is already grandparent visitation in place, it will not be terminated unless ordered by the court after an opportunity to be heard and the district court determines it to be in the best interest of the child, or if the child had been placed for adoption prior to attaining six months of age.

APPLICATION OF THE STATUTE

In an effort to determine in advance whether your client would be eligible to receive grandparental visitation, the statute states that visitation may be granted if:

- (a) the court deems it is in the child's best interest; *and*
- (b) there is a showing of parental unfitness or harm to the grandchild;
- (c) the intact nuclear family has been disrupted by a divorce, annulment, separate maintenance; legal custody has been given to a third party; a parent has deceased; a parent has been imprisoned; a parent has deserted the family; or the

grandparent requesting visitation had custody previously.²⁰

Note, again that a judge may not order visitation if the child is in an intact nuclear family and both parents are determined fit. In determining “fitness” it may be shown that a parent has an untreated chemical or alcohol dependency; a history of violent behavior or mental illness; exhibited a lack of proper care that has been detrimental to the child; or has demonstrated conduct that shows the parent is incapable or unwilling to take care of the child.

In *the Matter of the Guardianship of H.E.W.*²¹ the court stated that the grandparent seeking visitation bears the burden of proving harm to the child and harm must be shown before the court considers the child’s best interests.²² The statute defines harm or potential harm as a showing that without court-ordered visitation by the grandparent, the child’s emotional, mental or physical well-being could reasonably or would be jeopardized.²³ As previously stated, it isn’t enough to state that the child would miss seeing the grandparent. One might need an expert witness to explain the extent of the pre-existing relationship between grandparent and child, the emotional bonds that were created during that time and what emotional and psychological damage would occur with the end of the relationship.

In determining “best interest” the court may make specific findings of fact with regard to numerous considerations. To name a few, the court will look at the willingness of grandparent to encourage the parental relationship; the length and quality of the pre-existing relationship; motivation of parents in denying visitation and grandparent’s request for visitation; the moral fitness of the parties; interruption to the child’s activities and the significant people the child would interact with in both the parent’s and grandparent’s lives.²⁴ Because it requires a bloodline, 43 O.S. §109.4 does not apply to step-grandparents.

MODIFICATION OF GRANDPARENTAL RIGHTS

In *Scott v. Scott*²⁵ a child was born in September 1992 to mother and father during their marriage. The parents were divorced in 1994, with mother receiving custody and father visitation. Thereafter, father’s parental rights were terminated. Mother remarried in 1995 and one year later she and her new husband adopted the child. Before the adoption was

“The parents never married and live in separate households. Mother filed a petition against father seeking custody and child support.”



final, the district court issued interim orders granting father’s parents visitation. After the adoption was finalized, the court granted visitation to the grandparents over mother’s objection. In response, mother filed a motion to terminate grandparent visitation which the court denied. Mother appealed and the Court of Civil Appeals affirmed. The Supreme Court granted the writ of certiorari.

The court has held that a party seeking to modify a visitation order has the burden of proof:

This court has construed this provision in a custody modification proceeding to require the moving party to show a change in circumstances which “adversely effect[s] the best interest of the child such that the temporal, moral and mental welfare of the child would be improved by the change.

A similar showing is appropriate for a modification or change of a grandparent visitation order. Because the Mother is seeking to terminate existing court-ordered grandparent visitation, she has the burden of showing a change in circumstances such that modification or termination of an existing grandparent visitation is in the best interest of the child."²⁶

*Ingram v. Knippers*²⁷ adds to this discussion: Child was born in 1995, to mother and father. The parents never married and live in separate households. Mother filed a petition against father seeking custody and child support. In December 1997, the district court awarded custody of child to mother, set a visitation schedule for father, and fixed the father's monthly child support obligation.

In 2000, child's paternal grandfather filed a motion to intervene and for visitation. Grandfather alleged that he had been involved in child's life since birth, that he had provided financial and other support for both child and mother, that grandparental visitation would be in child's best interest, and that grandfather had unsuccessfully attempted to receive visitation through his direct contact with mother.

Eventually mother and father came to an agreement which the district court entered that allowed visitation between child and grandfather. The schedule covered October and November of 2000. The parties agreed and the court ordered that further visitation would be as recommended by child's counselor.

In December, mother unilaterally terminated grandfather's visitation with child. Mother did not seek court approval before terminating the visitation. Grandfather filed a motion to enforce his visitation rights, alleging that mother had unreasonably interfered and denied him visitation. He requested an order setting a specific visitation schedule, requiring mother to post a bond, and awarding him costs and attorney fees.

Mother then filed a motion seeking to terminate grandfather's visitation. She argued that courts may not order grandparental visitation absent a showing that the custodial parent is unfit or that the child will suffer harm if the visitation is not allowed. She did not allege that termination of grandparent's visitation was in child's best interest. Even though mother specifically requested that the visitation be terminated and that grandfather's

motion be denied, the district court treated mother's motion only as an objection to grandfather's motion to enforce visitation. Grandfather then filed an application for a contempt citation for mother's unilateral action terminating grandfather's visitation in contravention of the November order. He requested reinstatement of the order, mother's incarceration, and an award of costs and attorney fees.

At a hearing on the motions, the district court placed the burden of proof on grandfather to show mother's unfitness or potential harm to child. Grandfather presented the testimony of child's counselor that termination of grandparental visitation would result in harm to child. Mother did not allege or present any evidence that there had been a substantial change of circumstances or that terminating visitation would be in child's best interest. In April 2001, the district court entered an order enforcing grandfather's motion to visitation.

On appeal, mother claimed the statute which allowed the initial grant of grandparental visitation required a showing of harm to child or parental unfitness; the grandfather failed to meet his burden of showing harm; the visitation should not have been granted, and she should be allowed to unilaterally terminate the visitation.

The problem with Mother's claim was that the initial visitation was a consent order entered after Mother and Grandfather had *reached an agreement*. (Emphasis added.) Because Mother consented to the initial visitation, the order was not entered under authority of Title 10 §5, and Mother's rights were not infringed by the order. Further, the visitation order is not now subject to collateral attack on the ground that Title 10 §5 is unconstitutional.

A judgment based on an agreement of "the parties is enforceable and valid even though it does what a trial court cannot [otherwise] do, provided the agreement does not contravene public policy. Nothing in Title 10 §5 or this Court's jurisprudence prevents a court from granting grandparental visitation when the parties agree to the visitation. Mother has failed to present any convincing argument that the grandparental visitation order was void such that it is subject to collateral attack in an enforcement proceeding.

The district court should have considered Mother's motion as a request to terminate grandparental visitation. On remand, the district court should conduct a hearing on Mother's motion to terminate. The burden is on Mother, as the moving party, to first show a change of circumstances and to then show that termination of the visitation would be in Child's best interest. The district court should consider all relevant factors in determining the Child's best interest giving due regard for Mother's interest in raising her child. Mother must present evidence more than that she simply has changed her mind and does not wish Grandfather to have any contact with Child."²⁸

PROCEDURE

Sections 43 §109.4 (F) (1-7) lays out the procedures for requesting or enforcing grandparental visitation. Jurisdiction lies with the district courts to order or enforce visitation rights upon the filing of a verified petition. Venue is in the county of ongoing litigation or county of child or parent. Notice must be given to the person having custody of the child.²⁹

If the parent unreasonably interferes or denies grandparental visitation a motion to enforce visitation may be filed. At the initial hearing, mediation will be ordered and a hearing on the merits is set. If mediation is successful, the agreement is brought to the court for an order. If the court finds that there was interference or denial, the court may order a specific visitation schedule, compensating visitation time, attorney fees or for the parent to post a bond.³⁰

ATTORNEY FEES

Last, but not least; you lose, you may pay. *Folsom v. Folsom*³¹ discusses attorney fees in grandparental visitation cases.

This Court stated the following in *State ex rel. Tal v. City of Oklahoma City*, concerning the well-known American Rule as to the recovery of attorney fees in litigation:

The Rule is generally that each litigant pays for their own legal representation and our courts are without authority to assess attorney fees in the absence of a specific statute or contract allowing for their recovery. Exceptions to the Rule are narrowly defined and carved out with great caution because it is understood liberality of attorney fee

awards against the non-prevailing party has a chilling effect on our open access to courts guarantee.

Oklahoma jurisprudence, thus, recognizes that attorney fee statutes are strictly applied because to do otherwise holds out the real possibility of chilling access to the courts. ... Further, if the involved attorney fee statute requires interpretation it may be read in context with other parts of the statute and in light of the law in effect at the time of its enactment.³²

In 1999 an express attorney fee provision was added to 10 O.S. Supp.1997, §5 as subsection (E).³³ It provided that in any action for grandparental visitation pursuant to §5, the court may award attorney fees and costs if the court found it to be equitable. In 2000, §5 was extensively amended, providing that if the court found that the motion for enforcement of visitation rights was unreasonably filed or pursued by the grandparent, the court could assess reasonable attorney fees, mediation costs, and court costs against the grandparent.³⁴

In the current statute, if it is found that the parent unreasonably interfered or denied established visitation, or the grandparent filed a frivolous motion for enforcement, the losing party may be awarded an assessment of reasonable attorney fees, mediation costs and court costs.³⁵

CONCLUSION

In light of the attention grandparental visitation rights has received from the Legislature, this area appears to be much like Will Rogers' observation about Oklahoma weather: "If you don't like it, just wait awhile. It's bound to change." The confusing and contradictory provisions of 43 §109.4 make grandparental visitation rights a reliable source of controversy and litigation that would include extensive fact patterns and expert witnesses. Attorneys attempting to have a court order grandparental visitation would be best advised to read the statute often, anticipating the evolution of the law which continues to accommodate new and equitable fact patterns.

1. See 43 O.S. §109.4(A) (3).

2. See 43 O.S. §109.4(A) (5).

3. *In re Fox*, 1977 OK 126, 567 P.2d 985.

4. *Julien v. Gardner*, 1981 OK 54, 628 P.2d 1165.

5. *Matter of K.S., T.W. & G.S.*, 54 P.2d 1050 (Okla., 1982).

6. 1998 OK 100, 971 P.2d 395.

7. *In re Herbst*, 1998 OK 100, 971 P.2d 395 ¶ 17.

8. 120 S.Ct. 2054 (2000).

9. *Troxel*, 120 S.Ct. at 2062.
10. 2004 OK Civ. App 19, (OK, 2004).
11. *Id.* at ¶ 7.
12. 1987 OK 115, 747 P.2d 282.
13. *Id.* at ¶ 8.
14. 614 P.2d 1107 (Okla. 1980).
15. *Id.* at 1110.
16. *Id.*, dissenting opinion at 1111.
17. *In Matter of Fox*, 567 P.2d 985 (Okla. 1977).
18. 1993 OK CIV APP 148, 861 P.2d 346.
19. 1993 OK CIV APP 148, 861 P.2d 346 ¶ 9.
20. See 43 §109.4 (A) (1) (c 1-9).
21. 2004 OK Civ. App 19, (OK, 2004).
22. *Id.* at ¶ 7.
23. See 43 §109.4 (2) (a).
24. See 43 O.S. §109.4 (E).
25. 2001 OK 9, 19 P.3d 273.
26. *Stephen v. Stephen*, 1997 OK 52, ¶ 4, 937 P.2d 92, 95.
27. 2003 OK 58, 72 P.3d 17.
28. *Id.* at ¶14.(citations omitted).
29. See 43 §109.4 (F) (1).
30. See 43 §109.4 (F) (6)(a-c).
31. 2003 OK 96, 81 P.3d 652.
32. *Id.* at ¶ 8.
33. 1999 Okla.Sess.Laws, Ch.383, §1; 10 O.S.Supp.1999, §5(E).
34. 2000 Okla.Sess.Laws, Ch.246, §1; 10 O.S.Supp.2000, §5(E)(7).
35. See 43 §109.4 (6) (d) and (7).

ABOUT THE AUTHOR



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Marital Homestead Rights Protection: Impact of *Hill v. Discover Card*?

By Kraettli Q. Epperson

THE LAW ON 'MARITAL HOMESTEAD' MAY HAVE CHANGED

The recent Oklahoma Court of Civil Appeals holding in the *Hill v. Discover Card* case may mean that in certain circumstances there is no longer a requirement for both spouses' simultaneous execution of a single deed (or mortgage) to a third party, even though both spouses are living, married, and the property is still their homestead. Such situation, under *Hill*, would arise where one spouse has already conveyed his or her legal interest in the homestead to the other spouse. (*Hill v. Discover Card*, 2008 OK CIV APP 111¹) Such opinion may change the long standing protection created under the constitutional and statutory prohibition against the unilateral conveyance (or encumbrance) of the "marital homestead" to a third party.

THE MARITAL HOMESTEAD IS ONE OF THE FOUR TYPES OF HOMESTEAD

The primary home or residence of an individual, a married couple or a family is referred to in Oklahoma within the legal profession as the "homestead," or, more specifically, depending on the legal question involved, the "assessment homestead," the "execution homestead," the "probate homestead" or the "marital homestead."²

Oklahoma is known as a "populist" state, meaning its statutes reflect a leaning toward protecting those citizens and residents who were, and still are, perceived by the state's policy mak-

ers as needing safeguards created and enforced by the government. This includes shielding the debtor from the clutches of the "overreaching" creditor through enactment of anti-deficiency statutes,³ and preventing a spouse and the minor children from being abandoned and left homeless by a thoughtless and selfish spouse through enforcement of the marital and probate homestead laws,⁴ among others.

Historically, public policy sought to protect both the wife and the family, with three principal reasons being given for the creation of homestead laws:

1) To protect the family unit from forced eviction from its home through the enforcement of general creditors' claims;

2) To provide protection to the widow after the death of her husband; and

3) To protect the wife from ill deeds of the husband.⁵

Currently, such homestead rights are equally available to either a husband or wife.

The homestead right is not shown in the land records, and it exists alongside but separate from the normal ownership interest wherein one or more persons hold record legal title to land. This homestead right is overlaid on the recorded legal title interest, such as a fee simple absolute, and, depending on the type of homestead right being asserted, can be held by one or more single persons or by a married couple, and, when there are multiple holders of legal title, they can hold as tenants in common or as joint tenants with right of survivorship. The homestead right is understood better if it is recognized as a personal "right" held by a person and not as an "interest" in real estate. This is a better approach because any sort of "interest" in real estate can be conveyed (unless such right to convey is expressly restricted of record), but a right held personally can be waived for a particular transaction but cannot be conveyed permanently to another person (regardless of whether it is a spouse or a third party).

Unlike dower and courtesy, homestead does not have its roots in the common law. The Oklahoma Supreme Court has explained that the homestead, as it exists in Oklahoma, is a creature of the state constitution and statutes, nothing like it being known at common law.⁶ It is a purely constitutional and statutory creation based on public policy considerations.

There are four categories of homestead rights in Oklahoma, including:

1) **assessment:** an *ad valorem* tax exemption, whereby an owner elects which tract of land is his homestead, and the owner receives a discount on his annual county *ad valorem* real property taxes;

2) **execution:** a prohibition exempting the debtor's homestead (for either an unmarried individual or a married couple) from execution for general creditors' debts (as distinguished from special debts whereby a specific tract of

land is voluntarily encumbered to serve as collateral for the debt, *i.e.*, a real estate mortgage);

3) **probate:** the preservation of the equivalent of a life estate in the couple's homestead for the benefit of a surviving spouse (and any minor children) when a spouse dies, even where the deceased spouse was the holder of all of the record title; and

4) **marital:** a protection of the spouses' homestead rights against voluntary encumbering or conveyancing by one spouse without the joinder of the other spouse, even where the spouse who is attempting to affect the title holds all of the record legal title.⁷

A SUMMARY OF THE FACTS AND DECISION IN *HILL*

The Operative Facts

In brief summary, the operative facts of the *Hill* case occurred in the following order:

- 1) the husband, Larry Jennings, unilaterally conveyed of record his interest in the homestead (which he had been holding as a joint tenant with his wife) to his wife, Sue Ann Jennings, then;
- 2) the wife, Sue Ann, (falsely stating in the deed she was single) unilaterally conveyed of record the land to a third party (plaintiffs *Hill* herein), then;
- 3) a general creditor of the first couple (defendant, Discover Card) properly filed a statement of judgment in the land records where it immediately became a lien on all lands actually owned by such first couple (the Jennings), then;
- 4) the first couple (the Jennings) then signed (both of them) and recorded an identical deed of the same land to the second couple (the Hills), then;
- 5) the second couple (the Hills, the plaintiffs herein) thereafter filed an action against the creditor to quiet title extinguishing any money judgment lien claim on the land.⁸

The Questions to Be Resolved

The four questions which had to be resolved to reach a decision in *Hill* were:

- 1) Was the recorded transfer of the legal title to the marital homestead lands from the husband, Larry, to his wife, Sue Ann, valid?

- 2) Did such transfer of the legal title from the husband, Larry, to his wife, Sue Ann, include a transfer and relinquishment of any further claim by Larry to the protections provided under the Oklahoma Constitution and statutes concerning marital homesteads?
- 3) Was the conveyance of the legal title for the marital homestead lands from Sue Ann to the Hills invalid, due to the absence of Sue Ann's husband's signature on the same deed as her signature, which signature would have shown his consent to such transfer?
- 4) Did the judgment lien held by Discover Card against Larry and Sue Ann Jennings attach to and become perfected against the subject lands?

The Trial Court Decision

The trial court found the deed from Larry to his wife, Sue Ann, to be valid, but held that the deed from Sue Ann Jennings to the Hills was invalid (due to the absence of Larry's signature), thereby restoring title to the Jennings, but then it held that the Discover Card judgment lien failed to attach to the Jennings' land, stating (as set forth in ¶5 in the *Hill* case):

¶5 *The trial court heard argument of the parties' counsel on May 23, 2007, and issued its order on July 5, 2007. The trial court made the following findings:*

[Discover's] unsecured judgment against the Jennings was only filed of record against the Jennings after their [sic] was a conveyance of title to [the Hills] by Mrs. Jennings, defective in its failure to convey as well the homestead interest of Mr. Jennings, and misleading in its characterization of Mrs. Jennings as a single woman. The only notice of judgment filed, the notice against the Jennings, was filed as a general judgment, devoid of even a reference to the real property conveyed to the [Hills]. These actions on the part of [Discover] do not constitute legal notice to the [Hills] of the claim against the subject property, and do not meet [sic] an operation of law which perfects the purported lien against that property.

Assuming this trial court decision was left standing, you would have the situation where the debtors, the Jennings, still owned the subject lands instead of the Hills, but the creditor,

Discover Card, had lost its properly filed judgment lien (*i.e.*, apparently due to the absence of a "reference" to specific real property). It should be noted that a statement of judgment, prepared and then submitted to the local county clerk by the creditor, pursuant to 12 O.S. §706, is on a form created by the administrator of the courts, and that neither the statute nor the form calls for the listing of any specific lands. Such statutory lien is intended to be a lien on any and all of the debtor's real estate in that county, whether owned when the statement of judgment is initially filed, or later acquired by the debtor.⁹ The appellate court found that the judgment lien did not attach to the subject land for reasons different than those used by the trial court, so this trial court holding – which implies that the statement of judgment must describe the lands being covered by the lien – can be ignored.

The Appellate Court Decision

The appellate court answers the four essential questions, listed above, as follows:

1) a deed from one spouse to the other spouse is valid to transfer legal title to such spouse without the grantee's signature on the deed, because:

(a) "[c]onveyance of the homestead from one spouse to the other is not a sale of the homestead within the meaning of Sec. 2, Art. XII, Constitution" (¶7 of *Hill*, quoting *Howard v. Stanolind Oil and Gas Co.*¹⁰)

(b) a husband's unilateral mortgage of the homestead to the wife does not require the wife's signature because "no effort was made to divest the wife of her estate or right. That remained unimpaired. I can see no reason why she should be required to execute the deed to herself in order [sic] to its validity." (¶8 of *Hill*, quoting *Brooks*, which was quoting *Furrow*¹¹)

(c) "The case of a deed to the wife is not within the spirit of this section [on marital homestead], which surely cannot intend that the wife do the vain and absurd thing of executing, as grantor, a deed to herself as grantee." (¶8 of *Hill*, quoting *Hall*¹²)

2) such unilateral deed of the homestead from one spouse to the other spouse permanently transfers the grantor's marital homestead claims, because:

(a) (*Hill* at ¶10) “There is a statutory presumption that every estate in land granted by a deed shall be deemed an estate in fee simple unless limited by express words.” *Clearly Petroleum Corp. v. Harrison*, 1980 OK 188, ¶8, 621 P.2d 528, 532, and 16 O.S. §§18 & 29, and *Atkinson v. Barr*, 1967 OK 103, ¶22, 428 P.2d 316, 320 [note that the *Clearly* case was dealing solely with the question as to whether a conveyance granted an easement or a fee simple, and note this author’s discussion of *Atkinson* below]

(b) (*Hill* at ¶10) “Further, the quit-claim deed from Larry [the husband] to Sue Ann [his wife] operated to convey Larry’s homestead rights to Sue Ann in addition to all other right, title, and interest he had in the property.”

(c) (*Hill* at ¶11) “We find no ambiguity in Larry’s quit-claim deed to Sue Ann. The deed intended to and did convey all the right, title, and interest, including **Larry’s homestead interest**, to Sue Ann.”

3) (*Hill* at ¶11) the Hills received valid title without Larry’s signature, because:

“Consequently, at the time that Sue Ann conveyed the property to the [third parties] Hills, it was unnecessary for Larry [her husband] to relinquish his homestead rights to the property **as he had already done so in the quit-claim deed [to Sue Ann].**”

4) (*Hill* at ¶13) while the appellate court held that the “statement of judgment [was] properly filed”, the creditor still has no lien on the subject lands, because:

Discover also contends that the trial court erred when it ruled that a statement of judgment properly filed pursuant to 12 O.S. §706 is insufficient to create a lien and that some additional notice to the Hills was required. Since we hold that the quit-claim deed from Larry to Sue Ann was valid and operated to divest Larry of his homestead rights and since Sue Ann, the sole owner of the property conveyed the property to the Hills before Discover’s judgment lien, we find it unnecessary to address this issue as the lien did not attach to the property during either Sue Ann’s or Larry’s ownership.

The result of this decision appears to be that hereafter, title examiners will no longer need to ensure that a conveyance or encumbrance of

the homestead includes the non-title-holding spouse’s signature, if the non-title-holding spouse had previously deeded the legal title to the other spouse.

Such conveyance, placing the entire legal title in one of the two spouses, might be for legitimate reasons, such as to avoid probate, to avoid creditors of the grantor spouse, etc. In those situations (arising pre-*Hill*), the non-title-holding spouse would still be protected against adverse actions by his or her spouse due to such non-title-holding spouse’s marital protection, which would require the non-title-holding spouse’s signature on any subsequent deeds or encumbrances. But now (post-*Hill*), such conveyances to the other spouse may have the grave consequence of stripping away such constitutional protection.

It should be noted that this significant ruling is not made expressly prospective in nature, which would have thereby made it apply only to future conveyances; therefore, it is possible that it affects all existing deeds and titles as well.¹³

PROBLEMS WITH THE *HILL* DECISION

General Background

According to the Oklahoma Constitution, Art. 12, Section 2:

The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money therefore or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law; Provided, Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage.

This constitutional homestead is the land that is occupied by the family as a home.¹⁴

The state Legislature was expressly empowered by such constitutional language to prescribe the “manner” in which a spouse would give their “consent” to the sale (including the conveyancing or encumbrancing) of the marital homestead. Under 16 O.S. §4(A):

A. No deed, mortgage, or conveyance of real estate or any interest in real estate, other than a

*lease for a period not to exceed one (1) year, shall be valid unless in writing and subscribed by the grantors. **No deed, mortgage, or contract affecting the homestead exempt by law**, except a lease for a period not exceeding one (1) year, shall be valid unless in writing and subscribed by both husband and wife, if both are living and not divorced, or legally separated, except as otherwise provided for by law.*

In recognition of the practical realities associated with married life, the state Legislature, when enacting the initial implementation statutes, carved out a few situations (*i.e.*, abandonment, incapacity, and non-homestead) where it was not deemed necessary for both spouses to sign a deed conveying lands which was the marital homestead, including:

16 O.S. §6 provides (upon abandonment):

Where the title to the homestead is in the husband, and the wife voluntarily abandons him for a period of one (1) year or from any cause takes up her residence out of the state, he may convey, mortgage or make any contract relating thereto without being joined therein by her; and where the title to the homestead is in the wife and the husband voluntarily abandons her, or from any cause takes up his residence out of the state for a period of one (1) year she may convey, mortgage or make any contract relating thereto without being joined therein by him.

16 O.S. §7 provides (upon incapacity):

In case of a homestead held in joint tenancy, if one spouse becomes incapacitated, upon application of the other spouse to the district court of the county in which the homestead is located, and upon due proof of said incapacity, the court may issue an order permitting said other spouse to sell, convey, lease, lease for oil and gas mining purposes, or mortgage the homestead. For purposes of this section and sections 3 and 4 of this act "incapacitated" or "incapacity" means impairment due to mental illness, mental deficiency, physical illness or disability, to the extent the individual lacks sufficient understanding or capacity to make or communicate responsible decisions.

16 O.S. §§8-10, define the judicial procedure to establish such incapacity and to authorize such sale.

16 O.S. §13 provides (if non-homestead):

The husband or wife may convey, mortgage or make any contract relating to any real estate, other than the homestead, belonging to him or her, as the case may be, without being joined by the other in such conveyance, mortgage or contract.

However, the obstacle to an examiner approving a title where any of these three circumstances might apply – without a judicial proceeding establishing the necessary facts — is that all title examiners must examine title for lenders, buyers or title insurers on the basis of looking for “marketable title,” and such title must be determined based on what the public land records show.¹⁵ Unless there is a court proceeding undertaken (as is expressly required to establish incapacity) and the resulting decree filed in the land records, no examining attorney can pass the title even where someone insists that one of these three situations is present. This reluctance is because the consequences of a deed failing to include both spouses’ signatures, if it turns out that the land was their marital homestead, is a void deed, a disastrous result.¹⁶

None of these three statutory exceptions apply to our fact pattern here in the *Hill* matter: 1) there was no allegation of abandonment, 2) there was no claim of incompetency, and 3) the property was admittedly the marital homestead.

Pre-*Hill* precedential case law in Oklahoma supported the first point decided by the *Hill* appellate court. Yes, a unilateral conveyance by one spouse to the other of the marital homestead is valid to convey the legal title. This case-law created principle is reflected in Oklahoma Title Examination Standards 7.1 and 7.2, which deal with marital interests, as approved by the Oklahoma Bar Association House of Delegates.¹⁷ Standard 7.2 provides in part:

7.2 MARITAL INTERESTS AND MARKETABLE TITLE

Except as otherwise provided in Standard 7.1, no deed, mortgage or other conveyance by an individual grantor shall be approved as sufficient to vest marketable title in the grantee unless:

A. The body of the instrument contains the grantor’s recitation to the effect that the individual grantor is unmarried; or

B. The individual grantor’s spouse, identified as such in the body of the instrument, subscribes the instrument as a grantor; or

“Yes, a unilateral conveyance by one spouse to the other of the marital homestead is valid to convey the legal title.”



C. The grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument.

The practice followed by real estate attorneys in Oklahoma is to require that every deed, or encumbrance (such as a mortgage¹⁸) must include the statement of marital status and joinder of spouse, if married, except in the single instance covered by TES 7.2(C) (set forth above), which is when the grantee is one of the spouses. Such exception (TES 7.2(C)) matches the first of the two deeds involved in our fact pattern in *Hill* (i.e., from husband Larry to wife Sue Ann).

Also, it would be hard — **assuming** the court’s decision on points one to three were correct or were conceded — to argue with point four as decided by the *Hill* court. Yes, if the title to the lands was effectively conveyed from the Jennings to the Hills, **before the judgment lien against the Jennings was created by filing the statement of judgment in the land records**, then the Hills took title free from such lien.

Unilateral Deed to Other Spouse Does Not Transfer Grantor’s Homestead Right

However, the pronouncements in *Hill* regarding points two and three are directly contrary

to three existing Oklahoma Supreme Court opinions.

When title to the marital homestead is being conveyed to the other spouse, there are three possible combinations as to how title was held before such conveyance: 1) all of the title is held by the grantor spouse, 2) the title is held jointly by the spouses (either as tenants in common or joint tenants), or 3) all of the title is held by the grantee spouse.

If one was trying to prove that a spouse grantee had received the entire legal title including a permanent transfer of any personal homestead protections, the third scenario (i.e., grantor did not hold any legal title at the time of executing the deed) is the most supportive of such an argument. This is because the granting spouse has only a homestead claim to transfer and has no legal title to convey, so they “must” intend (it would be argued) that they were conveying something — whatever they had — meaning their homestead rights. In the other two scenarios (i.e., the spouse grantor had either all of or half of the legal title to convey), there could be an effective counter argument that the spouse grantor had some legal title to convey, so that it would be unclear whether the intent was to convey only the grantor’s legal title or to transfer such legal title plus transfer permanently all of his or her homestead right. The pre-*Hill* Oklahoma Supreme Court opinion (*Atkinson*, discussed immediately below), which is “on-point” with the *Hill* issues, happens to deal with facts identical to the third scenario set out above (i.e., no initial legal title in grantor), and, consequently, its holding cannot be explained away when it holds that any conveyance between spouses does not convey the grantor spouse’s marital homestead right.

In the 1967 *Atkinson* case, the Oklahoma Supreme Court rendered a decision where the facts were as follows: 1) the entire legal title was in the wife (scenario three above), and 2) the husband (who held no legal title) unilaterally deeded the marital homestead to the wife (who had used her money to initially acquire the land, and took and held title exclusively in her name), and 3), while the husband was alive, the wife unilaterally deeded the marital homestead to third parties, her children (not by this husband). Such fact pattern is, in all relevant aspects, identical to the one in *Hill*.

The appellate court in *Hill* was aware of and cited *Atkinson* for one point (i.e., a unilateral deed from one spouse to the other spouse is valid to convey the legal title covering the marital homestead, at ¶10 in *Hill*) and then failed to follow the rest of the holding in such case when considering this later point (i.e., whether the grantee spouse can subsequently unilaterally convey the marital homestead to a third party).

At ¶9 of *Atkinson*, the Oklahoma Supreme Court held (directly contrary to *Hill*) that:

The trial court found that the property was at all times the homestead of Vinnin [the husband] and Annette [the wife] and concluded as a matter of law that the warranty deed, dated August 17, 1949, from Annette to her children... was void because it did not bear the signature of Vinnin as required by 16 O.S. §4. The court further concluded as a matter of law that when Vinnin executed and delivered to Annette the quit-claim deed of August 12, 1949, it was his intent to convey to Annette any and all right, title and interest he might have in the property, except his homestead right.

Finally, at ¶18 of *Atkinson*, the Oklahoma Supreme Court held, “It is our conclusion that the warranty deed [from Annette unilaterally to her children] was void because Vinnin did not sign it and such conclusion by the trial court was correct.”

Also, in another case cited by the appellate court in *Hill* at ¶8 & 9, to support its position that the unilateral deed from husband Larry to wife Sue Ann was valid, the Oklahoma Supreme Court adopted and quoted favorably this language from an Alabama case:

A conveyance of homestead premises by the husband to the wife, while having effect as an alienation of the land in the sense of passing the legal title to her, is yet not an alienation of the homestead, since that [the homestead right] does not thereby pass either from the husband, the wife, or the family, but is still in every essential quality and attribute, with respect to possession, enjoyment, and all the rights necessary to its protection as exempted property, the homestead alike of the husband, the wife and their children. Brooks v. Butler, 1939 OK 132, ¶18, 87 P.2d 1092, 1096.

It should be noted that another prior Oklahoma Supreme Court case similarly held that:

The constitutional provisions are set forth in article 12, secs. 1, 2, and 3, of the constitution, and are designed to protect the family while both husband and wife are living, regardless of which one of them is vested with title to the land occupied as the homestead. In re Carothers’ ¶10.

CONCLUSION: JOINDER OF SPOUSE IS STILL REQUIRED

Based on three precedential cases pre-dating *Hill* (*Atkinson*, *Brooks*, and *In re Carothers’*), the law of Oklahoma is clear that the homestead rights of the husband Larry, in the *Hill* case, survived his conveyance of his legal title to his spouse, Sue Ann, and, consequently, the later unilateral conveyance by Sue Ann of the marital homestead to the Hills, was void, because Larry was living and it was still their homestead.

Hence, the holdings of the Oklahoma Supreme Court in *Atkinson*, *Brooks* and *In re Carothers’* remain the law of Oklahoma.

Out of deference for the precedential nature of an Oklahoma Supreme Court case, and due to concern about passing title where such title might be “void,” this author recommends that a cautious title examiner continue to require that any land must be conveyed with disclosure of marital status and joinder of spouse, if any. And furthermore, any prior deeds discovered in a review of a chain of title which fail to disclose that the grantor was unmarried, or if married, was joined by his or her spouse, should continue – post-*Hill* – to be viewed as being defective and must be cured. The only exception to such required joinder would concern a conveyance from one spouse as grantor to the other spouse as grantee of the legal title, as discussed in Title Examination Standard 7.2(C).

1. On Dec. 1, 2008, Request for Certiorari to the Oklahoma Supreme Court was denied, from an adverse decision from the Court of Civil Appeals (Division II), and on Dec. 31, 2008 mandate issued. The Oklahoma Court of Civil Appeals opinion was published in the *Oklahoma Bar Journal* on Jan. 17, 2009, Vol. 80, No. 2, page 132, and in the Oklahoma Supreme Court system as 2008 OK CIV APP 111.

2. This author previously wrote about the four types of homesteads in Oklahoma in an article in the *Oklahoma Bar Journal* in 2004: “Real Estate Homesteads in Oklahoma: Conveying and Encumbering Such Interest,” 75 *The Oklahoma Bar Journal* 1357 (May 15, 2004); some of the text in this current article is repeated from that earlier article; a copy of this earlier article (as paper #162) is available on the author’s Web site: www.EppersonLaw.com.

3. 12 O.S. §686.

4. Ok. Const., Art. 12, Secs. 1-2; 16 O.S. §4; 31 O.S. §1(A)(1); 58 O.S. §311.

5. Raymond J. Werner, *Real Estate Law* (Southwestern — Eleventh Edition — 2002), Section 19.03, Homestead.

6. *In re Carothers’ Estate*, 1946 OK 111, ¶10, 167 P.2d 899, 902.

7. Ok. Const., Art. 12, Secs. 1-2; 16 O.S. §4; 31 O.S. §1(A)(1); 58 O.S. §311;

68 O.S. §§2888-2889, 2892-2893, 2901.

8. *Hill v. Discover Card*, 2008 OK CIV APP 111, ¶2, ___ P.3d ___, ___; the detailed facts as shown in the Discover Card "Petition for Rehearing Before the Court of Appeals and Brief in Support of the Petition" follow:

Date of Filing	Instrument	Comment
3/18/96	Deed	Larry & Sue Ann Jennings acquire title to property in joint tenancy.
4/4/03	Quit-Claim Deed	Larry Jennings gives quit-claim deed to Sue Ann Jennings.
10/2/03	Joint Tenancy Warranty Deed	Sue Ann Jennings (falsely claiming to be a single woman) conveys property to Hills. Larry Jennings does not join in the execution of the conveyance.
4/8/04	Statement of Judgment	Discover Bank records a statement of judgment with the county clerk of Rogers County reciting that it recovered judgment against Larry and Sue Ann Jennings in Rogers County Case Number CS-03-351 on April 1, 2004.
9/28/04	Warranty Deed	Larry and Sue Ann Jennings as husband and wife convey property to Hills.
12/12/05	Divorce Decree	Larry and Sue Ann Jennings' divorce decree filed in the Rogers County court clerk's office.

9. The author has written several articles concerning the creation of money judgment liens, which are available on his Web site: www.EppersonLaw.com, including: "Have Judgment Lien Creditors Become 'Bona Fide Purchasers'?", 68 *Oklahoma Bar Journal* 1071 (March 29, 1997) (paper # 106); "Judgment Lien Creation Now Requires a Judgment Affidavit," 59 *Oklahoma Bar Journal* 3643 (Dec. 1988) (paper # 32).

10. *Howard v. Stanolind Oil & Gas Co.*, 1946 OK 56, ¶36, 169 O.2d 737, 744.

11. *Brooks v. Butler*, 1939 OK 132, ¶13, 87 P.2d 1092, 1095; *Furrows v. Athey*, 33 N.W. 208, 209 (Neb. 1887).

12. *Hall v. Powell*, 1899 OK 50, ¶5, 57 P.168, 170.

13. OK Const., Art. 2, Sec. 7.

§7. Due process of law

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

14. *In re Carothers' Estate*, 1946 OK 111, ¶16, 167 P.2d 899, 903; *In re Gardner's Estate*, 1926 OK 167, ¶14, 250 P. 490, 493-494.

15. In 1982, the Oklahoma Supreme Court endorsed the Title Examination Standards of the Oklahoma Bar Association by saying: "we deem such Title Examination Standards and the annotations cited in support thereof to be persuasive." *Knowles v. Freeman*, 1982 OK 89, ¶16, 649 P.2d 532, 535.

TES 1.1 MARKETABLE TITLE DEFINED

A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record.

16. *Wilson v. Clark*, 1924 OK 233, ¶8, 223 P. 668, 670-671.

17. TES 7.1 MARITAL INTERESTS: DEFINITION; APPLICABILITY OF STANDARDS; BAR OR PRESUMPTION OF THEIR NON-EXISTENCE

The term "Marital Interest," as used in this chapter, means the rights and restrictions placed by law upon an individual landowner's ability

to convey or encumber the homestead and the protections afforded to the landowner's spouse therein.

Severed minerals cannot be impressed with homestead character and therefore, the standards contained in this chapter are inapplicable to instruments relating solely to previously severed mineral interests.

Marketability of title is not impaired by the possibility of an outstanding marital interest in the spouse of any former owner whose title has passed by instrument or instruments which have been of record in the office of the county clerk of the county in which the property is located for not less than ten (10) years after the date of recording, where no legal action shall have been instituted during said ten (10) year period in any court of record having jurisdiction, seeking to cancel, avoid or invalidate such instrument or instruments on the ground or grounds that the property constituted the homestead of the party or parties involved.

Authority: 16 O.S. §4.

Comment: See Title Examination Standard 6.7 as to use of powers of attorney.

18. There is an earlier case, *Cimarron Federal Sav. Assn. v. Jones*, 1991 OK CIV APP 67, 832 P.2d 426 (approved for publication by the Oklahoma Supreme Court), which allows the enforcement of a purchase money mortgage against the execution and marital homestead even without the signature of the non-title holding spouse. Transactional attorneys and title attorneys typically ignore such holding and require the signature of the non-title holding spouse because 1) it is usually unclear in the record whether the loan is a purchase money mortgage, and 2) because the case is based on an erroneous assumption that a purchase money vendor's claim and a purchase money mortgage are the same thing. OK Const. Art. 12, Section 2, expressly allows a general execution against the execution homestead for a purchase money vendor's claim, which claim is not evidenced by a signed mortgage, but also requires the signature of the non-title holding spouse on any mortgage, whether purchase money or not.

19. *In re Carothers' Estate*, 1946 OK 111, ¶10 167 P.2d 899, 900.

ABOUT THE AUTHOR



Kraettli Q. Epperson graduated from OCU (J.D. in 1978). He is a partner with Mee Mee Hoge & Epperson in Oklahoma City, and he focuses on mineral and real property litigation (arbitration, receiverships, lien priorities, ownership, restrictions, and condemnation issues), commercial real property acquisitions and homeowners/condominium association representation. Mr. Epperson is chair of the OBA TES Committee and teaches "Oklahoma Land Titles" at OCU School of Law.



Medical Malpractice: Plaintiff, Defense, and Ethics Perspectives

Sponsor: Oklahoma Association for Justice

Date: Friday, December 18, 2009

Place: OAJ headquarters, 323 NE 27th - Oklahoma City, OK

Registration: 8:30 a.m.

Tuition: \$150 for OAJ members and \$175 for nonmembers. Students \$50.

CLE Credit:

Participants will earn 8 hours of mandatory CLE credit, including 1 hour of ethics.

Register & Pay Online:
www.okforjustice.org

Registration:

Name _____ OBA # _____
Firm _____
Address _____
City _____ State _____ Zip _____
Phone _____ Fax _____ Email _____

Registration Category:

☐ \$150 OAJ Member ☐ \$175 Non-member
☐ \$50 Student

Method of Payment:

☐ Check Enclosed ☐ Visa ☐ MC ☐ Am Ex

Cardholder name _____
Card number _____ Exp. Date _____
Signature _____

Return Registration Form & Payment to:

OAJ, 323 NE 27th Street, Oklahoma City, Ok. 73105
Fax: 405-528-2431

Speakers and Topics include: **Red Walters:** Case Evaluation, From the Defense Standpoint, **Ben Butts:** Case Selection for Plaintiffs, **Steve Clark:** Jury Selection, **Greg Haubrich:** Tort Reform, Constitutional Issues, **Ted Sherwood:** Preparing for Expert Depositions, **Gary Brooks:** Medical Licensing Board Issues, **Deborah Arndt, RN, Certified Nurse Legal Consultant:** Medical Charting & Nursing Errors, **Lisa Riggs:** Preparing the Plaintiff for Deposition & Mediation, **Travis Pickens (OBA Ethics Counsel):** Ethics



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2010

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OBA 105th Annual Meeting

Nov. 4 - 6, 2009 • Sheraton Hotel, OKC



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Ellen Quinton, Governor Deborah Reheard, Amber Peckio Garrett, Governor Cathy Christensen and Judge Donna Dirickson



Comedian Henry Cho



D. Faith Orlowski and Dru Warren

** See more photos in
the photo gallery at
www.okbar.org*



OBA members enjoying Casino Night



Gov. Brad Henry



Board of Governors voting held at the House of Delegates



OBA President Jon Parsley and Abe Lincoln look-alike at the CLE Plenary Session



Jennifer Johnson and Luke Gaither



Shirley Chesnut and Governor Charles Chesnut



Annual Luncheon speaker Gene Kranz



Space shuttle ice sculpture on display at the President's Reception



OBA President Jon Parsley, Annual Luncheon speaker Gene Kranz and OBA Vice President Linda Thomas



OBA President Jon Parsley presents the Outstanding County Bar Association Award to the Garfield County Bar Association. Accepting is Randy Long, Enid.



Nkem House, Jeff Trevillion, Charles Battle, Reginald Smith and Marcus Bivines



Attendees socialize at the President's Reception.

**Plan to attend the
2010 Annual Meeting?**

**Join us Nov. 17-19
at the Tulsa
Crowne Plaza Hotel!**

*Photographers: Melissa Brown
and Carol Manning*

2009 Attorney Art Show

The 2009 OBA Art Show was another great success. Eleven artists entered 22 pieces of art in five different categories. A panel of three judges scored the art, and awards were presented to the attorney artists listed below.

BEST IN SHOW/ARTIST OF THE YEAR

The 2009 OBA Artist of the Year goes to Cam Cherry of Edmond for his wooden bowl made of turned wood and turquoise, titled "Hope." Woodturning involves forming the external and internal shape of the piece and then sealing the wood repeatedly for a smooth finish. His piece is highly figured with burl swirls and turquoise embellishments running around the entire bowl. The piece is named "Hope" after the HOPEfully Yours consignment shop in Edmond where the wood used in the piece was removed before construction of the shop. "It seemed natural, since the piece was reclaimed from a tree destined for the landfill, and given the purpose of the property it came from, to name the piece 'Hope,'" Mr. Cherry said.



OBA President Jon Parsley presents the 2009 Artist of the Year Award to Cam Cherry at the Annual Luncheon. Photo: Melissa Brown



"Hope" Photo: Morgan Estes

OIL PAINTING

2nd Place

Judge John Gardner,
Shawnee

"Study of Santa
Fe Depot"

ACRYLIC

2nd Place

Judge John Gardner,
Shawnee

"Portrait of Terry West"

BLACK AND WHITE PHOTOGRAPHY

1st Place

Kenni B. Merritt,
Oklahoma City
"Back Country"

2nd Place

Judge Michael Stano,
Stillwater
"Lake Overholser
Bridge"

3rd Place

Judge Michael Stano,
Stillwater
"Got Wood?"

COLOR PHOTOGRAPHY

1st Place

Judge Michael Stano,
Stillwater
"Fort El Morro"

2nd Place

Kenni B. Merritt,
Oklahoma City
"Chuckanut Sandstone"

3rd Place

Reginald Smith,
Oklahoma City
"The Protector"

THREE-DIMENSIONAL

1st Place

Cam Cherry, Edmond
"Hope"

2nd Place

James H. Paddleford,
Oklahoma City
"Retirement: Golden?"

3rd Place

Cam Cherry, Edmond
"Reclaimed"

House of Delegates Actions

Actions of the OBA House of Delegates on matters submitted for a vote at the 105th Annual Meeting on Friday, Nov. 6, 2009, are as follows:

RESOLUTION NO. ONE

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in The Oklahoma Bar Journal and posted on the OBA Web site at www.okbar.org, proposed legislation amending 12 O.S. 2001, Section 2005, Service and Filing of Pleadings and Other Papers. (Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the OBA Civil Procedure Committee. **Adoption recommended by the OBA Board of Governors.**)

Action: Adopted

ADOPTED

RESOLUTION NO. TWO

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in The Oklahoma Bar Journal and posted on the OBA Web site at www.okbar.org, proposed legislation amending 12 O.S. 2001, Section 158.1, Licensure of Private Process Server – Revocation – List of Servers. (Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the OBA Civil Procedure Committee. **Adoption recommended by the OBA Board of Governors.**)

Action: Adopted

ADOPTED

RESOLUTION NO. THREE

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in The Oklahoma Bar Journal and posted on the OBA Web site at www.okbar.org, pro-

posed legislation amending 12 O.S. 2001, Section 3230 relating to recording of testimony by other than stenographic means. (Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the OBA Civil Procedure Committee. **Adoption recommended by the OBA Board of Governors.**)

Action: Adopted

ADOPTED

RESOLUTION NO. FOUR

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in The Oklahoma Bar Journal and posted on the OBA Web site at www.okbar.org, proposed legislation amending 12 O.S. 2001, Section 2004.1 relating to subpoenas for testing and sampling information, electronically stored information, privileged information and duties in responding; amending 12 O.S. 2001, Section 3226 adding new language for initial disclosures, electronically stored information, limitations on frequency and extent, claims of privilege and procedure; 12 O.S. 2001, Section 3233 interrogatories to parties; 12 O.S. 2001, Section 3234 production of documents and things; 12 O.S. 2001, Section 3237 failure to make or cooperate in discovery. (Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the OBA Civil Procedure Committee. **Adoption recommended by the OBA Board of Governors.**)

Action: Adopted

ADOPTED

RESOLUTION NO. FIVE

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in The Oklahoma Bar Journal and posted on the OBA Web site at www.okbar.org, proposed legislation amending 12 O.S. 2001 Section 3226 relating to discovery conference. *(Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the OBA Civil Procedure Committee. Adoption not recommended by the OBA Board of Governors.)*

Action: Withdrawn

WITHDRAWN

RESOLUTION NO. SIX

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in The Oklahoma Bar Journal and posted on the OBA Web site at www.okbar.org, proposed legislation amending 28 O.S. 2001 Section 152.1 relating to payment of jury trial fee. *(Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the OBA Civil Procedure Committee. No position taken by the OBA Board of Governors.)*

Action: No Position Taken

ADOPTED

RESOLUTION NO. SEVEN

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in The Oklahoma Bar Journal and posted on the OBA Web site at www.okbar.org, proposed changes to Rule 5 of the Rules for District

Courts of Oklahoma. *(Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the OBA Civil Procedure Committee. Adoption recommended by the OBA Board of Governors.)*

Action: Adopted

ADOPTED

RESOLUTION NO. EIGHT

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in The Oklahoma Bar Journal and posted on the OBA Web site at www.okbar.org, proposed amendments to Oklahoma Supreme Court Rule 1.21 relating to computation of time for commencement of an appeal. *(Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the OBA Civil Procedure Committee.)*

Action: Withdrawn

WITHDRAWN

TITLE EXAMINATION STANDARDS

Action: The Oklahoma Title Examination Standards revisions and additions published in the *Oklahoma Bar Journal* 80 2304 (Nov. 7, 2009) and posted to the Web site at www.okbar.org were approved in the proposed form. The revisions and additions are effective immediately.

ADOPTED

All resolutions are available in their entirety at www.okbar.org/annualmeeting09/business/resolutions

The OBA Needs You — Volunteer for a Committee

The work of OBA committees is vital to the organization — and that work requires volunteers. Sure, you're busy, but we need you... whether you are a seasoned lawyer or a new lawyer. Please consider becoming involved in your professional association. There are many committees to choose from, so there should be at least one that interests you.

If you practice in or around the Tulsa metro like I do, remember that meetings are conducted using videoconferencing equipment in Tulsa, which makes it convenient to interact with others in Oklahoma City. No time wasted driving the turnpike.

The easiest way to sign up is online at <http://my.okbar.org/login>. If you are already on a committee, my.okbar shows you when your current term expires. Other sign-up options are to complete the form below and either fax or mail it to me. I'm counting on your help to make my year as your bar president a productive one. Please sign up by Dec. 11, 2009.



Allen Smallwood, President-Elect

Standing Committees

- | | | |
|--------------------------------|--|---|
| • Access to Justice | • Group Insurance | • Paralegal |
| • Awards | • Law Day | • Professionalism |
| • Bar Association Technology | • Law-related Education | • Rules of Professional Conduct |
| • Bar Center Facilities | • Law Schools | • Solo and Small Firm Conference Planning |
| • Bench and Bar | • Lawyers Helping Lawyers Assistance Program | • Strategic Planning |
| • Civil Procedure | • Lawyers with Physical Challenges | • Uniform Laws |
| • Communications | • Legal Intern | • Women in Law |
| • Disaster Response and Relief | • Legislative Monitoring | • Work/Life Balance |
| • Diversity | • Member Services | |
| • Evidence Code | | |

Note: No need to sign up again if your current term has not expired. Check www.okbar.org/members/committees/ for terms

Please Type or Print

Name _____ Telephone _____

Address _____ OBA # _____

City _____ State/Zip _____

FAX _____ E-mail _____

Committee Name	Have you ever served on this committee?	If so, when? How long?
1st Choice _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	_____
2nd Choice _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	_____
3rd Choice _____	<input type="checkbox"/> Yes <input type="checkbox"/> No	_____

☐ Please assign me to only one committee.

☐ I am willing to serve on (two or three - circle one) committees.

Besides committee work, I am interested in the following area(s):

Mail: Allen M. Smallwood • 1310 S. Denver Ave., Tulsa, OK 74119

Fax: (918) 582-1991 • E-Mail: amsmallw@swbell.net

Board of Governors Travels to Guymon



Justice Steven Taylor, OBA President Jon Parsley, Texas County Bar President Peggy Carter and Jim Swartz at a dinner hosted by the Texas County Bar Association. The Board of Governors held its October meeting in Guymon, home of President Parsley.



Guymon attorney John D. Board goes through the barbeque buffet line with Gov. Lou Ann Moudy, 1987 OBA President David Petty and Sharon Petty.



Kimmy Reddick, Judge Ryan Reddick and Kenneth Kelly with Gov. Jerry McCombs and Joyce McCombs. The McCombs travelled 485 miles from Idabel to attend the board meeting.

Thad Parsons visits with 2008 OBA President Bill Conger and Cory Hicks inside Jon Parsley's barn that was the location for the evening's festivities.



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An Introduction to Practice: U.S. Bankruptcy Court and U.S. Tax Court

Oklahoma City

Dates: 9: 00 AM until 4: 00 PM, Monday, December 21, 2009 (registration: 8:30 AM) and
9: 00 AM until 4: 00 PM, Tuesday, December 22, 2009
(Lunch each day from Noon until 1:00 PM)
9: 00 AM until 4: 00 PM, Monday, December 28, 2009 (registration: 8:30 AM) and
9: 00 AM until 4: 00 PM, Tuesday, December 29, 2009
(Lunch each day from Noon until 1:00 PM)
7: 00 AM until 8: 00 PM, Wednesday, December 30, 2009 (registration: 6:45 AM)
(Lunch: Noon until 1:00 PM)
9: 00 AM until 4: 00 PM, Monday, January 4, 2010 (registration: 8:30 AM) and
9: 00 AM until 4: 00 PM, Tuesday, January 5, 2010
(Lunch each day from Noon until 1:00 PM)
9: 00 AM until 4: 00 PM, Monday, January 6, 2010 (registration: 8:30 AM) and
9: 00 AM until 4: 00 PM, Tuesday, January 7, 2010
(Lunch each day from Noon until 1:00 PM)

Location: The Low Income Taxpayer Clinic at Oklahoma Indian Legal Services, Inc.
4200 Perimeter Center Drive, Suite 222
Oklahoma City, OK 73112-2310
Voice: 1.800.658.1497

CLE Credit: This course has been approved by the Oklahoma Bar Association Continuing Legal Education Commission for twelve (12) hours of mandatory CLE credit, including one (1) hour of ethics.

Tuition: This CLE course and its accompanying materials are free. Attendees will neither be solicited nor expected to make a contribution of time or money. This course is funded by an LITC Program Grant.

Cancellation

Policy: Cancellations will be accepted at anytime.

Enrollment: Call 1.800.658.1497 (toll free) or 405.943.6457 and request course enrollment.

FREE CLE

Failure Was Not an Option

By John Morris Williams

President Jon K. Parsley told me that if we did not have a great Annual Meeting he was going to kill me. With his being from the panhandle and all, I figured he had the means to pull it off. So for me personally — failure was not an option! I know this is a cheesy play off of this year's Annual Meeting theme, but given all the planning, hard work, creativity, great programs and speakers, failure was never a possibility.

Any meeting that starts with free chocolate ought to be pretty good in my book. This was the prelude into what many have said was one of the best meetings ever. At the luncheon, Gene Kranz mesmerized the crowd. Having the governor, lieutenant governor and attorney general in attendance also made the event even more special. The comedy of Henry Cho, the Art Show, the CLE, the section meetings and all the other activities made it a very full and productive meeting. Of course, I need to also thank the vendors and the people who put all the hospitality suites together.

I was especially proud of the Lawyers Helping Lawyers Assistance Program CLE. During the session, the Whitten-Newman Foundation made a

gift of \$25,000 to the program. My special thanks to my friend Reggie Whitten and his family for this generous gift. Also, a special thanks to another friend, former Texas Bar Association President Martha Dickie, for coming yet another time to our Annual Meeting and serving on the panel at the LHLAP CLE.

In Gene Kranz's moving story of the fate and rescue of the Apollo 13 crew, one could not help but to realize his passion for the work even after he had long retired. As he spoke, it was clear that apathy was never an option for him either. Talk about stress. Can you imagine someone telling you that the space vehicle carrying returning astronauts might miss the earth! I remember the news during the time of the mission, and until Mr. Kranz told us the vivid details, it never dawned on me the

“Any meeting that starts with free chocolate ought to be pretty good in my book.”



incredible efforts that it took to pull off this feat. Talk about putting things in perspective.

So it is with much of the work that our members do. Not many of us are involved in rocket science, but often the work is high stakes and the fate of people's lives is involved. From the faces in the crowd, I do not think I was the only one who was moved by the message. Thank you President Parsley for picking this great speaker!

In the end, the great work of the OBA staff and President Parsley ensured that failure was not an option for this year's Annual Meeting. Many thanks to the volunteers who led meetings, spoke at CLEs and assisted in the meeting planning. Special thanks to staff members Carol Manning, who does all the awards and promotion, and Craig Combs, who does all the logistics work with the hotel on space and food — not to mention working with the vendors and

all the sections and committees that meet at the Annual Meeting. Thanks also to Donita Douglas, who puts together the CLE program and 1,000 other details that add the special touch to the meeting. Each of them is assisted by a first-rate staff that makes it all happen.

Had it been left to me, the meeting probably would have been a failure. Given the vision of Jon Parsley and the hard work of the rest of the staff, failure was never even considered. A special thank you to those of you who attended to make this meeting a real success.



To contact Executive Director Williams, e-mail him at johnw@okbar.org

Oklahoma Bar Journal Editorial Calendar

2009

- December: **Ethics & Professional Responsibility**
Editor: Jim Stuart
jtstuart@swbell.net
Deadline: Sept. 9, 2009

2010

- January: **Meet Your OBA**
Editor: Carol Manning
- February: **Indian Law**
Editor: Leslie Taylor
leslietaylorjd@gmail.com
Deadline: Oct. 1, 2009
- March: **Workers' Compensation**
Editor: Emily Duensing
emily.duensing@oscn.net
Deadline: Jan. 1, 2010
- April: **Law Day**
Editor: Carol Manning
- May: **Commercial Law**
Editor: Jim Stuart
jtstuart@swbell.net
Deadline: Jan. 1, 2010
- August: **Oklahoma Legal History**
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: May 1, 2010
- September: **Bar Convention**
Editor: Carol Manning
- October: **Probate**
Editor: Scott Buhlinger
scott@bwrlawoffice.com
Deadline: May 1, 2010
- November: **Technology & Law Practice Management**
Editor: January Windrix
janwindrix@yahoo.com
Deadline: Aug. 1, 2010
- December: **Ethics & Professional Responsibility**
Editor: Pandee Ramirez
pandee@sbcglobal.net
Deadline: Aug. 1, 2010

If you would like to write an article on these topics, contact the editor.



Everyone Loves a Few Handy Tips

By Jim Calloway, Director, OBA Management Assistance Program

Tips programs are popular at lawyer CLE programs, whether they are technology conferences, solo and small firm conferences or bar association annual meetings.

They are often labeled 50 Tips in 50 Minutes or 60 Tips in 60 Minutes, depending on the length of the mandatory CLE hour in the state. Oklahoma lawyers had opportunities to hear tips programs this year at our OBA Solo and Small Firm Conference and at the OBA Technology Fair featuring the ABA TECHSHOW® Roadshow. I also did 50 tips programs for some of the county bars. This summer I took a couple of days off to be on a 60 tips panel for the American Immigration Lawyers Association Annual Conference in Las Vegas. I don't know much about immigration, but the audience seemed to enjoy the technology tips.

So for this month's *Law Practice Tips* column, let's cover a few technology tips to help you be a better lawyer (or maybe just enjoy yourself more).

One of my favorite Web site discoveries of the year is Readability lab.arc90.com/experiments/readability/ (or just Google Readability). Readability makes Web sites easier to read by serving you up a version free of ads and with bigger fonts, if you desire. This is really great if someone has



selected a black background with white or yellow fonts. Just visit Readability once and select the way you'd like Readability to change Web sites and drag the link up to the Links browser toolbar. The next time you are visiting a hard-to-read Web site, click on the link in your tool bar and you now have a "reader friendly" version.

Anagram from GetAnagram.com is the quintessential Outlook utility. Anagram allows you to quickly capture contact information from an e-mail signature block, e-filed pleading or digital contact list. It fills the information in Outlook Contact for you, rarely making a mistake. Readers who use Outlook should at least utilize the free trial. I

think most will end up purchasing at the end of the trial.

So many lawyers are getting iPhones that I wanted to mention the site iphonejd.com for all of you to visit. If you are in a part of the state with no AT&T "map for that," the new Droid phone from Verizon is getting good reviews.

CREATE YOUR OWN FREE CLIPPING SERVICE

Google Alerts allows you to set up an e-mail alert service so you are notified when your name or a client's name is mentioned in a media source indexed by Google. Since so many online new services have free content for the first few days and then lock it behind a "subscribers only" password, it is a good practice

to visit the news site as soon as you get the e-mail and use Adobe Acrobat Professional or another tool to print the Web page to a PDF file for future reference.

Speaking of Adobe Acrobat and PDF files, I still get calls and e-mail from lawyers who do not understand that there are two kinds of PDF files, roughly speaking. There are image-only files and there are PDFs which contain hidden text in addition to the image. It is easy to test the file. Just try to select a sentence or two and copy and paste it into another document. If you can't it is probably image-only. I say probably because advanced Adobe users can protect documents in many ways, including disabling printing or other functions. But generally, if you cannot copy text, it is because there is none there. The only way to generate text from this is OCR (Optical Character Recognition) which is unlikely to be perfect.

How do you create a § sign? In Microsoft Word 2003 you typically use the Insert command and then select the § sign from a list of available symbols and hit Insert. Next time you have the § selected, hit Keyboard Shortcut and then the keystroke combination Alt + S. Click Assign and from then on, the keystroke combination Alt + S will insert the § at the cursor without you having to remove your hands from the keyboard.

Videoconferencing is a hot topic and one service for free video conferencing is dimdim.com. You may not think you need this, but having three or four lawyers meet for a Web-

conference to review and edit a document can save hours of sending around version by e-mail attachments.

Adopt a File and Folder Naming Convention (and stick to it). One New Year's resolution for law firms is to adopt written guidelines for how documents will be named and where they will be stored on the computer network. If someone is out of the office, this makes it much easier to locate the documents that they were working on.

One of the hottest topics under discussion is the paperless office, or as I call it the digital law practice. I mentioned it in my September column, but if you didn't check it out, the "paperless" theme issue of *Law Practice Today* is a great free resource on this topic. www.abanet.org/lpm/lpt/archives/september09.shtml

HOLIDAY GIFT GUIDES

Sharon Nelson and I have posted our latest Digital Edge podcast, "High Tech Toys for the Holidays." While a few of these have some business use, most are just fun. Listen to the podcast (about 20 minutes) and then click on the links in the attached show notes section to visit the product Web sites. tinyurl.com/yfm2wy3 This is our 25th podcast!

Fellow practice management advisor Reid Trautz has also posted his 2009 Holiday Gift Guide for Lawyers with lots of interesting gift ideas. This is his fifth year for the Holiday Gift Guide, and I certainly saw several items there I need. tinyurl.com/yz925y8

MORE PRACTICE MANAGEMENT TIPS FOR YOU

You can get even more great tips at the ABA TECHSHOW® 2010 which is scheduled for March 25-27, 2010, at the Chicago Hilton. The Oklahoma Bar Association is an ABA TECHSHOW® event promoter and you can get a discount when you register by using our event promoter code, which is EP1017.

In case you missed the news, the Oklahoma Bar Association's 2010 Solo and Small Firm Conference will be held June 24 through 26, 2010, at the Downstream Casino and Resort. Room reservations are now open, and we are encouraging attendees to stay Saturday night this year to get the most out of this great new venue. The resort's Web site is downstreamcasino.com. We will continue our tradition of many family-friendly activities and don't forget your swim suit this year as Downstream has a great pool with cabanas for relaxing.

Well, I have more tips but had probably better save a few for my program for the Payne County Bar Association Nov. 30 in Cushing.

Your year-round source for practice tips should be Jim Calloway's Law Practice Tips Blog, online at jimcalloway.typepad.com. If you cannot remember to visit the site regularly, you can visit once and subscribe to the e-mail service that allows you to receive the posts there via e-mail. The average will be a couple of e-mails per week.

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Grievances and How to Avoid Them

By Gina Hendryx, OBA General Counsel

Upon becoming general counsel of the OBA, I was intrigued to learn which practice areas of law were receiving the most grievances and what types of complaints were routinely being lodged against attorneys. It was not surprising to learn that 43 percent of the complaints in 2008 were in matters relating to criminal law and family law representations. And, this was not an aberration.

Year after year, these two areas of practice consistently receive the most complaints. While still disconcerting especially if these are your two primary areas of practice, it is understandable given the nature of the legal needs facing a criminal defendant or family law litigant. There are arguably no other areas of law wherein the parties find themselves with more at risk albeit either loss of liberty or family.

THE #1 COMPLAINT

The primary complaint charged against Oklahoma attorneys continues to be client/file neglect. One of every two grievances filed with the Office of the General Counsel alleges dissatisfaction due to the attorney's failure to respond to client inquiries or the delay in moving the matter to conclusion. In 2008, 49 percent of the grievances received were categorized as "neglect" complaints followed by 13 percent based upon the personal behavior of the attorney and 11 percent alleging some form of misrepresentation by the lawyer.

What can be learned from these statistics? First, if you practice in the areas of family law or criminal law the likelihood of receiving a bar complaint is high. Regardless of practice area, the most common complaint will be that you have failed to keep the client informed and/or are taking too long to achieve a result. This information is not novel. As attorneys, we have been repeatedly warned of the risks of procrastination. There are a wealth of classes, seminars, books and opportunities to address your own shortcomings when it comes to personal work habits. In addition, you should also be directing your client's expectations. From the initial client intake, discuss such issues as return of phone calls, return of e-mail and expected length of the representation. Set realistic response time with your clients.

Tell the client when you return phone calls and e-mail. Repeat the information in the representation agreement. If the client has been told and has a document that explains that e-mails are most often returned within 24 hours of receipt, then the client will not have an expectation of a response within a couple of hours. The same approach should be taken with cell phones. If you don't want a client calling you on Saturday evening when the visitation exchange was been delayed, then don't give out your cell number. Give the client information on office numbers and

hours and what to do if they perceive there is an emergency. If you set personal goals to be responsive to client's concerns within reasonable parameters and give the client sufficient information to set realistic expectations, you will reduce the risk of receiving a complaint of client neglect.

During 2008, the Office of the General Counsel received 283 formal grievances involving 201 attorneys and 1,239 informal grievances involving 885 attorneys. In total, 1,522 grievances were received against 988 attorneys. The total number of attorneys differs because some attorneys received both formal and informal grievances. The OBA membership on Dec. 31, 2008, was 16,275 attorneys.

Considering the total membership, the receipt of 1,522 grievances involving 988 attorneys constituted approximately six percent of the attorneys licensed to practice law by the Oklahoma Supreme Court. This is a small fraction of our membership, and the statistic that should not be lost is that 94 percent of OBA attorneys did not receive a complaint in 2008. Too often we dwell on the negative because that is what gets the most attention. However, a review of the 2008 stats should highlight the positive hard work being done every day by Oklahoma attorneys for their clients.

October Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Holiday Inn Express in Guymon on Friday, Oct. 16, 2009.

REPORT OF THE PRESIDENT

President Parsley reported he attended the joint OBA/OBF dinner and the Southern Conference of Bar Presidents meeting in Kansas City. He also finalized plans for this month's Board of Governors meeting in Guymon.

REPORT OF THE VICE PRESIDENT

Vice President Thomas reported she attended the OBA Tech Fair, Oklahoma Bar Foundation meeting, September Board of Governors meeting and OBA/OBF joint dinner.

REPORT OF THE PRESIDENT-ELECT

Unable to attend the meeting, President-Elect Smallwood reported via e-mail that he met with certain members of the Budget Committee. He also conducted interview sessions with the Judicial Nominating Commission and made final preparations for the Annual Meeting.

REPORT OF THE PAST PRESIDENT

Past President Conger reported he attended the September board meeting, Bar Center Facilities Committee meeting, Southern Conference of Bar Presidents meeting in Kansas City, John Grisham lecture at OCU and the Innocence Project meeting.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported that he attended the joint OBA/OBF dinner, Bar Center Facilities Committee meeting, Southern Conference of Bar Presidents, OCU Innocence Project program, Group Insurance Trust meeting, Supreme Court Conference to hear the program on online filing and development of an electronic information system, staff meeting to discuss online experience for members, meeting to discuss potential program for new lawyers, directors meeting, monthly staff celebration and an open house at CoreVault.

BOARD MEMBER REPORTS

Governor Carter reported she attended the September Board meeting and the joint OBA/OBF dinner. She also prepared her first report as presiding master of the Professional Responsibility Tribunal. **Governor Chesnut** reported he attended the joint OBA/OBF dinner, September board meeting and the Ottawa County Bar Association monthly meeting. **Governor Dirickson** reported she attended the joint OBA/OBF dinner, September board meeting and the Custer County Bar Association monthly meeting. **Governor Dobbs** reported he attended the OBA/OBF joint dinner, September board meeting and

the Civil Procedure Committee meeting. **Governor Hixson** reported he attended the OBA/OBF joint dinner, September board meeting and OBA Tech Fair. **Governor McCombs** reported he attended the OBA/OBF event in Bartlesville and the McCurtain County Bar luncheon. **Governor Moudy** reported she attended the joint OBA/OBF dinner and the September board meeting. **Governor Reheard** reported she attended the joint OBA/OBF dinner, September board meeting, Southern Conference of Bar Presidents Annual Meeting in Kansas City and the "Evening with John Grisham" at OCU. **Governor Stockwell** reported she attended the Board of Governors social evening, September board meeting, OBA Tech Fair, Cleveland County Bar Association Executive Committee meeting, Cleveland County Bar Association luncheon with the Russian delegates and the Cleveland County Bar Association luncheon and CLE. **Governor Stuart** reported he attended the joint OBA/OBF dinner, Pottawatomie County Bar Association meeting and OBA Board of Editors meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Rose reported the YLD held a social event for new lawyers in Oklahoma

City, and 75 people attended. A similar event will be held in Tulsa soon.

LAW STUDENT DIVISION LIAISON REPORT

Unable to attend the meeting, LSD Chair Nathan Milner reported via e-mail he attended the September OBA/OBF dinner. He also distributed information for the OBA Annual Meeting, held an Annual Meeting registration table and communicated with Craig Combs about the division's involvement in the Annual Meeting.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported that she gave an ethics presentation at the New Lawyer Experience programs in Tulsa and Oklahoma City, as well as to the Garvin County Bar Association and the ABA Family Law Section. She also hosted a delegation of Russian attorneys at the Oklahoma Bar Center and presented a program on attorney ethics and the discipline system in Oklahoma with Ethics Counsel Pickens. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for September 2009 was submitted for the board's review.

RESOLUTION OF APPRECIATION FOR TEXAS COUNTY BAR

The board voted to issue a resolution expressing appreciation to the Texas County Bar Association for its hospitality.

2012 MEMBERSHIP SURVEY

Executive Director Williams reported the association has surveyed members every 10 years. He recommended that a taskforce be formed after the first of the year and conduct-

ing the survey electronically be considered.

CREATION OF SOUTHERN CONFERENCE OF BAR PRESIDENTS TASK FORCE

President Parsley reported Oklahoma is part of an alliance of 17 states called the Southern Conference of Bar Presidents, which holds an annual meeting in addition to meeting during ABA annual and midyear meetings. He said the group is helpful for networking and for information sharing. It will be Oklahoma's turn to host the annual meeting in 2013. Because details need to be confirmed two years in advance, planning will need to begin soon and a task force will be formed.

NOMINATIONS FOR FORENSIC REVIEW BOARD

President Parsley reported he submitted the names of Eddie Streater, Wewoka; James R. Webb, Oklahoma City; and Megan Simpson, Cordell; to the governor for his appointment of one person to the board. The term will expire Dec. 31, 2014.

OBA TECHNOLOGY FAIR REPORT

President Parsley reported the OBA's first technology fair at the Oklahoma Bar Center was a great success with about 160 members attending. It was noted that the event was an excellent member benefit and many members who came in the morning stayed all day. Executive Director Williams said it is not planned to be an annual event.

BAR CENTER FACILITIES COMMITTEE REPORT

Past President Conger reported Emerson Hall renovation is complete including

upgraded restrooms, a new reception desk, carpet and improved entrances. Members who have seen the new space are giving it rave reviews. Signage for Emerson Hall and the Lambird Board Room is underway. Past President Conger reported the next project is moving the bar center's main receptionist desk to the west side of the lobby.

DOCUMENT CONTROL FOR OFFICE OF THE GENERAL COUNSEL

General Counsel Hendryx reported the physical weight of document storage is causing the floor on the second floor to sag. Discussion followed about the current rules on retention. She said the scanning of documents is currently taking place, and research on solutions has just started. It was suggested that requesting a rule change be considered to allow the destruction of nonessential documents and files on deceased lawyers.

RESOLUTION NO. EIGHT

President Parsley reported Resolution No. Eight that was presented at the Sept. 25 board meeting and resulted in the board tabling action has been withdrawn.

SOUTHERN CONFERENCE OF BAR PRESIDENTS REPORT

President Parsley reported that he enjoyed the meetings and social activities. Several OBA past presidents attended.

EXECUTIVE SESSION

The board voted to go into executive session to discuss pending litigation against the OBA, met in executive session and voted to come out of executive session.



The University of Tulsa College of Law and the Tulsa Minority Networking Taskforce thank the many judges and lawyers who volunteered for the Inaugural **2009 Speed Networking** event held on September 24:

Judge E. Mark Barcus
Sara Barry
Keith B. Bartsch
Elise Dunitz Brennan
Jacqueline Caldwell
Excetral K. Caldwell
Judge Daman H. Cantrell
Maria E. Cervantes
Katherine G. Coyle
Jo Anne Deaton
S. Douglas Dodd
Judge Theresa Dreiling
Selim Fiagome
Alberto Franco
Martin A. Frey
Judge Carl Funderburk
Michael J. Gibbens
James O. Goodwin
Judge Edward J. Hicks, III

Alissa A. Hurley
Vaughn Iskanian
Jo Lynn Jeter
Carlye O. Jimerson
Debbie Johnstone
Judge Sam A. Joyner
Marvin Lizama
Lucy S. Kroblin
Judge Dana Kuehn
Karen Langdon
Bronwen Llewellyn
Judge Linda G.
Morrissey
Judge Rebecca B.
Nightingale
Robert Perugino
Kevinn Matthews
Barbara Sears
George D. Shahadi

R. Trent Shores
Pete Silva, Jr.
Angela L. Smoot
Matthew A. Sunday
Roy D. Tucker
Tamara A. Wagman
Ashley Webb
Cara Collinson Wells
Joseph R. Wells
Christopher W. Wilson


THE
UNIVERSITY
of **TULSA**
COLLEGE OF LAW

The Safety of Your IOLTA Account

By Richard A. Riggs

A book could be written about the development of IOLTA programs in the United States. That book might not be exciting enough to keep you awake at night, but it would definitely be a long book — and it would tell a story that is still developing.

Here are the basics familiar to most of you. The occasion often arises for a lawyer to hold funds belonging to clients or others. Under the Rules of Professional Conduct, those funds must be held in accounts separate from the lawyer's assets. If those funds can be economically invested while held by the lawyer, earnings will accrue to the benefit of the person for whom the funds are held. Often, the amount held is so small or the period during which it is held is so short that the small amount of interest that would be earned would be more than eaten up by bank fees and costs. If the funds held by a lawyer are aggregated, however, the total interest earned could exceed these costs. For a number of years state laws have permitted this interest to be remitted for charitable purposes, usually for organizations devoted to access to justice. Authorization in Oklahoma is found in Rule 1.15 of the Rules of Profes-

sional Conduct. That rule has, since 1983, permitted lawyers to maintain interest bearing trust accounts, into which funds that "are nominal in amount or are on deposit for a short period of

“Like every other aspect of our financial system, IOLTA accounts have been affected by the recent economic turmoil.”

time” may be deposited, with the interest earned on such accounts to be remitted to the Oklahoma Bar Foundation for the furtherance of its charitable purposes.

Rule 1.15 was amended in 2004 to make IOLTA mandatory in Oklahoma. Accordingly, Rule 1.15(h) now provides that a lawyer who holds funds of clients or third parties “shall create and maintain” an IOLTA account. Pursuant to Rule 1.15(g) lawyers are required to keep the Oklahoma Bar

Association advised of accounts maintained in response to this rule.

IOLTA accounts have not been without controversy. They have been subject to challenge in several cases, primarily on 5th Amendment grounds. However, these claims were resolved by the United States Supreme Court in the case of *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), in which the court upheld Washington's IOLTA program. Accordingly, IOLTA programs are now firmly established and have become a significant resource for funding legal service programs throughout the country. Aggregate IOLTA revenue throughout the country in 2007, for instance, exceeded \$371,000,000.

It should come as no surprise that the establishment, administration and monitoring of IOLTA accounts present administrative challenges. However, through the cooperation of Oklahoma lawyers, their banks, the Oklahoma Bar Association and the Oklahoma Bar Foundation, those challenges will soon be a thing of the past. The foundation is working diligently with Oklahoma banks to establish electronic reporting

and remittance procedures which, to date, have been very well received by participating banks. While putting these procedures in place has proven to be a tedious and difficult process, in the long run it will make administration of Oklahoma's IOLTA program much easier for all concerned.

Like every other aspect of our financial system, IOLTA accounts have been affected by the recent economic turmoil. First, because of the dramatic decline in interest rates, IOLTA revenue has dramatically decreased. The economic climate has also raised concerns about the possibility of bank failures. In response to this concern, the FDIC increased its insurance of depository accounts from \$100,000 to \$250,000. This increased level of insurance will remain in effect through Dec. 31, 2013. However, the FDIC also adopted the Transaction Account Guaranty Program (TAGP), which provides participating banks temporary, unlimited insurance coverage for certain depository accounts, including IOLTA trust accounts. Accordingly, IOLTA accounts held in participat-

ing banks are currently insured without limitation. This program has been extended through June 30, 2010. That's the good news. The bad news is that the FDIC is imposing fees on the TAGP participating banks to cover the costs of the additional coverage. Banks participating in the program, understandably, seek to pass increased costs on to customers by way of service charges. These charges further erode the IOLTA income available for distribution. Banks may opt out of the program, and accounts in non-participating banks would only retain the standard FDIC insurance, currently \$250,000. A current list of banks that have elected to opt out of the extended program can be found at www.fdic.gov/regulations/resources/TLGP/optout.html.

As IOLTA has become an important source of funding for the Oklahoma Bar Foundation, the foundation has kept a close eye on the IOLTA developments described above. As OBF Trustees evaluate IOLTA programs and their roll in the foundation's mission, two

facts have become clear. First, although we regret the dramatic decline in IOLTA revenue, we realize such a decline is merely a function of the economic cycle which, in time, will change. As interest rates rise, IOLTA income will be restored to, or exceed, historic levels. That is a day we look forward to, and in the meantime we are taking care to conserve the foundation's resources and to maximize the impact of foundation grants. Second, the decline in IOLTA revenue places more emphasis on our Fellows program, through which Oklahoma lawyers generously contribute to the foundation's mission through annual contributions. In light of our current economic circumstances, OBF Fellows are more important than ever before. If you are not an OBF Fellow, please sign up to become one — a form follows on the next page. Please rest assured that your contribution will be well spent in helping Oklahomans in need.

Richard A. Riggs is president of the Oklahoma Bar Foundation. He can be reached at Richard.riggs@mcafeetaft.com



FELLOW ENROLLMENT FORM

☐ Attorney ☐ Non-Attorney

Name: _____
(name, as it should appear on your OBF Fellow Plaque) County

Firm or other affiliation: _____

Mailing & Delivery Address: _____

City/State/Zip: _____

Phone: _____ Fax: _____ E-Mail Address: _____

☐ I want to be an OBF Fellow **now** – Bill Me Later!

☐ Total amount enclosed, \$1,000

☐ \$100 enclosed & bill annually

☐ New Lawyer 1st Year, \$25 enclosed
& bill as stated

☐ New Lawyer within 3 Years, \$50 enclosed
& bill as stated

☐ I want to be recognized as a **Sustaining Fellow** & will continue my annual gift of
at least \$100 – (initial pledge should be complete)

☐ I want to be recognized at the leadership level of **Benefactor Fellow** & will annually
contribute **at least \$300** – (initial pledge should be complete)

*Lawyers Transforming
Lives through educa-
tion, citizenship and
justice for all. Join the
OBF Fellows today!*

Signature & Date: _____ OBA Bar #: _____

Make checks payable to:

Oklahoma Bar Foundation • P O Box 53036 • Oklahoma City OK 73152-3036 • (405) 416-7070

OBF SPONSOR: _____

☐ *If we wish to arrange a time to discuss possible cy pres distribution to the Oklahoma Bar Foundation and my contact information is listed above.*

Many thanks for your support & generosity!

Legal Aid Pro Bono Outreach Projects

Leveling the Playing Field for Victims of Domestic Violence

Pro bono opportunities come in many shapes and sizes. Case referrals are the most well known pro bono opportunity; however, this doesn't work for all attorneys. Sometimes attorneys are prohibited from direct representation due to current employment or other obligations. Taking into account this need for alternate scheduling, Legal Aid Services of Oklahoma offers many flexibly scheduled outreach projects and other pro bono opportunities across the state — enabling attorneys to volunteer their time and expertise to those who otherwise would not have access to the legal system.

One such outreach project was created in 1986 by Oklahoma City attorney Gail Stricklin. In collaboration with Legal Aid and the YWCA, Ms. Stricklin crafted a partnership to support victims of violence. Volunteer attorneys meet in person with shelter residents on a weekly basis. After a frightful escape from an abusive situation, legal advice to shelter residents can be crucial, especially if children are involved. Shelter staff also

arranges child care, as needed, and has a liaison available for consultation.

The project provides an invaluable service to violence victims by providing quick access to legal advice in a secure setting. Jennifer Cluck, YWCA liaison, who has a deep understanding of the project's benefits to clients, as well as to shelter staff, observes that, "The clients have been very excited to be able to talk to an attorney after entering the shelter. Access to legal advice relieves stress for residents, as well as YWCA staff. To have a consistent group of support for these ladies helps to create safety and justice for them in a world in which they have had neither."

The project is especially rewarding to the attorneys involved. Laurie Jones, a professor at OCU Law School, is a regular project volunteer. "The impact that we as lawyers can make to help domestic violence victims is immediate, powerful and far-reaching," she said. "In 25 years of law practice, the work at Passageway is the most rewarding and



meaningful work I've done as a lawyer."

These days, Gail Stricklin focuses much of her time seeking to secure legislative changes regarding domestic violence situations. Such changes are needed to ensure the safety of those victims who are trapped in especially perilous situations. Ms. Stricklin said, "Legal Aid provides an invaluable service to violence victims; as research studies from the University of Arkansas and Colgate University indicate that access to legal services contributes more to the decline in domestic violence than do other

sources such as shelters, hotlines or counseling.”

Ms. Stricklin’s most recent efforts in transforming Oklahoma law have resulted in the passage of House Bill 1739, which provides more protections for non-abusive parents and children involved in child custody and visitation matters, including the provision that a parent may suspend visitation under certain circumstances to protect the children.

Occasionally, a case comes along in which a client is in

danger of losing her life if she is unable to escape from her abuser. Ms. Stricklin has offered pro bono representation to clients in this type of dire situation. Many times, attempts to flee have been unsuccessful, and the violence has escalated to a point at which the danger of loss of life is imminent. According to Ms. Stricklin, “These cases require the extraordinary measure of seeking a sealed name change to safeguard the client and her children.”

HOW YOU CAN HELP

The generous donation of time and effort of pro bono attorneys throughout the years has benefited many clients. Legal Aid Services of Oklahoma Inc. is a statewide program with offices assisting every county. If you are interested in lending a hand with an outreach project or would like more information about outreach projects, contact Cindy Goble, statewide pro bono coordinator, Legal Aid Services of Oklahoma Inc., by calling (405) 488-6823 or e-mail at cindy.goble@laok.org.

NOTICE: DESTRUCTION OF RECORDS

Pursuant to Court Order SCBD No. 3159, the Board of Bar Examiners will destroy the admission applications of persons admitted to practice in Oklahoma after 3 years from date of admission.

Those persons admitted to practice during 2005 who desire to obtain their original application may do so by submitting a written request and \$25 processing fee. Bar exam scores are not included. Requests must be received by December 18, 2009.

Please include your name, OBA number, mailing address, date of admission, and daytime phone. Enclose a check for \$25, payable to Oklahoma Board of Bar Examiners.

Mail to: Oklahoma Board of Bar Examiners, PO Box 53036,
Oklahoma City, OK 73152.

YLD ELECTION RESULTS ANNOUNCED

The YLD Board of Directors convened for its regular monthly business meeting on Nov. 5, with Chairperson Rick Rose presiding over the session. Immediate Past Chairperson of the division and current YLD Nominating Committee Chairperson Kimberly Warren announced the results of the election for the open YLD board positions.

The officers of the division for 2010 will be: Chairperson – Molly Aspan (Tulsa); Chairperson-Elect – Nathan Johnson (Lawton); Treasurer – Roy Tucker (Muskogee); Secretary – Jennifer Kirkpatrick (Oklahoma City); and Immediate Past Chairperson – Rick Rose (Oklahoma City).

New to the Board of Directors in 2010 will be: Lane R. Neal (Judicial District No. 3); Collin R. Walke (Judicial District No. 3); Robert Faulk (Judicial District No. 4); Briana J. Ross (Judicial

District No. 6); Joe Vorndran (Judicial District No. 8); Kaleb Hennigh (At Large – Rural); Jennifer Kirkpatrick (At Large); Jeff Trevillion (At Large); and Bryon Will (At Large).

YLD PRESENTS AWARDS AT ANNUAL BREAKFAST

The YLD closed out the 2009 Oklahoma Bar Convention with its annual Friends and Fellows Breakfast. Fellows of the YLD are chosen annually from members of the OBA who are no longer young lawyers, but have served with distinction as a YLD officer, director or committee chairperson, or who have otherwise demonstrated their support of the division and dedication to the objectives of the YLD. Similarly, Friends of the YLD are named each year to recognize those non-lawyers who have contributed significantly to the division and its many community service projects.

After breakfast was served, Rick Rose called the group to order to recognize the 2009 YLD award recipients:

YLD Fellows:

Chief Justice James E. Edmondson
Vice Chief Justice Steven W. Taylor

YLD Friend:

Candace Bass

Outstanding YLD Committee Chairpersons:

Cody J. McPherson (Wills for Heroes Committee)
John D. Weaver (New Attorney Orientation Committee)

Outstanding YLD Directors:

A. Gabriel Bass
Robert R. Faulk

Outstanding YLD Officer:

Roy D. Tucker



The OBA/YLD sponsored Casino Night during the Annual Meeting, where hundreds of convention attendants tried their hand at blackjack, roulette and Texas hold 'em poker.

November

26-27 **OBA Closed** — Thanksgiving Holiday

December

3 **OBA Legal Intern Committee Meeting**; 3 p.m.; Sneed Lounge; OU College of Law, Norman; Contact: H. Terrell Monks (405) 733-8686

OBA Law-related Education Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack G. Clark Jr. (405) 232-4271

8 **Death Oral Argument**; Alfred Brian Mitchel; D-2008-57; 10 a.m.; Court of Criminal Appeals Courtroom

Workers' Compensation Public Hearing; 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tish Sommer (405) 522-8710

10 **OBA Bench & Bar Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211

11 **OBA Board of Governors Meeting**; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

Oklahoma Council of Administrative Hearing Officials; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212

OBA Family Law Section Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424



Calendar

12 **OBA Young Lawyers Division Committee Meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose (405) 236-0478

18 **OBA Appellate Practice Section Meeting**; 11:45 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Brian Goree (918) 382-7523

25 **OBA Closed** — Christmas Holiday

January

1 **OBA Closed** — New Year's Day

8 **OBA Family Law Section Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424

14 **OBA Leadership Academy**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

15 **OBA Leadership Academy**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

OBA Board of Governors Meeting; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

18 **OBA Closed** — Martin Luther King Jr. Day

20 **Ruth Bader Ginsburg American Inn of Court**; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611

21 **OBA Law-related Education Committee 2010 Supreme Court Teacher and School of the Year Judging**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jack G. Clark Jr. (405) 232-4271

23 **OBA Law-related Education We the People State Finals**; 10 a.m.; Oklahoma History Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

February

- 12 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424
- 15 OBA Closed** — Presidents' Day
- 17 OBA Law-related Education Close-Up;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 18 OBA Law-related Education Close-Up;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- OBA Law-related Education Close-Up Teachers Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 19 OBA Board of Governors Meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 22-26 OBA Bar Examinations;** Oklahoma Bar Center, Oklahoma City; Contact: Oklahoma Board of Bar Examiners (405) 416-7075



PARALEGAL

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you're worth . . .
without
billable hours!**

W.C. Bradley Co., a 120+ year old International Consumer Products company, seeks a qualified paralegal for its Tulsa, Oklahoma office. Reporting directly to the General Counsel, this position will perform critical legal functions related to contracts, research and document preparation.

Requirements include a self-motivated team player with 5+ years' experience; completion of an ABA-accredited paralegal program is preferred. Qualified candidates must have solid contractual experience (preferably in a consumer products setting). Any merger and acquisition experience is a definite plus. Candidates must also have strong legal research skills and the ability to draft complex legal documents. Excellent computer, organizational, attention to detail, project management, written/verbal communication and prioritization skills are musts. The ability to meet deadlines is critical. The General Counsel's office is a fast-paced environment that addresses many areas of the law, including regulatory, intellectual property, risk management, litigation and international.

Your expertise will be rewarded with an attractive salary/benefits package and a business casual work environment. To apply, please send salary requirements, salary history and resume to resumes.kc02@nasrecruitment.com. EOE

1885
WC BRADLEY CO

Judicial Appointments Announced



*Judge William C.
Hetherington Jr.*

Gov. Brad Henry recently named several attorneys to the bench. Judge William C. Hetherington Jr. has been appointed to the state Court of Civil Appeals. He succeeds Judge Glenn Adams, who retired last September. Judge Hetherington has been a district judge in Cleveland County since 1992. Before that, he served as a special district judge and was in private practice. He graduated from OU in 1970 and earned his law degree from OCU in 1979.

Also, Lisa Tipping Davis was named a district judge in Oklahoma County. She succeeds Judge Carolyn Ricks, who retired last October. Judge Davis served as the governor's general legal counsel since 2003. Prior to that, she spent 11 years as an assistant attorney general. She also has worked in private practice. She graduated from OU in 1981 and earned her law degree from the OU College of Law three years later.



*Judge
Lisa Tipping Davis*

Additionally, two appointments were made to the 14th Judicial District in Tulsa County. The governor appointed Carlos Chappelle to Office 6 and Kurt G. Glassco to Office 14. Judge Chappelle succeeds Judge Gordon McAllister, while Judge Glassco succeeds Judge Michael Gassett. Both Judge McAllister and Judge Gassett retired from the bench. Judge Chappelle has practiced law in Tulsa for 28 years. He graduated from OU in 1973 and later earned his law degree from TU. Judge Glassco has been in private practice since 1986. Prior to that time, he was an assistant district attorney in Tulsa County before serving as general counsel for then-Gov. George Nigh. He graduated from OSU in 1978 and earned his law degree from TU.



*Judge
Carlos Chappelle*



*Judge
Kurt G. Glassco*

President's Award Winners Recognized

Along with the annual OBA awards presented during this month's Annual Meeting, President Jon Parsley named seven President's Award winners. Honored were David Petty of Guymon, Bill Grimm of Tulsa, Stephen Beam of Weatherford, Melissa DeLacerda of Stillwater, Gary Clark of Stillwater, Linda Thomas of Bartlesville and John Morris Williams of Oklahoma City. All were recognized for their mentorship and guidance during President Parsley's tenure as OBA president.

*Jon Parsley, David Petty, Bill Grimm,
Stephen Beam and Melissa DeLacerda*



Jon Parsley, Gary Clark and Linda Thomas

Lawyer Counseling Program Receives Grant

The Lawyers Helping Lawyers Assistance Program was presented a \$25,000 grant to support the treatment of lawyers struggling with addictions and mental health issues. Oklahoma City attorney Reggie Whitten of the Whitten-Newman Foundation presented the check during the OBA Annual Meeting earlier this month. Mr. Whitten said the grant was given in memory of his son Brandon, who became addicted to Valium at an early age and died in a drug-related motorcycle crash in 2002 at age 25.

The OBA Lawyers Helping Lawyers Assistance Program has partnered with professional counselors throughout the state to provide up to six visits free of charge. There is also a peer support network in place to help attorneys through specific issues. If you are an attorney seeking help, call (800) 364-7886. Your call is strictly confidential.



Reggie Whitten (second from left) presents a \$25,000 check to the OBA Lawyers Helping Lawyers Assistance Program. Pictured with Mr. Whitten are Jeffrey Hargrave, Jon Parsley and LHLAP Committee Chair Tom Riesen.

Annual Meeting Giveaway Winners Announced

The OBA held a drawing for free prizes during the Annual Meeting. To enter the drawing, meeting registrants had to visit at least 20 exhibitor booths and have them initial a special card. Names were drawn at the end of the meeting. The winner of the Netbook is Laurie Miller of Oklahoma City. The winner of the Kindle is Elizabeth Wilson of Edmond, and Paul Kouri of Oklahoma City won an iPod Touch.

OBA Member Reinstatement

The following OBA member suspended for nonpayment of dues has complied with the requirements for reinstatement, and notice is hereby given of such reinstatement:

Brian Dean Dill
OBA No. 15989
9728 Elmcrest Drive
Dallas, TX 75238

OBA Member Resignation

The following OBA member has resigned as a member of the association and notice is hereby given of such resignation:

Thomas Lynn Bright
OBA No. 1131
P. O. Box 182066
Arlington, TX 76096

OBA Communications Team Honored for Law Day PR Campaign

The OBA Communications Department recently brought home two awards to recognize the team's public relations work for Law Day. Communications Director Carol Manning and Communications Specialists Melissa Brown and Jeff Kelton work closely with the OBA Law Day Committee in supporting the annual statewide student contests, Ask A Lawyer free legal advice and one-hour TV show on OETA.

For its efforts, the department won a Luminary Award for Excellence in Public Relations from the National Association of Bar Executives Communications Section. This national award is given for a public relations effort that exemplifies effectiveness of communications in getting the bar's message across to its members and the public. Additionally, the Communications Department received an honorable mention award in the special event category from the Public Relations Society of America, Oklahoma City Chapter.

Bar Center Holiday Hours

The Oklahoma Bar Center will be closed Nov. 26 and 27 for the Thanksgiving holiday.



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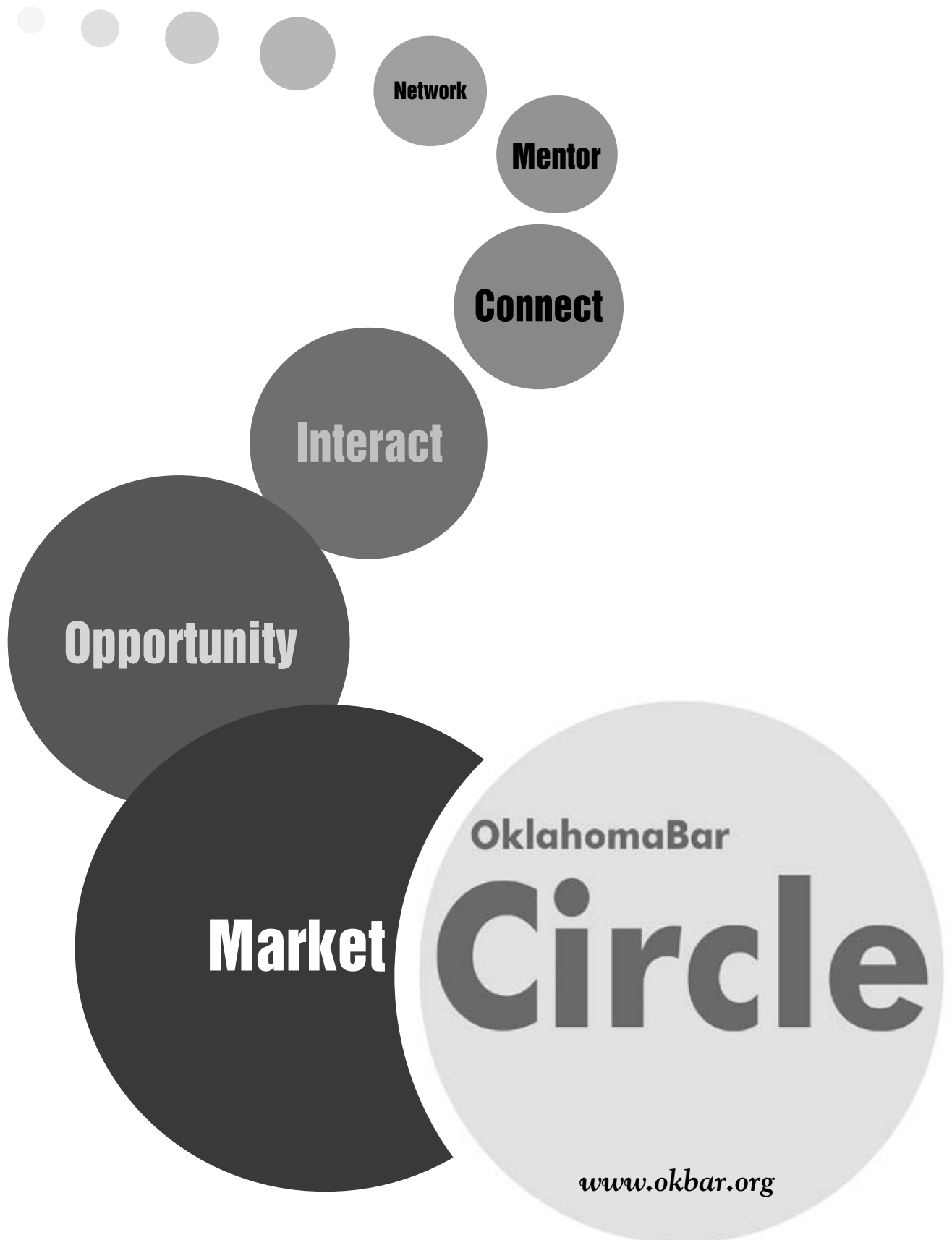
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Kudos

Gov. Brad Henry appointed **Jana Kay Wallace** as associate district judge for Pushmataha County. She replaced Lowell Burgess Jr., who retired. Judge Wallace earned her bachelor's degree from Southeastern Oklahoma State University and earned her J.D. from OU. She previously handled civil cases in private practice and also served as an assistant district attorney in Pushmataha County.

Lynne McGuire has been named a special judge for Oklahoma County. She will start the position Dec. 1. She is a former assistant district attorney and the current CEO of Oklahoma Lawyers for Children.

James G. Hamill was recently inducted into the Oklahoma Hall of Fame of City & Town Officials. He is the first attorney to be honored by this foundation.

D. Michael McBride III was recently elected a national member of the board of directors of the Federal Bar Association. His term will run through 2012.

Tim Reese has been selected to serve on the *Edmond Sun's* editorial board.

President Barack Obama nominated **Sanford Coats** to be the U.S. attorney for the Western District of Oklahoma. Mr. Coats must be confirmed by the U.S.

Senate before he can take the position.

Linda Crook Martin has been elected to the 15-member board of regents of the American College of Environmental Lawyers at its 2009 annual conference held in October in Portland, Maine. She also chairs the Regional Membership Committee.

Sharon Voorhees was recently re-appointed by Gov. Brad Henry as a commissioner for the Oklahoma Community Service Commission. She has served on the commission since 2002 and her term runs through June 2011.

Donald K. Shandy was inducted as a fellow of the American College of Environmental Lawyers at its annual meeting in Portland, Maine, last month.

The Oklahoma Child Support Enforcement Association honored **Judge Philip A. Ross, Judge Carolyn Koger, Dorinda Morris and Clay Pettis** with awards. Attorneys assuming office in 2010 include **John M. Sharp**, treasurer; **Dawn Zellner**, parliamentarian; **Sloan Wood**, president-elect; **Gary Newberry**, board member; and **Clay Pettis**, past president.

Theodore Haynes was recently inducted into the Langston University Athletic Hall of Fame. While an undergrad at Langston, he was a two-sport letterman. He played center on the basketball team and was a linebacker on the varsity football team.

The Voice of the Defense Bar chose **Kevin Driskill** to be on its board of directors.

On The Move

Hornbeek Vitali & Braun PLLC announces that **B. Taylor Clark** has become an associate with the firm. Mr. Clark received his B.A. from the University of Arizona in 2005 and his J.D. from TU in 2009.

Rainey, Ross, Rice & Binns announces it has changed its name to the Rainey Law Firm. The new address is Hightower Building, 105 N. Hudson, Suite 650, Oklahoma City, 73102; (405) 235-1356.

Ladner & Little PLLC announces that **Roger K. Eldredge** has joined the firm as a member. He will practice real estate acquisition and development, construction law, commercial law and general commercial litigation.

Donelle H. Ratheal PC announces that **Gabe Perez** and **Jaime N. Ortiz** have joined the firm. The firm also announces the change of its name to Ratheal & Associates PC. Mr. Perez practices in the areas of domestic and international family law litigation, immigration law and international business law. Mr. Ortiz practices in the areas of domestic and international family law litigation, domestic and international adoption law, probate law and assisted

reproductive technology. Both Mr. Perez and Mr. Ortiz graduated from OCU School of Law in 2009.

Phillips Murrah PC announces that attorney **Patrick L. Hullum** has joined the firm's litigation and trial practice department. Mr. Hullum practices litigation, primarily in the areas of products liability, catastrophic injury and insurance defense. He graduated from the OU College of Law in 2003.

Doerner, Saunders, Daniel & Anderson LLP announces that **Benjamin C. Perrine** and **Kenneth T. Short** have joined the firm as associates. Mr. Perrine received his J.D. from the OU College of Law where he served as the managing editor of the *American Indian Law Review*. He will practice creditors' rights and bankruptcy, health law and corporate and business law. Mr. Short received his J.D. from the University of Kansas School of Law where he was a staff editor and business manager of the *Kansas Journal of Law and Public Policy*. He will practice civil and commercial litigation, labor and employment law, and construction law.

Douglas N. Gould announces the moving of his practice to 6303 Waterford Blvd., Suite 260, Oklahoma City, 73118; (405) 286-3338; Fax: (405) 848-0492; dg@d Gouldlaw.com.

Mitchell Cohen has been appointed general counsel of the Illinois Department of Natural Resources. He started his legal career, after graduating from TU, with the Tulsa County District Attorney's Office. Before this appointment, he was an assistant attorney general practicing

environmental law, which included serving as chief of the Environmental Crimes Bureau.

The Lyons Law Firm announces that **G. Nash Lamb** is of counsel for the firm. He received his law degree from the TU College of Law. His primary areas of practice are real estate, oil and gas, contracts and construction law.

Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile announces that **Rhiannon K. Thoreson**, **J. Andrew Brown** and **Jennifer D. Ary-Hogue** have joined the firm as associates. Ms. Thoreson graduated with honors from the TU College of Law in 2009. During law school, she was awarded the Order of the Curale Chair for academic success and distinguished service, an ABA/BNA Award for Excellence in Health Law, the Robert C. Butler Jr. Award for Excellence in Legal Scholarship and Writing and several CALI Awards for Excellence. She also served as executive editor of the *Tulsa Law Review*. She will practice appellate advocacy and civil litigation. Mr. Brown received his J.D. from TU in 2009. During law school, he served as articles editor for the *Tulsa Journal of Comparative and International Law*. He will practice insurance defense, civil litigation, medical malpractice defense and products liability. Ms. Ary-Hogue received her J.D. with honors from OU in 2009. While in law school, she served as an assistant managing editor for the *Oklahoma Law Review* and was a Comfort Scholar. She will practice appellate advocacy and civil litigation.

Raygan Pierce Chain announces the opening of her new practice at 106 N. Custer Street, P.O. Box 858, Weatherford, 73096; (580) 774-1414.

Eller & Detrich PC announces that **Phillip J. Jennings** has joined the firm as an associate. He received his J.D. from the TU College of Law in 2008. He will practice estate and trust planning, probate, litigation and commercial transactions.

Barber & Bartz announces the addition of **Kenneth E. Crump Jr.**, **Roger Gassett**, **Kelsey Pierce** and **Kurtis Eaton**. Mr. Crump received his J.D. from the TU College of Law in 1986. He practices contract disputes, employment issues, construction law, business torts and family law matters and serves as an adjunct settlement judge for the U.S. Federal Court for the Northern District of Oklahoma and on the panel of arbitrators for the National Arbitration Forum. Mr. Gassett received his J.D. from TU in 2009. He practices in the areas of domestic law and collections. Mr. Pierce received his J.D. from TU in 2009. While attending law school, he served as editor for the *Tulsa Law Review*. He will practice business and commercial transactions, corporate securities, business organizations, real estate transactions and intellectual property law. Mr. Eaton received his J.D. from OCU in 2008. While attending law school, he was a member of Phi Alpha Delta, the OBA Law Student Division and was the law school chair on the Student Senate. He will practice business and commercial transactions, real estate transactions and corporate securities.

Pray Walker PC announces that **Tyler P. Evans** and **Lauren Madden Williams** have joined the firm as associates. Mr. Evans graduated from the OU College of Law in 2009. He served as assistant note editor of the *Oklahoma Law Review* and graduated with honors. He will work primarily in the energy law group. Ms. Madden Williams graduated from TU College of Law, where she served as an articles research editor of the *Tulsa Law Review*. She will work in the firm's business law group.

GableGotwals announces that **Sarah Powers**, **Cesar Tavares** and **Melissa Taylor** have been named associates in the firm's Tulsa office. Ms. Powers graduated from the TU College of Law where she was a member of Order of the Curule Chair, editor of the *Tulsa Law Review* and a member of the Delta Theta Pi law fraternity. From 2004-2006, she served as a liaison assistant for the Department of Homeland Security U.S. Citizenship and Immigration Services in Washington, D.C. Mr. Tavares graduated from Harvard Law School. He was the submissions editor of the *Harvard Latino Law Review* as well as a member of the Ames Moot Court and the Estate Planning and Child Advocacy Clinical Programs. Ms. Taylor graduated from the TU College of Law, where she was a member of Order of the Curule Chair, production editor of the *Tulsa Law Review* and a member of Phi Delta Phi.

Laura Eakens and **Thomas Manning** have joined the firm of Holden Carr & Skeens. Ms. Eakens received her J.D. from TU. She practices general civil litigation

in areas including railroad, employment and medical malpractice. Mr. Manning received his law degree from the OCU School of Law in 1995. He practices general civil litigation including medical malpractice, trucking, construction, liens and product liability.

Jeremy R. Fitzpatrick has joined Kirkpatrick Oil Company as an attorney/landman.

Scimeca Law Firm announces that **Anita Anthony McSweeney** has joined the firm as of counsel. She will practice in the area of probate and oil and gas title examination. Additionally, the firm recently relocated to Central Tower of Williams Square, Las Colinas Urban Center, 5215 N. O'Connor Blvd., Suite 200, Irving, Texas, 75062; (972) 868-9144.

Toni D. Hennike announces that she has moved to the position of coordinator of international investments and arbitration with Exxon Mobil's law department in Houston. She is a 1981 graduate of the TU College of Law. She has been with Exxon Mobil since 1992 and has held two affiliate general counsel positions within the company.

Pignato, Cooper, Kolker & Roberson PC announces that **Jonathan A. Zende Del** and **S. Corey Stone** have joined the firm as associates. Mr. Zende Del graduated from Baylor University in 2004 and the OCU School of Law in 2008. He will focus his practice on civil defense. Mr. Stone is a graduate of the OU College of Law. He received degrees in marketing, finance and computer science from OSU. He will practice in the areas of insurance defense, transportation

law, contracts and electronic discovery.

Conner & Winters announces that **Daniel Carsey** will join the Oklahoma City office. He will focus on environmental, energy and business matters. He earned his J.D. with honors from TU. After graduating, he clerked for Judge Earl S. Hines at the U.S. District Court for the Eastern District of Texas.

McAfee & Taft announces that **Robert J. Joyce**, **Kathy R. Neal**, **Chris A. Paul**, **Leanne G. Barlow**, **Chris K. Miller**, **Sharolyn C. Whiting-Ralston** and **David M. Winfrey** have joined the firm's Tulsa office. Mr. Joyce practices complex environmental, toxic tort and regulatory matters. Ms. Neal practices labor and employment law. Mr. Paul practices business and complex transactional and regulatory matters for businesses. Ms. Barlow practices estate and business continuation planning. Mr. Miller is a registered patent attorney who practices intellectual property law. Ms. Whiting-Ralston is a trial lawyer who practices labor and employment law. Mr. Winfrey practices environmental, occupational health and safety and transportation law.

At The Podium

Mitchell Cohen recently presented "Ethical Considerations during Parallel Proceedings" at an environmental law training conference in Lincoln, Neb., for the

National Association of Attorneys General.

Chris A. Paul made a presentation on the subject of "Nanotechnology: Risks and Environmental Impacts" to the Air & Waste Management Association on Oct. 14 at the OSU-Tulsa campus. He also made three presentations at the Association of Oil Pipelines 2009 Business Conference held in San Diego, Calif., in September. He was a presenter on the subject of pipeline security issues and a co-presenter for legal issues in pipeline integrity programs and environmental issues.

William B. Federman was chosen to speak at a D&O roundtable discussion in Houston, Texas, in October. He discussed class actions and how the class actions filed today are affected by anti-corporate sentiments, government

regulation, settlement barriers, increasing costs and bankruptcy filings.

Kimber J. Palmer spoke recently on the U.S. Constitution and the U.S. judicial branch to municipal government officials from northern Mexico at an executive forum of the Bi-National Center for Leadership, Research and Education in Public Service, sponsored by Texas A&M International University in Laredo, Texas. She teaches constitutional and business law at the university.

John R. Woodard III spoke to members and guests of the American Association of Subcontractors of Oklahoma on Oct. 20 at the association's monthly meeting. The presentation addressed how to stay out of court and what to do if you end up there – as defendant or plaintiff.

Compiled by Rosie Sontheimer

How to place an announcement: If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award or given a talk or speech with statewide or national stature, we'd like to hear from you. Information selected for publication is printed at no cost, subject to editing and printed as space permits. Submit news items **(e-mail strongly preferred)** in writing to:

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Articles for the Dec. 12 issue must be received by Nov. 27.

IN MEMORIAM

Sharon Carol Duke of Oklahoma City died Oct. 2. She was born January 26, 1965. She joined the bar in 2004 after graduating from Oklahoma City University.

Harold Thomas Garvin Jr. of Duncan died Nov. 9. He was born Oct. 6, 1946, in Wichita Falls, Texas. He soon moved to Duncan where he graduated high school and then attended Westminster College. **He enlisted in the U.S. Army during the Vietnam War and was commissioned as a 2nd Lieutenant.** After service, he earned his B.A. from OU and his J.D. from OCU School of Law. He served as assistant Oklahoma

County district attorney, assistant attorney general and administrative law judge at the Corporation Commission. He practiced oil, gas and energy law and criminal law at his private practice. Recently, he served as an associate professor of law at the University of Texas-San Marcos.

Bruce Harlton of Tulsa died Oct. 12. He was born Feb. 17, 1931. **He served in the Air Force and in the 125th Squadron of the 138th Air National Guard during the post-Korean Conflict and the Cold War.** He was admitted to the bar in 1960 after graduating from the TU College of Law. He practiced criminal

and family law at his general practice in Tulsa and served the community through pro bono work. Memorial donations may be made to the Arthritis Foundation or the American Heart Association.

Ray Lockwood Jones of Cordell died Oct. 25. He was born April 3, 1944, and graduated from the OU College of Law in 1969. After graduation, he served as an assistant district attorney in Frederick and Altus before going into private practice with his father in Cordell. In 1988 he was appointed district judge of Oklahoma where he served until 1995. Shortly after he left the bench

he returned to private practice. In his free time, he loved watching OU football games with his family and friends.

James P. Linn of Oklahoma City died Oct. 24. He was born April 21, 1926, in Spearman, Texas. At age 17, he enlisted in the U.S. Army. He participated in several campaigns in the European Theater of Operations with the Fighting 69th in World War II, and was honorably discharged in June 1946. He put himself through college at Texas A&M and law school at the University of Texas. He began practicing law in Spearman and moved to Oklahoma City in 1969. He was well known for his representation of several celebrities and of his representation of Oklahoma City's National Cowboy & Western Heritage Museum when it was in danger of failing financially. Outside of the law, he loved to quote Shakespeare and other poets and to surround himself with art and music — especially opera. Memorial donations may be made to Children's Hospital Foundation, 800 Research Parkway, Suite 150, Oklahoma City, 73104, or Special Care Inc., 12201 N. Western, Oklahoma City, 73114.

Robert (Bob) N. Naifeh of Norman died Nov. 8. He was born April 1, 1921, in Covington, Tenn. In 1942, following the attack on Pearl Harbor, and in his third year at OU, he enlisted in the U.S. Air Force. He was later assigned as an intelligence officer to the 92nd Bomb Group (Heavy) B-17's at Podington, England, until VE Day. He returned to the U.S. as a Captain in late 1945. He received his B.A. from OU in 1947 and his J.D. in 1950 from the OU College of Law. On April 1, 2009, he was recognized by the OBA for his 60 years of service to the bar. His personal life also consisted of community service. He served as deacon, trustee and elder of the First Presbyterian Church of Norman and was an active member of the India Temple Shriners' Crippled Children's Committee, OU Associates, OU Dads Association, Norman Kiwanis Club and OU Alumni Association. Additionally, he served on the Norman City Council and was assistant attorney general of Oklahoma. Memorial contributions may be made to the Oklahoma Medical Research Foundation, 825 NE 13th St., Oklahoma City, 73104.

Thomas W. Perkins of Oklahoma City died Oct. 19. He was born Oct. 22, 1929, in Shawnee. He earned his undergraduate degree from West Texas State University and earned his J.D. from OCU School of Law in 1962. He served for four years in the U.S. Air Force and retired from the Federal Aviation Administration in Oklahoma City. He later did consulting in aviation.

Wayne B. Snow of Oklahoma City died Oct. 4. He was born Dec. 23, 1920, in Coalgate. During World War II, he served in the 14th Air Force (Flying Tigers) and was attached to the Chinese American Composite Wing under Gen. Chennault. He was awarded two battle stars and the Distinguished Unit Citation for his involvement in the China Defense and China Offense. After the war, he attended the OU College of Law and earned his J.D. in 1947. He practiced law for 23 years at Savage, Gibson, Benefield and Shelton, joined the Oklahoma Supreme Court staff as a legal assistant and was awarded with the OBA Distinguished Service as a Lawyer Award in 1992.

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LOST WILL: IF YOU WERE CONTACTED BY AND/OR PREPARED A WILL for Gregory P. Freeman, a/k/a Greg Freeman, late of the Grand Lake area and Tulsa, please contact attorney Ned Dismukes of Tulsa at (918) 583-9080.

REQUEST FOR PROPOSAL

THE PRINCIPAL CHIEF OF THE MUSCOGEE (CREEK) NATION has issued a Request for Proposal for professional services related to the identification and development of a suitable economic development and diversification strategy for the MCN. The MCN seeks review of the following: (i) review of the MCN's current gaming/non-gaming business and economic development and gaming/non-gaming business operations and strategies; (ii) identification and assessment of the best structural approaches and formats for the MCN's various gaming/non-gaming business entities; and (iii) development of a detailed, comprehensive strategic business development and diversification plan. Interested individuals and firms are invited to go to www.muscogeenation-nsn.gov to access a detailed copy of the Request for Proposal.

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ASSOCIATE ATTORNEYS: SMALL SOUTH TULSA LAW FIRM is looking for two associates, with 0-2 years experience for civil trial practice. Strong research, writing and organizational skills are needed. Must be licensed to practice law in Oklahoma. Starting salary is \$50,000.00-60,000.00 annually. Please send Resume, References and Writing Sample to P. O. Box 700660, Tulsa, OK 74170.

ADVOCATE GENERAL: SERVES AS THE CHIEF ADMINISTRATIVE OFFICER, Advocate General, of the Office of Consumer Advocacy for Oklahoma Department of Mental Health & Substance Abuse Services (ODMHSAS). Serves as an advocate, not an attorney, for consumers receiving services from facilities operated by, subject to certification by or under contract with ODMHSAS. Requires: An attorney admitted to practice in the State of Oklahoma with a minimum of three (3) year's experience. \$65,000 - \$82,225. ODMHSAS offers excellent benefit & retirement packages; reference #09-51 with job title and apply to address below with a copy of your most recent performance evaluation. Reasonable accommodation to individuals with disabilities may be provided upon request. Application period: 10/19/09 - 12/18/09. EOE. ODMHSAS - Human Resources, 2401 NW 23rd, Suite 85, OKC, OK 73107. Fax (405) 522-4817, humanresources@odmhsas.org.

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DOWNTOWN OKLAHOMA CITY, AV RATED, product liability and insurance defense firm seeks attorney with at least 5 years of experience. Please send resumes to "Box L," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

CLASSIFIED INFORMATION

CLASSIFIED RATES: One dollar per word per insertion. Minimum charge \$35. Add \$15 surcharge per issue for blind box advertisements to cover forwarding of replies. Blind box word count must include "Box _____, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152." Display classified ads with bold headline and border are \$50 per inch. See www.okbar.org for issue dates and Display Ad sizes and rates.

DEADLINE: Tuesday noon before publication. Ads must be prepaid. Send ad (e-mail preferred) in writing stating number of times to be published to:

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P.O. Box 53036, Oklahoma City, OK 73152
E-mail: jeffk@okbar.org

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The Spare Office

By B.J. Brockett

It seemed of little matter, but it would reduce our overhead by a few dollars. So here we were having this discussion (lawyers like to call them conferences) about this strange, strange beyond-eccentric fellow, who, by my associate's telling, was a man born at least 100 years past his time. His name was Bill, not a nickname, but his true name. The name seemed harmless enough; after all, at the passing I couldn't think of anyone I had ever read or heard about with the true name of Bill, who had raped, robbed, murdered or pillaged, or even been accused of such.

But this fellow of whom we conferenced was a lawyer and could not have achieved middle age without some tarnish or transgression, or so I did at the moment to myself reason. Bill was described as middle aged, although his actual age was never fully disclosed, but as I later learned to know him, he was

aged far beyond his actual years. He was tall, about 6 feet, slim and erect, a Lincoln-esque figure, a man to whom the ladies might turn an eye but for his other characteristics of which I will later illuminate.

Barney, the one with whom I conferenced, met Bill when they worked for an insurance company. They were claim adjusters, or as Barney put it, "claim deniers." He was telling me now how particularly adept Bill was at picking out the tiniest fly-speck of a reason for denying a claim, which stood him in good stead with his employer, and then, through incessant, ceaseless, boring, haranguing, beating the hapless insured, who had paid his premiums in innocent belief that someday, upon suffering an insured loss, he would be made whole again, into a pittance of a settlement. Bill's penchant for nit-picking and claim denying were not his most valuable traits, at least

not from our perspective. As Barney explained, it was his gloomy, depressive outlook on life that would be of greatest value to us.

Barney, who could have excelled at claim denying but for a too tender heart, which stood him not always well, particularly in the practice of law, where tenderness of heart is more apt a liability than an asset, enlightened his premise thus: A lawyer, in the natural course of his dealings, is often besieged with disappointment — for every case won there is a loser, and you can't always be on the winning side. On those down days, when the case is lost and all hope of reversal on appeal has faded, and the disappointed client has announced your incompetence in open court, and worse, has refused to even reimburse your out-of-pocket expenses — we, you and I, will have Bill.

You see, Barney continued, doom and gloom are relative, and when Bill comes on the scene, your troubles, your woes and disappointments are soon reduced to a fly-speck of nothingness. Bill, even though not inquired, will soon ensconce you in the true meaning of depression, for, as you are quickly aware, your troubles and woes, disappointments and depression are nothing compared to Bill's. Bill, Barney concluded, was the personification of Joe Btfsplk, the cartoon character over whom the dark cloud perpetually hung, in the Li'l Abner comic strip.

And, having thus convinced ourselves of his great value to us, we rented the spare office to Bill. He did not disappoint, and over time his value appreciated, and we grew fond of him so that years later we greatly mourned his passing.

Mr. Brockett practices in Oklahoma City.

Snooze = lose



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