

Oklahoma Bar JOURNAL

Volume 83 ♦ No. 20 ♦ Aug. 11, 2012

Family Law



ALSO INSIDE

- Board of Governors
2013 Vacancies
- Sovereignty Symposium
Photo Highlights

Comprehensive Probate Seminar: From Starting a Probate to Maintaining It

September 7, 2012
Oklahoma Bar Center, OKC

September 14, 2012
Renaissance Hotel, Tulsa

Planner/Moderator:

Donna J. Jackson, JD, LLM, Donna J. Jackson Attorney At Law, Oklahoma City

www.okbar.org/cle

8:30 a.m.

Registration and Continental Breakfast

9

Part 1: Starting a Probate: What You Need to Know
About Probate - Statutes and Forms

Jack W. Ivester, Ivester, Ivester & Ivester, PLLC, Sayre
& Elk City

9:50

Break

10

Part 2: Finishing the Probate

David P. Hartwell, David P. Harwell, Attorney, PC,
Oklahoma City

10:50

Real Estate Issues in Probate

Terrell Monks, Terrell Monks, Attorney, PC,
Oklahoma City

11:40

Networking lunch (included in registration)

12:10

Current Issues in Probate

Donna Jackson

Dawn Hallman, Hallman & Associates, PC, Norman

1

Fraud in Probate (ethics)

Kara Greuel, Curzon, Cumbey & Kunkel, PLLC, Tulsa

1:50

Break

2

Probate of the Rich and Famous - Why They Have Them
and What Can Be Learned

Donna Jackson

2:50

Adjourn

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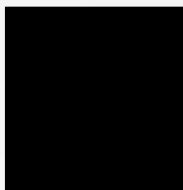




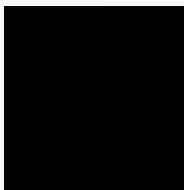
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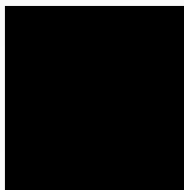
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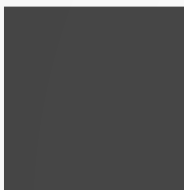
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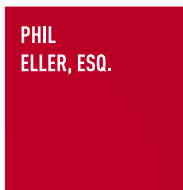
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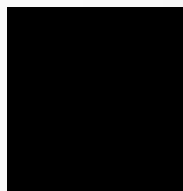
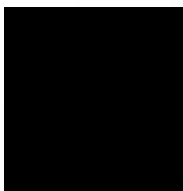
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C12-0201-010 (2/12)

THEME:
FAMILY LAW
EDITOR: SANDEE COOGAN

contents

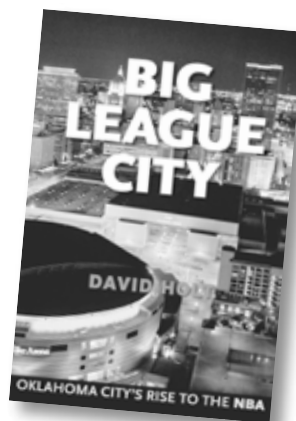
Aug. 11, 2012 • Vol. 83 • No. 20



FEATURES

- 1687 SCRA: THE REAL 'RULES OF ENGAGEMENT' AND ITS IMPACT IN FAMILY LAW PRACTICE
By Phillip J. Tucker
- 1699 ESTATE PLANNING PRIOR TO, DURING AND AFTER MARITAL DISSOLUTION
By Katherine Saunders
- 1709 GIBBONS V. GIBBONS: THE BURDEN OF PROOF FOR A CHANGE OF CUSTODY SINCE 1968
By Treva Krivohlavek Kruger
- 1719 DRAFTING MILITARY ORDERS
By Virginia Henson
- 1727 LICENSE REVOCATION, SUSPENSION AND NONISSUANCE – IS THIS AN UNDERUSED TOOL FOR CHILD SUPPORT ENFORCEMENT?
By Michelle C. Harrington
- 1731 CALCULATING CHILD SUPPORT FOR MILITARY PARENTS
By Linda Monroe and Amy E. Wilson
- 1737 SHARED PARENTING IN OKLAHOMA: WHAT ABOUT FATHERS?
By Melissa DeLacerda, Kari Adamsons, Tammy Henderson and Erinn Tucker
- 1743 CHILD TAX EXEMPTIONS RELATED TO A DECREE OF DISSOLUTION OF MARRIAGE
By M. Shane Henry
- 1747 ONE LESS ARGUMENT
By Steven L. Holloway

pg. 1758
BOOK REVIEW



DEPARTMENTS

- 1684 FROM THE PRESIDENT
- 1751 FROM THE EXECUTIVE DIRECTOR
- 1760 LAW PRACTICE TIPS
- 1765 EDITORIAL CALENDAR
- 1766 ETHICS/PROFESSIONAL RESPONSIBILITY
- 1768 OBA BOARD OF GOVERNORS ACTIONS
- 1774 OKLAHOMA BAR FOUNDATION NEWS
- 1775 YOUNG LAWYERS DIVISION
- 1776 CALENDAR
- 1777 FOR YOUR INFORMATION
- 1780 BENCH AND BAR BRIEFS
- 1786 IN MEMORIAM
- 1792 THE BACK PAGE



pg. 1756
SOVEREIGNTY SYMPOSIUM
PHOTO HIGHLIGHTS

PLUS

- 1753 BOARD OF GOVERNORS 2013 VACANCIES
- 1756 PHOTO HIGHLIGHTS: SOVEREIGNTY SYMPOSIUM
- 1758 BOOK REVIEW: *BIG LEAGUE CITY: OKLAHOMA CITY'S RISE TO THE NBA*
Reviewed by Judge Allen J. Welch

No Summer Vacation for Busy OBA Volunteers

By Cathy Christensen

It is “summer time and the living is easy!” Right? Not necessarily if you serve on one of the many OBA sections and committees. Although the sections and committees work diligently all throughout the year, this summer they are going above and beyond in their commitment to help build a better lawyer and a stronger bar association. The Oklahoma Bar Association has 26 committees and 24 sections offering members unique opportunities to become involved in bar activities and areas of substantive law. I’d like to recognize a few of the committees and highlight their summer activities.

The **Solo and Small Firm Committee**, under the leadership of Chair Collin Walke and Vice Chair Chuck Chesnut, recently presented a very successful conference at the Choctaw Casino Resort in Durant. A new location brought with it a few logistical challenges to achieve registrants’ comfort in the CLE, at meal time and entertainment, or pool side at the resort. Any challenges were promptly overcome,

and the conference was superb! The committee offered a one-day trial college sponsored by Oklahoma Attorneys Mutual Insurance Co. By all accounts, the 2012 solo conference was a resounding success!



Cathy Christensen

President Christensen
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405-752-5565

The **Women in Law Committee**, led by Chair Deirdre Dexter and Vice Chair Deborah Bruce, is busy planning the annual Women in Law Conference that will be held Sept. 28 in Oklahoma City. The keynote speaker is Ms. Lisa Bloom, a prominent American civil rights attorney, best known as anchor of *Lisa Bloom: Open Court* and author of the books, *Swagger* and *Think: Straight Talk for Women to Stay Smart in a Dumb World*. She is a legal analyst and TV commentator who brings an important message and will inspire the conference attendees. This year the Women in Law Committee is pleased to host a reception honoring Deans

Valerie Couch and Janet Levit, Oklahoma’s female law school deans. Watch for information in the bar journal about the reception scheduled Thursday evening, Sept. 27 and make plans to attend.

On Oct. 18, the **Diversity Committee** will present the first Ada Louis Sipuel Fisher Diversity Awards. Committee Chair Kara Smith, Vice Chair Marcus Bivens, and a very devoted

committee have created a fitting event to pay tribute to the work and accomplishments of attorneys, groups and entities that have championed the cause of diversity in Oklahoma. Please join the committee members and award recipients at the Skirvin Hilton Hotel in Oklahoma City. The keynote speaker for the CLE presentation will be Mr. Mark Curriden, a legal journal-

ist and attorney, who will discuss his award-winning and best-selling book, *Contempt of Court*, about a lynching and two lawyers who made legal history and forever changed the practice of law.

Chair Judy Hamilton Morse and the **Professionalism Committee** are diligently planning a Professionalism Symposium to be held Dec. 13, 2012. The day will begin with breakfast with the law school deans and

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cont’d on page 1750

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EVENTS CALENDAR

AUGUST 2012

- 15 **OBA Women in Law Committee meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Dierdre Dexter 918-584-1600
- 16 **Access to Justice Committee meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose 405-236-0478
- OBA Justice Commission meeting**; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Carrie Bullard 405-235-5500
- 17 **OBA Board of Governors meeting**; 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams 405-416-7000
- Oklahoma Association of Black Lawyers meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Brittini Jagers 405-314-0611
- 18 **OBA Real Property Law Section Title Examination Standards meeting**; 10 a.m.; Stroud Conference Center, Stroud; Contact: Chris Smith 405-919-6876
- 21 **OBA Bench and Bar Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: David Swank 405-325-5254
- OBA Civil Procedure and Evidence Code Committee meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU-Tulsa, Tulsa; Contact: Jim Milton 918-594-0523
- 23 **Oklahoma Bar Foundation meeting**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy 405-416-7048
- OBA Men Helping Men support group meeting**; 5:30 p.m.; The University of Tulsa College of Law, 205 John Rogers Hall, 3120 E. 4th Place, Tulsa; RSVP to Kim Reber kimreber@cabainc.com
- OBA Work/Life Balance Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sara Schumacher 405-752-5565
- 25 **OBA Young Lawyers Division meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jennifer Kirkpatrick 405-553-2854

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

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

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SCRA: The Real ‘Rules of Engagement’ and its Impact in Family Law Practice

By Phillip J. Tucker

All family law cases start with a jurisdiction analysis; and family law jurisdictional analysis is often more complex than other types of civil litigation. Add a servicemember (with his/her mobility to the mix), and this analysis becomes even more complicated. The initial case review depends upon what is happening, *e.g.* original dissolution of the marriage action, paternity determination, post-decree child custody modification, post-decree child support modification, international child abduction, etc. If you are called upon to represent a servicemember, one must gather enough initial information to determine the nature or type of pending family law proceeding. Further, one must make an initial determination on whether to invoke the provisions of the Servicemembers Civil Relief Act (SCRA).¹ As family law attorneys, we often believe that just understanding state laws, practice and procedure is enough to get by; however, that is **not** the case when a party is in military service. The SCRA is where the real rules of engagement are located.

INTRODUCTION AND HISTORY

On Dec. 19, 2003, President Bush signed into law the *Servicemembers Civil Relief Act*, which was a complete revision of the statute known as *The Soldiers' and Sailors' Civil Relief Act*, (SSCRA). Even for lawyers with no military base nearby, this federal statute is important. Presently, there are more than 100,000 National Guard and Reserve personnel who have been called to active duty. Over 40 percent of the armed forces

serving in Iraq and Afghanistan are Reserve or Guard servicemembers.² These Reserve component military members often come from the big cities and small towns across Oklahoma. So, lawyers need to be acquainted with the basic federal statute that protects those on active duty.

Congress wrote the SCRA to clarify the language of the old SSCRA, to incorporate many years of judicial interpretation of the old law and to update it to reflect new developments in Amer-

ican life since 1940 when it was enacted.³ The SSCRA, which was updated after the 1991 Gulf War, was still largely unchanged as of 2003.

Although the old statute offered limited coverage for Guard members, the new law extends protections to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the President or the Secretary of Defense.⁴

Until the passage of the SCRA, the basic protections of the SSCRA for a servicemember included:

- Postponement of civil court hearings when military duties materially affected the ability of the servicemember to prepare for or be present for civil litigation;
- Reducing the interest rate to six percent on pre-service loans and obligations;
- Barring eviction of a servicemember's family for nonpayment of rent without a court order for monthly rent of \$1,200 or less;
- Termination of a pre-service residential lease; and
- Allowing servicemembers to maintain a state/status of residence for tax purposes, despite military reassignment to other states.

BASIC CONCEPTS

Liberally constructed in favor of the servicemember

Like its predecessor, the SCRA is intended "to provide for, strengthen, and expedite the national defense" by enabling servicemembers "to devote their entire energy to the defense needs of the nation" through "the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service."⁵

In a 1943 case addressing the purpose of the old act, the U.S. Supreme Court noted that liberal construction of the statute served the end of "protect[ing] those who have been obliged to drop their own affairs to take up the burdens of the nation."⁶

Servicemember must be materially affected

The servicemember must be materially affected by the call to military service for application of SCRA protections to apply against eviction,⁷ self-help repossessions on autos and other

property,⁸ foreclosures⁹ or enforcement of storage liens.¹⁰ No specific definition of "materially affected" exists in the act. In making a material effect determination, one should look at the totality of the impact from the call to active service on the servicemember and family. The inquiry is more than just, "what did the soldier earn before active duty, and what does the soldier earn now?" Without question, this will be a key piece of any SCRA analysis you must perform.

It is up to the trial judge to determine, on a case-by-case basis, what are the boundaries of the "material effect" concept. A good example can be found in *Cromer v. Cromer*.¹¹ In *Cromer*, the defendant was serving aboard a submarine scheduled for sea operations at the same time as his child support case trial. The North Carolina Supreme Court remanded the case back to the trial court with instruction for consideration of the affidavit of the sailor's commanding officer in determining whether his military service and duties had a material effect on his ability to defend himself so as to justify a stay of proceedings under the act.

Further, there is no clear formulation of who has the burden of proof to show material effect. As stated by the U.S. Supreme Court in *Boone v. Lightner*:

"The act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sense to know from what direction their information should be expected to come."

Although it is logical to require the burden of proof to be on the movant (the servicemember who is requesting a stay of proceedings), some courts have stated that both parties may be required to produce evidence on the issues.¹²

Expansive coverage

As noted above, the SCRA covers all active-duty servicemembers, including Reserves and Guards serving more than 30 consecutive days in times of national emergency under 32 U.S.C. §502 (f).¹³ It also applies to periods of absence

from active duty due to injury, illness, leave, and other lawful causes — and for Reserves and Guards, to the period between when they receive orders and when they report.¹⁴

The act applies whether the service is voluntary or involuntary and applies to servicemembers serving in the continental United States and stationed or deployed overseas. In order to determine whether your client is protected by the SCRA, require the production of his or her orders. In the case of a Guardsman, look to see if his or her orders reference 32 U.S.C. §502(f), “in support of a national emergency declared by the president,” for a period of more than 30 consecutive days. If so, that duty qualifies for the act’s protection.

The SCRA also expands the application of a servicemember’s right to stay court hearings to include administrative hearings (e.g. DHS Administrative Child Support proceedings, etc.).¹⁵ Previously only civil courts were included in the purview of the SSCRA and this caused problems in cases involving administrative child support determinations as well as other agency determinations which impacted servicemembers.

Note: criminal matters are still excluded.¹⁶

Miscellaneous

SCRA rights can be waived. The best practice is for the waiver to be in writing and executed only during or after a period of military service. Again, a member of a Reserve component who has been ordered to report for duty (whether or not he or she is actually on active duty) is considered within a period of military service.¹⁷

The SCRA defines “legal representative” as an attorney acting on behalf of the servicemember or a person in possession of a power of attorney.¹⁸ A legal representative may enforce any of the servicemember’s rights and may demand protections provided by the SCRA on behalf of the servicemember. All branches of services “highly recommend” that servicemembers who are soon to deploy overseas or depart for extended periods for other duties, establish Family Care Plans, which will include the execution of a power of attorney.¹⁹ Based on the author’s experience, one of the most common myths servicemembers have is the belief that custody transfers of minor children can be accomplished by a power of attorney. Just so

we are clear on this point: A power of attorney *never* changes custody.

50 U.S.C. App. §522(c) eliminates the previous concern that a stay motion would constitute a general appearance, exposing the servicemember to the jurisdiction of the court. This new provision makes it clear that a stay request “does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense;” nor should it be the basis for an award of attorney fees for dilatory conduct.²⁰

The SCRA offers many options to help you protect your clients’ rights. You should use care and creativity in employing its provisions.²¹ Since many of the SCRA’s provisions are particularly useful (and potentially dangerous) in domestic litigation, the family law attorney should have a good working knowledge of them. Here’s an overview of what the SCRA does.²²

STAYS AND DELAYS

One of the central protection points in the old statute that continues on in the SCRA is the granting of a continuance which halts legal proceedings. How it applies depends upon the circumstances within your case.

No Notice of Proceedings

In a case where the servicemember has not made an appearance in the proceedings, the SCRA requires a court or administrative agency to grant a stay or continuance of at least 90 days when the defendant is in military service, and

- the court or agency decides that there may be a defense to the action, and such defense cannot be presented in the defendant’s absence, or
- with the exercise of due diligence, counsel has been unable to contact the defendant (or otherwise determine if a meritorious defense exists).²³

50 U.S.C. App. §521 applies to all civil cases. In 2008, Congress added the phrase “including any child custody proceeding” to the act’s sections pertaining to default judgments and stay of proceedings. Many practitioners and SCRA experts felt that additional language was completely unnecessary since “all civil actions” means just that: **all** actions. Congress clearly

“In a case where the servicemember has not made an appearance in the proceedings, the SCRA requires a court or administrative agency to grant a stay or continuance of at least 90 days when the defendant is in military service...”

wanted to remind family law Judges that the SCRA applies to family law cases as well!²⁴

Can you obtain a default judgment against a servicemember? Broadly construing “default judgment” as any adverse order or ruling against the servicemember’s interest, the act clarifies how to proceed in a case where the other side seeks a default judgment (one in which the servicemember has been served but has not entered an appearance by filing an answer or otherwise) if the tribunal cannot determine whether the defendant is in military service. A default judgment may not be lawfully entered against a servicemember in his absence unless the court follows the procedures set out in the SCRA.

Again, when the servicemember has not made an appearance, 50 U.S.C. *App.* §521 governs. The court must first determine whether an absent or defaulting party is in military service. Before entry of a judgment or order for the moving party (usually the petitioner or plaintiff), the movant must file an affidavit stating whether or not the defendant is in the military service and showing the necessary facts to support that affidavit. If the plaintiff is unable to determine whether the defendant is in the military service, an affidavit must be filed stating such.

Criminal penalties are provided for filing a knowingly false affidavit.²⁵

When the court is considering the entry of a default judgment or order, one tool that is specifically recognized by the SCRA is the posting of a bond. If the court cannot determine wheth-

er the defendant is in military service, then the court may require the moving party to post a bond as a condition of entry of a default judgment. Should the nonmoving party later be found to be a servicemember, the bond may be used to indemnify the defendant against any loss or damage which he or she may incur due to the default judgment (if it should be later set aside).²⁶

When the filed affidavit states that the party against whom the default order of judgment is to be taken is a member of the armed forces, no default may be taken until the court has appointed an attorney for the absent servicemember. Specifically, 50 U.S.C. *App.* §521(b)(2) provides:

“If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in this case shall not waive any defense of the servicemember or otherwise bind the servicemember.”

If you are appointed under these circumstances to represent a servicemember defendant, what are you supposed to do?²⁷

And, if the court fails to appoint an attorney, the default judgment against a person protected by the SCRA is voidable, provided that the servicemember seeking to set aside the default judgment was materially affected by reason of military service in defending the action and had a “meritorious or legal defense” to the action or some part of it. To do so, the servicemember must apply to the trial court that rendered the original judgment or order. In addition, the default judgment must have been entered when the member was on active duty military service or within 60 days thereafter, and the servicemember must apply for the reopening of the judgment while on active duty or within 90 days thereafter.²⁸ Reopening or vacating the judgment does not impair any right or title acquired by a *bona fide* purchaser for value under the default judgment.²⁹

Again, to prevail on this motion to reopen a default order, the servicemember must prove that, at the time the judgment was rendered, she was prejudiced in her ability to defend herself due to military service. In addition, she

must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of judicial effort and resources in opening default judgments in cases where servicemembers have no defense to assert.³⁰ As part of a well-drafted motion or petition to reopen a default judgment or order under SCRA, the servicemember should clearly delineate her claim or defense so that the court will have sufficient facts upon which to base a ruling.

Notice of Proceedings

In a situation where the military member has notice of the proceeding, a similar mandatory 90 days (minimum) stay of proceedings applies upon the request of the servicemember, so long as the application for a stay includes the following:³¹

- A letter or "other communication" that 1) states the manner in which current military duty requirements materially affect the servicemember's ability to appear; and 2) gives a date when the servicemember will be available to appear.
- A letter or other communication from the servicemember's commanding officer stating that 1) the servicemember's current military duty prevents appearance, and 2) that military leave is not now authorized for the servicemember.

Of course, these two communications may be consolidated into one if they are from the servicemember's commander. No specific form of communication with the court is mandated. Therefore, "other communication" is liberally viewed and includes emails, phone calls, faxes, etc. directed to the judge, court clerk and/or counsel.

These protections substantially clarified the old SSCRA's stay provisions, under which all stays were discretionary. Also, the old law provided no explicit guidance on the length of a stay or the impact of a stay request on jurisdictional defenses, and that omission created fertile ground for appeals.³²

ADDITIONAL STAYS

An application for an additional stay may be made at the time of the original request or later.³³ If the court refuses to grant an additional stay, then the court must appoint counsel

to represent the servicemember in the action or proceedings.³⁴ Once again, give this some thought. What is the attorney supposed to do — tackle the entire representation of a servicemember whom he has never met, is currently absent from the courtroom and is likely unavailable for consultation?

Additionally, there is no provision for compensation in the SCRA. Imagine that her honor beckons you to the bench next Monday and says, "Counselor, I am appointing you as the attorney for Sgt. Sandra Blake, the absent defendant/respondent in this case. I understand that she's in the Army or maybe the Army Reserve or National Guard ... whatever. Please report back to the court in two weeks and be ready to try this case." How would you respond?

Lastly, it should be remembered that a stay is not forever. Contrary to the popular notion of many servicemembers and family law attorneys, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. In fact, the stay is intended to last only as long as the material effect lasts. For example, military members accrue leave at the rate of 30 days per year, and courts can take judicial notice of this fact.³⁵

ATTORNEY FOR THE ABSENT

The role of the appointed attorney is to represent the defendant. The statute does not say what happens if the servicemember is, in fact, the plaintiff in a particular domestic case. Undoubtedly, this wording is just careless drafting. Particularly in domestic cases, it is just as likely that the servicemember would be the petitioner or plaintiff as the respondent or defendant; and default orders are sought against both sides, not just defendants.

The statute does not say what tasks are to be undertaken by the appointed attorney, but the probable duties are to protect the interests of the absent member, much as a guardian *ad litem* protects the interests of a minor or incompetent party. This would include contacting the member to advise that a default is about to be entered and asking whether that party wants to request a stay of proceedings. Counsel for the servicemember should always renew the request for a stay of proceedings, given the difficulty of preparing and presenting a case without the client's participation.

Accessing Military Status HELPFUL WEBSITES

Department of Defense Manpower Data Center
www.okbar.org/s/6b99y.³⁶

- Enter last name and Social Security number of the individual.
- To execute a report, click "Look Up," which opens a second window with the generated report.
- Further information is available on the "Help" section of the website.

"ARE WE THERE YET?" – A Roadmap for Appointed Counsel Under the Servicemembers Civil Relief Act

www.okbar.org/s/51xjh.

- Download for your personal library

OR WRITE**

ARMY

Army World Wide Locator Service
Enlisted Records and Evaluation Center
8899 East 56th St.
Indianapolis, IN 46249-5031
Note: All requests must be in writing

NAVY

Bureau of Naval Personnel
PERS-312E
5720 Integrity Drive
Millington, TN 38055-3120
Locator Service 901-874-3388

AIR FORCE

Air Force Manpower and Personnel Center
Attn: Air Force Locator/MSIMDL
550 C. St. West, Suite 50
Randolph AFB, TX 78150-4752
Locator Service 210-652-5775

MARINE CORPS

Commandant of the Marine Corps
Headquarters, U.S. Marine Corps (MMSB10)
2008 Elliott Road, Suite 201
Quantico, VA 22134-5030
Locator Service 210-784-3941

***A nominal fee is charged for each written inquiry*

The statute also leaves one in the dark about the limitations of the appointed attorney. His or her actions may not bind or waive any defense of the servicemember. What is the attorney to do? How can he or she operate effectively before the court with these restrictions? Can the attorney, for example, stipulate to the income of his or her client or the other party? Can he or she agree to guideline child support and thus waive a request for a variance? Without elaboration in this area, the law could mean that he or she must contest everything, object whenever possible and refuse to make even reasonable stipulations or concessions for fear of violating the act. Such conduct is at odds with the ethical requirements that counsel act in a professional and civil manner, avoiding undue delay and expense.

INTEREST RATES

The act clarifies the rules on the six percent interest rate cap on pre-service loans and obligations by specifying that interest in excess of six percent a year must be forgiven.³⁷ The absence of such language in the SSCRA had allowed some lenders to argue that interest in excess of six percent was merely deferred. How does this apply when your servicemember client has a child support arrearage judgment that is drawing a statutory 10 percent per year/annum interest rate per 43 O.S. 114?

The act specifies that a servicemember must request this reduction in writing and include a copy of his/her military orders.³⁸ Once the creditor receives notice, the creditor must grant the relief effective as of the date the servicemember is called to active duty. The creditor must forgive any interest in excess of the six percent with a resulting decrease in the amount of periodic payment that the servicemember is required to make.³⁹ The creditor may challenge the rate reduction if it can show that the servicemember's military service has not materially affected his or her ability to pay.⁴⁰ Again, this should be a totality of circumstantial analysis. If the creditor does not challenge when noticed, then the creditor must comply with the servicemember's demand for rate reduction, which extends for the duration of military service.⁴¹

STAY OF EXECUTIONS, ATTACHEMENTS AND GARNISHMENTS

50 U.S.C. App. §524 is considered the ultimate protection provision in the SCRA. Under its terms, the servicemember could have failed to

comply with almost every other provision of the act, had a valid judgment rendered against him or her and *still* apply to a court for relief. If the court determines that a servicemember, by virtue of his service, is materially affected in complying with a court judgment or order, the court may *sua sponte*. The court must also, on application of the servicemember, stay the execution of any judgment or order against the servicemember, and vacate or stay an attachment or garnishment of property, money or debts in the possession of the servicemember or a third party before or after judgment. The act places no limits on the type of actions that are covered. So, can a servicemember seek a stay in child support collection proceedings? The author is not aware of any Oklahoma case on point.⁴²

ANTICIPATORY RELIEF

50 U.S.C. App. §591 allows a servicemember to proactively seek judicial relief from pre-service obligations and from taxes or assessments arising during military service. These anticipatory relief provisions can be used to request relief from pre-service obligations, such as child support or alimony, when a prospective breach is likely. For example, when the servicemember is earning more in a civilian job before mobilization than he or she will be earning on active duty, and the civilian wage garnishment will terminate upon call to active duty, the servicemember should use this section to request a reduction in child support or alimony and to request a new garnishment from Defense Finance and Accounting Service to pay the other party on a timely basis.

In planning to use the SCRA anticipatory relief, some questions to ask your client will include,

- Is a delay necessary?
- Is a delay desirable? [e.g., build-up of arrears, citations for contempt as results]
- Is a delay helpful at present, or will it simply delay the day of reckoning in the long run?

IMPACT ON FAMILY LAW

Pause for a moment to think through the potential impact of a SCRA stay on the family lawyer and the client. How would this affect an action for custody by the non-custodial dad when mom, who has custody, receives mobilization orders and takes off for Afghanistan,

leaving the parties' child with her mother in Florida? How are you going to get the child back when mom's lawyer interposes a stay request to stop the litigation dead in its tracks? If mom has executed a Family Care Plan, which is required by military regulations, leaving custody with the maternal grandparent, will that document — executed by mom, approved by her commanding officer and accompanied by a custodial power of attorney — displace or overcome a court order transferring custody to dad? Can the court even enter such a custody order given the stay and default provisions of the act?

To see how the battle is being played out in this area, take a look at *Lenser v. McGowan*⁴³ and *In re Marriage of Grantham*.⁴⁴ In *Lenser*, the Arkansas Supreme Court noted:

"The idea [of SCRA] is to relieve servicemembers from disadvantages arising from military service, not to provide advantages by reason of military service....To accept [servicemember's] argument [of granting an SCRA stay] would create an environment in which a servicemember could always gain custody by simply making sure the child is staying with the servicemember when the stay is requested. That would provide servicemembers an advantage rather than protect against adverse affects."⁴⁵

Next, consider this scenario: A woman waits until the eve of her husband's overseas deployment to file dissolution of marriage papers, including a request for *pendente lite* support, exclusive possession of the marital residence, continued insurance coverage, and power of attorney over the husband's affairs. The husband gets served, is due to ship out within the week and he consults you. What do you do?⁴⁶

50 U.S.C. App. §522 entitles the serviceman to a mandatory 90-day stay of proceedings. To qualify for it, he must alert the court — in writing (which might include email), supported by a commanding officer's statement — that he is on active duty, which will materially affect his ability to defend for a specified period of time during which he cannot take military leave. He may also seek an extended, discretionary stay if he shows that his military service will continue to affect his ability to defend. If this additional stay is denied, counsel must be appointed to protect his rights.

In another example, what happens if a husband ships out without consulting an attorney or appearing in his wife's dissolution of marriage action, and in due time she moves for a default judgment?

The SCRA reads that before the court may enter a default judgment, the plaintiff must file an affidavit (or a subscribed written statement in any form, certified or sworn to) that the defendant is not in military service and show "necessary facts" to support the affidavit.⁴⁷ The plaintiff may obtain an acceptable affidavit or certificate from the Department of Defense (DOD) Manpower Data Center. If the plaintiff fails to conduct or prove a DOD search occurred in order to discover whether the defendant is serving in the military, the court may scrutinize or even discredit the affidavit.⁴⁸

On another front, think about support. How does the SCRA stay provision affect the custodial dad who suddenly stops receiving child support when his ex-wife is called up to active duty from the Guard or Reserve? When she leaves her day job, her pay stops, and so does the monthly wage garnishment for support of their children. How can dad get the garnishment restarted while she's in uniform on active duty? Will the reduction in pay she probably gets result in less child support?⁴⁹ Or will her reduced costs of living in the military (how much does it cost to live in a tent outside Bigram Air Base in Afghanistan?) have the opposite result? How can dad move the case forward to establish a new garnishment when he cannot locate her? He may not be able to serve her, even if he can locate her; and she probably will have a bullet-proof motion for stay of proceedings if dad ever gets the case to court!

The SCRA's stay and default protections pose special challenges in child support and custody proceedings. Under the old law, courts readily recognized the need to balance servicemembers' procedural rights against dependants' rights to adequate care and support during the period of military service, particularly when the dependants were children.⁵⁰ Likewise, if the issue is only child support, courts under the old act routinely granted the military obligor a discretionary stay, subject to an award of temporary child support, which could be determined on papers alone, without a hearing.⁵¹

Does the court have the same discretionary power to award interim relief to the civilian

parent under the SCRA, with its 90-day mandatory stay provision? At least one court has held that it did — in the custody context, although the grant of a stay in that case was accompanied by assurance that in proceedings before the stay application, the best interests of the child had already been aired.

Another court, on a child support agency's petitioner against the military father, simply refused to grant an SCRA stay. It concluded that father had ample time before being called up to active duty to gather necessary income materials so that counsel could have presented in documentary form.⁵²

Other courts have held, however, that the issuance of an SCRA stay does not bar temporary relief for the civilian parent. Thus, a child's temporary custody is not determined by the happenstance of being with a particular parent or grandparent at the time a stay is requested, particularly if it appears that the servicemember obtained custody of the child by subterfuge or unfair dealing (by holding the child over on visitation, for example).⁵³

A courts' willingness to condition or override an SCRA stay is based on the longstanding principle that SCRA functions as a shield that can help protect servicemembers from disadvantages arising from military service, but not as a sword to give them unfair advantage over other litigants. Also, in balancing servicemembers' needs against their dependants' needs, courts are willing to push the definition of a servicemember's "unavailability" for an SCRA stay to allow for video or telephone appearances or to consider *pendente lite* issues, particularly regarding child support, on papers alone.⁵⁴ Also, courts will require full compliance with SCRA provisions in order for a servicemember to obtain relief.⁵⁵

It is hoped that with the enactment of the Oklahoma Deployed Parents Custody and Visitation Act,⁵⁶ many of these types of court battles can be avoided. However, as noted in endnote 24, the act only became effective May 26, 2011. The author is not aware of any appellate decisions in the works to examine its provisions. During the bill's legislative consideration, questions about its constitutionality (especially regarding the delegation of visitation rights) arose.⁵⁷ Nevertheless, until our appellate courts speak, the new act will provide a framework for dealing with custody, visitation and sup-

port questions due to a servicemember/parent's deployment.⁵⁸

CONCLUSION

The family law attorney, perhaps even more than the general practitioner, needs to know and understand the SCRA (and general domestic jurisdiction) for those occasions when a military member is one of the parties to the litigation. Mobilizations and deployments affect mothers and fathers, wives and husbands, and separated partners who are in the Reserves, on active duty and in the National Guard. They will have an impact on income, visitation, family expenses, custodial care for children, mortgage foreclosures, garnishments and many other domestic issues.

One of the best sources of quick information on the SCRA is *A Judge's Guide to the Servicemembers Civil Relief Act*, found at the website of the Military Committee of the ABA Family Law Section, www.americanbar.org/family/military. Also the most complete reference work on the subject is the Army JAG School's SCRA guide, JA 260, which is available at www.okbar.org/s/ja260. Lastly, if ever in doubt regarding SCRA claims in your family law case, feel free to call. We all get by "with a little help from our friends".

Author's Note: As with many of us, I see far because I stand on the shoulders of giants. Toward this end, I want to acknowledge the continual efforts and extensive works of my colleague, Mark E. Sullivan. Mr. Sullivan is a retired Army Reserve JAG colonel who practices in Raleigh, NC. He is a board-certified specialist in family law and past president of the North Carolina Chapter of the American Academy of Matrimonial Lawyers. Further, Mark is a past Chair of the Military Committee of the ABA Family Law Section and author of *The Military Divorce Handbook* (American Bar Association, May 2006), from which much of this material is adapted. His book is available (now in its 2nd addition) through the ABA. It is an indispensable resource guide for the family law attorney working a military case.

1. 50 U.S.C. App. §§501- 597b.

2. Oklahoma recently contributed 3,000 to 3,500 servicemembers to these numbers in the first quarter of 2011. Further, calls for assistance through the OBA's Oklahoma Lawyers for America Hero's Program are running 20+ calls a day according to Susan Carey, former program coordinator. The majority of these calls involve family law matters. To sign up for volunteer work, please call or Email Cree Gathright, the new program coordinator at 405-416-7086 and/or creeg@okbar.org. **The need is real and now.**

3. The latest revision was the passage of Senate Bill 4508, which amended Pub. L. No. 111-289 by extending the "sunset" provision of 50 U.S.C. App. §533(b) to Dec. 31, 2012.

4. 50 U.S.C. App. §511(2)(A)(ii).

5. 50 U.S.C. App. §502(2).

6. *Boone v. Lightner*, 319 U.S. 561, 575 (1943). See also, *LeMaistre v. Leffers*, 333 U.S. 1 (1948) (A[T]he Act must be read with an eye friendly to those who dropped their affairs to answer their country's call.").

7. 50 USCA App. §531.

8. 50 USCA App. §532.

9. 50 USCA App. §533.

10. 50 USCA App. §534.

11. 303 N.C. 307, 278 S.E.2d 518 (1981).

12. *Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980).

13. See, 50 U.S.C. App. §511(2)(A).

14. *Id.* §§511(3) and 516. See also, *Sec'y of Housing & Urban Dev. v. McClenan*, 798 N.Y.S.2d 348 (N.Y. Civ. Ct. 2004). A popular misconception is that the SCRA does not protect a servicemember until he or she has actually reported for duty and is on the payroll of the U.S. government. This is incorrect. The protections of the SCRA apply to members of the Reserve component **from the date they receive orders** calling them to active duty. The "spin up" period is intentionally designed to allow citizen-soldiers some time to get their affairs in order before reporting for duty.

15. Under 50 U.S.C. App. §§511(5) and 512(b), any civil court or administrative agency of the United States or of any state (including any political subdivision of a state), whether or not a court or administrative agency of record, is required to comply with the SCRA. So, for example, the SCRA would apply to city councils, zoning boards and planning commission; tax commissions and lawyer disciplinary boards (if the board is a state administrative agency), etc.

16. 50 U.S.C. App. §511-512.

17. 50 U.S.C. App. §516.

18. 50 U.S.C. App. §519.

19. Prior to Oklahoma's deployments, there were several "Yellow Ribbon" programs throughout the state to assist servicemembers in getting their personal affairs in order (which included establishment of FCPs). These programs were affectionately known as "death by PowerPoint" events and were attended by Oklahoma Lawyers for America's Heroes volunteers.

20. See, *Perez v. Cottrill*, No. A04-771, 2005 WL 701701, (Minn. Ct. App. Unpublished Mar. 29, 2005). ("[A]n award of conduct-based attorney fees based on delays caused by a party's status as an active member of the armed services is contrary to the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. §522 (2000).").

21. For example, study the case *In re Adoption of J.D.P.*, 2008 OK CIV APP 103, 198 P.3d 905. The SCRA became, in essence, a complete affirmative defense in a step-parent adoption without consent (AWOC) proceeding.

22. An expansive (146 page) pdf guide to the SCRA can be located on the internet at: www.okbar.org/s/qct7h.

23. 50 U.S.C. App. §521(d).

24. In the 2011 legislative term, Oklahoma passed the *Deployed Parents Custody and Visitation Act*. 43 O.S. §150 - 150.10. It became effective May 26, 2011. While a detailed analysis of this act is outside the scope of this material, some key tenets of this Act are: 1) no permanent orders altering existing custody arrangements are to be entered while the custodial parent is unavailable due to military service; 2) a servicemember with visitation rights is allowed to seek court approval to delegate his/her visitation rights to third persons having a "close and substantial relationship with the child"; and 3) custody orders in place before the absence of a military parent are reinstated within a set time upon return of servicemember from duty (or as 43 O.S. §150.9(B) provides: "A temporary modification order granted in accordance with the Deployed Parents Custody and Visitation Act shall terminate by operation of law ten (10) days after notice has been provided to the nondeploying parent of the completion of deployment and the original terms of the prior custody or visitation order shall be automatically reinstated."). Further on this point, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all the states at its annual conference on July 19, 2012 a model Uniform Deployed Parents Custody and Visitation Act. An article on these Acts will be forthcoming, so stay tuned.

25. 50 U.S.C. App. §521(c).

26. 50 U.S.C. App. §521(b)(3).

27. See, attorney for "the absent" discussion, *infra*.

28. 50 U.S.C. App. §521(g).

29. 50 U.S.C. App. §521(h).

30. See *Davidson v. Gen. Fin. Corp.*, 295 F. Supp. 878 (N.D. Ga. 1968) and *Bell v. Niven*, 35 S.E.2d 182 (N.C. 1945).

31. 50 U.S.C. App. §522.

32. See e.g., *Henneke v. Young*, 761 N.E.2d 1140 (Ohio Ct. App. 2001) and *Phelps v. Fowler*, 668 N.E.2d 558, 561-62 (Ohio Ct. App. 1995).

33. 50 U.S.C. App. §522(D)(2).

34. 50 U.S.C. App. §522(d)(2).

35. *Plesniak v. Wiegand*, 31 Ill App. 3d 923, 335 N.E.2d 131 (1975).

36. The last time your author navigated to the DMDC website, I encountered a warning certificate that read: "There is a problem with this website's security certificate." Disregard and click on "continue to this site (not recommended)." The DMDC site presents no danger to your computer or network.

37. 50 U.S.C. App. §527(a)(2).

38. 50 U.S.C. App. §527(b)(1). The OBA/FLS now has its outstanding practice manual as a web-based application, which for a nominal fee you can subscribe to by going to: www.flspm.com. An example interest reduction letter on behalf of a SERVICEMEMBER is contained therein. In your author's humble opinion, anyone who wants to seriously practice family law in Oklahoma should subscribe to this publication.

39. 50 U.S.C. App. §527(b)(2).

40. 50 U.S.C. App. §527(c).

41. Creditor contesting is almost never done unless and until a servicemember sues the creditor for failing or refusing to grant the interest rate relief. Many courts have held that laches or estoppel attaches at that point, and that the creditor should have resolved the issue when the demand for interest reduction was received. 2008 amendments to SCRA make it a federal crime to knowingly fail to reduce the interest rate upon proper demand for that relief by a servicemember.

42. See however, *Smith v. Davis*, 364 S.E.2d 156 (N.C. Ct. App. 1988) (support order set aside on the basis of affidavit from member that he had not been paid in several months and was unable to comply with court order).

43. 191 S.W.3d 506 (Ark. 2004) (sustaining judge's grant of custody to the mother when the mobilized father requested a stay of proceedings to keep physical custody with his own mother, holding that the SCRA provides a stay of the domestic relations case but did not prevent the circuit court from entering a temporary order of custody). See also, *Diffin v. Towne*, 787 N.Y.S.2d 677 (N.Y. Fam. Ct. 2004) and *Ex parte K.N.L.*, 872 So. 2d 868 (Ala. Civ. App. 2003) (refusing stay to member who placed child with new spouse immediately before deploying overseas and filing a stay motion, holding that the other parent's rights also merited protection, and that members should not be permitted to use the law enacted for their protection as "a vehicle of oppression and abuse" to deprive the other parent of custody).

44. 698 N.W.2d 140 (Iowa 2005) (reversing a judge's order that stayed the mother's custody petition when father was mobilized and had given custody *via* his FCP to his mother).

45. See, *Lenser*, 191 SW 3d 506, 511. The author believes the reasoning and arguments in *Lenser* would be very persuasive before an Oklahoma Court (which has no state or federal decision on point). However, the 2008 amendment to SCRA adding the phrase "including any child custody proceeding" may supersede the 2004 Arkansas decision and the 2005 Iowa decision in *Grantham*.

46. See, e.g., *Cherubini v. Cherubini*, 2003 N.Y. Slip Op. 50569U, 2003 N.Y. Misc. LEXIS 114, (N.Y. Sup. Ct. Feb. 13, 2003) (unpublished); *Michael v. Michael*, No. E200301214-COA-R3-CV, 2004 WL 362348 (Tenn. Ct. App. Feb. 27, 2004); see also *Berkheiser v. Berkheiser*, No. 851, 1970 WL 8806 (Pa., Lycoming County Ct. Com. Pl. Apr. 8, 1970) (per curiam).

47. 50 U.S.C. App. §521(b)(1)(A), (b) (4).

48. *Sec'y of Housing & Urban Dev. v. McClenan*, 798 N.Y.S.2d 348 (N.Y. Civ. Ct. 2004). As a practical practice tip...do a DOD search to support your SCRA default affidavit. In your author's experience, this is seldom done.

49. The converse (increase in pay) is also worth considering. The author has seen reports that say around 40 percent of servicemembers called to active duty actually receive an increase in income/pay.

50. See, e.g., *Cherubini*, *supra* footnote 45 and *Kelley v. Kelley*, 38 N.Y.S.2d 344 (N.Y. Sup. Ct. 1942). See also *Lebo v. Lebo*, 886 So. 2d 491 (La. Ct. App. 2004) and *Rayman v. Rayman*, 47 P.3d 413 (Kan. 2002) (in post-divorce context, leaving children in custody of step-mother while father went on unaccompanied tour to Korea).

51. See, e.g. *Cherubini*, *supra* endnote 45; *Kelley*, *supra* endnote 49 and *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989).

52. *Lackey v. Lackey*, 278 S.E.2d 811 (Va. 1981). If a child support modification is just based on a change of income (new leave and earning statement), resulting in a simple recalculation of a child support guideline, then it would be difficult to see how a servicemember would be "materially affected" and afforded an SCRA stay. However, if a question of fact existed regarding some deviation from a child support guideline, then a SERVICEMEMBER could likely be "materially affected" and entitled to an SCRA stay.

53. *Lenser v. McGowan*, 191 S.W.3d 506, 507 (Ark. 2004). But compare, *George P. v. Super. Ct.*, 24 Cal. Rptr. 3d 919, 924 (Ct. App. 2005) (even if 90-day stay is mandatory, additional stay is discretionary and subject to denial for want of legitimate defense).

54. See, e.g., *In re Diaz*, 82 B.R. 162 (Bankr. M.D. Ga. 1988) and *Foster v. Alexander*, 431 S.E.2d 415, 416 (Ga. Ct. App. 1993).

55. *In re Marriage of Bradley*, 282 Kan. 1, 137 P.3d 1030 (2006) and *Herridge v. Herridge*, 173 Wn2d 752, 270 P.3d 574 (2012).

56. 43 O.S. §§150 - 150.10.

57. *Craig v. Craig*, 2011 OK 27, 253 P.3d 57 (2011) (Grandparents not entitled to visitation rights by delegation from son, they can only be obtained *via* grand parental visitation statute.)

58. However, other states have approved similar deployment/visitation delegation case law. See *McQuinn v. McQuinn*, 866 So. 2d 570 (Ala. Civ. App. 2003)(permitting member to designate any member of his extended family where he was absent on active duty, and barring the non-military parent's right to interfere, at least where her complaints were made "without any particular reason") and *Webb v. Webb*, 148 P.3d 1267 (Idaho 2006)(approving delegation of visitation rights thru power of attorney to member's parents while member was deployed).

ABOUT THE AUTHOR



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Estate Planning Prior to, During and After Marital Dissolution

By Katherine Saunders

Consider the fact pattern below:

H and W separate and eventually agree that dissolution of the marriage is the only solution. W hires you as the family law attorney. Unfortunately, before a petition for divorce is filed, W is in a tragic car accident and hovers on the brink of life and death. It is not known whether she will live or even wake up. H has power of attorney over W's health and finances, is the beneficiary of a life insurance policy, the beneficiary of W's 401(k) plan, will, and a trust she created and funded with assets inherited from her father. If W dies before the divorce is final, H will take everything.

To make matters complicated, H gets a call from one of the members of a business venture in which he has an ownership interest reminding him that the buyout clause in a buy/sell agreement is triggered by the filing of a petition for divorce. The buyout terms would be unfavorable considering the growth potential of the business. Worse, while going to W's apartment to check her mail H discovers that W has taken a large bank account in her own name with assets accumulated from a business venture of her own she entered after marriage, and she placed her children from a separate marriage as payable on death beneficiaries. Moreover, property tax assessments arrive in the mail, including one for a piece of real property W has bought in Colorado with someone else. A bank statement on a joint account verifies that a large part of the purchase came from joint funds through checks paid to a Colorado title company.

Dynamics such as these highlight the fragile framework to which divorcing clients are exposed. This article on estate planning and marital dissolution addresses how the legal

structure of asset ownership within an estate-planning context interplays with potential dissolution of marriage and untimely death. It also highlights the effect of spouses having authority of fiduciary for each other as well as the effect of, restrictions on and vulnerability to asset transfers.

ESTATE PLANNING

The dissolution of a marriage unravels numerous strands that weave through people's lives like veins. More than the family home, bank accounts and children are implicated. Estate planning develops its own strands, including asset transfer, care of surviving spouses upon death and granting spouses fiduciary control upon disability. Most estate planning incorporates control over health, life and death decision-making and management of assets by the other spouse. Some of these issues can become actual conflicts of interest when the marital relationship unravels.

Estate planning usually includes a last will and testament and/or trust. A last will and testament transfers property through the court system in a probate procedure, while a trust is not subject to probate and creates an entity separate from a person transferring property according to its own terms. Other methods that also transfer property outside of probate include the automatic transfer to the survivor in joint tenancy with right of survivorship, properties which have beneficiary designations such as payable-on-death bank accounts, and beneficiary designations on IRAs and life insurance.

During the estate planning process, most individuals also execute documents which anticipate a time of disability, incapacity or life support in life and death instances, such as powers of attorney and advance health care directives. Most spouses name each other as their agent and frequently the authority is immediately effective.

PRIOR TO MARRIAGE

Prenuptial Agreements

Before thinking about end-life decisions, some planning opportunities are only available before marriage. One is a prenuptial (antenuptial) agreement which can protect separate assets from later claims. These agreements are enforceable in Oklahoma¹ subject to a showing of fraud, duress, coercion and overreaching in their execution.²

Usually a prenuptial agreement describes separate property and dictates its continuing characterization as separate in the event of marital dissolution or death. Other important elements might include:

- An agreement not to assert a right to inherit
- An agreement to provide life insurance on the other in lieu of an inheritance
- Rights of a widower to use separately owned residence at death (waiver of the surviving spouse's homestead right)
- Agreement to a division of share at death into a trust which provides for restrictive distribution terms during the life of the surviving spouse and leaves the remainder at his or her death to beneficiaries of the deceased spouse's choosing³
- Agreement to participate in estate tax planning⁴

A potential tool to protect a gift coming from wealthy parents to a son or daughter anticipating marriage is a trust estate unreachable upon demand by the child and thereafter, the child's creditors or spouse, thus protecting those assets from later dissipation in the event of an unstable marriage or other life events. While in Oklahoma a trust cannot be created for oneself with one's own assets with the goal of avoiding creditors,⁵ a completed gift of property to a beneficiary — whether outright or in a trust format, which is not reachable upon demand by the beneficiary and is property where the grantor has relinquished control — is protected by both the grantor's and the beneficiary's creditors (including a divorce action).

ESTATE PLANNING DURING MARRIAGE AND PRIOR TO FILING A PETITION

Prior to the initiation of divorce proceedings, the legal relationships created between spouses should be reviewed to determine how to safeguard financial and health care positions. Fiduciary relationships reflect an area where one spouse holds great power to alter the financial and sometimes health position of the other.

Fiduciary Designations

Powers of Attorney — One fiduciary role is typically granted to the other spouse through a power of attorney, which grants the power to another to make decisions which the individual himself could make.⁶

Havoc could result from misuse of this power by shifting and depleting assets, unsupportive medical decisions or commitment into medical facilities.

While an individual has mental capacity, the power of attorney may always be revoked. Revoking a power of attorney, however, does not remove the ability for the other to act on one's behalf, as third parties are entitled to rely on the legitimacy of the power unless there is actual knowledge of its revocation.⁷ In order to effectively revoke the power, the revocation must be delivered to all parties who have possession of the granting instrument.

In the exercise of the fiduciary power, an attorney-in-fact is bound "by standards of conduct and liability applicable to other fiduciaries." Oklahoma statutes do not describe the particular remedy for violation of that duty, but courts have held that at least a constructive trust is

imposed due to the fraudulent misuse of a power of attorney with respect to property.⁸

In the earlier example of H and W, early replacement of the appointment of the other spouse as attorney-in-fact could avoid that control being an issue at a vulnerable time, such as by H changing the payable on death beneficiary on W's bank account. The replacement of a spouse as an attorney-in-fact is not a change that requires the other spouse's permission or even knowledge, as it is personal to each individual.

Advance Health Care Directive — An advance directive is a document which provides that in the event a person is terminally ill, in a permanent coma or otherwise alive only by virtue of life support and in a condition of severe and permanent deterioration, life sustaining treatment and/or food and water may be withheld.⁹

The decision to withhold life sustaining treatment and food and water can be left to a proxy, who is usually the spouse. In the H and W scenario referenced at the beginning of this article, the spouse might sustain or end the life of the other for a more favorable property division to the spouse having the power, by prolonging the use of a power of attorney to transfer funds (as it becomes void at death) or to hasten death to maintain the marital status until death.¹⁰

Do Not Resuscitate — A "do not resuscitate" (DNR) order refutes the presumption that a person would choose the administration of cardiopulmonary resuscitation in the event of cardiac or respiratory arrest. It can be executed by a person, by a power of attorney for health care decisions or by a proxy appointed in an advance directive.¹¹

This document does not require that a person have dim hopes of a recovery, unlike an advance directive, and is therefore potentially dangerous in an arrest situation, as a hospital will likely follow it. Again, revocation of a "do not resuscitate," power of attorney and advance health directive with distribution to appropriate medical files might be wise.

Trustee Designations — Where a husband and wife have separate trusts, each is usually trustee of his or her own trust with the other named as successor upon disability or death. Appointing a new successor trustee would avoid an uncomfortable situation of the spouse being trustee over the separate property of the

other. Again, for a separate trust, this revocation does not require the spouse's knowledge or consent.

Spousal Rights in Property Upon Death of the Other

Divorcing clients should be aware of not only the results of passing away with and without an estate plan in place, but also the survivor's rights in the marital and separate properties of the deceased spouse.

Disinheritance v. Intestacy — Upon realization that a marriage is failing a spouse may wish to disinherit the other or avoid instigating a plan to provide for the other. In either instance, if an individual dies prior to dissolution of the marriage, Oklahoma law allows the survivor certain rights.

If a spouse dies without a will, assets which are in the person's name at death (and not subject to joint tenancy, beneficiary designations or in trust) pass by "intestate succession." Intestate succession is a statutory framework that creates a default last will by defining rights of others, including a surviving spouse, in the estate of a decedent.¹²

In the event there is no will and there are no children, parents or siblings, the surviving spouse receives all of an individual's assets, even if the assets were accumulated before marriage.¹³ Where there are children from a prior marriage, parents or siblings, the surviving spouse receives either an equal share with each child;¹⁴ or in the event there are no children (but there are parents and/or siblings), spouses receive one-third of the estate.¹⁵ Additionally, the surviving spouse receives half of assets accumulated during marriage.

If a person assertively disinherits the other by will to avoid the statutory inheritance format and dies prior to or during pendency of the divorce, the surviving spouse may assert rights through a forced share of the estate; i.e. the "marital election." The survivor has a right to "elect" an interest in the deceased spouse's estate instead of taking under the provisions of the will.

In Oklahoma, pursuant to 84 O.S. 2011, §44, B, 1, the surviving spouse receives an undivided half of the interest in property acquired by joint industry during a marriage. The right to elect favors spouses with long marriages who have acquired abundant property during

“If a spouse dies without a will, assets which are in the person’s name at death (and not subject to joint tenancy, beneficiary designations or in trust) pass by ‘intestate succession.’”

the marriage. This right is in lieu of all legacies in the last will and must be affirmatively made by written election, filed in the district court in which the decedent’s estate is being administered on or before the final date for hearing the petition for final distribution of the estate, or the right is barred forever.¹⁶

Separate v. Jointly Acquired — The ability to transfer assets during marriage in avoidance of division by divorce, or the right of a surviving spouse to elect against an estate of the decedent and the share allowed by intestate succession, depends on the characterization of the ownership as separate or by “joint industry.”

During marriage, a husband and wife may generally convey *separate* property from the reach of each other subject to limitations described in 43 O.S. 2011, §202.¹⁷ Property that is transferred which was *accumulated* by joint industry during marriage is more suspect.

Separate Property — The courts will generally uphold the transfer of separate property unless it appears intended to defraud, or the transfer is illusory.¹⁸

Separate property has been construed to mean 1) property owned prior to marriage, which retained its separate status during marriage 2) gifts to one spouse from a third party during marriage 3) gifts from spouse to spouse 4) property inherited by one spouse from a third party 5) an exchange of separate property from other separate property 6) a purchase of separate property from separate property.¹⁹ Therefore, in the opening scenario, if W had changed the beneficiary designation on the trust funded with assets inherited from her father, H would not have any rights when W

passed away if she maintained the separate character of the assets.

Joint Industry Property — Transfer of property acquired during marriage as joint industry property is more problematic. While not a *per se* violation of marital rights, a transfer is analyzed to determine motive and intent.²⁰

The definition of “joint industry property” and property acquired “during coverture” is more limited than all property acquired during marriage. However, there is a rebuttable presumption that property acquired during marriage is through the joint efforts of husband and wife.²¹ This may be true even if property is acquired or earned by, or in the separate name of, one spouse.²²

Revocable Trusts — Assets in a revocable trust are brought back into the decedent’s estate for purposes of the marital election upon death, as a revocable trust is considered an incomplete gift, whether funded with property that is separate or jointly owned. Nevertheless, a determination will still be made to assess whether the property is jointly acquired within the definition of the marital election.²³

Exceptions to Separate Property Protection — Upon death of a spouse, the residence of a person is available to the survivor as a homestead even if separate property, by virtue of a statutory life estate, unless abandoned.²⁴ This right is not available for joint tenancy property owned with third parties.

Additionally, in the court’s discretion, a financial allowance for the surviving spouse and/or children may be carved out of the entire probate estate during the pendency of the probate.²⁵

Transfers of Property from the Estate — Effect of Death of a Spouse

Various forms of asset ownership and transfer might be beyond the reach of the marital election by the surviving spouse upon death of the other.

Irrevocable Gifts — Within a marriage, husbands and wives often make gifts of property through irrevocable trusts in order to accomplish estate tax and asset protection planning goals.²⁶

A situation can be imagined where some of the assets of a wealthy spouse accumulated by him or her during marriage could be placed

into an irrevocable trust for the benefit of the wealthy spouse's children by a previous marriage, thereby depleting the share of the transferor's estate for purposes of property division upon divorce.²⁷ This is a different scenario than one where assets are transferred to a child with the unspoken understanding that they will become available to the transferring parent following divorce.²⁸

Other jurisdictions have addressed issues relating to unilateral gifts of marital assets, defining the following factors in determining whether a transfer violates marital rights.²⁹

- The proximity of the gift to the parties' separation.
- Whether the gift was typical of those made prior to the breakdown of the marriage.
- Whether the gift benefitted the joint marital enterprise or benefitted one spouse to the exclusion of the other.
- The need for, or amount of, the gift.

Wealth Preservation Trust — A wealth preservation trust, defined by 31 O.S. 2011, §11, *et seq.* is an exception to the rule regarding protection of one's own assets from creditors and potential continued use and the reachability of a revocable trust. In this case, a trust may be created by a grantor and funded up to \$1,000,000 for the benefit of beneficiaries, such as children. If a grantor desires access to principal he or she may revoke a part of the trust without the whole considered accessible for purposes of creditor protection, and it is not reachable by the divorcing spouse except as to the portion revoked.³⁰

The only exception to the protection of the assets from creditors of the grantor are payments under a child support judgment, and existing mortgage or security interests.³¹ Assets transferred to a wealth preservation trust would also be subject to the same scrutiny with respect to unconscionability and fraud, in the event of marital dissolution.

Change of Beneficiary Designation — In the event a spouse dies during marriage and has assets which name beneficiaries other than the spouse, those assets will pass to the named beneficiaries absent clear intent to defraud the marital estate or federal law issues such as the Employee Retirement Income Security Act.³²

*In the Matter of Estate of Wellshear*³³ upholds the transfer of IRA assets to children of the deceased, defeating the marital election.³⁴

During an owner's lifetime, the asset is fully vested only in the owner, and therefore subject to marital claims.

Payable on Death Clauses — A payable on death clause is one that allows an owner of certain assets, such as bank accounts, to designate a trust, person or persons to receive the assets in the account upon the death of the owner.³⁵

Therefore, absent fraud or other valid claims, a payable on death asset will pass to the named beneficiary upon death of the owner, thereby defeating the marital election. However, as is generally true with beneficiary designations, during an owner's lifetime the asset is fully vested only in the owner, and therefore subject to property division upon divorce.

Joint Tenancy Property — Assets in joint tenancy with an owner other than the spouse will pass outside the marital election. Joint tenancy property is ownership that "establishes a present estate in which both joint tenants are seized of the whole."³⁶ There is no interest that passes to the survivor since, "title of the joint tenant who dies first terminates at death and vests *eo instant* in the survivor." Additionally, "[The] survivor takes the entire estate to the exclusion of heirs of the deceased."³⁷

Nevertheless, a transfer of an interest into a joint tenancy relationship is subject to claims of fraud, and in that event a constructive trust will be imposed on the property.³⁸

While death extinguishes the interest of the first to die, joint tenancy property is also subject to severance during life and therefore reachable to the extent of a person's interest. Additionally, any joint tenancy arrangement can be severed by the transfer — by either party — of their undivided percentages in the whole, which has the effect of creating a tenancy in common. The effect as between spouses would be that the decedent's estate has an undivided interest subject to the surviving spouse's marital rights or intestate succession.³⁹

Therefore, in the earlier example, W's transfer of funds from a joint account to purchase joint tenancy property with another will be analyzed to determine whether fraud applies to set aside the purchase.

Asset Splitting — Traditionally, to use each spouses' unified credit (the amount each person can transfer at death without the imposition of the estate tax), some assets from a wealthier spouse were re-titled in the name of the less wealthy spouse to use that person's unified credit in the event he or she died first. The assets in the amount of the credit then funded a trust either for children, or with restrictive use by the survivor to avoid inclusion in his or her estate. Most likely, a transfer of separate property would not have been made in contemplation of divorce, so the issue becomes whether the wealthier spouse has made a gift of that separate property, thereby erasing its separate character.

It has been held that where marital assets were transferred to separate revocable trusts expressly for estate planning purposes, they remained marital property for the purposes of division in case of divorce.⁴⁰ If there is evidence supporting joint use and management during continued marital relations after creation of the trust, the assets may be marital property for division in divorce.⁴¹

Presumably, the same would be true for separate property, absent commingling but for the transfer for the purpose of planning.

Marital and Credit Shelter Trusts — In tandem with asset splitting, the effective operation of the "bypass trust" described above might be less than desirable in the event of divorce, except that death arrives before the final decree. For example, a deceased spouse (who died in 2012) funded a bypass trust at death to the extent of the unified credit (\$5,120,000), which left everything to his or her children by a separate marriage. The choice for the survivor, of course, is election against the will. However, the will and/or trust might also transfer everything to the surviving spouse and in the event of death prior to divorce, the spouse will receive much more than through the marital election.

Shareholder/Buy-Sell Agreements – Family Partnerships — Wealthy families often create entities like family partnerships or limited liability companies to consolidate family assets and provide a gifting mechanism to younger generations. Divorce may upset the plan if a spouse is involved. Many shareholder and buy-sell agreements include provisions that, upon the filing a petition for divorce, the other owners

have the option of purchasing the divorcing owner's interest. These agreements should be analyzed to determine the effect of a divorce proceeding on rights to stay involved with the entity and the particular buy-out terms.

Again, back to the earlier example, it can also be imagined that the unfavorable buyout terms of the buy/sell agreement that H is subject to could encourage unscrupulous use of the advance directive to hasten death, if W otherwise meets the criteria.

CONCLUSION

Positioning clients to retain the status quo with respect to assets as a divorce progresses, educating about legal relationships of asset ownership and control, and possible impediments to planning after a divorce is filed should be as much a part of the divorce-planning process as analyzing assets from an accounting perspective. These issues all involve some aspects which a family law and estate planning attorney, working together, should address at an early stage in contemplation of the process (before the accident).

Key steps

- Review prenuptial agreements
- Review or create spendthrift trusts for others (by parents)
- Review fiduciary and dispositive provisions of documents
- Do not commingle separate assets
- Review wills and trusts
- Review asset ownership
- Review beneficiary designations.
- Review partnership buy/sell agreements

1. *Freeman v. Freeman*, 1977 OK 110, 565 P.2d 365. Early Oklahoma courts disfavored prenuptial agreements as "...wicked device[s] to evade the laws applicable to marriage relations, property rights, and divorces" which were "clearly against public policy and decency," an attempt by the husband to "legalize prostitution, under the name of marriage." *Burgess' Estate, Matter of*, 1982 OK CIV APP 22, ¶¶ 10, 12 646 P.2d 623 (OK APP. 1982), quoting *Estate of Duncan*, 87 Colo. 149, 285 P. 757 (1930). The court in *Burgess* disagreed, "Well-intentioned though this chivalrous attitude may have been in the past, times have changed. It will no longer do for courts to look on women who are about to be married as if they were insensible ninnies."

2. *Burgess*, at ¶17, 646 P.2d 623. The following are defined by *Burgess* as factors supporting sustaining an agreement: that it is fair; with reasonable provision made for the other party; a full, fair and frank disclosure of each other's worth. *Id.* at ¶16. Additionally, it must be in writing, and the other party should have sufficient opportunity to consider its provisions. Representation of each party by their own counsel and full written disclosure of assets should protect each party's interest.

3. One such trust is called a Qualified Terminal Interest in Property Trust ("QTIP"), which provides for income and perhaps limited principal to a surviving spouse upon death of the trustor, but will pass the remainder to beneficiaries the other party chooses who could be children by a prior marriage from the wealthier spouse. It also qualifies for the marital deduction, which is a right to inherit by each spouse without incurring estate tax, but the property in the end does not rest in his or her estate. In this case, the QTIP might also provide for a lesser amount transferred to the spouse than realized by a claim through the marital election.

4. Such as gift splitting, which is a tax provision that allows one spouse to attribute funds of his or her own to the other in gifting to a third party, taking advantage of the \$13,000 annual exclusion (in 2012) or lifetime gift amount allowed each person of \$5,120,000 million (in 2012). The spouse does not actually receive the funds or have an option to direct their use.

5. See, 60 O.S. 2001, §299.15. Section 299.15 states that a reservation of a power to revoke a transfer characterizes the asset as owned by the grantor, for purposes of creditor rights.

6. Powers of attorney are dictated by 58 O.S. 2011, §1071 et seq. It is a written document whereby a person appoints another as his "attorney-in-fact." An "attorney-in-fact," who is a person authorized to act in one's place and stead, either for some particular purpose, as to do a particular act, or for the transaction of business in general. The power may be limited or it may be general, encompassing all that an individual could do. Excepted from the power of attorney is creating an advance health care directive or other document giving power over life sustaining treatment as well as making life sustaining decisions, unless the power of attorney contains the statutory language required by statute in those documents. *Id.* At §1072.1.

7. *Id.* at §1076.

8. See, *Robertson v. Robertson*, 1982 OK 108, 654 P.2d 600.

9. 60 O.S. 2011, §3101.3.

10. 60 O.S. 2001, §3101.11, C provides that a person "who willfully conceals, cancels, defaces, alters, or obliterates the advance directive of another without the declarant's consent, or who falsifies or forges a revocation of the advance directive of another shall be, upon conviction, guilty of a felony." Paragraph D provides that a person who falsifies or forges the advance directive of another, or conceals knowledge of its revocation, is guilty of a felony. Paragraph E provides that a person who coerces or fraudulently induces another to execute a directive shall be guilty of a felony.

11. Generally, a "do not resuscitate" is a document that would not be carried everywhere out of concern that it will be literally followed, when a long and happy life could have been a possibility following recovery from a cardiac arrest. There should be caution in using this document, since it does not always apply to end-life conditions.

12. 84 O.S.2011, §213.

13. 84 O.S. 2001, §213, B, 1, a.

14. 84 O.S. 2001, §213, B, 1, d, 2.

15. 84 O.S. 2001, §213, B, 1, b, 2.

16. 84 O.S. 2001, §44, B, 2 and 3.

17. 43 O.S. 2001, §203 states that "Except as mentioned in [43 O.S. 2001, §202], neither husband nor wife has any interest in the separate property of the other...." 43 O.S. 2001, §202 states that a husband must support himself and wife out of the community property or separate property or by his labor. A wife must support the husband (if he has not deserted her) out of the community property, or out of her separate property when he has no community or separate property and he is infirm.

18. See, *Irvin v. Thompson*, 1972 OK 99, ¶9, 500 P.2d 283, where the court upheld a transfer of separate property where it was not for the purpose of defrauding creditors (stating that the surviving spouse was not a "creditor"). *Courts v. Aldridge*, 1941 OK 405, ¶¶ 1, 6; 120 P.2d 362 (husband continued to take rents from land, pay taxes, remaining in possession and control).

19. *Estate of Hardaway*, 1994 OK 30, ¶9, 872 P.2d 395 (Oklahoma 1994).

20. The courts in Oklahoma have held that "...if one spouse 'gave away [the parties'] jointly acquired property with an intent to defraud [the other spouse] of...marital rights to this property upon [the giving spouse's] death then the law should be just as responsive in protecting [the defrauded spouse's] interest as in instances ...where the gift is made anticipatory to a divorce, or whether it is given incomplete with an attempt to defeat the [the spouse's] interest..." *In the Matter of Estate of Wellshear*, 2006 OK CIV APP 90, ¶15, 142 P.3d 994, quoting *Sanditen v. Sanditen*, 1972 OK 39, 496 P.2d 365. In *Sanditen*, the court said that a spouse cannot transfer jointly acquired property without the consent and knowledge of the other "where the transfer is in fraud of the wife's marital rights." However, the interest of a spouse in property acquired during joint coverture is not vested, the court said, until the occurrence of a "statutorily enacted contingency such as divorce,

separation, inability to support, homestead and death, all of which emanate from the marriage relationship." In that case, a spouse cannot "make a disposition of the property anticipatory to a divorce proceeding to defeat a division of jointly acquired property." *Id.* At ¶¶3 and 8.

21. *Manhart v. Manhart*, 1986 OK 12, ¶38725 P.2d 1234.

22. See, *In re Estate of Stone*, 206 P. 246 (Oklahoma 1922), which refuted the contention that: "We do not think that mere housekeeping, the importance of which, when well done, cannot be overestimated, falls within the definition of industry, so as to make the wife, who does nothing else but keep house, engaged in joint industry with her husband, who may be engaged in banking, merchandising, manufacturing." The court disagreed, saying that the industry of a husband and wife, each in his or her own sphere of marital activity, is adequate to be joint, and the labor doesn't have to be identical and in the same course of employment. *Id.* at ¶¶6 and 7.

23. See, *Thomas v. Bank of Oklahoma, N.A.*, 1984 OK 41, 684 P.2d 553, which held that the revocability of a trust by a testator created an incomplete gift, and therefore, the trust was an asset of the estate for purposes of the marital election. In this case, the assets that funded the trust were the separate inherited assets of the spouse, and although brought back into the estate for marital election purposes and reachable, might not be accessible to the survivor by marital election today. 84 O.S. §44(B)(2) was amended in 1984 and applied to estates of decedents who died after July 1, 1985. Prior to then and at the time of the decision in *Thomas*, the election applied to ½ of non-joint industry property and existed as a right, rather than by election. 84 O.S. §44 (A)

24. Pursuant to 58 O.S. 2011, §311, a surviving spouse may continue to occupy the residence of the decedent for his or her lifetime. This right is not an estate in land but, a "mere personal right or privilege or individual right, distinct from the interest which the surviving spouse takes in the land...and that it is merely a right to continue to possess and occupy the property as a home, which may be lost by abandonment or terminated by any one of many different ways." *Kemp v. Turnbull*, 1946 OK 277, 174 P.2d 384, ¶8.

25. 58 O.S. 2001, §314. However, while a marital election may apply to a revocable trust of the deceased, presumably a spousal allowance would not since the court does not have jurisdiction over a trust, which is a non-probate asset.

26. Estate tax savings come into play when a couple's taxable estate exceeds the amount which can be passed onto the next generation without the imposition of the estate tax, which is \$5,120,000 in 2012, slated to return to \$1 million in 2012. Only in 2012, each person also has the right to gift away the same amount. The benefit is that once gifted, the appreciation can occur in the next generation, not subject to the claims of a decedent's creditors or added into the estate for tax purposes. Additionally, as this historic gift figure is slated to expire, this is a year when the greatest gain can be made from a large gift. Asset protection is created by the transfer of assets out of a person's estate. If the transfer is not made with the intention to defraud creditors, the assets are protected from that person's creditors. If the transfer is made through an irrevocable trust that contains restrictive language in terms of distributions, the assets also will not be subject to the beneficiary's creditors.

27. See *Sanditen v. Sanditen*, 1972 OK 39, 496 P.2d 365, ¶ 8, which stated that one spouse "cannot complain of reasonable gifts by the [other] to ... children by a former marriage."

28. See, *Sanditen* : "[I]t is only when the gift has sinister elements of fraud of the marital rights that the law protects the [spouse from the gifts by the other]". *Id.* at ¶9.

29. See, *Kothari v. Kothari*, 255 N.J. Super. 500 (App. Div. 1992).

30. Pursuant to 31 O.S. 2011, §12: "Notwithstanding Section 3 of this title and Section 299.15 of Title 60 of the Oklahoma Statutes, the corpus and income of a preservation trust shall be exempt from attachment or execution and every other species of forced sale and no judgment, decree, or execution can be a lien on the trust for the payment of debts of a grantor..."

31. *Id.* at 12.

32. Note, where a change in beneficiary would result in a minor child receiving the asset, creating a trust for the child to receive it instead would not only avoid the Uniform Transfers to Minors Act, but also provide distribution provisions and protection of the funds for the child. 20 O.S. 2001, §1201 et seq.

33. *In the Matter of Estate of Wellshear*, 2006 OK CIV APP 90, ¶12, 142 P.3d 994

34. The wife contended that the beneficiary designation of the husband's IRA which named children by a prior marriage as beneficiaries was invalid. She claimed that the IRA was a testamentary disposition, not executed with statutory formality, or alternatively was subject to the marital election. The court held that federal law governed the right to designate beneficiaries of IRAs, and where "the dispersion of accrued benefits on the premature death of a member was clearly the

secondary consideration in the contractual agreement creating the membership"... it "would not extend the definition of the term 'will' to such instruments." (quoting *Pepper v. Peacher*, 1987 OK 1, 742 P.2d 21). The court further disallowed the application of the marital election to the IRA as the terms of 84 O.S. 2001, §44(b)(1) which state that no spouse shall "bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than an undivided one-half interest in property acquired by the joint industry..." did not apply, holding that a beneficiary designation is not a bequest or devise.

35. Under Oklahoma law, 18 O.S. 2011, §381.39a, B,1 states that when a deposit is made "in any association" using the terms "payable on death" or "POD," the deposited funds shall be paid at death to a trust or individual or individuals named as beneficiary, "notwithstanding any provision to the contrary contained in Sections 41 through 57 of Title 84" (encompassing the marital election provision of Section 44). Prior to the passage of 18 O.S. 2001, §381.39a, case law suggested that payable on death clauses were "in the nature of testamentary dispositions" and therefore, required the statutory formality of will execution for a transfer to the intended beneficiary to be valid. *Waitman v. Waitman*, 1972 OK 157, 505 P.2d 171. However, the passage of Section 381.39a dismissed this theory. Section 381.39a, C applies the statute to "all forms of deposit accounts, including, but not limited to, transaction accounts, savings accounts, certificates of deposits, negotiable order of withdrawal accounts and money market deposit accounts.

36. *Clovie v. Clovis*, 460 P.2d 878, 881-882.

37. *Draughon v. Wright*, 200 Okl. 198 191. P.2d 821 (1948).

38. *Alexander v. Alexander*, 538 P.2d 200 (1975). "If one obtains the legal title to property by fraud or by violation of confidence or fiduciary relationship, or in any other unconscientious manner so that he cannot equitably retain the property which really belongs to another, equity...[imposes] a constructive trust upon the property in favor of the one who in good conscience is entitled to it..." *Peyton v. McCaslin*, 1966 OK 4, 417 P.2d 316, ¶15, quoting *Powell v. Chastin*, 318 P.2d 859.

39. See, *Shackelton v. Sherrard*, 1963 OK 193, 385 P.2d 898.

40. See, *Dorn v. Heritage Trust Co.*, 2011 OK CIV APP 64, 24 P.3d 886.

41. ¶¶15, 16 *Kelln v. Kelln*, 30 Va. App. 113, 515 S.E.2d 789 (1999).

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The Oklahoma Bar Association Family Law Section seeks nominees for the following awards to be presented at its annual meeting on November 15, 2012.

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Outstanding Family Law Judge for 2012

The Phil and Noel Tucker Outstanding Guardian Ad Litem Award for 2012

Outstanding Family Law Mediator for 2012

Nominees should have made significant contributions to the practice of family law in Oklahoma in 2012, or over an extended period of time. Please submit your nominations and a brief description of the reasons for your nomination by October 12, 2012, to: OBA Family Law Section, Nominations and Awards, c/o David A. Tracy, 1701 S. Boston Ave., Tulsa, Oklahoma 74119 (or by email to david.tracy@nwtlaw.com).

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Gibbons v. Gibbons

The Burden of Proof for a Change of Custody Since 1968

By Treva Krivohlavek Kruger

1968 was a remarkably eventful year. Americans were fighting a controversial war in Vietnam, Martin Luther King, Jr. and Robert F. Kennedy were assassinated, and in November the U.S. presidential race culminated in the election of Richard M. Nixon to the White House. These were only a few of the events of that tumultuous year.

Certainly less news-making at the time was the decision announced by the Oklahoma Supreme Court on April 3, 1968 in *Gibbons v. Gibbons*, 1968 OK 77, 442 P.2d 482. The decision articulated the burden of proof for a change in court-ordered child custody, and that burden of proof, that language and the case are still the standard to this day, 44 years later.¹ What makes a decision become and remain the standard for so many years? Although a review of *Gibbons* and the cases that follow it may not reveal the answer to *Gibbons'* longevity, it does provide an interesting tour of the changes in emphasis that appellate family law has undergone in the 44 years since the announcement of the decision.

GIBBONS AND ITS FOUNDATIONS

The syllabus in *Gibbons* begins:

An order fixing the custody of a minor child... is final on the conditions then existing, and may not be modified, with respect to the custody of the child, unless material facts are disclosed which were either unknown or could not have been ascertained with reasonable diligence at the time such order was made, or unless a showing is made of a **permanent, material and substantial change** in the circumstances or con-

ditions of the parties, directly affecting the welfare of the child to a substantial or material extent, and as a result of which it would appear that the child would be substantially better off, with respect to its temporal welfare and its mental and moral welfare, if the requested change in custody were ordered by the court. (Emphasis added.)

The syllabus continues to state that the party moving for a modification of custody has the burden of proof to show the permanent, material and substantial change.

The trial court in *Gibbons* granted the mother's motion to modify custody based entirely on 30 O.S. 1961 § 11,² the "tender years" statute. The statute stated that, "... other things being equal, if the child be of tender years, it should be given to the mother," The Oklahoma Supreme Court in a decision by Justice Lavender undertook a review of cases which provided "some well-established rules" for change in custody cases.³ Quoting *Jones v. Jones*,⁴ which in turn quotes *Jackson v. Jackson*,⁵

"... A decree fixing the custody of a child is, however, final on the conditions then existing and should not be changed afterward unless on altered conditions since the decree

or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child.”⁶

Justice Lavender then quotes from *Young v. Young*,⁷

In a proceeding to modify provisions of an order relating to custody of child, burden of proof is upon applicant to show a substantial change in conditions since entry of order sought to be modified which bear directly upon welfare and best interest of child or show that material facts bearing upon welfare and best interest of child were unknown to court at time order sought to be modified was entered.

The opinion continues with a long quotation from *Ness v. Ness*,⁸ to the same effect: “. . . unless it be shown that the circumstances of the parties have changed. . .”, and with two quotations from *Stanfield v. Stanfield*,⁹ also stating the need for a substantial change in circumstances which affects “the welfare of the children to a substantial or material extent”

Justice Lavender continues,

These basic rules are specifically applicable to the modification of orders concerning the custody of minor children of the parties to a divorce action, as contained in the final decree of divorce or in orders made subsequent to the final decree of divorce, so as to change the custody of a minor child of the parties to a divorce action from one parent to the other, as distinguished from ‘awarding’ custody at the time of rendering the final decree of divorce.

. . . [Facts not known at the time of the existing order not at issue in this case.]

Under these basic rules, the burden of proof is upon the parent asking that custody be changed from the other parent to make it appear: a) that, since the making of the order sought to be modified, there has been a permanent, substantial and material change of conditions which directly affect the best interests of the minor child, and b) that, as a result of such change in conditions, the minor child would be substantially better off, with respect to its temporal and its mental and moral welfare, if the requested change in custody be ordered. It follows that . . . things are not equal and,

therefore, paragraph 2 of 30 O.S. 1961 §11 . . . would have no application. . . .¹⁰

As the trial court had based its order changing custody entirely on the tender years statute, which this decision found inapplicable to compel a change of custody standing alone, the decision vacated the trial court order and returned custody to the father.

CASES FOLLOWING GIBBONS

*Gilbert v. Gilbert*¹¹ was decided in September 1969. The trial court granted mother’s motion to modify custody from the father, who had received custody in the divorce more than six years earlier; the father complained that *Gibbons* had not been followed. The decision’s language rather alters the change of circumstances requirement,

. . . in the *Gibbons* case we reversed the trial court and stated in effect that where the facts were known to the trial court in awarding custody in a divorce decree, that for the other parent to get custody it would be incumbent upon him (her) to show 1) he (she) was a fit person, i.e., circumstances had changed, and 2) it would be for the betterment of the welfare of the child that the change be made. . . .¹²

Gibbons had found that, in that factual situation, the change in mother’s circumstances alone (she was now “a fit person”) was insufficient to cause a change of custody. However, a further reading of *Gilbert* reveals that there were perhaps other factors which the trial court took into account, “. . . circumstances relating to the divorces and remarriages of the father and his financial affairs. . .” which caused the trial court to grant mother’s motion and the Oklahoma Supreme Court to affirm.

In *David v. David*,¹³ decided a month later, the trial court had refused to modify custody from the father to the mother. Mother had not appeared in the original divorce, although she had hired an attorney who did appear and the decree was granted in March 1966. Eight months later she moved to modify custody. The matter was heard in January 1967, and the trial court upheld father’s demurrer. Mother filed her second motion to modify Oct. 30, 1967. The trial court, following a hearing,¹⁴ again denied mother’s motion and she appealed.

Mother asserted that, as she was not found to be unfit and as the child was of tender years, the court must change custody to her. The

Oklahoma Supreme Court, citing *Gibbons*, said that “. . . the age of the child is only one of the factors to be considered. . . .”

We find that the paramount consideration in awarding custody on a motion to modify is what appears to be for the best interest of the child in respect to the temporal, mental and moral welfare, and the entire determination of the questions must be in the light of what is the child’s best interest. . . .¹⁵

The opinion goes on to say that the law is clear that the burden is “upon the applicant to show a substantial change in conditions. . . .” The trial court’s refusal to modify was affirmed.

*Walker v. Walker*¹⁶ was decided a week after *David*. The parties were divorced in September 1965. The mother made no appearance and the father was given custody of their nine-year-old daughter. Mother filed a motion to modify in July 1968, and hearing was held that September. The trial court denied mother’s motion and mother appealed.

Defendant emphasizes that, as she is the mother of Pamela Ann, considerations of the best interest of a 12-year-old girl child indicate that her custody should have been awarded to defendant.¹⁷

Citing *Gibbons* and *Stanfield*, *supra*, the Oklahoma Supreme Court declined to overturn the trial court’s decision.

*Hoog v. Hoog*¹⁸ decided the same day, is more difficult to reconcile with *Gibbons*, although it is also written by Justice Lavender. The parties were divorced in July 1965. Both parties remarried, and the mother filed a motion to modify on March 3, 1966.

. the court expressed itself as doubtful whether the evidence was sufficient to show a substantial change in circumstances which would indicate or warrant a change in the custody of the boy. The doubt of the trial court was whether the evidence demonstrated that the defendant had by that time overcome the immaturity and emotional instability with which she suffered at the time of the divorce. . . . the court wondered if the second marriage would work out, and he was therefore hesitant to disturb the boy’s custody. . . .¹⁹

The mother’s first motion to modify was denied; she filed her second motion a year and half later. She presented evidence that she was

now a good mother and homemaker. There was also evidence that the father had interfered with the boy’s contact with her and, “There was also testimony that the plaintiff’s present wife was too ill to come to the hearing and that, although her last miscarriage had occurred several months previously, she was, according to the plaintiff, still under the care of a doctor.”²⁰

The decision itemized specific testimony which reflected well on the mother and other evidence which reflected poorly on the father in affirming the trial court’s grant of mother’s motion to modify, “We cannot say that the defendant failed to sustain the burden of proof required by *Gibbons*”²¹

*Owens v. Owens*²² concerned a father who didn’t pay his child support, kept the children after visitation and refused to return them, and may have managed to cheat the mother out of possession of the home and furnishings awarded to her in the divorce.²³ Mother cited the father for contempt for failure to return the children and he countered with a motion to modify custody, which the trial court granted. The Oklahoma Supreme Court found that any changes in condition had “largely been brought about by defendant’s wrongful conduct. . . .”,²⁴ and reversed the trial court.

JOINT CUSTODY PART I

When *Rice v. Rice*²⁵ was decided joint custody, Justice Hodges wrote, “. . . has been thought to be an anathema” The father had moved to modify the joint custody order in the divorce decree and the trial court gave him custody. In affirming the trial court the Oklahoma Supreme Court stated that,

Ordinarily, an order granting custody may not be modified unless the facts are disclosed which were unknown, and could not have been reasonably ascertained when the final decree was entered, or unless there is a permanent material and substantial change in the circumstances which directly affect the child’s mental, moral or temporal welfare.

[Stating the child’s medical problems and mother’s disciplinary techniques.] However, we find that child custody should be modified, if for no other reason than to eliminate the dual custody provisions of the original decree.²⁶

The opinion goes on to state that joint custody may in some situations be a viable alterna-

tive, but that in this case the testimony was that the arrangement was not working and that it was not in the child's best interest. The trial court's order modifying custody to father was affirmed.

LIFESTYLE CHOICES

Two Oklahoma Court of Civil Appeals decisions authored by Judge Brightmire concern the custodial parent's lifestyle. In *Brim v. Brim*,²⁷ the Court of Civil Appeals addressed the issue of a mother's lifestyle and the trial court's granting of a change of custody to the father. The parties had a son in May of 1970 and divorced in July of 1972. The father's motion to modify was heard sometime between May 1973 and May 1974. The evidence was that the mother was having a sexual relationship with a man to whom she was not married and whom she had no intention of marrying. She also made it quite clear she had no intention of ending the relationship.²⁸ The trial court gave custody to the father and the mother appealed, asserting that father did not carry his burden of proof under *Gibbons*, and also alleging the infringement of her rights of association claiming the trial court decision was based on her lover being black. Neither contention carried any weight with Judge Brightmire.

In *Cooper v. Cooper*,²⁹ the mother's lifestyle choice involved drugs. Again Judge Brightmire wrote the opinion. He found the evidence, although contradictory, sufficient to sustain the trial court's change of custody to the father.

The Oklahoma Supreme Court took up the lifestyle issue in *M.J.P. v. J.G.P.*³⁰ The case involved the mother living in an "acknowledged, open homosexual relationship." The trial court found the relationship constituted a sufficient change of condition to warrant modification of custody. The parents had divorced in August 1978 and custody of their two-year-old son was placed with the mother. Within a few months mother moved in with her lover and the two women began an openly homosexual relationship and, the opinion says, "... went so far as to invite 40 friends to a 'Gay-la Wedding' in a church, performed by a minister."³¹

The Oklahoma Supreme Court first cites the statutory authority to modify custody³² and the case law burden of proof of *Gibbons*. The court then reviewed decisions in Massachusetts,³³ Washington³⁴ and Utah,³⁵ quoting from the Utah case,

Although a parent's sexuality in and of itself is not alone a sufficient basis upon which to deny completely a parent's fundamental right, the manifestation of one's sexuality and resulting behavior patterns are relevant to custody and to the nature and scope of visitation rights.

“Two Oklahoma Court of Civil Appeals decisions authored by Judge Brightmire concern the custodial parent's lifestyle.”

The court then concluded:

These decisions of our sister states have one common thread running through them; the determining factor should be the effect the homosexual relationship has on the child and if found to be detrimental to the child's well-being or an impairment to his emotional or physical health, the custody modification is allowed. In other words, our "best interests of the child" standard has been applied.³⁶

The trial court had heard numerous witnesses, including a psychiatrist. The opinion quotes from her testimony at length and found that the evidence presented to the trial court was sufficient to sustain the change of custody.

In *Wells v. Wells*,³⁷ the parties were divorced in August 1978 and father brought a motion to modify 11 months later. The parties agreed to a temporary order granting father custody, a second motion to modify was filed, and the matter was finally heard in August 1980. Father alleged the mother was living with a man out of wedlock and that their children objected to the arrangement. The mother demurred to the evidence and the trial court sustained her demurrer. Justice Barnes wrote, "Changes in custody must be justified on the basis of the best interests of the child. The burden of showing such interests is on the party seeking change," citing *Gibbons*. Stating that "the moral environment" was "one of the factors to be considered," the

Oklahoma Supreme Court reversed the trial court's decision.³⁸

Also in this "lifestyle" category is *Fox v. Fox*.³⁹ Father brought a post-decree motion to modify seeking custody of the two children, "alleging that the mother is a lesbian which is contrary to the children's moral and religious values and to their psychological and emotional stability."⁴⁰ The trial court granted the father's motion, finding the mother unfit, the Court of Civil Appeals affirmed, and the Oklahoma Supreme Court granted certiorari. While the Court of Civil Appeals decision was pending, mother filed a motion to modify alleging father had a history of physical violence and that his parental rights to the child of his second marriage had been terminated. In that hearing the father demurred to the evidence, the trial court sustained the demurrer, and mother appealed that decision separately. Justice Wilson wrote,

... We find neither an allegation that the mother is unfit nor any relevant evidence which establishes the unfitness of the mother as a custodial parent. The trial court's finding that the mother is unfit is wholly without evidentiary support and clearly erroneous.⁴¹

The opinion goes on to say that "the determinative factor is always the effect of the parent's behavior on the child."⁴²

The father's custody motion was grounded in his assertion that the mother's sexual proclivities are immoral and in contradiction of religious values. However, the father testified that he is not aware of any direct harm to the children and that there are no signs that the children's school performances and behavior patterns or their relationships with the immediate and extended family, peers, and community have been adversely affected by the mother's behavior. And, the father did not present any evidence to prove the essential determinative factor — a significant change of circumstance that directly and adversely affects the children. Hence, we find that the father failed to meet his burden of proof as established in *Gibbons v. Gibbons*, *David v. David* and *Gorham v. Gorham*.⁴³

The Court of Appeals decision was vacated and the trial court's decision changing custody was reversed. The mother's appeal of the second motion to modify was dismissed as moot.⁴⁴

JOINT CUSTODY, PARTS II AND III

Joint Custody, Part II

In *Hornbeck v. Hornbeck*,⁴⁵ the divorce decree gave custody to mother with visitation to father. "Upon learning of appellant's plans to remarry and leave the state, appellee moved for a modification of the custody arrangement and presented the trial court with a plan for shared custody of the child." The trial court granted father's motion over mother's objection. In an opinion by Justice Lavender, the Oklahoma Supreme Court rejected mother's arguments that under 12 O.S. §1275.4 joint custody could only be ordered in an initial custody determination, and that a joint custody plan could only be entered if approved by both parties.

The mother also questioned whether her remarriage and relocation were sufficient changes of circumstances to support a change of custody. The appellate decision found that it was, and that "... the first level of the two-stage burden of proof imposed by this Court in *Gibbons v. Gibbons* ..."⁴⁶ had been met. Finally, the court said that mother's final proposition, concerned "... the second stage of the *Gibbons* two-stage burden of proof, i.e. "... whether the child would be substantially better off if the requested modification of custody was ordered."⁴⁷

We are now at the point where policy arguments both in favor of and opposed to joint custody arrangements may be presented to the trial court. ... But the very existence of these conflicting viewpoints demonstrates the desirability of leaving the resolution of these matters in the sound discretion of the trial court to be decided on a case by case basis.⁴⁸

The appellate opinion agreed with the trial court that joint custody was both viable and desirable under the facts of the case and affirmed the trial court decision.

Joint Custody, Part III

The appellate decisions concerning joint custody since *Hornbeck*, *supra*, have centered on what burden of proof must be met to enable the trial court to end joint custody.

In *Daniel v. Daniel*,⁴⁹ joint custody had been ordered in the July 1999 divorce decree, giving mother the school year and father the summers. Three months later, father filed a motion to modify, asking for sole custody and alleging that the mother refused to abide by the joint

custody plan and refused to communicate with him. Mother filed a counter-motion. The trial court terminated joint custody and awarded custody to the father.

The Court of Civil Appeals reversed. Dealt with first in the Oklahoma Supreme Court opinion by Justice Kauger was the action of the Court of Civil Appeals in attempting to order the opinion to be immediately enforced by the trial court.⁵⁰ Going on to the custody issue, the Court reiterated the *Gibbons* standard for a change of custody, but then states, "Here, however, there is no change in custody from one parent to the other because both parties were awarded custody of the child pursuant to a court ordered joint custody arrangement."⁵¹ (The opinion cites *Hornbeck*, *supra*, stating in a footnote that under *Hornbeck* the court can order joint custody without a parent's consent.)

The opinion reviews *Rice*, *supra*, and states that, "When it becomes apparent to the court that joint custody is not working and it is not serving the child's best interests, then a material and substantial change of circumstance has occurred and the joint custody arrangement must be vacated."⁵²

In *Foshee v. Foshee*,⁵³ Justice Kauger reiterated her reasoning in *Daniel*, *supra*. Although the case does not cite *Gibbons*, the language quoted from *Gibbons* in *Daniel* is repeated in a footnote as the ordinary standard when a change of custody is requested, and that a change is not at issue when both parties had joint custody.⁵⁴

RELOCATION CASES

The final category into which the cases following *Gibbons* fall is relocation. These cases begin with *Kaiser v. Kaiser*.⁵⁵ The parties were divorced in 1994, when their son was two years old. Father had previously sought to modify custody and the motion was resolved by agreement in April 1999. On July 30, 1999, mother filed a motion to modify father's visitation due to her pending relocation to Washington, D.C., for an employment position at NASA headquarters. Father filed an objection to mother's move and an application for temporary custody. The hearing was had over four partial days.

The trial court ruled against mother's move, concurring with the guardian *ad litem* that it would be detrimental to the child to lose out on the existing relationship with his father. The judge acknowl-

edged that mother was a fit parent who could care well for Warren in Washington, D.C. or anywhere else, but she thought it would be a 'big detriment' to Warren if she were to 'sustain the motion and allow him to move to Washington because his relationship with his father will be different.'⁵⁶

The Oklahoma Supreme Court opinion looked at the relocation statute then in effect⁵⁷ and reviewed the statutory history and case law of its predecessor in Dakota Territory and similar statutes in California, North Dakota, and Montana. Also considered by the court were opinions from New York, New Jersey and Tennessee. The court stated that mother's fitness was unquestioned and that maintaining the father's visitation schedule was not a sufficient basis to deny mother's relocation.

The test for modifying custody based on a change of circumstances is set forth in *Gibbons v. Gibbons*, 1968 OK 77, 442 P.2d 482, and that test and its allocation of the burden of proof applies here. A custody order may not be modified unless the applicant parent establishes a permanent, substantial and material change of circumstances which directly and adversely affects a child in such a material way that as a result the child would be substantially better off if custody were changed to the other parent as requested.

. . . . The custodial parent's decision to move from Oklahoma to a different location with the child is not in itself a change of circumstances which will justify a change of custody. . . .⁵⁸

The decision concluded that the mother was, ". . . without challenge, a fit mother. . . ." and the trial court decision was reversed.

Shortly following *Kaiser*, *supra*, *Abbott v. Abbott*,⁵⁹ was decided. The father appealed the trial court's decision granting mother's motion to modify father's visitation to accommodate her proposed move to Michigan. Again, mother's fitness as a custodial parent was "without challenge." The trial court first decided in father's favor, granting his motion to change custody if mother did relocate. The trial judge later vacated that ruling on his own motion.

. . . . The trial court announced to the parties that upon reviewing case law and family law treatises, it had determined that the decision announced earlier was wrong.

... the judge stated that he realized that the question he should have addressed was not one of geography, but custody. Therefore since the evidence did not support a finding that Kyle would be better off if his custody were changed from his mother to his father, the court reversed his prior ruling in favor of father and allowed mother to relocate to Michigan. The court stated that as Kyle's custodial parent, it was up to mother to decide what was best for him, and the court could not 'infringe upon her province as a parent' to make the determination of where they should reside.⁶⁰

The Oklahoma Supreme Court, citing *Gibbons*, found the trial court's decision in reversing its initial order to be correct.⁶¹

In *Mahmoodjanloo v. Mahmoodjanloo*,⁶² the relocation statute at issue was 43 O.S. §112.3. This statute became effective Nov. 1, 2002. The Oklahoma Supreme Court opinion reviews the previous decision in *Kaiser*, *supra*,

We held in *Kaiser* that a noncustodial parent objecting to a proposed relocation must meet the same heavy burden of proof required to satisfy the test to change a custody award set forth in *Gibbons v. Gibbons*, 1968 OK 77, 442 P.2d 482, that being the establishment of a permanent, substantial and material change of circumstances that directly and adversely affects a child in such a way that he or she would be substantially better off if custody were changed. We found that neither relocation from Oklahoma nor a resulting change in the existing terms of visitation is, in itself, a change in circumstance that would justify reopening the issue of custody. Accordingly, we held that the dispositive issue in a relocation challenge is not the decision to relocate, but rather the fitness of the custodial parent and whether the evidence showed that living with that parent in the proposed location would place this child at risk of specific and real harm. (Citations omitted.)⁶³

The opinion reviews 43 O.S. § 112.3: the 75-mile for more than 60 days definition of relocation, the notice requirement, and the statement of reasons for the relocation and proposed change in visitation. "Upon meeting the statutory requirements, the proposed relocation is deemed authorized unless the opposing parent files a proceeding challenging the intended

relocation within 30 days after receipt of notice."⁶⁴ If an objection to the move is filed, the custodial parent must show the move is in good faith. "If that is shown, the burden of proof then shifts to the noncustodial parent to show the proposed move is not in the best interest of the child."⁶⁵

The father in *Mahmoodjanloo* proposed to move to Buffalo, NY. The mother objected. The trial court sustained mother's objection, holding that the father had not shown it was in children's best interest to move. Father appealed, alleging that the trial court had wrongly allocated the burden of proof. The Oklahoma Supreme Court agreed,

We agree with father. The statute plainly and unambiguously places the burden on the relocating parent to show the move is proposed in good faith and, once that burden is met, as it was in this case, shifts the burden of proof to the opposing parent to show the proposed move is not in the best interest of the children. The trial court's imposition of the added burden on father was error and we reverse for that reason.⁶⁶

So the *Gibbons v. Gibbons* standard is the burden of proof under the current relocation statute, as it is, after 44 years, for all post-divorce⁶⁷ motions to modify custody. At least until the next Oklahoma Supreme Court family law decision!

1. At this writing the most recent citations of *Gibbons*, *supra*, were in *Cabar v. Dahle*, 2012 OK CIV APP 19, 272 P.3d 733, and *Johnson v. Wingert*, 2011 OK CIV APP 128, 268 P.3d 145.

2. Repealed in 1983.

3. *Gibbons*, ¶5.

4. 1956 OK 60, 294 P.2d 304. This decision states, "The record does not disclose any material change in condition . . ." (¶4) and then quotes *Jackson*, *infra*, and goes on to discuss financial issues.

5. *Jackson v. Jackson*, 1048 OK 122, 193 P.2d 561. *Jackson* is quoting, and cites, 17 Am Jur. Divorce and Separation 684 (¶13).

6. Father was awarded custody of the two-year-old girl in the decree. Approximately one year later a hearing was held on the mother's motion to modify. "In this appeal plaintiff makes no contention based on a showing of change in the conditions of either of the parties Argument is presented based on the age and sex of the child and plaintiff's motherhood. . . ." (¶5.) The trial court's order denying mother's motion of modify was affirmed.

7. 1963 OK 14, 383 P.2d 211. *Young*, in turn, cites *Jackson*, *supra*, and *Stanfield v. Stanfield*, 1960 OK 55, 350 P.2d 261, both also cited in *Gibbons*.

8. 1960 OK 259, 357 P.2d 973, which in turn cites *Duffy v. King*, 1960 OK 58, 350 P.2d 280. *Ness* held that a change in the mother's living conditions — her remarriage and her move into a suitable home — was a proper change of circumstances to be considered by the trial court when dealing with a motion to modify the custody of a child of tender years. *Ness* cites and quotes extensively from *Lewis v. Sisney*, 1952 OK 5, 239 P.2d 787, which was a post-divorce custody dispute but between the mother and her ex-sister-in-law. The *Lewis* decision speaks of a change in circumstances (mother was, at the time of the divorce, "nervous and sickly" and "is now in good health") and of the tender years doctrine, although the statute is not cited.

9. *Stanfield*, *supra*. The mother, although showing she was now in a position to provide a home, made no showing that her home was better than that provided by father, or that a change would benefit the

children. The trial court's denial of her motion to modify was affirmed.

10. *Gibbons, supra*, ¶10-12.

11. 1969 OK 133, 460 P.2d 929.

12. *Gilbert*, ¶13.

13. 1969 OK 164, 460 P.2d 116.

14. The opinion states, in paragraph 3, that the second hearing was held on Feb. 8, 1967; however, as the second motion to modify was filed on Oct. 30, 1967, we must assume this is a typographical error and the hearing was held in February 1968.

15. *David*, ¶6.

16. 1969 OK 172, 460 P.2d 900.

17. *Walker*, ¶12.

18. 1969 OK 174, 460 P.2d 946.

19. *Hoog*, ¶5.

20. *Id.* ¶11.

21. *Id.* ¶12.

22. 1972 OK 26, 494 P.2d 318.

23. *Owens*, ¶10.

24. *Id.* ¶12.

25. 1979 OK 161, 603 P.2d 1125.

26. *Rice*, ¶18-19.

27. 1975 OK CIV APP 4, 532 P.2d 1403.

28. *Brim*, ¶6.

29. 1980 OK CIV APP 12, 610 P.2d 1226.

30. 1982 OK 13, 640 P.2d 966.

31. *M.J.P.*, ¶2.

32. 12 O.S. §1277, now 43 O.S. §112.

33. *Bezio v. Parenau*, ____ Mass. ____, 410 N.E. 2d 1207 (1980).

34. *Schuster v. Schuster*, 90 Wash.2d 626, 585 P.2d 130 (1975).

35. *Kallas v. Kallas*, 614 P.2d 641 (Utah 1980).

36. *M.J.P.*, ¶10.

37. 1982 OK 83, 648 P.2d 1223.

38. The decision was made on a 5-4 vote; Justice Opala wrote a typically erudite concurring opinion and Justice Simms wrote a strong dissent.

39. 1995 OK 87, 904 P.2d 66.

40. *Fox*, ¶2.

41. *Fox*, ¶5.

42. *Id.*, ¶7.

43. *Id.*, ¶9.

44. Other cases fall loosely into this category: *Stover v. Stover*, 1984 OK CIV APP 43, 689 P.2d 952, involved a father's motion to modify custody. While his motion was pending, the mother shot at and narrowly missed him. She had been provided the gun by her new husband, an ex-convict. Judge Brightmire found these circumstances showed mother's mental instability and were sufficient to justify the trial's court's modification of custody. In *Boatsman v. Boatsman*, 1984 OK 74, 697 P.2d 516, the father's motion to modify was denied. The Oklahoma Supreme Court affirmed, finding that the father has not shown that mother's conduct was "permanent." *Coget v. Coget*, 1998 OK CIV APP 164, 966 P.2d 616, also involved the mother's conduct; the trial court had changed custody to the father and the Court of Civil Appeals reversed, holding the condition has clearly not been permanent (she married her live-in lover during the course of the litigation). See also *Shaw v. Hoedebeck*, 1997 OK CIV APP 69, 948 P.2d 1240, arguably a lifestyles case as the mother claimed the trial court's decision was impermissibly based on her religion. It involved a trial court decision

to end joint custody and award custody to the father. The mother's assertion was dealt with succinctly, "The fact that one parent is awarded custody of the children does not, in itself, violate the other parent's religious rights." ¶8.

45. 1985 OK 48, 702 P.2d 42.

46. *Hornbeck*, ¶13.

47. *Id.*, ¶15.

48. *Id.* ¶17.

49. 2001 OK 117, 42 P.3d 863.

50. *Daniel*, ¶¶9-13.

51. *Id.*, ¶17.

52. *Id.*, ¶20. See also *Meigs v. Meigs*, 1996 OK CIV APP 76, 920 P.2d 1077, and *Lyons v. Lyons*, 1998 OK CIV APP 153, 970 P.2d 200.

53. 2010 OK 85, 247 P.3d 1162.

54. *Foshee*, footnote 2.

55. 2001 OK 30, 23 P.3d 278.

56. *Kaiser*, ¶14.

57. 10 O.S. §119, now 43 O.S. §112.2A, "A parent entitled to the custody of a child has a right to change his residence, subject to the power of the district court to restrain a removal which would prejudice the rights or welfare of the child."

58. *Kaiser*, ¶¶32-33.

59. 2001 OK 31, 26 P.3d 291.

60. *Abbott*, ¶6.

61. *Id.*, ¶8.

62. 2007 OK 32, 160 P.2d 951.

63. *Mahmoodjanloo*, ¶4.

64. *Id.*, ¶6.

65. *Id.*, ¶7.

66. *Id.*, ¶12. See also *Atkinson v. Atkinson*, 2006 OK CIV APP 124, 149 P.3d 1055, (decided May 2006, mandate issued 10/30/06). The situation was very similar to *Mahmoodjanloo* and so was the appellate decision.

67. See also *Puett v. Müller*, 2001 OK CIV APP 43, 23 P.3d 979, in which the *Gibbons* standard was applied by the Court of Civil Appeals in a paternity post-decree custody dispute.

ABOUT THE AUTHOR



Miami, Fla., and New York City before returning to Oklahoma.

Treva Krivohlavek Kruger practices in the areas of family law, adoption and guardianship, and she performs research and appellate work in Norman. She is a 1984 graduate of the OU College of Law. She graduated from Northwestern Oklahoma State College in Alva in 1971, and she lived and worked in



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Drafting Military Orders

By Virginia Henson

The vagaries and vicissitudes of drafting retirement orders, particularly military orders, plague family law practitioners. Not only is the language often confusing and arcane, the fluctuating case and statutory law makes drafting dangerous work. The only real protection for family law practitioners is to insure they are well-informed as to the current law, as failure to stay current can be devastating to one's client and distressful to one's malpractice carrier. Still, practitioners often make routine errors in drafting.

PITFALL NO. 1: FAILURE TO ADDRESS JURISDICTION ISSUES

Division of Military Pensions is not governed by state law. Instead, it is governed by the Uniformed Services Former Spouse's Protection Act (USFSPA). Therefore, just because a state court has jurisdiction to grant dissolution does not mean the court has the jurisdiction to divide a military pension. Statutory authority for the division of a military pension is found at 10 U.S.C. §1408, which states that domicile pursuant to the act is not the place where the servicemember is stationed. 10 U.S.C. §1408 (c)(4) provides, "A court may not treat the disposable retired pay of a member in the manner described in paragraph 1) unless the court has jurisdiction over the member by reason of A) his residence, **other than because of military assignment**, in the territorial jurisdiction of the court, B) his domicile in the territorial jurisdiction of the court or C) his consent to the jurisdiction of the court."

In *McCarty v. McCarty*, 453 U.S. 210 (1981), the Supreme Court ruled that state courts have no jurisdiction to divide military pensions, but observed that Congress could change the statutory framework to allow division. In response, Congress passed the USFSPA. However, because

this federal statute is the only basis for division of military pensions, 10 U.S.C. §1408(c)(4) is determinative of jurisdiction.

Domicile, of course is not the same as residence. It has been defined as:

"The place of one's actual residence with the intention to remain permanently, or for an indefinite time, and without any certain purpose to return to a former place of abode. Once established, a party's domicile continues until another one is acquired, regardless of changes in temporary sojourn. However, intention without the concurrence of residence is not sufficient to change or create domicile. Both must coexist."¹

Domicile, in general, requires intent to not only make a certain jurisdiction the person's home, but also to remain there. Federal law allows servicemembers to retain their homes as their domiciles for tax and voting purposes.² Most servicemembers have no intention of remaining at their duty station when their military assignment ends. Therefore, the duty station of a serviceman is often not that person's domicile. Even if there are special statutes that grant jurisdiction to grant a divorce based on a servicemember's residence,³ the state still has no

jurisdiction to divide a military pension unless the servicemember is domiciled in the jurisdiction or consents to jurisdiction of the court to divide his or her pension.

Numerous state cases have determined that domicile is critical in determining the jurisdiction for division of military pensions. Further, a servicemember can consent to jurisdiction to determine a divorce, but not jurisdiction to divide his military pension.⁴

Practitioners who wish to invoke the domicile defense to a division of military pension should be mindful not to subject the servicemember to the jurisdiction of the court. Therefore, an objection to jurisdiction, before any general appearance is made, should be filed by the servicemember.

PITFALL NO. 2: DRAFTING THE ORDER FOR A SET DOLLAR AMOUNT

If a practitioner is dividing a pension for a servicemember who is already retired and in pay status, it is tempting to determine the amount of the pension and award to the former spouse an amount equal to one-half of the gross amount. At first glance, it seems that this avoids many of the problems of reduction of retired pay due to waivers. This practice, however, creates at least two problems: The first is that USFSPA prohibits the assignment of more than 50 percent of a servicemembers' disposable retired pay. The second is that it prohibits the former spouse from receiving cost-of-living adjustments. Although this division scheme may be appropriate in individual circumstances, it is important to carefully examine the type and character of the pension to avoid depriving the former spouse valuable benefits.

PITFALL NO. 3: NOT CONSIDERING EARLY SEPARATION BENEFITS

Sometimes the armed services downsize in response to budget pressures or to meet manpower requirements. The last time this happened, the military created two programs: the Voluntary Separation Incentive⁵ and the Special Separation Benefit.⁶ These programs allowed the servicemember to retire before completing 20 years of military service. The benefit was paid in a lump sum to the servicemember — even those whose former spouses were awarded a percentage share of military pension. The incentive was an annual payment made to the servicemember over a period of twice the number of years of active service.

Because USFSPA was limited to traditional military retirement, Defense Finance and Accounting Service would not pay either benefit to a former spouse directly. These programs have since expired, but when they were active, state courts were compelled to address the questions of whether the payments were marital property and, if so, were they divisible? Some courts ruled that the benefits were separate property,⁷ but the majority of courts have determined that these benefits are a replacement for retirement benefits and therefore divisible.⁸

While these exact programs have expired, and therefore the opportunity to defeat a pension award is lessened, the clear trend now is to reduce the manpower of the armed forces (*i.e.* the withdrawal of troops from Iraq and the opposition to increase forces in Afghanistan). There is a real possibility that the armed forces will offer these programs in the future to current military members. Be sure to draft your order to address early out programs. However, it is important to understand that the accounting service will not directly pay any such benefits. Therefore, the percentage of the award must be adjusted to account for the benefit, or it must be ordered to be directly paid by the servicemember.⁹

PITFALL NO. 4: NOT ADVISING A FORMER SPOUSE OF THE EFFECT OF HIS OR HER REMARRIAGE

Pursuant to 10 U.S.C. §1450(b), a former spouse will lose rights to a survivor annuity under the Survivor Benefit Plan portion of the USFSPA if the spouse remarries before age 55. However, if the marriage ends by death, annulment or divorce, the benefit will be reinstated.¹⁰ There is no procedure for a former spouse, alone, to relinquish the spousal benefit. If an existing court order requires coverage, the relinquishment may be accomplished by the servicemember withdrawing from the program between the 24th and 36th month of retirement. A former spouse may voluntarily give up his or her right to the plan after remarriage, but the defense service will require a court order terminating the benefit and a DD2656-2¹¹ signed by the former spouse.

The important issue for the practitioner on this point is to remember to advise the former spouse that the benefit plan is terminated on remarriage before age 55, but the pension division by a living servicemember is unaffected.

This means that, so long as the servicemember from whom the former spouse draws pension payments is alive, the remarriage will have no effect. However, if the servicemember dies, the payments to the former spouse will terminate if the former spouse has remarried before age 55. These benefits will be lost permanently unless the former spouse's subsequent marriage is terminated.

PITFALL NO. 5: FAILURE TO SHIFT THE SURVIVOR BENEFIT PLAN PREMIUM

The defense service will make no calculation to shift a benefit plan premium, either to the servicemember or to the former spouse.¹² Further, they will accept no order which requires them to calculate a separate benefit — the payment of the pension to the former spouse is always on a shared payment approach. Therefore, a military order which merely provides that “former spouse will pay the benefit plan premium” will have no effect on the division of the military pension. The defense service will, in all cases, deduct the premium (6.5 percent of total retired pay) “off the top” or before the division of the pension.¹³

A practitioner who represents a servicemember unaware of this fact may unwittingly subject a client to involuntary payment of one-half of the benefit plan's premium, which can amount to thousands of dollars over the life of the pension. The only way to effectively shift the premium from the servicemember to the former spouse is to award to the former spouse a reduced benefit amount to compensate for the premium. For example, if a former spouse is awarded 50 percent of the retirement benefit, and he or she is responsible for the payment of the plan premium, an award of 46.52 percent of the pension is necessary to shift the premium to a former spouse. Of course, the property division order could also provide direct reimbursement of the premium.

A table for shifting the premium is found at Marshal S. Willick, *Military Retirement Benefits in Divorce*, 158-60 (ABA 1998), and is reprinted in Mark E. Sullivan, *The Military Divorce Handbook*, American Bar Assn.: 2006, pp. 584-585. Both books are available from the American Bar Association.

PITFALL NO. 6: FAILURE TO ADDRESS REDUX ISSUES

Servicemembers who began service on or after Aug. 1, 1986 may participate in a program

“If you represent the former spouse, you will want to include language in the decree that protects your client if the servicemember elects the REDUX bonus.”

called REDUX. If elected, the servicemember agrees to remain on active duty for a minimum of 20 years, and for this agreement receives a career status bonus of \$30,000, payable between 14 and 14.5 years of service.

This election can substantially affect the former spouse. By electing REDUX, the servicemember reduces his retirement pay upon retirement, and thereby reduces the former spouse benefit. The REDUX is calculated at 40 percent of the average of the highest three years of basic pay after 20 years of creditable service, instead of the 50 percent multiplier if the servicemember does not elect REDUX. The retirement is recalculated when the servicemember reaches age 62 to increase the retirement to full benefits, with full cost of living adjustments, so the effect of the REDUX election is only applicable to retirees who receive payments before their 62nd birthday. However, the adjustments from the recalculation are reduced by deducting one percentage point from the consumer price index, which is used to calculate adjustments for military retirees. A REDUX retirement calculator can be found at www.dod.mil/cgi-bin/redux.pl.

If you represent the former spouse, you will want to include language in the decree that protects your client if the servicemember elects the REDUX bonus.

PITFALL NO. 7: IMPROPERLY ADDRESSING MARITAL PERCENTAGES

Of course, the award of military benefits to a former spouse should be limited to period of the marriage. In other words, if the parties are married for 10 years during a servicemember's 20-year career, the former spouse is entitled to only 25 percent of the military pension. However, the amount of the servicemember's pension is affected not only by the length of service, but also by the rank of the servicemember at the time of

retirement. Some states take the position that the increase in rank of the servicemember should not be considered.¹⁴ Other states take the position that the former spouse should not share the increases in pension due to continued service by the servicemember.¹⁵

Of course, if the servicemember is already retired by the date of the divorce, these issues are not as important. If, however, the state requires that the amount of the former spouse share be limited to one-half of the pension due to the servicemember if he or she retired as of the date of the dissolution, a "hypothetical order" will be required. The military order should carefully state how the accounting service is to calculate the pension, such as language which states: "Wife is granted 50 percent of what a staff sergeant would earn if he were to retire with 18 years of military service."¹⁶ If the court order fails to specify the year of retirement, the accounting service will assume that the date of retirement is the actual date of retirement.

It is important to realize that such an order may be unfair to the former spouse. For example, let's assume that the parties are married 10 years, and the servicemember has been on active duty for 10 years and is a staff sergeant. If the servicemember were to retire immediately, the former spouse would be entitled to one-half of the pension. However, let's now assume that the servicemember continues to serve another 20 years. At the time of the dissolution, the marital fraction is 50 percent (one-half of the 10 years of service). However, when the servicemember actually retires, the marital fraction is 16 percent (10 of 30 years, or one-third of service multiplied by 50 percent). At the time of actual retirement, then, if the order is not carefully drawn, the wife could be limited to only 16 percent of the retired pay instead of 50 percent. If the clauses are contradictory, the discount can be applied twice.

PITFALL NO. 8: FAILURE TO ADDRESS DISABILITY WAIVERS

USFSPA provides that a court can only divide "disposable retired pay."¹⁷ This is defined as "gross retired pay less recoupments or repayments to the federal government, such as for over-payment of retired pay, deductions from retired pay for court-martial fines or forfeitures, disability pay benefits, and survivor benefit plan premiums."¹⁸ A servicemember can elect to reduce disposable retired by elect-

ing disability benefits.¹⁹ This has a significant advantage to the servicemember, because disability payments are received tax-free. A court cannot bar the accounting service from allowing the servicemember to receive disability pay, which is not divisible under USFSPA.²⁰

Language in the military order, therefore, should provide that the court retains jurisdiction to make orders equalizing the award if the servicemember elects disability pay. An appropriate clause might read:

"The parties consent to the court's retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if the husband should waive military retired pay for an equivalent amount of VA disability compensation and this action reduces wife's share or amount of his retired pay as set out herein. This retention of jurisdiction is to allow the court to adjust the wife's share or amount to the pre-waiver level or to require payments or property transfers from husband that would otherwise adjust the equities between the parties so as to carry out the intent of the court in this order."²¹

Remember that the Defense Finance and Accounting Service will not honor any order that requires it to pay to a former spouse directly an amount that exceeds 50 percent of the servicemember's disposable retired pay. The accounting service will not reject the order, but will limit direct pay to 50 percent of the servicemember's disposable retired pay. The former spouse may be left with an order that requires the servicemember to pay the former spouse directly.

PITFALL NO. 9: FAILURE TO COMPLY WITH DEADLINES

Retirees participating in the survivor benefit plan must elect the coverage within one year of the divorce decree.²² Even if the spouse is already covered by the plan, the election must be renewed on divorce. This is because the plan's coverage is paid to the servicemember's current spouse unless the election is made to cover the ex-spouse.

The retiree must provide a statement setting forth whether the election is pursuant to court order or agreement, and if by agreement, whether the agreement has been incorporated into, ratified or approved by court order. If the retiree fails to make the election or refuses to

do so, the former spouse may obtain the coverage through a deemed election. This election must be made **within one year of the order providing for plan coverage**. You must docket these deadlines and meet them.

A court decree cannot create coverage. In *Dugan v. Childers*, 261 Va. 3, 539 S.E. 2d 723 (2001), a retired Army member named his wife as the beneficiary under the plan. When they divorced, he failed to elect the benefit plan's coverage for her, and instead named his current wife. When he died, the court refused to impose a constructive trust on the retirement proceeds, ruling that the former wife had failed to protect herself by the deemed election. Because there can only be one Survivor Benefit Plan beneficiary, the former spouse lost her coverage.

Remember, though, that a deemed election must be backed up by a court order or court-approved agreement that requires the servicemember to elect the survivor benefit.

PITFALL NO. 10: FAILURE TO CONSIDER CIVIL SERVICE ROLLOVERS

If a servicemember takes a civil service job after retirement, he or she can "roll over" his or her military service into credit for Civil Service Retirement System (CSRS) purposes. This means that when calculating eligibility for retirement from civil service, the military service is credited as if the servicemember had been working in the civil capacity for the time he or she was in the military. Before Jan. 1, 1997, a servicemember could avoid paying the former spouse the share of military retirement by giving up the military pension in exchange for credit on a civil service retirement. Now, however, the military member may not do that unless he or she authorizes the Office of Personnel Management to deduct the amount due to the former spouse.²³

However, this statute only applies if the order is served on Defense Finance and Accounting Service. In the case where a division is ordered in a dissolution decree, but a military order is never entered, the military member may convert all of the military pension to CSRS and block the former spouse from receiving the benefit ordered. Further, there are situations when the issue is never addressed because both parties know the party in the military has no intention of staying in the service long enough to collect a pension. However, even though the servicemember may not have enough credits to be granted a military

pension, his or her service will translate into a CSRS pension when the military service is rolled over into the civil pension.

CONCLUSION

The best protection for a practitioner is not to draft military orders unless the practitioner takes the time to read and understand the law regarding military pensions. Some practitioners may decide that the liability is too great — and refer the drafting of the military orders to another lawyer who is experienced in the area. Rest assured, however, competent drafting is possible for the practitioner who is willing to devote sufficient time to learning about law pertaining to pensions.

1. *Atkins v. Atkins*, 932 P.2d at 868.

2. 50 U.S.C. App. §501 et seq.

3. North Carolina, Georgia, Texas and Virginia to name a few.

4. See, *Flora v. Flora*, 603 A.2d 723 (R.I. 1992); *Mortenson v. Mortenson*, 409 N.W. 2d 20 (Minn. App., 1987); *Marriage of Atkins*, 932 P.2d 863 (Colo. App., 1997); *Tarvin v. Tarvin*, 232 Cal. Rptr. 13, 187 Cal. App. 3d 56 (Cal. App. 1 Dist., 1986); *Tarvin v. Tarvin*, 232 Cal. Rptr. 13, 187 Cal. App. 3d 56 (Cal. App. 1 Dist., 1986).

5. 10 U.S.C. §1175.

6. 10 U.S.C. §1174a.

7. *Baer v. Baer*, 657 So.2d 899 (Fla. Dist. Ct. App. 1995); *McClure v. McClure*, 98 Ohio App. 3d 27, 647 N.E. 2d. 832 (1994). Both of these cases dealt with a servicemember who was informed that he could voluntarily leave the military and receive a benefit, or be involuntarily separated from the military without a benefit.

8. *Lykins v. Lykins*, 34 SW 3d 816 (Ky. Ct. App. 2000); *Diaz v. Babauta*, 66 Cal. App. 4th 784, 78 Cal. Rptr. 2d 281 (1998); *Marriage of Heupel*, 936 P.2d 561 (Colo. 1997); *Marsh v. Wallace*, 924 SW 2d 423 (Tex. App. 1996); *Pavatt v. Pavatt*, 920 P.2d 1074 (Okla. Civ. App. 1996). For a table summarizing the SSB and Voluntary Separation Incentive cases see Gary A. Schulman, *Qualified Domestic Relations Order Handbook* §30.13 (2d ed. 1999 & Supp. 2005).

9. Remember, however, that any order for direct pay must not exceed 50 percent of the servicemember's disposable retirement pay.

10. However, if the former spouse is entitled to two Survivor Benefit Plan awards, from both marriages, the former spouse must elect which Survivor Benefit Plan pension to receive, they cannot receive both.

11. Scott Lafferty is the deputy assistant general counsel for garnishment operations at the Defense Finance and Accounting Service. Scott had the opportunity to review this article and his comments are footnoted throughout. Accordingly, Scott commented: The DD 2656-2 Form is solely for the purpose of the member electing to terminate Survivor Benefit Plan coverage with the necessary concurrences or court order as required by 10 U.S.C. 1448a. Otherwise, FSSBP coverage continues and could only be changed should the member remarry and request to now cover the current spouse, subject to a court order that terminates the prior FSSBP coverage order. See 10 U.S.C. 1450(f)(1) and (2).

12. Remember to file DD Form 2656-10 when your client is entitled to a survivor benefit plan.

13. Defense Finance and Accounting Service deducts the survivor benefit plan premium as part of the disposable pay computation (off the top) only when a valid election of FSSBP has been entered in the retired pay system. The premium does not come off the top if the survivor benefit plan coverage is for a subsequent spouse or children.

14. Delaware, Indiana, North Carolina, Missouri, New York, Pennsylvania and North Dakota.

15. *Boyet v. Boyett*, 703 So. 2d 451 (Fla. 1997); *In re Hunt*, 868 P.2d 1140 (Colo. Ct. App. 1993); *Berry v. Berry*, 647 S.W. 2d 945 (Tex. 1983).

16. Language reprinted from Mark E. Sullivan, *The Military Divorce Handbook*, American Bar Assn.: 2006, p 459.

17. 10 U.S.C. §1408(c)(1). Upheld in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed. 2d 675 (1989).

18. 10 U.S.C. §1408(a)(4).

19. Scott Lafferty, who graciously reviewed these materials, pointed out that this statement is somewhat simplistic, stating: I assume you are referring to the situation of a member who applies to the VA to

receive VA disability compensation under title 38. While it is correct that the member chooses to apply to receive the disability compensation, there is a requirement that the member to waive an equivalent portion of any retired pay he receives in order to receive the VA compensation. If the VA disability is 50 percent or greater, the portion that is waived would be restored as retired pay in the form of concurrent disability and retirement pay (CRDP) if the member qualifies under 10 U.S.C. 1414. However, if the member also qualifies for combat-related special compensation (CRSC) as well, under 10 U.S.C. 1413a, CRSC payments are not retired pay and thus not divisible under the USFSPA.

20. Scott Lafferty noted: It should also be pointed out that in addition to disability compensation from the VA, that must be waived from retired pay, if a member retires from the service for disability under title 10 chapter 61 (disability retired pay) the portion of the retired pay attributable to the member's disability on the date of retirement is also a deduction used to determine disposable retired pay. See 10 U.S.C. 1408(a)(4)(C).

21. Language borrowed from: Mark E. Sullivan, *The Military Divorce Handbook*, American Bar Assn.: 2006, p. 447.

22. 10 U.S.C. §1448 (b)(3)(A)(iii).

23. 5 U.S.C. §8411(c)(5).

ABOUT THE AUTHOR



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BBQ Lunch (included in fee)

1:00 p.m. - 1:50 p.m.

Legal Ethics - Gina L. Hendryx

2:00 p.m. - 2:50 p.m.

Insurance - Kelli Masters

3:00 p.m. - 3:50 p.m.

Criminal Law - Graham Guhl

3:50 p.m. - 5:00 p.m.

Social Hour

5:00 p.m. - 7:00 p.m.

Steak Dinner (included in fee)

Approved for CLE of 6.0 hours (1 hour of ethics).

Registration fees: \$175.00 for pre-registrations received prior to the Institute date; \$200.00 for walk-in registrations. Lunch, dinner and materials included in Registration Fee. Pre-registration is required for lunch and dinner.

Cancellations will be accepted at any time prior to the Institute date; however, a \$25.00 fee will be charged for cancellations made within three (3) days of the Institute date. No requests for refunds or cancellations will be considered after the date of the Institute.

2012 BOILING SPRINGS LEGAL INSTITUTE REGISTRATION FORM

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I WILL BE UNABLE TO ATTEND THE SEMINAR. **PLEASE SEND MATERIALS ONLY:** _____ (\$50.00)

Please make checks payable to the Woodward County Bar Association and mail this form with check to Jay Mitchel, Woodward County Bar Association, P.O. Box 887, Woodward, OK 73802. For more information, contact Jay Mitchel at jmitchel@westoklaw.com or (580) 254-3447.

NOTICE OF PROPOSED NEW LOCAL RULES

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF OKLAHOMA

Pursuant to the authority of the United States District Court for the Western District of Oklahoma, as provided in Rule 9029 of the Federal Rules of Bankruptcy Procedure, public notice is given of the proposed new Local Rules of the United States Bankruptcy Court for the Western District of Oklahoma.

The proposed new Local Rules may be accessed on the Bankruptcy Court's website at <http://www.okwb.uscourts.gov>. A summary of the proposed New Local Rules highlighting changes from the Local Rules currently in effect is also located on the Bankruptcy Court's website.

Comments to the proposed new Local Rules may be submitted in writing no later than October 1, 2012, and mailed to the Bankruptcy Court at the following address:

U.S. Bankruptcy Court
Attn: Cheryl Shook
Chambers of The Honorable Sarah A. Hall
215 Dean A. McGee Avenue - Sixth Floor
Oklahoma City, Oklahoma 73102

or emailed to: cheryl_shook@okwb.uscourts.gov. Comments to the proposed new Local Rules may be set forth in the body of a letter or an email or may be included in a separate attached document.

Dated: August 11, 2012

The Honorable Sarah Alexander Hall
Chief Bankruptcy Judge



License Revocation, Suspension and Nonissuance

Is This an Underused Tool for Child Support Enforcement?

By Michelle C. Harrington

In cases involving child support, do you routinely include an interrogatory that asks what state-issued permits and licenses the payor has or has applied for? If not, you may be missing an opportunity to protect your client's interests.

Since 1995, a tool has been available for enforcing child support orders that goes beyond the routinely used indirect contempt of court action. Title 43 O.S. Section 139.1 sets forth a process for seeking the revocation, suspension or nonissuance of licenses issued by the state. Many readers may immediately think about the state-issued license that allows them to work in certain professions. Yes, that could be revoked or suspended if an obligor ignores her obligation to pay child support or provide medical insurance for the minor child.

"Fine," a cynical obligor might say. "I'll just go fishing instead of working — that will teach the complainer a lesson!" But the obligee gets the last laugh, because recreational licenses are covered too!

WHEN IS THIS REMEDY AVAILABLE?

The ability to seek a revocation or other options pertaining to licenses goes into effect when one is in noncompliance with an order for support, meaning:

- The obligor has failed to make child support payments required by a child support order

in an amount equal to the child support payable for at least 90 days.

- The obligor failed to make full payments pursuant to a court-ordered payment plan for at least 90 days.
- The obligor has failed to obtain or maintain health insurance coverage as required by an order for support for at least 90 days.
- An individual, after receiving appropriate notice to comply with subpoenas or orders relating to paternity or child support proceeding has failed to comply.
- An individual failed to comply with an order to submit to genetic testing to determine paternity.¹

WHAT IS A 'LICENSE' FOR THE PURPOSE OF THIS STATUTE?

"License" is a catchall term to encompass documents resulting from any state-issued right or privilege. It extends to certificates, registrations, permits, approval or similar documents issued by a licensing board. It includes licenses to engage in a profession, occupation, or business. While many immediately think of practic-

ing law or medicine in this purview, there is a plethora of professions that require licenses and permits — such as teachers, tattoo artists, taxi drivers, bingo operators, boat dealers and brewers. From abstractors to youth camps, there is an Oklahoma license available for almost every letter of the alphabet.²

In addition to business-related licenses, recreational licenses and permits are fair game. Hunting and fishing licenses or other authorization issued pursuant to the Oklahoma Wildlife Conservation Code are subject to revocation and the other options for relief.

“License” can also refer to certificates of title for vessels, motors, and other licenses or registrations issued pursuant to the Oklahoma Vessel and Motor Registration Act. This category includes a driver license or permit.³

“The Department of Human Services also has the authority to revoke or suspend a driver’s license if, as a result of a child support hearing, it determines an obligor is in noncompliance.”

WHAT RELIEF IS AVAILABLE?

If, during any hearing involving the support of a child, the district court finds that 1) the obligor has a license as defined by this statute and 2) there is evidence that the obligor is in noncompliance with an order for support, the court shall suspend or revoke the license or place the obligor on probation.⁴

In order to be placed on probation, an obligor is required to agree to a payment plan that includes 1) making all future child support payments as required by the current order and 2) paying the arrearage in a lump sum by a certain date if the court determines the obligor has the ability to do so, or making specified monthly payments in addition to the current payments. The additional payments continue

until the total arrearage and the interest thereon are fully paid.⁵ If the obligor is placed on probation, he or she may continue to practice his or her business or profession, or operate a motor vehicle. There is no notice given to any licensing board as a result of probation. If the obligor fails to comply with all terms of the payment plan by the ordered date of completion, the licenses of the obligor shall be automatically revoked or suspended without further hearing.⁶

At any time during a probationary period, the obligee or Oklahoma Child Support Services (OCSS) may request a hearing to review the status of the obligor’s compliance with the payment plan and to request immediate suspension or revocation of the obligor’s license. Notice of the hearing must be served on the obligor but it may be served by regular mail to the obligor’s address of record.⁷

The Department of Human Services also has the authority to revoke or suspend a driver’s license if, as a result of a child support hearing, it determines an obligor is in noncompliance.⁸

All the relief set forth above may be used in addition to any other child support enforcement remedies. If the non-compliant obligor is an attorney, he or she would also be subject to disciplinary proceedings pursuant to the rules of professional conduct.

WHAT IS THE ROLE OF THE LICENSING ENTITY?

The licensing board does not have discretion once it receives an order for suspension, revocation, or nonissuance of an obligor’s license. The licensing board has no jurisdiction to modify remand, reverse, vacate or stay the order.⁹

The obligor is not entitled to a refund of any funds already paid to the board for costs related to issuance, renewal, or maintenance of a license. In addition, the board may charge the obligor a fee to cover administrative costs incurred by administering the order. It is noteworthy that the board is exempt from liability to the obligor for activities conducted in compliance with Title 43 O.S. Sect. 139.1.¹⁰

WHAT RIGHTS DOES THE OBLIGOR HAVE?

Once the obligor has paid in full pursuant to the payment plan and complied with all other terms of the order of support, either he or OCSS may file a motion with the court to rein-

state the license or terminate the probation. The matter gets set for a hearing and the court shall grant the requested relief if it determines the obligor has fully complied.¹¹

The obligor may seek reinstatement of his or her license prior to full compliance with the plan. He or she must set the matter for hearing and notice the obligee and OCSS. The court has the discretion to reinstate the license if the obligor can prove the following applicable substantial compliance: 1) paid the support for the current month as well as the two months immediately proceeding, or paid the equivalent of that amount; 2) disclosed all information regarding health insurance availability, obtained and maintained coverage required by the support order; 3) complied with all subpoenas relating to paternity proceedings; 4) complied with all orders to submit to genetic testing for paternity determination; and 5) disclosed employment and address information.¹²

If the court grants the obligor's requested relief for reinstatement prior to full compliance, the obligor shall be placed on probation conditioned on compliance with both the payment plan and the support order. If the obligor fails to comply with the terms of probation, the court may refuse to reinstate the license and driving privileges unless the obligor pays an amount determined by the court to ensure future compliance. This is in addition to the requirement for the obligor to comply with all other terms set forth by the court.¹³

A final order may be appealed to the Oklahoma Supreme Court.¹⁴

CONCLUSION

If you represent a client that may be entitled to child support, you may be remiss by not

determining early in the case whether the obligor has any licenses issued by the state of Oklahoma. A good way to obtain that information is with an interrogatory about licenses and a document production request for copies of those licenses.¹⁵ The very real possibility of not being able to work, drive or — worst of all — not being able to fish, may be just the motivation a non-compliant obligor needs to get caught up on child support obligations!

1. Title 43 O.S. Sect. 139.1(A)(2).
2. Author could not find licenses or permits that began with K, Q, X, or Z.
3. Title 43 O.S. Sect. 139.1(A)(4).
4. Title 43 O.S. Sect. 139.1(C)(1).
5. Title 43 O.S. Sect. 139.1(C)(2).
6. Title 43 O.S. Sect. 139.1(C)(6).
7. Title 43 O.S. Sect. 139.1(C)(5).
8. Title 47 O.S. 6-201.1.
9. Title 43 O.S. Sect. 139.1(L).
10. Title 43 O.S. Sect. 139.1(P).
11. Title 43 O.S. Sect. 139.1(D).
12. Title 43 O.S. Sect. 139.1(E)(2).
13. Title 43 O.S. Sect. 139.1(E)(4).
14. Title 43 O.S. Sect. 139.1(R).
15. Sample interrogatory: State each and every license, permit, certificate and registration issued to you by the state (including, but not limited to professions, driving, recreation, etc) and for each state the issuance number and the state entity that has issued it.

ABOUT THE AUTHOR



Michelle C. Harrington is a solo practitioner whose practice is restricted to family law and guardian *ad litem* representation. She received her J.D. from OU in 1992. Ms. Harrington has been an adjunct professor at OCU School of Law since 1999 teaching family law and related courses. She is the author of *Oklahoma Family Law Direct and Cross Examination*.



Calculating Child Support for Military Parents

By Linda Monroe and Amy E. Wilson

“These are men and women who have taken great risks and made huge sacrifices to defend our country. They have left their families, traveled to far-off lands, and put their lives on the line to protect ours. As President Obama has said many times, taking care of our troops and their families is one of our country’s most sacred responsibilities.”

– Secretary Kathleen Sebelius

Calculating child support for a member of the military can present certain challenges for practitioners who are not accustomed to reviewing military pay statements and other federal documents. However, the process itself is no more complicated than calculating child support for any family, as the same statutory guidelines apply to servicemembers and civilians alike. The bulk of the work in setting child support for military parents lies in interpreting the “Leave and Earnings Statement” issued by the Defense Finance and Accounting Service to all servicemembers.

DETERMINING INCOME PER THE GUIDELINES STATUTES

Child support is computed by determining the gross income of both parents and then combining the income.¹ 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 trick with the military case, then, is simply to use the Leave and Earnings Statement provided to determine the income of the servicemember parent.

The guidelines statutes do not specifically address servicemembers as a category. Instead,

certain types of military income are specifically included as a parent’s income for child support purposes. Additionally, some types of allowances received by servicemembers must be included in the parent’s income.

For child support purposes, “gross income” includes “earned and passive income from any source, except as excluded....”² The matter of determining income is discretionary with the court, which can choose between several methods. The court should use

the most equitable of: a. all actual monthly income described in this section, plus such overtime and supplemental income as the court deems equitable, b. the average of the gross monthly income for the time actually employed during the previous three (3) years, c. the minimum wage paid for a forty-hour week, or d. gross monthly income imputed as set forth in subsection D of this section.

Determining which method to use for a servicemember parent is subject to similar considerations as any other case. Is the servicemember at the same pay rank or grade as in previous years? Is it more accurate to look at a three-year time period and arrive at an average, or has there been a duty and pay grade change that would

support using only the most current income? It is important to ensure that the information provided by the servicemember parent is complete enough to assist the court in making the determination.

The child support guidelines require the use of the parents' gross income to calculate child support. Included in the definition of gross income is "military pay, including hostile fire or imminent danger pay, combat pay, family separation pay or hardship duty location pay."³

In addition to gross income, the statute also states certain "fringe benefits" received by a parent "shall be counted as income if they significantly reduce personal living expenses."⁴ This section specifically states that "basic allowance for housing, basic allowance for subsistence, and variable housing allowances for service members are considered income for the purposes of determining child support."⁵

CHANGES TO THE GUIDELINES AND PREVIOUS CASE LAW

The guidelines statutes were amended effective July 1, 2009. It was during this amendment cycle that the above language regarding military pay and fringe benefits was added to the statute. Prior to the statutory change, the Oklahoma Court of Appeals ruled that certain allowances, such as free housing or a basic housing allowance, should be included in a parent's income. In fact, the court determined, the matter of including such allowances was not discretionary with the court, but rather was mandatory under the statute.

In *Hees v. Hees*,⁶ the father was a servicemember who lived on base. Because he lived on base, he did not receive the housing allowance amount of \$688 per month. The trial court ruled that the allowance amount should not be included in father's income, presumably because he did not actually receive that amount. Mother argued the amount should be included, as it met the statutory requirements that any in-kind payments a parent receives from his employer that are "significant and reduce[s] personal living expenses" must be included as

income.⁷ On appeal, father argued that the trial court had discretion not to include the housing amount in his income.

The Court of Civil Appeals agreed with mother's interpretation of the statute. First, they found that the inclusion of language stating "in-kind payments received by a parent in the course of employment... shall be counted as income if they are significant and reduce personal living expenses" was a non-discretionary requirement for the trial court to include those "payments" as income.

Because neither party had objected to the amounts of monthly income and the amount of housing allowance father would have received if he lived off base, COCA reversed the trial court's ruling and ordered that the child support be recalculated to include the allowance amount as part of father's monthly income.

The 2009 amendment to the statute retained the non-discretionary directive that fringe benefits, specifically including military allowances, be included as income for child support purposes.

Several other jurisdictions allow the use of military benefits and allowances as income for child support purposes.⁸

READING THE LEAVE AND EARNINGS STATEMENT

One advantage to determining income for a servicemember parent is the standardization of the federal payment information received by any member of the military. The leave and earnings statement contains all of the military income received by the servicemember and is generally a "one-stop shopping" point.

Getting the statement should be a relatively simple matter. The servicemember can request a paper copy each month, but the majority receive the statement electronically, via the MyPay system from the Defense Finance and Accounting Service. It is important to be sure the statement is a month-end statement, rather than a mid-month statement. Many service-

“ In addition to gross income, the statute also states certain ‘fringe benefits’ received by a parent ‘shall be counted as income if they significantly reduce personal living expenses.’ ”

members are paid twice per month, but the total earnings and allowances for the month will only be reflected on the month-end statement. Similarly, it is good practice to request a statement from Dec. 31 of each year for which child support is calculated, to ensure an accurate annual income, or to arrive at a three-year average pay amount.

Reading the statement itself, however, can be tricky, as it contains several types of payments, deductions, allotments and explanatory remarks. The 2011 Military Pay Overview posted to the website www.military.com reports, "Currently, the military compensation system has over 70 separate types of pay and allowances...."⁹

The pertinent portion of the leave and earnings statement that provides gross income information for child support purposes is the "entitlements" section. This section will list all types of pay and allowances paid to the servicemember. There is room to list 15 entitlements in this area. If there are more than 15, they will print in the "remarks" section at the bottom of the statement.

As seen above, all types of pay and allowances are generally included in the parent's income for child support purposes. It is a simple matter to average the total "entitlements" from this section and average by the appropriate number of months to arrive at an average monthly income. Alternatively, if the servicemember has a recent change in duty or pay grade, the most recent leave and earnings statement can be used.

MEDICAL SUPPORT FOR CHILDREN OF SERVICEMEMBERS

"The actual health insurance premium for the child shall be allocated between the parents in the same proportion as their adjusted gross income and shall be added to the base child support obligation." Servicemembers and their families receive medical care through the Tricare health care program. Tricare premiums are reflected under "allotments" on the leave and earnings statement. There is no premium cost for active duty members and their families. There are premium costs for retired servicemembers under age 65 and National Guard and Reserve members.

If you are using standard language provided by Oklahoma Child Support Services, Tricare is considered "alternative coverage" and should be indicated using the second option. If Child

Support Services has an open case, the servicemember or other person eligible for Tricare should be listed within the order so that Child Support Services can verify coverage. For examples of standard medical support language, see the sample child support order on the state Department of Human Services website at www.okbar.org/s/j93b0.

Children who are eligible and enrolled in Tricare are considered to be covered by insurance under the statute. Therefore, no cash medical order in lieu of insurance is necessary. This is true even if the children are covered by SoonerCare. If Oklahoma Child Support Services has an open case, proof of Tricare enrollment should be provided to the local office servicing the case.

COLLECTING CHILD SUPPORT FROM A SERVICEMEMBER

This article focuses on methods of setting child support when a parent is a servicemember. For information about working with the military to collect child support, the federal Department of Health and Human Services Administration for Children and Families, Office of Child Support Enforcement has prepared a resource guide.¹¹

RESOURCES

For good general information on the leave and earning statement, see the following websites, in addition to the websites included above: www.marriedtothearmy.com and www.militarymoneymight.com.

For information on federal Department of Health and Human Services services and initiatives for military families, see: www.acf.hhs.gov.

CONCLUSION

Private practitioners and Oklahoma Child Support Services alike understand the importance of setting accurate child support orders based on the best information available about the resources a family has to support its children. Using the best information possible will result in an accurate child support order that honors the needs of the family and increases the cooperation between the parents. Accurate child support orders help ensure that the child will have a reliable source of support and a good relationship with both parents. A reasonable child support order is particularly important in cases where one parent is physically absent due to deployment in the military. Our

servicemembers are especially deserving of the best our justice system has to offer. Thank you for offering your legal services to our country's heroes and their families.

1. 43 O.S. §118B
2. 43 O.S. 118B(A)(1)
3. 43 O.S. §118B(A)(2)(g)
4. 43 O.S. §118B(F)(1)
5. 43 O.S. §118B(F)(3)
6. 2003 OK CIV APP 103
7. 43 O.S. §118(E)(3)(e) (superseded version, revised effective July 1, 2009).
8. See, e.g., *Massey v. Evans*, 68 A.D.3d 79, 886 N.Y.S.2d 280, N.Y.A.D. 4 Dept.,2009; *Norman v. Norman*, 50 So.3d 1107, Ala.Civ.App.,2010; *Alexander v. Armstrong*, 415 Pa.Super. 263, 609 A.2d 183, Pa.Super.,1992, among others.
9. www.okbar.org/s/rind7, last viewed Oct. 10, 2011.
10. 43 O.S. §118F (H)(1).
11. See "Working with the Military as an Employer A Quick Guide" available at www.acf.hhs.gov/programs/cse/newhire/employer/publication/military_quick_guide.htm.

ABOUT THE AUTHORS



Linda Monroe is a managing attorney and regional administrator with Oklahoma Child Support Services, a division of the Department of Human Services. She is a graduate of the OU College of Law and was admitted to the OBA in 1983. She has 25 years experience with Oklahoma's child support program. She retired with 20 years service as a major in the U.S. Army.



Amy E. Wilson has been a state's attorney for Oklahoma Child Support Services since February 2001, currently serving as appellate and legal research counsel. She has presented numerous CLE and training workshops at state and regional child support conferences as well as for the private bar in Oklahoma. She is a past chairperson, secretary and CLE chair for the OBA Family Law Section. She is a 2000 graduate of the TU College of Law.



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The Oklahoma Bar Association Family Law Section seeks nominees for the following awards to be presented at its annual meeting on November 15, 2012.

Outstanding Family Law Attorney for 2012

Outstanding Family Law Judge for 2012

The Phil and Noel Tucker Outstanding Guardian Ad Litem Award for 2012

Outstanding Family Law Mediator for 2012

Nominees should have made significant contributions to the practice of family law in Oklahoma in 2012, or over an extended period of time. Please submit your nominations and a brief description of the reasons for your nomination by October 12, 2012, to: OBA Family Law Section, Nominations and Awards, c/o David A. Tracy, 1701 S. Boston Ave., Tulsa, Oklahoma 74119 (or by email to david.tracy@nwtlaw.com).

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GableGotwals Welcomes Diana Vermeire as an Of Counsel Attorney in the Oklahoma City Office

Diana has 12 years experience in the corporate and nonprofit sectors, including litigation; administrative, regulatory and legislative advocacy; policy analysis and management. She brings a unique skill to our clients in the area of compliance review. Diana has extensive experience in providing external reviews for companies which includes an analysis of workplace policies and procedures, identifying areas of exposure for potential litigation, and offering solutions that not only ensure compliance, but also the adoption of better workplace practices. She also has experience in Government Relations and representing clients in negotiations with policy makers to obtain resolutions that are best for all parties.

Welcome Diana!

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Shared Parenting in Oklahoma

What about Fathers?

*By Melissa DeLacerda, Kari Adamsons, Tammy Henderson
and Erinn Tucker*

Few have examined the influence of shared parenting on children and parents. The impact of shared parenting on fathering and the contributions of fathers remain a road less traveled in the literature. To support the healthy development of families and provide relevant research to legal professionals, we address these questions: a) what affects fathers' well-being post-divorce, b) how do fathers affect children's well-being, and c) what hinders fathers' involvement? Given the lack of literature on shared parenting, the literature on joint custody is used as a proxy for shared parenting, explaining the pros and cons of joint custody followed by some recommendations for promoting father involvement.

WHAT IS OKLAHOMA'S SHARED PARENTING LAW?

The first shared parenting statute was enacted in 1999 and included an explanation of Oklahoma's policy as to shared parenting:

It is the policy of this State to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage.¹

The first version of the legislation required the court to provide substantially equal access to the minor children to both parties at the temporary order hearing. In 2009 the Legislature amended the earlier statute to make the award of shared parenting permissive by the court.²

There are three requirements that must be met before the court can order shared parenting. The first requirement is that shared parenting must be requested by either parent. The second requirement is that the parties must agree to cooperate. Lastly, the court must find that domestic violence, stalking or harassing behaviors are not present in the parental relationship.

There is no legislative guidance as to how the parents are to share the children. Some trial courts are alternating the children on a seven-day basis while other trial courts use a shorter alternation.

One division of the Court of Civil Appeals has analyzed the statutory construction of 43 O.S. §110.1. In its analysis, the court opined that the Legislature clearly intended to provide both parents substantially equal access to the children if appropriate. The legislation was also interpreted

by the court to apply only to the temporary order phase of the case.³

Shared parenting does not eliminate child support but can change the child support under the child support guidelines when the shared parenting allows for each parent to have more than 120 overnights with the child or children. This reduction in child support acknowledges that both parents incur child-rearing expenses including housing, food, transportation, educational expenses, clothing and entertainment.⁴ The parenting time adjustment under the child support guidelines is not mandatory but is presumptive, allowing the presumption to be rebutted by one of the parties.

WHAT HAPPENS TO CHILDREN POST-DIVORCE?

Research shows that divorce and parental separation places both children and adults at considerable risk for negative outcomes.⁵ Regardless of age, children from divorced families typically suffer a number of disadvantages. Compared with children from non-divorced families, children with divorced parents:

- Fare worse academically
- Demonstrate more conduct and behavior problems
- Have poorer parent-child relationships
- Have lower psychological well-being and adjustment

These differences have continued to grow over time, as the developmental gap between children from divorced and married families is wider now than it was in the 1980s.⁶

HOW DOES DIVORCE AFFECT FATHERS?

Divorce exacts a significant toll on both the physical and psychological health of fathers.⁷ Divorcing or divorced fathers often experience:

- High levels of distress, such as anxiety, emotionality, irritability, impulsivity
- A pervasive sense of loss
- Depression
- Increased risk for suicide⁸

The combination of unresolved psychological distress and unaddressed structural constraints of the divorce decree sometimes leads to fathers' disengagement from their children. Fathers' disengagement often contributes even

further to a chronic sense of grief, loss and sadness for fathers.⁹

HOW DO FATHERS AFFECT CHILDREN'S WELL-BEING?

Although many factors influence children's well-being, father-child relationships are particularly important to a child's adjustment after divorce.¹⁰ When children do not live with their fathers for a substantial amount of time after divorce, their relationships with their fathers suffer,¹¹ and children's post-divorce relationships with their fathers contribute to children's well-being as young adults.¹² Children's emotional well-being declines when problems are reported in the father-child relationship.¹³

The economic impact of divorce also poses challenges to the well-being of children. Fathers who are involved with their children are more likely to pay their court-ordered child support.¹⁴ When fathers pay child support, it not only benefits children through access to greater economic resources, but it also is associated with better parenting by custodial mothers¹⁵ and benefits to children's academic achievement.¹⁶

WHAT HINDERS THE INVOLVEMENT OF FATHERS?

A number of potential barriers exist to fathers' involvement with their children following divorce. Some factors that can hinder men's involvement include:

- Living farther from their children
- Parental remarriage (mothers' or fathers')
- Economic disadvantage
- Mothers' interference with visitation¹⁷
- Difficulty establishing a cooperative co-parenting relationship between ex-spouses¹⁸
- Unresolved legal issues pertaining to child custody, access and visitation¹⁹
- A lack of support and role models

Many of these issues contribute to a lack of role clarity for fathers, which also hinders involvement. Fathers may not know if they are supposed/allowed to play a pivotal role in their children's lives following divorce, which discourages them from taking an active role in raising and parenting their children.²⁰ Finally, fathers' chronic grief and emotional distress due to limited legal and physical access to their

children pose continuing challenges to father involvement.²¹

The first two years following separation and divorce are crucial to establishing ongoing routines and patterns of behavior, setting the stage for future father-child relationships.²² Therefore, the post-divorce transition is a critical time for establishing shared parenting arrangements that seek to build or maintain fathers' relationships with their children. As noted, research on post-divorce father involvement has demonstrated that separation and divorce limit the amount of time fathers spend with their children, but less is known about the subjective meaning of this reduction in fathers' parenting time, or how it affects the dynamics of actual time fathers spend with children. Sadly, some researchers have suggested that the fathers who were most involved with and attached to their children before divorce were the most likely to experience acute negative emotions in response to the divorce; therefore, they also were the most likely to withdraw from their children after the divorce.²³

The actual amount of time that fathers are allowed to spend with their children is highly salient in terms of nonresident fathers' views of themselves and their behaviors as parents. Fathers who disengaged from their children reported an inability to adapt to the constraints of the "visiting" relationship. Disengaged fathers found it difficult to construct a new role as a "part-time" parent. They reported feeling stymied in their efforts to be influential in their children's growth, development, values and lifestyles, and they were dissatisfied with the brevity, artificiality, and superficiality of their visits with the children.²⁴

The issue of role transition is important for fathers, as fathers who have a clearer sense of their post-divorce father role, who are more satisfied with that role, and who experience greater encouragement and support from others during the post-divorce transition, report greater role clarity and satisfaction. Role clarity also resulted in fathers experiencing higher levels of well-being. All three factors resulted in greater father involvement.²⁵

JOINT CUSTODY AS A PROXY FOR SHARED PARENTING

Joint custody is the sharing of the legal care and decision making by both parents post divorce.²⁶ The Supreme Court has held that joint custody "...requires parents who: 1) have

an ability to communicate with each other even though they are no longer married, 2) are mature enough to put aside their own differences and 3) work together and engage in joint discussions with each other and make joint decisions regarding the best interests of their children."²⁷ Joint custody is associated with both greater father involvement and benefits to children as long as there are not high levels of parental conflict.²⁸ Children fare better when both parents are highly involved in their lives and they tend to have better relationships with both parents in such cases. Joint custody does not compromise the mother-child relationship but can, in fact, improve it.

As noted, more time spent living with fathers post-divorce is associated with children having better father-child relationships in adulthood as well as better health in young adulthood.²⁹ Joint custody also is associated with teens having better emotional, behavioral and academic adjustment.³⁰

Importantly, research shows that even when joint custody isn't voluntary (i.e., the court orders joint custody in spite of mothers not supporting it), joint custody awards still result in increases in father involvement.³¹ There is a highly symbolic element to shared parenting and joint custody for fathers; noncustodial fathers feel the "visitor" label keenly and miss being able to have meaningful interactions with their children. Mothers also are less burdened in joint custody arrangements because they do not have to disproportionately bear the responsibilities of childrearing, which benefits their post-divorce adjustment as well.

All in all, joint custody arrangements have potential benefits for all parties involved — mothers, fathers and children. The caveat remains that parents must limit interparental conflict in order to fully benefit themselves and their children; continued high levels of parental conflict are extremely detrimental to everyone, but particularly to children, as they frequently get caught in the middle. It also should be noted, however, that sole custody arrangements do not solve this problem; they merely create a different set of negative outcomes due to one parent being shut out of the child's life.

WHAT ROLE MAY LEGAL PROFESSIONALS PLAY IN ENHANCING FATHER INVOLVEMENT?

Glenn Stone suggested that court systems play a particularly important role in being able

“... more time spent living with fathers post-divorce is associated with children having better father-child relationships in adulthood as well as better health in young adulthood.”

to identify and reduce sources of role ambiguity for divorcing fathers, especially when it comes to establishing patterns of shared parenting time that encourage fathers' post-divorce involvement in their children's lives.³² Here are some concrete steps are offered to enhance the involvement of fathers following divorce, thereby promoting child and family well-being:

- **Promote shared parenting as the default parenting arrangement.** Unless legitimate safety concerns exist, children need quality relationships with *both* parents following parental divorce, and such relationships require significant amounts of time spent with both parents.
- **Increase the amount of time fathers can spend with their children.** By awarding fathers more equal time with their children, legal professionals give them the time and space to be able to effectively parent their children, rather than being relegated to a visiting or recreational role. The award of shared time and access also sends the message to fathers, mothers and children that fathers continue to be an important and valued part of their children's lives, not merely an afterthought or a support payment.
- **Specify the shared parenting arrangement in as much detail as possible (i.e., parenting time, visitation, legal custody, etc.)** including specificity about the father's role in decision-making and parenting. This also increases and solidifies fathers' presence and roles in their children's lives. As noted, when fathers know what is expected of them as parents, they are more likely to

be involved with their children and live up to those expectations.

CONCLUSION

The Oklahoma Legislature enacted a shared parenting law to support positive parent/child relationships in cases of divorce or parental separation. Still it appears that joint custody and the use of shared parenting continue to be the road less travelled, but most needed to serve the best interests of the child, to promote family well being, and to protect the rights of parents. Overall, the court system needs to send a consistent message to divorcing mothers and fathers that “fathers matter” to their children after divorce and that the expectation is and will be that the rights of both parents to raise their children will be protected. Once this expectation and norm is made clear, the task for parents, then, changes from an adversarial one of trying to eliminate or reduce the involvement of the other parent, to a collaborative one of planning how to successfully co-parent their children, something that truly is in the best interests of the children.

Authors' note: The authors would like to thank Judge Michael Stano for his critique of the current manuscript.

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2. 43 O.S. §110.1 (2009).

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22. *Supra* note 11.

23. *Supra* note 16.

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31. *Supra* note 18.

32. *Supra* note 18.

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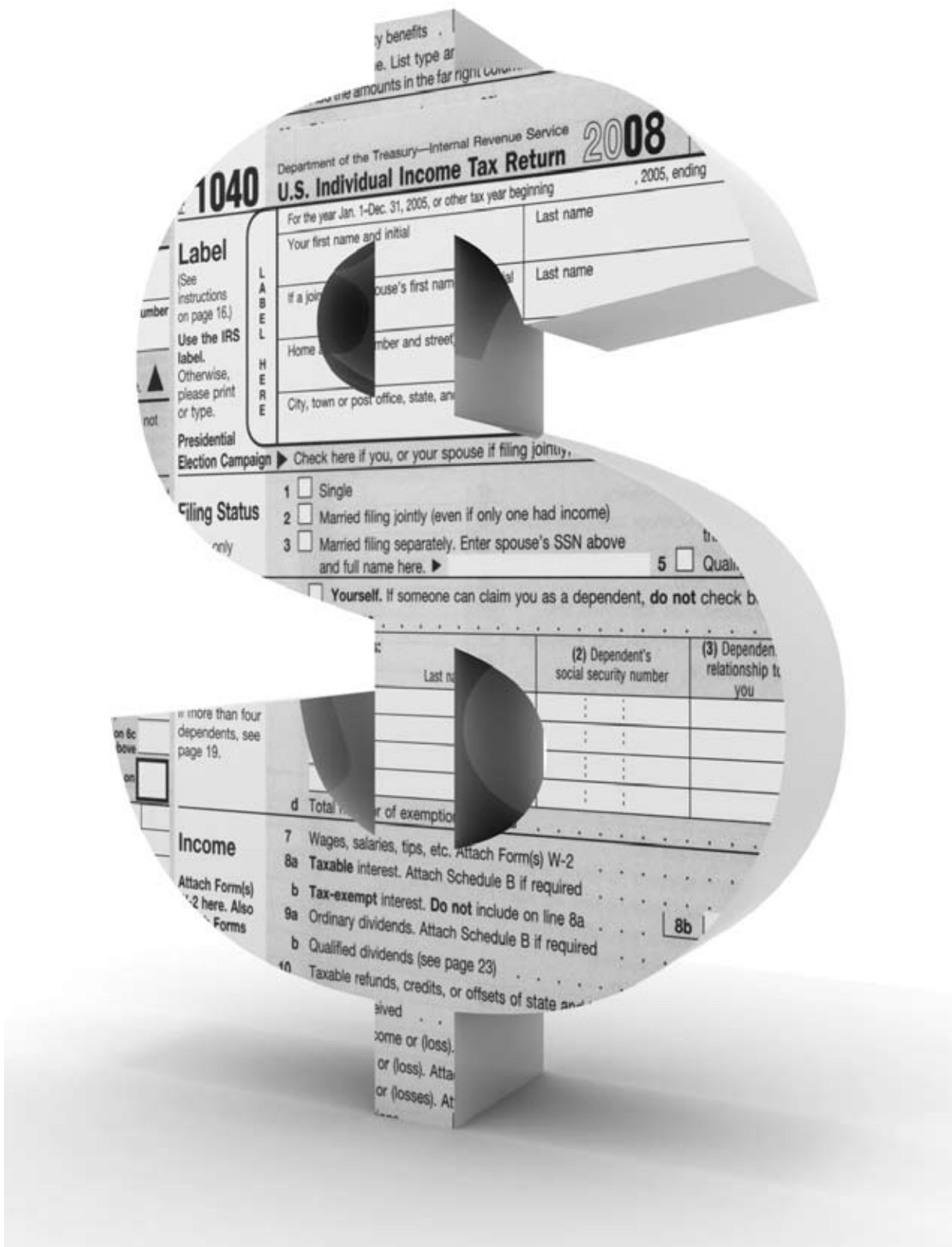
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Child Tax Exemptions Related to a Decree of Dissolution of Marriage

By M. Shane Henry

If you make any money, the government shoves you in the creek once a year with it in your pockets, and all that don't get wet you can keep.

– Will Rogers

A divorce action may involve many issues – from custody and visitation to alimony, property division, business valuation and taxes – making it important that an attorney understand each area in order to properly advise his or her client. The last thing a family law practitioner wants to receive is a phone call, after entry of a decree, from a client reporting discovery of an error or failure to address an issue.

When the parties have a minor child or children, it is important to include a provision in the decree of dissolution for the income tax exemption for a minor dependant. Otherwise, the exemption may become a “land grab” issue: The first party to file his or her taxes and claim the dependency exemption initially receives the benefit, leaving the opposing party exposed to the possibility of having their tax return rejected and needing to seek relief from the Internal Revenue Service (IRS) and the court. The best practice is to provide language in the decree designating which party shall receive the exemption and when each party shall receive it. The decree should also require the party not receiving the exemption to timely execute the documents needed to effectuate the exemption upon being provided such documentation by the requesting party.

This article provides a general analysis and review of issues relating to the tax exemption for a minor dependant in Oklahoma. Tax issues involve both Oklahoma law and federal regulations. As always, one is well advised to research

issues related to specific situations, as exceptions may apply.

IRS REQUIREMENTS AND STATE COURT JURISDICTION TO ALLOCATE TAX EXEMPTIONS

The IRS allows a party to claim a dependency exemption for a qualifying child or other relative. For 2011, the amount was \$3,700 for each exemption;¹ for 2012, the amount increased to \$3,800 per exemption.² One exemption is allowed for each person who can be claimed as a dependant.

In order to qualify for a dependency exemption, the child must meet the following tests: “relationship,” “age,” “residency,” “support” and “joint return.”³ The “relationship” test requires the child to be the claiming taxpayer’s son, daughter, stepchild, foster child or a descendant of any of them. Adopted children also qualify as long as the taxpayer is a U.S. citizen and the child has lived with the party as a member of his or her household all year.⁴ The “age” test requires the child to be under age 19 at the end of the year, a full-time student under age 24 at the end of the year, or permanently and totally disabled at any time during the year regardless of age. The “residency” test requires the child to have lived with the party for more than half of the year. The standard gauge is the number of overnights, though there are exceptions, such as for parents who work at night.⁵ The “support” test requires that the child must not have provided more than half of his or her own support

during the year. Finally, the “joint return” test requires that the child must not be filing a joint return for the year (unless that joint return is filed only as a claim for refund.)⁶

Although a minor child may qualify as an exemption for both parties, the IRS allows only one party to claim the dependency exemption.⁷ First preference goes to the party with whom the child has lived for the longer period of time during the year. In cases where both parties had equal time, the IRS will treat the child as the qualifying child of the party who had the higher adjusted gross income for the year.⁸

Generally, the party eligible to claim the dependency exemption for a minor child receives the following benefits: the exemption for the child; the child tax credit; head of household filing status; the credit for child and dependant care expenses; and the exclusion from income for dependant care benefits and the earned income credit. Though beyond the scope of this article, there also are specific instances in which the benefits are divided between the parties. The practitioner should consult a tax professional when the minor child lived with one or both parent(s) and a relative during the year, when the minor child lived with both parents for over one-half of the year and then the parties separated, or when the minor child lived with both parents who were unmarried for over one-half of the year.

It is common for parties to agree as to the dependency exemption, with one party receiving the benefit each year or with the parties rotating the benefit by “odd” or “even” years. The IRS provides a mechanism for these situations in that the custodial parent can execute IRS Form 8332, which provides a release of claim to an exemption and assigns it to the noncustodial parent. The noncustodial parent will attach the executed IRS Form 8332 to his or her tax return.

Though the IRS has specific guidelines relating to dependency exemptions, state courts have the power to allocate the child dependency exemption in Oklahoma.⁹ In 1991, the Court of Civil Appeals held “the trial court has the power to allocate the exemptions and the power to order the custodial parent to execute the exemption waiver to be attached to the noncustodial parent’s tax return.”¹⁰ In 1992, the court held an Oklahoma district court erred when it refused to order a custodial parent to execute the declaration for the noncustodial

“It is common for parties to agree as to the dependency exemption, with one party receiving the benefit each year or with the parties rotating the benefit by ‘odd’ or ‘even’ years.”

parent to claim the tax exemption under 26 U.S.C. §152(e)(2).¹¹

NONCOMPLIANCE

Where a decree has been entered specifically designating the party entitled to claim the dependency exemption and a party does not comply, the opposing party has three options. The first option is to try to reach an agreement. This can be accomplished by the party wrongfully taking the dependency exemption either amending his or her tax return, or by having that party directly reimbursing the opposing party for the net benefit he or she was to receive (plus adjustment for tax consequences of the reimbursement payment on the following year’s tax return).

The second option is to seek relief from the district court in a contempt action. Title 43 O.S. §111 provides:

Any order pertaining to the division of property pursuant to a divorce or separate maintenance action, if willfully disobeyed, may be enforced as an indirect contempt of court.

A contempt citation to enforce the allocation relating to the tax dependency exemption in a divorce decree is appropriate when it is shown that the offending party has willfully disobeyed an order of the court.¹² Civil contempt generally is the willful violation of an order to do something ordered by the court for the benefit of the opposing party.¹³ Failure by a party to execute the only form allowed by law to effectuate the court’s order “comes within the rubric of resistance by a person to the lawful order or process of the Court for failure to comply to be a contempt.”¹⁴

The third option is to seek relief from the IRS. The opposing party should file his or her tax return by mail, claiming the appropriate dependency exemption and enclosing a file-stamped copy of the dissolution decree. The IRS will then send both parties a form with requested information that must be completed and returned. Upon receipt, the IRS will make a decision as to which party shall receive the dependency exemption. This process generally takes eight weeks but there are instances where it takes much longer. It is important to make your client aware that this option usually triggers an audit of one or both of the parties' tax returns.

CONCLUSION

Even the most carefully drafted decrees provide ample fodder for dispute between parties who loathe each other. The tax dependency exemption is no exception, but sometimes the mention by counsel of possible contempt proceedings and associated attorney's fees, along with an IRS audit, will cause reasonable minds to prevail. It is hoped that the information in this article provides the information needed to diligently protect a client's interests.

1. See IRS Publication 501 (2011).
2. IRS Release, IR-2011-104 (Oct. 20, 2011).
3. IRS Publication 501 (2011), at page 11.

4. *Id.*

5. *Id.* at page 13. If, due to a parent's nighttime work schedule, a child lives for a greater number of days but not nights with the parent who works at night, that parent is treated as the custodial parent. On a school day, the child is treated as living at the primary residence registered with the school.

6. *Id.* at page 12.

7. *Id.* at page 14.

8. *Id.*

9. *Lamb vs. Lamb*, 1992 OK CIV APP 119, 848 P.2d 582.

10. *Wilson vs. Wilson*, 1991 OK CIV APP 79, 831 P.2d 1. The court relied on a 1990 *Oklahoma Bar Journal* article by C. Michael Zacharias, "IRS Form 8332: Can Oklahoma Judges Order Exemption Claim Released?" 61 O.B.J. 2179 (1990), which thoroughly analyzes the issue of whether an Oklahoma state court has jurisdiction to decide which party is to receive a tax dependency exemption.

11. *Light vs. Light*, 1992 OK CIV APP 11, 828 P.2d 447.

12. *McCrary vs. McCrary*, 1986 OK 49, 723 P.2d 268.

13. *Whillock vs. Whillock*, 550 P.2d 558 (Okla. 1976).

14. *Lamb*, 1992 OK CIV APP 119, 848 P.2d at 583.

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NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

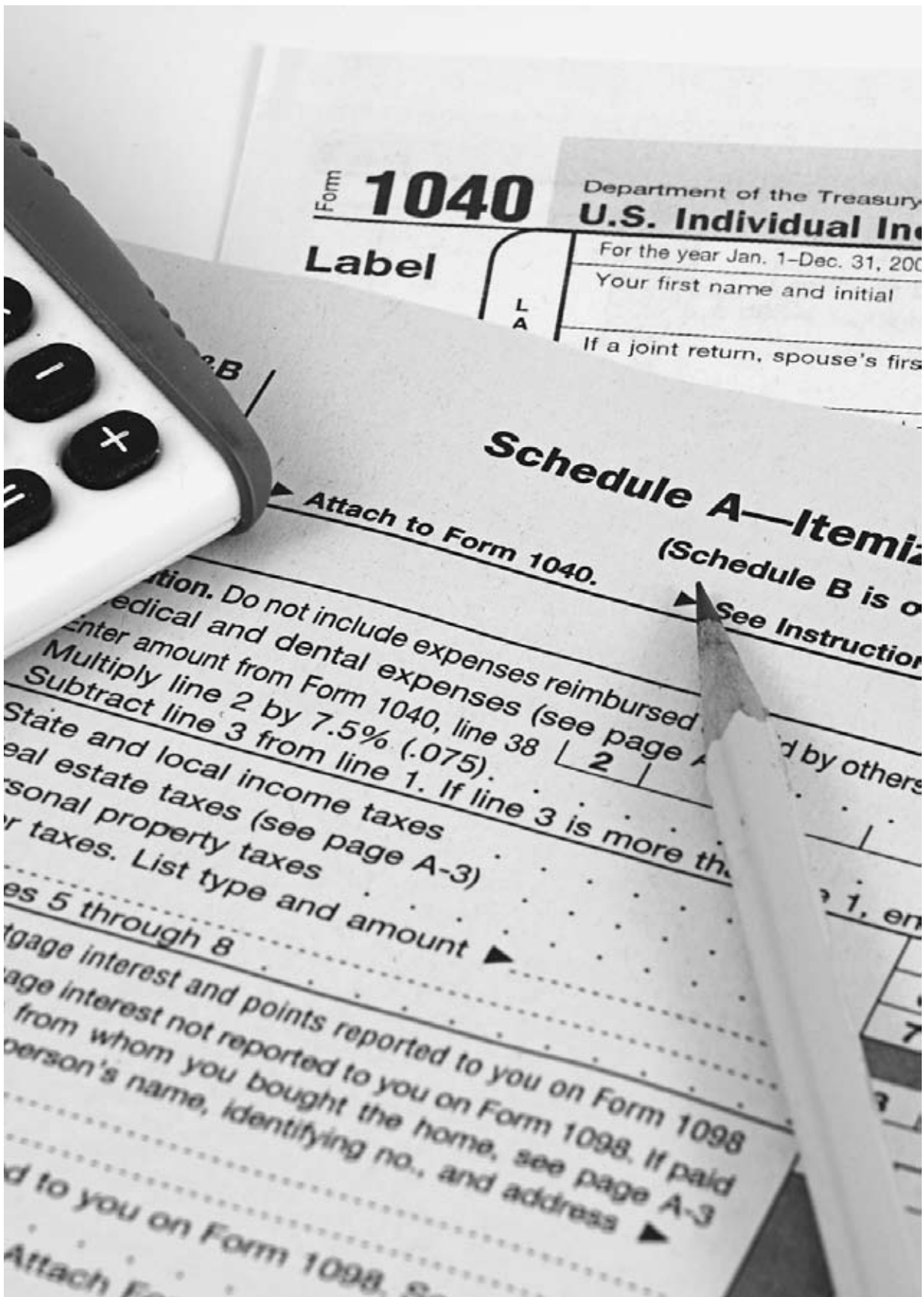
**District Judge
Twenty-fifth Judicial District, Office 1
Atoka and Coal Counties**

This vacancy is due to the retirement of the Honorable Richard Branam effective August 1, 2012.

To be appointed to the office of District Judge, one must be a registered voter of the respective judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointees shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net under the link to Judicial Nominating Commission, or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 N. Lincoln, Suite 3, Oklahoma City, Oklahoma 73105, (405) 556-9862. Applications must be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, August 31, 2012. If applications are mailed, they must be postmarked by midnight, August 31, 2012.**

Jim Loftis, Chairman
Oklahoma Judicial Nominating Commission



One Less Argument

By Steven L. Holloway

Even after the Legislature attempted to reduce the issues available for argument in domestic relations cases by adopting the Oklahoma Child Support Guidelines, plenty remain. One of those pertains to the award of dependant children to one party or the other for state and federal income tax deduction purposes.¹ If there is one child, both parties want to claim that child. If there are two children, both parties want to claim both children, or in some situations, a proposal is made to split the deductions so that each party claims one. If there are three or more children, the fuss escalates because the consequences and benefits escalate.

In some cases, a suggestion is made that the parties alternate the deduction(s) in some manner from one year to the next. But, in each instance, there's a winner and a loser, which does not bode well for a peaceful resolution of the case. I propose a solution that will utilize our role as a counselor instead of our role as an adversary on behalf of our client. We all are aware that a substantial portion of the benefit of the federal and state income tax deduction(s) for a child(ren) is wasted if claimed on the tax returns of the parent with substantially lower income than the other.²

In other words, the tax deduction benefit may not be completely wasted, but it is not fully utilized by the divorced parties.³ Even though the parties are divorced, they are still joined financially so long as there are minor children.

Regarding the dependant tax deduction(s), our goal should be to minimize the amount sent to the United States Treasury or to the Oklahoma Tax Commission and to maximize the amount available to the divorced parties so that the support, education and welfare of the children is enhanced as much as possible. This can be done even though the parents now reside in separate households.

Consider awarding the deduction for a dependant child(ren) to the parent with higher income while mandating that the higher-earning parent compensate the lower-income parent the amount of negative tax consequence sustained by that lower-earning parent, whether the negative tax consequence is a reduced refund, an increase to tax liability or a combination thereof.⁴ This can be accomplished by an order of the court compelling the lower-income parent to sign and deliver an appropriate IRS Form 8332 to the higher-income parent *only after* the higher-income parent has made the appropriate recompense. At that point, the higher-income parent can utilize the IRS Form 8332 and file his or her federal and state income tax return. A deadline can be incorporated such as Jan. 15 for early filers but certainly no later than April 1. Obviously, this scenario contemplates the higher-income parent as the noncustodial parent (less than 50 percent of calendar year).⁵ The lower-income parent, when preparing his or her taxes, will do so without claiming the child(ren) to establish a baseline consequence. Then the lower-income parent can quickly, easily and inexpensively calculate his or her tax consequence claiming the child(ren).⁶ The difference between those two amounts is the "nega-

tive tax consequence” sustained by the lower-income parent. At that point, the lower-income parent should notify the higher-income parent of the negative tax consequence, whereupon the higher-income parent can compensate accordingly and thereafter realize a substantially larger “net” refund (in most cases) than would be the case if one or more deductions were unavailable to the higher-income parent. The lower-income parent has no complaint because he or she hasn’t lost anything. The compensation from the higher-income parent makes the lower-income parent whole. This is an objective WIN-WIN result financially and in most cases takes argument entirely out of the issue.

It is not uncommon to review proposed decrees awarding the tax deduction(s) to the higher-income, noncustodial parent. An Oklahoma state court cannot effectively award the tax deduction(s) to a noncustodial parent and compel the taxing authorities to recognize the award, as that is not within the jurisdiction of our Oklahoma courts. However, doing so in conjunction with provision for compensation of the lower-income parent in the amount of that parent’s negative tax consequence should give effect to the court’s order, since the higher-income parent would be foolish not to compensate the lower-income parent an amount that would result in a substantially higher net refund (or positive tax consequence) to the higher-income parent claiming all of the dependant deductions.

The lower-income parent is not harmed by awarding the tax deduction(s) to the higher-income parent in the decree of dissolution, since the higher-income parent, if one and the same as the noncustodial parent, still must attach IRS Form 8332 to his or her returns before the taxing authorities will recognize the deduction(s) on the return.

I recognize that there may still be negotiation or litigation if the incomes of both parents are substantially the same. While that does occur, it is not the case in the majority of domestic filings.

I have not encountered another attorney who has utilized this concept. I have difficulty believing it hasn’t occurred to other members of the bar. In any case, I recently received correspondence from a colleague suggesting that his client (noncustodial father/higher-income

parent) claim the child every other year. I responded as follows:

“There is one small issue regarding the tax deductions which I think makes good sense. Each year when my client has her taxes figured without claiming the child as a deduction, she will ask her tax preparer to figure the tax consequences alternatively claiming the child and compare the results. Your client is likely to realize a significant tax refund each year, from which he would pay my client an amount equal to the negative consequence of her not claiming the child. That is to say, if her refund is \$200.00 not claiming the child but would be \$500.00 claiming the child, your client would reimburse her the difference of \$300.00, while retaining the large remaining net tax refund. For example, claiming the child, your client might get a refund of \$4,500.00 and would pay her \$300.00, netting \$4,200.00. That’s a small price to pay for our concession of the tax deduction to your client each and every year, instead of every other year as was your initial suggestion. This payment to my client must be made before she will deliver IRS Form 8332 to him, at which time he can file his tax returns.”

I have been able to utilize the services of

“It is not uncommon to review proposed decrees awarding the tax deduction(s) to the higher-income, noncustodial parent.”

bookkeepers, public accountants and CPAs to prepare a simple one-page analysis comparing the two alternatives for the lower-income parent, which is then provided to the higher-income parent, who seldom fails to recognize the logic of the solution. The written analysis provides a basis to explain the benefits of such an arrangement to clients with one child, an even number of children or an odd number of children exceeding one.

I have utilized this methodology successfully on multiple occasions without objection from the bench or bar. Based on my experience, I believe that this kind of arrangement would

benefit everyone involved, not only by maximizing tax benefits (and thus the funds available to divorced parents to support their children), but by leaving one less argument to resolve in an already stressful situation.

1. Of the 32 jurisdictions addressing the issue of whether courts have the power to allocate income tax dependency exemptions, a majority — including Oklahoma — have held that the trial court has that inherent discretionary power. *See, e.g., Wilson v. Wilson*, 831 P.2d 1, 2 (Okla. Ct. App. 1991); *Nichols v. Tedder*, 547 So.2d 766 (Miss. 1989); *Cross v. Cross*, 363 S.E.2d 449 (W. Va. 1987); *In re Baker*, 16 FLR 1184 (Ind. App. 1990); *Motes v. Motes*, 786 P.2d 232 (Utah App. 1989).

2. Ostensibly, this is the reason that federal law has begun to contemplate this situation by providing a special rule that the higher-earning parent should claim the child; however, under federal law, that requirement applies only in instances of “perfect” 50/50 custody. 26 U.S.C. §152(c) (4)(A)(ii), (B)(ii). This so-called special rule expressly applies when two or more people can claim the same qualifying child. 26 U.S.C. §152(c)(4). This occurs when two parents share exactly equal 50/50 custody; in that instance, the federal rule provides that the child “shall” be treated as the qualifying child of the taxpayer “with the highest adjusted gross income.” 26 U.S.C. §152(c)(4)(B)(ii).

3. The purpose of this article is not to examine every possible situation resulting from various theoretical permutations caused by joint custody by parents with disparate earnings, but to recognize that the current statutory scheme allows situations to occur in which the benefit of the tax deduction would be lost, for example, where parents share joint custody in an unequal arrangement in which the higher-earning parent has 49 percent or less custody. These situations, in which the overall benefit of the tax deduction is lost due to the parties’ disparate earnings levels and the deduction(s) being claimed by the lower-earning parent resulting in a lower overall financial benefit, are the ones that this article seeks to address.

4. Federal law requires that exemptions for dependant children will be taken by the custodial parent. 26 U.S.C. §152(c)(1)(B) (defining “qualifying child” as having “the same principal place of abode as the taxpayer for more than one-half of [the] taxable year”).

Notwithstanding this provision, Oklahoma state courts consistently have maintained their equitable power to award dependency exemptions to either parent. *Decker v. Davis*, 162 P.3d 956, 959 (Okla. Civ. App. 2007) (noting that the financial impact of allocating exemption to one party or the other should be carefully considered and equities carefully balanced); *In re Adoption of M.C.D.*, 42 P.3d 873, 884 (Okla. Civ. App. 2001) (trial court has authority to allocate dependant exemptions and to order custodial parent to sign written declaration disclaiming right to exemption if trial court finds that noncustodial parent should claim the exemption); *Wilson v. Wilson*, 1991 OK Civ App 79, 831 P.2d 1; *White v. Polson*, 2001 OK Civ App 88, 27 P.3d 488, 491 (same).

Oklahoma law merely applies federal law regarding tax dependency exemptions, unlike some other states that articulate additional state guidelines for allocating federal tax dependency exemptions among divorced parents separate and apart from the federal guide-

lines. *See, e.g., Colo. Rev. Stat.* 14-10-115(12) (specifying that a parent shall not be entitled to claim a child as a dependant if so doing would not result in any tax benefit).

The leading Oklahoma cases to construe Oklahoma courts’ judicial authority to allocate federal tax dependency exemptions have, then relied on an analysis of federal law regarding dependency exemptions and other state courts construing it. *Wilson v. Wilson*, 831 P.2d 1, 2-3 (Okla. App. 1991); *Decker v. Davis*, 162 P.3d 956, 960 (2007 Okl. Civ. App. 2007); *In re Adoption of M.C.D.*, 42 P.3d 873, 884 (2002 Okl. Civ. App. 2001); *White v. Polson*, 27 P.3d 488, 491 (2001 Okla. Civ. App. 2001); *Lamb v. Lamb*, 848 P.2d 582, 583 (1992 Okl. Civ. App. 1992) (Oklahoma district courts have jurisdiction to award federal dependant tax exemption to noncustodial parent, including power to make order compelling custodial parent to execute declaration for noncustodial parent to claim exemption under 26 U.S.C. 152(e)(2)).

5. While federal law contains the “special rule” discussed above to address instances of “perfect 50/50 custody,” it unfortunately does not address the issue of a noncustodial parent claiming the dependency exemption, unless the parties are cooperative enough to exchange a written release: federal tax law currently requires a written declaration by the custodial parent that s/he will not claim the child as a dependant, with a corresponding declaration by the noncustodial parent. 26 U.S.C. §152(e)(2)(A), (B); *see Light v. Light*, 828 P.2d 447, 448 (Okla. App. 1992) (noncustodial father appealed trial court’s denial of motion to claim one of parties’ children for federal income tax purposes; he sought relief because he contributed more than half the annual support for the child per 26 U.S.C. 152; court declined to rule on request for award of tax exemption, specifically finding that it lacked jurisdiction to award federal dependant tax exemption to noncustodial parent); *Wilson v. Wilson*, 851 P.2d 1, 3 (Okla. Ct. App. 1991).

6. Where necessary, the higher-earning parent could front the \$30 for Turbo Tax or the cost of another tax preparation service, in case the parties argue that they cannot “quickly” recalculate.

ABOUT THE AUTHOR



Steven L. Holloway practices in the areas of municipal law, family law, real estate and probate in Elk City. He earned his J.D. from Oklahoma University in 1978. He is on the board of trustees of the Baptist Foundation of Oklahoma. He spends his time with family, church, a successful outdoor advertising company and a ranch operation in the Panhandle.

FROM THE PRESIDENT

cont'd from page 1684

conclude with lunch with the Oklahoma Supreme Court justices. The morning keynote speaker is Mr. Bud Krough. This is a symposium you won't want to miss!

Under the guidance of Chair Michael Salem and with the assistance of OBA General Counsel Gina Hendryx, the **Clients' Security Fund Committee** has begun to review this year's claims filed by clients who allegedly suffered loss of money or other property from the dishonest conduct of their attorney. Claimants must be unable to be repaid or recover money from other sources, such as insurance or a bonding company, before filing for restitution from the Clients' Security Fund. The work of this committee fulfills an important function for the association. It prevents the dishonest conduct of a few lawyers from reflecting adversely on the majority of Oklahoma attorneys. It helps to restore the public trust in those instances where trust has been damaged.

OBA sections have also been busy this summer! Many sections will present legal seminars in the fall and at the Annual Meeting for the benefit of their section members. I have noticed the Family Law Section, Alternative Dispute Resolution Section, Government and Administrative Law Practice Section and General Practice/Solo and Small Firm Section — just to name a few — conducting business meetings at the bar center.

My first six months serving as your bar president have been interesting, educational and exciting. It has been an honor to travel to so many county bar activities, meet my colleagues and represent the Oklahoma Bar Association. I hope to travel to many more counties and attend many more OBA meetings before my term ends Dec. 31. The work of OBA members in their county bar associations, OBA committees and sections is second to none! It is truly an honor to work with you and for you.

Enjoy the remaining dog days of summer! If it gets too hot for you outside, remember that the OBA committee and section meetings are usually held in your remodeled bar center where the air conditioning works just fine! You are welcome to join any committee and section and contribute to the work of building a better lawyer and a strong bar association.

APPELLATE LITIGATION & CONSULTING

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Co-Author

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Done!

By John Morris Williams

As of a couple of weeks ago, we completed the major construction and renovation in the Office of the General Counsel. We are done with the complete renovation of the building. Done! While we have some “touch-ups” and minor re-dos, the major stuff is done.

We still need to add some artwork and buy a bit of furniture to complete the “look” selected by our designer. Those are minor issues that do not require any sawing, jack-hammering or turning off the water. As for the big items, they are done!

In May 2003 when I became your executive director, it was apparent the bar center build-

ing had suffered from deferred maintenance for some time. In addition, the original part of the building was highly contaminated with asbestos. After consultation with engineers and architects, the OBA elected leadership and Bar Center Facilities Committee decided that a complete rehab of the facilities was needed. The issues were threefold. The first issue was to ensure the structural integrity of the building. That included sealing the marble veneer and to stop any leakage from the roof and basement. The second issue was to remove the asbestos and bring the building up to code and in compliance with the Americans with Disabilities Act. The third was to ensure that we had mechanical systems and physical spaces that would have the association headquarters in good shape at least through the first third of the 21st Century. Except for an older chiller that serves the west side of the building, all the electrical and mechanical systems are completely updated and working well. I want to thank each of you for your support during this time of change. As many of you know, more than one-half of the staff was relocated to a modular



The completed bar center lobby features updated furnishings and emphasizes natural light.



Modernized and stylish new restrooms complete the top-to-bottom building makeover.

building (trailers) for nine months during the asbestos abatement. It is a testament to your great staff that member service remained high during this time. I would be an ingrate not to thank all of the staff who worked through numerous relocations, loud noises, restrooms shut down, etc. and never missed a beat.

Past presidents Mike Evans, Harry Woods and William “Bill” Grimm are the true heroes who had the vision to make all of this possible. Past President J. William “Bill” Conger also did more than his share of chairing the Bar Center

Facilities Committee for several years. The exceptional dedication of the Bar Center Facilities Committee should also be noted. Richard "Rick" Riggs, Judy Hamilton Morse and the other members of the committee were invaluable in helping to make all the contracts and details come together. I am forever in debt to this great group of volunteers.

I know that to some of our members we are "those people in Oklahoma City" or "those people over on Lincoln Boulevard." We strive every day as the staff of your association to be more than "those people." It is our goal to enhance your professional lives and to be a resource whenever we can be. It is my personal belief that the OBA is not a building. It is its members and the leaders and staff who guide the direction of our profession. However, I do believe that having a modern, safe and code compliant facility in which to conduct the work of our association is not a bad thing. In an age where we substitute electronic communications and social media for face time, it is my



The most recent upgrades are found in the Office of General Counsel, where the focus is also on enhancements to privacy and security.

belief that having a welcoming place to come together is still essential to the well-being of our organization.

The work of our association is never done. Next, we are working hard to enhance our online tools. Hopefully, within the next two years you will see

some significant positive changes. I just want to warn you now that there will be challenges. We will not be in portable buildings in the parking lot, and the bathrooms will all be working. However, there will be system down-times as we upgrade, and with such a big undertaking we will have some things that will not be perfect on the first try. You granted us your patience during the remodel of the building, and we will ask your patience as we rebuild our computer systems. I promise that we will be wise stewards of association resources, always mindful of our mission to serve the members and will get it right before we claim it "done!"

Lastly, I hope that you have had a safe and happy summer. As we move into the fall, start looking for information on the 2012 Annual Meeting, and look to our CLE department for your educational needs.

To contact Executive Director Williams, email him at johnw@okbar.org.

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2013 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 14, 2012

OFFICERS

President-Elect

Current: James T. Stuart, Shawnee
Mr. Stuart automatically becomes OBA president
Jan. 1, 2013
(One-year term: 2013)
Nominee: **Renée DeMoss, Tulsa**

Vice President

Current: Peggy Stockwell, Norman
(One-year term: 2013)
Nominee: **Dietmar Caudle, Lawton**

BOARD OF GOVERNORS

Supreme Court Judicial District Three

Current: Susan Shields, Oklahoma City
Oklahoma County
(Three-year term: 2013-2015)
Nominee:

Supreme Court Judicial District Four

Current: Glenn Devoll, Enid
Alfalfa, Beaver, Beckham, Blaine, Cimarron,
Custer, Dewey, Ellis, Garfield, Harper, Kingfisher,
Major, Roger Mills, Texas, Washita, Woods and
Woodward counties
(Three-year term: 2013-2015)
Nominee:

Supreme Court Judicial District Five

Current: Ryland Rivas, Chickasha
Carter, Cleveland, Garvin, Grady, Jefferson, Love,
McClain, Murray and Stephens counties
(Three-year term: 2013-2015)
Nominee: **Sandee Coogan, Norman**

Member-At-Large

Current: David Poarch, Norman
(Three-year term: 2013-2015)
Nominee:

Summary of Nominations Rules

Not less than 60 days prior to the Annual Meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the Executive Director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such Judicial District, or one or more County Bar Associations within the Judicial District may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the Annual Meeting, 50 or more voting members of the OBA from any or all Judicial Districts shall file with the Executive Director, a signed petition nominating a candidate to the office of Member-At-Large on the Board of Governors, or three or more County Bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the Annual Meeting, 50 or more voting members of the Association may file with the Executive Director a signed petition nominating a candidate for the office of President-Elect or Vice President or three or more County Bar Associations may file appropriate resolutions nominating a candidate for the office.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Vacant positions will be filled at the OBA Annual Meeting Nov. 14-16. Terms of the present OBA officers and governors listed will terminate Dec. 31, 2012. Nomination and resolution forms can be found at www.okbar.org.

OBA Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

OFFICERS

PRESIDENT-ELECT

RENÉE DeMOSS, TULSA

Nominating Petitions have been filed nominating Renée DeMoss for election of President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2013.

A total of 507 signatures appear on the petitions.

VICE PRESIDENT

DIETMAR CAUDLE, LAWTON

Nominating Petitions have been filed nominating Dietmar Caudle for election of Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2013.

A total of 129 signatures appear on the petitions.

Nominating Resolutions have been received from the following counties: Comanche, Cotton, Pottawatomie and Seminole

BOARD OF GOVERNORS SUPREME COURT

JUDICIAL DISTRICT No. 5

SANDEE COOGAN, NORMAN

Nominating Petitions have been filed nominating Sandee Coogan for election of Supreme Court Judicial District No. 5 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2013.

A total of 51 signatures appear on the petitions.

Nominating Resolutions have been received from the following counties: Cleveland, McClain and Garvin

You are not alone.



Men Helping Men.....

Oklahoma City • Sept. 6, 2012

Time - 5:30-7 p.m.

Topic

Compassion Fatigue or Job Burnout?

Location

The Oil Center – West Building
2601 NW Expressway, Suite 108W
Oklahoma City, OK 73112

.....

Tulsa • Aug. 23, 2012

Time - 5:30-7 p.m.

Topic

Signs and Symptoms of
an Unbalanced Life

Location

The University of Tulsa College of Law
3120 East 4th Place, JRH 205
Tulsa, OK 74104

Women Helping Women.....

Oklahoma City • Sept. 13, 2012

Time - 5:30-7 p.m.

Topic

Compassion Fatigue or Job Burnout?

Location

The Oil Center – West Building
2601 NW Expressway, Suite 108W
Oklahoma City, OK 73112

.....

Tulsa • Sept. 6, 2012

Time - 5:30-7 p.m.

Topic

Compassion Fatigue or Job Burnout?

Location

The University of Tulsa College of Law
3120 East 4th Place, JRH 205
Tulsa, OK 74104

Food and drink will be provided! Meetings are free and open to OBA members. Reservations are preferred (we want to have enough space and food for all.) For further information and to reserve your spot, please e-mail kimreber@cabainc.com.

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM



Sovereignty Symposium 2012

Oklahoma City, June 12-13

Metamorphosis

Noted artists Mike Larsen and former Oklahoma Sen. and Seminole Chief Kelly Haney



Among those honored at the June 10 reception were artists whose work is exhibited in the new Oklahoma Judicial Center, left to right: D.G. Smalling, Kelly Haney, Debby Williams, Nathan Hart, Ben Harjo, Harvey Pratt, Jeri Redcorn, Brent Greenwood, Jim Van Deamon, Betty Price, Brent Learned, Bert Seabourn, Jim Bruce, Patrick Riley, Jean Richardson, Don Narcomey.



Sovereignty Symposium Medal for 25 Years of Service Award Winner Jess Green with Justice Yvonne Kauger.

In the background are Chief Justice Steven Taylor, D.G. Smalling, Deputy Attorney General James Cole, U.S. Attorney Sandy Coats, Vice Chief Justice Tom Colbert and Shari Hodges-Spencer, representing her father, Retired Justice Ralph B. Hodges.



Sovereignty Symposium Medal for 25 Years of Service Award Winner Arvo Mikkonen

Master of Ceremonies Retired Justice Rudolph Hargrave



Retired Justice Robert Lavender receives artwork honoring the RALPH B. HODGES –ROBERT E. LAVENDER AWARD from the artist D.G. Smalling





Deputy Attorney General James M. Cole, Justice James Edmondson and Congressman Tom Cole



OBA President Cathy Christensen



Professor Rennard Strickland, Dr. C. Blue Clark, Bob Funston, Oklahoma Rep. Anastasia A. Pittman, Dr. Bob L. Blackburn



Oklahoma Sen. Al McAffrey, Justice Noma Gurich and Deputy Attorney General James M. Cole



Robert Don Gifford II, Retired General Rita Aragon, Col. Brent Wright, Deborah Ann Reheard

*RALPH B. HODGES –
ROBERT E. LAVENDER
AWARD winner Judge
Carol Hansen and
Patrick Riley*



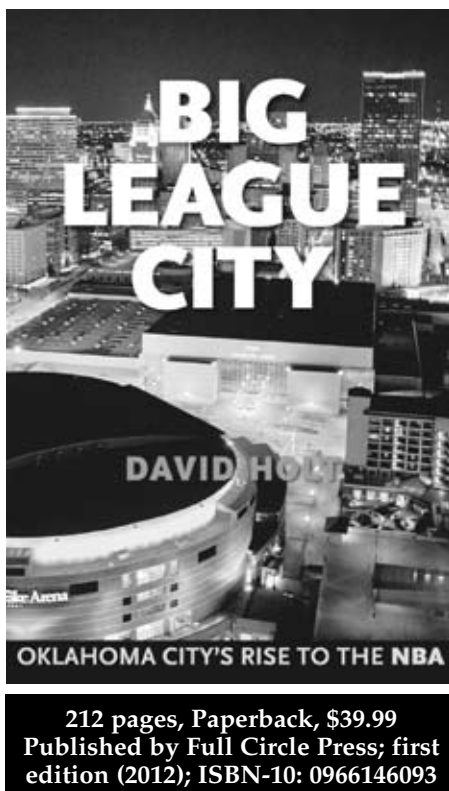
Big League City: Oklahoma City's Rise to the NBA

By David Holt

Reviewed by Judge Allen Welch

The story of how Oklahoma City acquired the Thunder is the tale of a perfect storm. This narrative about the confluence of unrelated events in Seattle, New Orleans and Oklahoma City is told in a very entertaining manner by state Sen. and OBA member David Holt in his new book, *Big League City: Oklahoma City's Rise to the NBA*.

The author was the mayor's chief of staff during the relevant period of time, and his ring-side seat gave him a unique and knowledgeable perspective. He begins with the declaration that "The arrival of major league sports in Oklahoma City was the most significant positive development in the city's history since the Land Run of 1889," and then provides a brief history in support of that proposition. He quickly explores the "funk" that Oklahoma City experienced in the 1980s, a "pretty miserable decade" in which "pipelines of young people" moved to Dallas and "cooler" places because Oklahoma City lacked the urban charm that young people crave. Former Mayor Ron Norick is identified as the visionary who dreamed of what Oklahoma City could be. The relevant sequence of events began with the narrow passage in 1993 of the Metropolitan Area (MAPS) Projects,



championed by Mr. Norick, which revitalized downtown Oklahoma City.

Mr. Norick's successor, Mick Cornett, flirted with the NHL and the NBA, hoping that his efforts might land an NHL franchise and, thereby, put Oklahoma City on the map of big league cities with professional sports franchises. About the same time, the city of Seattle floundered in the course of its efforts to renovate its NBA arena, while the Super-Sonics' wins and attendance numbers plummeted. When Hurricane Katrina wiped out much of New Orleans, and washed the New Orleans Hornets out of town, Oklahoma City offered to provide a temporary home for that team. Mayor Cornett's earlier overtures to the NBA com-

missioner bore fruit, the Hornets moved to Oklahoma City for two years, and Oklahoma City's audition to become a big league city was a resounding success. Meanwhile, the love affair between the city of Seattle and its team soured.

But this story is not just about basketball. The story is mostly about the legal wrangling which ensued, after Clay Bennett ("the indispensable man") bought the Sonics. When Mr. Bennett initiated his effort to move the Sonics to Oklahoma City, season ticket holders sued

him. The city of Seattle sued him for specific performance of their arena lease and the previous owner of the Sonics sued him for various breaches of the sales agreement. The case was moved from state district court (with all the undercurrents that entailed) to federal court, a more dispassionate forum. Mr. Bennett answered Seattle's demand for specific performance with an "unclean hands" defense as well as revelations of Seattle's "poisoned well" plan to destroy the Sonics ownership group. As a result, that city memorialized its intent to make Mr. Bennett and his partners so miserable, with protracted and expensive litigation, that he would be forced to sell or ensure the team would be held in Seattle against its will. Mr. Bennett's adversaries read the tea leaves correctly such that, hours before the U.S. district court judge was to enter her ruling, the case settled.

Oklahoma City hasn't looked back. Within four days, 15,000 season tickets holders had signed up, and many more applicants were on a waiting list, Oklahoma City being only one of four NBA teams with such a list. Oklahoma City watched the 10th tallest building west of the Mississippi River rise. Before MAPS, Oklahoma City had one downtown hotel; there are now seven. *CNN, Fortune* and

Money magazines jointly named Oklahoma City as the best large city in the nation in which to start a business. The number of Oklahomans aged 25 through 34 grew at 12.2 percent, the fifth largest growth of that demographic in the nation. All of these developments are attributable, in part, to Oklahoma City becoming a big league city.

The product on the court did not similarly flourish, initially. In January 2009, after the Thunder began their history with a 3-29 record, a headline in *The Onion*, a satirical "news" website, reported that Oklahoma City was *still* waiting on an NBA team. The Thunder's remarkable turnaround soon followed.

Big League City is a well-written and quick read for anyone interested in the Oklahoma City Thunder, the intricacies of civil litigation, or both. It is available for purchase at www.bigleaguecitybook.com. Sen. Holt will also be a featured speaker at the 2012 OBA Annual Meeting to discuss his book and the issues surrounding the rise of the Oklahoma City Thunder.

Judge Allen Welch serves as special judge in Oklahoma County District Court and is a member of the OBJ Board of Editors.

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Email Issues for Lawyers Today

By Jim Calloway

Email.

Just seeing the word can make us cringe. It brings images of overflowing inboxes and strangers sending you unsolicited, time-consuming crap. Of all of the technological changes we have had to digest, email seems to be both one that will be with us for some time and one that is often challenging for users. Hopefully, there will be continuing improvements. Certainly billionaire status awaits anyone who can fix everything that's wrong with email.

I hope that the U.S. Postal Service can survive its current crisis. But we're never going back to postal delivery for so much of our day-to-day communication. There's simply no way the USPS will ever handle, "Are you free for lunch today?" — and there are more email attachments sent daily than the entire population of the United States could carry as couriers.¹

This month we will briefly discuss several interesting questions regarding lawyers' use of email. Be warned in advance that for many of these issues there will be no definitive answer.

QUESTION 1

I've heard Google scans all of my email. Is it OK to use Gmail or another free email service for attorney-client email?

There has been a lot of discussion about free email services.

Some say that free web-based email services should never be used for any secure or confidential information. Others say that big online providers are likely to have better security than many law firms with no dedicated IT staff.

Lawyers have to decide this issue for themselves, but here's a thumbnail sketch of the issues with using Gmail for sensitive emails.

Even though we had been warned in advance that it was the case, most of us thought it was a bit creepy as Gmail displayed advertisements off to one side that were based on the contents of the email we were reading or typing. Google assured us that no human being read our email and that machines generated the context sensitive ads. No record was kept of the ads displayed unless you clicked on one of them, and Google then billed the advertiser. But could we believe that?

In 2008, the New York State Bar Association Committee on Professional Ethics looked at this and believed Google. The committee issued Opinion #820, which stated:

"A lawyer may use an email service provider that conducts computer scans of emails to generate computer advertising, where the emails are not reviewed by or provided to human

*beings other than the sender and recipient."*²

This is often referred to as the New York Gmail opinion. But it refers to protecting confidentiality, not to security.

First of all, your online security is primarily up to you. There's more risk of compromise from your end than your service provider's end. But the huge service providers also present huge tempting targets for hackers. Every few months, some major online service provider reports some security breach,³ whether major or minor.

So because of these incidents, everyone using web-based email (not just lawyers) is going to have to strongly consider upgrading security practices. If you are using Gmail to communicate with clients, upgrading to two-step verification should be on this week's to-do list. Simply put, setting up the two-step verification means that in addition to logging in with your user name and password, you also have to enter a code that is sent to your mobile phone either by voice message or text message. This may sound like an unacceptable pain to deal with, except for the fact you can have the computers you regularly use remember the code for 30 days. So it may be a pain a dozen times each year, but the payoff is that even if a hacker cracks into Google or cons someone

into revealing your user name or password, *the hacker still cannot get into your account without access to your mobile phone or authorized computer.*

For more detailed instructions, visit Google's page on "Getting started with two-step verification."⁴ Many other online service providers have this security service, and others will be rushing to roll them out. After a recent breach caused some Dropbox users to receive spam due to accounts compromised via third-party websites, Dropbox promises two-step verification "in a few weeks" along with other enhanced security features.⁵

The time has come for lawyers to use two-step verification for web services containing sensitive information whenever they can.

However, two-step verification is not something one should do thoughtlessly. A very interesting article, "How I Lost Access to My Google Account for Weeks Thanks to Two-Step Verification,"⁶ was recently published. The author notes that a "perfect storm" of several events combined to create the problem and still endorses the idea of two-step verification, but reading this post will help you make certain that it doesn't go wrong for you.

Lawyers who are committed to using Gmail should really take a hard look at Google Apps for Business.⁷ For a relatively modest \$50 per user per year, you get many increased security features, along with a huge number of business tools. Among the more significant of these is having a customized email address (such as your law firm's domain name) rather than using Gmail.com.

"...even if a hacker cracks into Google or cons someone into revealing your user name or password, the hacker still cannot get into your account without access to your mobile phone or authorized computer."



Many laptop or tablet users regularly use free Wi-Fi hotspots, but using unsecured Wi-Fi networks carries a risk. You should avoid them when possible and when you do use them, change the passwords for services you accessed using them soon afterwards. Long, complex passwords that contain letters and/or numbers and symbols are required these days. (See sidebar on password managers.)

In particular with Gmail, you should update your secondary email address and your security question (see sidebar), and provide a mobile phone for SMS-based account recovery. This will help you recover your

account if you ever lose access to it.

If you travel a lot and need Internet access in different locations, it is important to remember that the mobile access provided by the cell phone carrier services are more secure than Wi-Fi. You can pay a monthly fee for a portable hotspot, with brand names like MiFi, or tether your computer to your smart phone (options and costs vary depending on your type of phone and carrier) or just respond to emails using your smart phone or 3G-connected iPad or tablet.

In other web-based email news, Microsoft is replacing Hotmail with Outlook.com.⁸ For those who are wondering how the new Outlook.com compares with Gmail, Lifehacker.com has done a feature-by-feature comparison.⁹

In short, web-based email isn't perfect, and the employees at some free web-based email services may be more focused on what makes a profit than on the latest in security. I know some speakers at ABA TECHSHOW™ have been quoted as saying lawyers should not use Gmail. But, read on, as email generally is far from perfect and secure regardless of what "flavor" of email provider you are using.

QUESTION 2

Should I be concerned with the email service my client uses to communicate with me?

This one is relatively easy. Yes.

Since email exists on both the sender and recipient's email, it is equally important for both "ends" of the "conversation" to be secure. So everything noted above also applies to the client, plus there are additional issues.

The most significant of these issues is the client who uses his or her work email as their personal account. Most every business now has in its handbook that all email in the system is not private, and it belongs to the employer with full right to the employer to read and review at any time. A recent California case held that an employee suing her employer could not claim attorney-client privilege with email correspondence with her lawyer made using company computers.¹⁰ Since the waiver of privilege is so significant, most lawyers will advise their clients never to communicate with them using their employer's computers or employer's email account.

There are also other potential issues with client email, including whether the password to the client's email account is or ever has been shared with another. The bottom line is that every lawyer has to have a discussion with their client if email communication between them is anticipated. And if you give your client a business card that includes your email address, that means probably almost every client.

QUESTION 3

So should I just make my client set up a special email to correspond only with me?

That question actually struck me as a bit extreme when I first heard it. It might be required where the client only had a business email account or shared his or her primary email password with friends or roommates. But in every case, that would be a bit extreme and complicated. If you are representing a business, your contact at the business probably has as much a challenge

Online Security Tip

Make up false answers to standard security questions. Most will remember how vice-presidential candidate Sarah Palin's web mail account was hacked because she chose "Where you fell in love" as her security question, and it was well documented that she met her husband in high school. How about deciding that your mother's maiden name was 405MOMS!! and your favorite pet's name was BBBrrr9935? You can write them down somewhere if you are worried you will forget. Then go change the answers to the security questions to all of the online accounts you value.

dealing with email as the rest of us. The idea that they should set up separate email accounts to deal with you would be seen as unworkable and silly, particularly since the new email account would, by corporate policy, likely need to be set up by their IT Department and reside on their same server.

I certainly had heard of clients who set up separate new email accounts for corresponding with their lawyer, primarily to avoid using their employer's email. But setting up an entirely new account (and remembering to check it) seemed challenging to me.

But Oklahoma City attorney Donelle Ratheal, speaking at the 2012 OBA Solo and Small Firm Conference, made several good points in favor of a new email account for clients to use with their lawyer. Ms. Ratheal practices in the area of family law, which does have some unique aspects, as we all appreciate.

"The new trend is to request complete copies of all computer files, and all email messages to/from the client and third parties. Then the client, or the attorney, must review the historical email messages to avoid disclosure of privileged infor-

mation. If the client has a designated email account between the client and the attorney, then it is easy to distinguish it from other email accounts," Ms. Ratheal said. "An objection to that particular account because it was exclusively created for privileged communications is then simple. Otherwise, a judge may have to do an *in camera* review of email messages and approve the deletion/redaction of privileged communications."

She also says that this setup makes it easier to have a three-way email conversation between the client, the attorney and a witness, usually an expert witness, without concerns that the communications would be forced into disclosure through discovery. The designated email account also preserves the "work product" issue if drafts, proposed exhibits or the client's chronology are attached to email messages.

Another idea that Ms. Ratheal mentioned was a possible argument that changing the password on an email account that both parties have historically used could give rise to an argument that the account itself was a joint account and the privilege no longer applies, like having an attorney/client dis-

cussion in a restaurant, where third parties can hear you. Plus, there is always the chance that the divorcing spouse has the login information to the account, and the client has forgotten sharing that information. Obviously, a divorcing spouse or former spouse accessing the client's email account and reading communications between lawyer and client could be a very bad thing. So in the contested family law context especially, this simple step makes a great deal of sense.

"It's akin to when we recommend to a client to open up a P.O. box for all future mail, so the divorcing spouse does not access the client's mail, including attorney client communications," Ms. Ratheal added.

QUESTION 4

Should lawyers use encrypted email?

This exact question¹¹ was recently asked by my colleague Erik Mazzone¹² in a blog post. Encryption is the coding of information in such a way that it cannot be read by others who do not have the key to unlock it. Of course, there are various strengths of encryption methods that make it more or less secure and the study of encryption is an entire professional discipline. Encryption tools are available but not widely used. Studies have referenced several social factors as to why that is the case.¹³

This is one of several paradoxes of email.

1. The use of email today is a virtual requirement in modern business operations. Those in business cannot have everyone else in business using one method of communications

that is instantaneous, essentially free and extremely efficient¹⁴ while you struggle with some version of tin cans connected by string.

2. Unencrypted email is not secure.
3. Lawyers have an obligation to keep secure the confidential information of their clients, but they also have an obligation to communicate with their clients in a way that the client can use and understand the communication.
4. Many others who have an obligation to keep information secret regularly use email ranging from ministers to employees dealing

with confidential corporate information.

5. Email still works. People sent email and attachments to others who receive them. When confidential information is actually exposed because of email, it is generally because one of the authorized users made a mistake or a judgment error.¹⁵
6. Legal ethics opinions allow lawyers to use unencrypted email to communicate with clients. After all, it is a federal crime to hack someone's email.¹⁶
7. If you ask most clients if they want to correspond by encrypted email, the widespread belief is that they will decline, and it is

Password Managers

Password Managers are becoming an essential tool. An Internet user needs long, complex passwords that cannot be guessed or compromised by brute force attacks. Everyone should use a different password for each important website or service. But it is a real challenge to remember many different complex passwords. The simple solution is a software tool to remember all of your passwords. Once you log into it with a long, complex password that you do have to remember, the password manager remembers all of the rest.

Most of the legal technology experts seem to favor LastPass, but KeePass does really well in online polls. Both of these are free, although if you want to use LastPass with a mobile device then there is a \$1 per month charge. Lifehacker has a feature on these products at www.lifehacker.com/password-managers.

The major products include:

- KeePass (Free) www.keeppass.info
 - LastPass (Free) www.lastpass.com
 - 1Password (\$49.99) www.agilebits.com/onepassword
 - Roboform (\$29.95) www.roboform.com
 - Kaspersky Password Manager 4 (\$24.95) www.okbar.org/s/kaspersky
-

their confidential information that is potentially impacted.

It's an interesting academic question. Reasonable people could disagree.

On the pro-encrypted email side of a debate, one might hear arguments like, "There's no reason we shouldn't do this as inexpensive encryption tools are readily available. Client confidences are deserving of the highest protection. A lawyer would never, ever want to violate attorney-client privilege."

While on the anti-encrypted email side we might hear, "There are few reported email breaches. There's a greater danger that the client wouldn't receive (or open) an important communication than there is someone will intercept it. No one wants to mess with encryption and a lot of clients couldn't handle dealing with it. Most of my emails to clients do not contain confidential information. And, to repeat: *There is a federal law against hacking email!* If my office gets burglarized, am I required to hire a security guard to protect my client's confidential information in my office? Plus, my clients do not want to have to deal with it either."

Whether you read the two preceding paragraphs and think pro, con or "looks like a coin flip," may depend more on your beliefs and risk-tolerance than any truth or falsity of the statements.

As to the question of whether a lawyer should use encryption, Erik Mazzone and I will both aid your analysis with a resounding, "It depends."

Even though the current email system is theoretically, and in fact, not secure, as a

practical matter there is a certain level of security just because of the massive amount of emails sent each day. If your email setup is secure and that of your client is as well, then it is very unlikely to be intercepted along the way. But if a client was targeted and information was compromised, one would hate to have to rely on the "needle in a haystack" defense.

Client confidences should be inviolate and protected. That goes without saying. Yet some risk-benefit analysis must take place. There is a difference between emails between you and your client about a brief that is to be filed next week (which communications the trial judge would never allow to be considered even if they were inadvertently disclosed), a corporate secret that your client's competitors would be dying to get or compromising photos of a celebrity client that would surely go viral on the Internet within minutes of disclosure. A proposed change to the comment to ABA Model Rules of Professional Conduct Rule 1.6 about the lawyer's efforts to prevent disclosure states:

"Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of

software excessively difficult to use). . . ."¹⁷

So while most people are not going to bother with encryption at present, lawyers probably need to have a basic understanding of the process and when it may be important to encrypt an email or an attachment to an email. In my tips programs this year, I have mentioned TrueCrypt,¹⁸ a free open-source tool for encrypting a hard drive or flash drive. That would not work for email or email attachments, but Erik Mazzone mentioned in his blog post that he is testing Enlocked¹⁹ (still in beta) and also includes links to an article with more information on the subject.

Most of us who follow such things predict that we will see an increase in secure online document repositories as a part of future client services. Then the insecure email to the client would just say, "Something new for you to read and respond to in the repository. Click on this link and log in with the user name and password we have previously provided to you." Already we are seeing the cloud-based practice management systems include these repositories as a part of the basic package.

CONCLUSION

Email seems to have a lot of staying power. So look for it to be with us for a while.

But email is not secure. It wasn't designed to be. An email goes through many servers in its travels and is likely stored in more places by Internet service providers than most people would guess.

Some things should only be emailed if encrypted. Some should not be emailed at all.

Mr. Calloway is director of the OBA Management Assistance Program. Need a quick answer to a tech problem or help resolving a management dilemma? Contact him at 405-416-7008, 800-522-8065 or jimc@okbar.org. It's a free member benefit!

1. Some of the most compelling statistics are simply made up. Don't you agree?

2. www.okbar.org/s/820.

3. Dropbox July 2012, www.okbar.org/s/dropboxblog. The Gizmodo Twitter account was apparently hacked through old-fashioned social engineering, i.e., talking an Apple tech support person out of the information, www.okbar.org/s/hacked.

4. Google's page on getting started with 2-step verification can be found at www.okbar.org/s/2step.

5. www.okbar.org/s/dropboxblog.

6. How I Lost Access to my Google Account for Weeks Thanks to Two-Step Verification, www.okbar.org/s/lost.

7. www.okbar.org/s/4yxzb.

8. www.okbar.org/s/jgetq.

9. <http://lifelifehacker.com/5931621>.

10. *Holmes v. Petrovich Development Co., LLC*, No. C059133 (Cal. Ct. App. Jan. 13, 2011). See also *Wired Magazine*, "Work E-Mail Not Protected by Attorney-Client Privilege, Court Says," Jan. 18, 2011, www.okbar.org/s/1x0t9.

11. www.okbar.org/s/u8g1c.

12. Erik Mazzone is the director of the Center for Practice Management for the North Carolina Bar Association. He is a former ABA TECHSHOW planning board member and well-regarded blogger. He also writes on small law issues for *Technolawyer*.

13. Gaw, et. al. *Secrecy, Flagging, and Paranoia: Adoption Criteria in Encrypted E-Mail*, www.okbar.org/s/encrypted.

14. OK, sure, there are well-documented and well-remembered email failures, but you usually receive what people send you via email and when you don't, you either find it in your spam filter or ask them to resend it to you.

15. Or someone got into litigation and e-discovery exposed it. Or you work for a university that has a huge scandal, and it invites former FBI Director Freeh to do an investigation and review everyone's email. Or there was a law enforcement investigation.

16. The Electronic Communications Privacy Act of 1986 (Pub.L. 99-508, 100 Stat. 1848, enacted Oct. 21, 1986, codified at 18 U.S.C. §§2510-2522).

17. ABA House of Delegates materials Aug. 6, 2012, www.okbar.org/s/aba.

18. www.truecrypt.org.

19. www.enlocked.com

OKLAHOMA BAR JOURNAL EDITORIAL CALENDAR

2012

■ September

Bar Convention

Editor: Carol Manning

■ October

Opening a Law Practice

Editor: Melissa DeLacerda
MelissDE@aol.com
Deadline: May 1, 2012

■ November

Homeland Security

Editor: Erin Means
erin.l.means@gmail.com
Deadline: Aug. 1, 2012

■ December

Ethics & Professional Responsibility

Editor: Pandee Ramirez
pandee@sbcglobal.net
Deadline: Aug. 1, 2012

2013

■ January

Meet Your OBA

Editor: Carol Manning

■ February

Indian Law

Editor: Mark Ramsey
mramsey@soonerlaw.com
Deadline: Oct. 1, 2012

■ March

Estate Planning & Probate

Editor: Pandee Ramirez
pandee@sbcglobal.net
Deadline: Oct. 1, 2012

■ April

Law Day

Editor: Carol Manning

■ May

Technology

Editor: Sandee Coogan
scoogan@coxinet.net
Deadline: Jan. 1, 2013

■ August

Criminal Law

Editor: January Windrix
janwindrix@yahoo.com
Deadline: May 1, 2013

■ September

Bar Convention

Editor: Carol Manning

■ October

Appellate Law

Editor: Emily Duensing
Emily.duensing@oscn.net
Deadline: May 1, 2013

■ November

Raising the Bar: Lawyers Who Make a Difference

Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2013

■ December

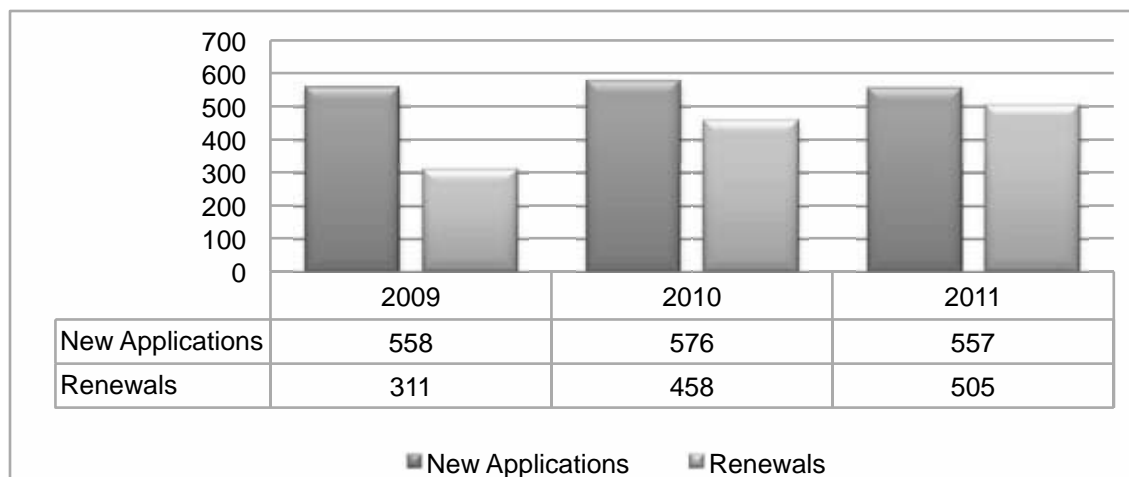
Ethics & Professional Responsibility

Editor: Joe Vorndran
joe@scdtlaw.com
Deadline: Aug. 1, 2013

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

Out-of-State Attorneys Reminded to Register

By Gina Hendryx



Oklahoma, like the majority of jurisdictions, requires out-of-state attorneys who wish to practice in a state tribunal to register with the Oklahoma Bar Association. The chart above depicts the number of out-of-state attorneys who have done so for the past three years. In 2011, 557 new applications were received from out-of-state attorneys seeking to practice before an Oklahoma tribunal. This was slightly down from 2010, but nearly the same for 2009. Furthermore, renewals steadily increased over the three-year span.

The registration requirements can be found in the *Rules Creating and Controlling the Oklahoma Bar Association*, 5 O.S. Ch.1, App. 1, Art. II. The rules state that the attorney

may appear in an action or proceeding only upon:

1. Registering with the Oklahoma Bar Association; and,
2. The approval of the court, arbitrator, mediator, or administrative or governmental hearing officer where the action or proceeding is pending.

The procedure for registering includes:

1. The out-of-state attorney submits the original and one copy of a completed and signed application to the OBA. The application form, along with detailed instructions, is at www.okbar.org.
2. Along with the completed form, the attorney should submit current certificates of good standing from the

clerk of the Supreme Court or highest admitting court in which the applicant is licensed to practice law.

3. A registration fee of \$350 payable to the OBA is due at the time the application is submitted.

Upon receipt of the application, certificates of good standing, and the fee payment, the OBA will review and issue a "Certificate of Compliance." This certificate is then included as an exhibit to a motion to admit or *pro hac vice* motion to the appropriate tribunal. All out-of-state attorneys appearing before an Oklahoma tribunal must associate local counsel. It is then up to the presiding judge or officer whether to allow the out-of-state attorney to appear

at hearings without the local counsel in attendance.

An Oklahoma court may temporarily admit an out-of-state attorney on a showing of good cause for noncompliance with the provisions of the rule. However, this temporary admission may be for no longer than 10 days, and the attorney must comply with the registration requirements.

If the matter remains pending, an annual renewal fee of \$350 is payable to the OBA on the anniversary date of the verified application. Failure to renew may result in the imposition of a \$100 late fee. Forms for renewal along with a full description of the requirements and text of the rule may be found at www.okbar.org/s/avc4p.

These requirements apply to matters pending before Oklahoma state courts or tribunals. They do not apply to matters pending in the federal courts. If you have questions about this rule or need assistance in getting an out-of-state attorney registered, contact Manni Arzola at mannia@okbar.org or 405-416-7061.

Ms. Hendryx is OBA general counsel.

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Meeting Summaries

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Wednesday, April 25, 2012.

REPORT OF THE PRESIDENT

Unable to attend the meeting, President Christensen reported via email that she attended Lawyers Helping Lawyers Assistance Program event planning meetings, OBA Day at the Capitol, dinner at the Governor's Mansion with attorney legislators, LHL banquet, planning meetings for Justice O'Connor events, OBA Strategic Committee Financial Subcommittee meeting, Garvin County CLE and dinner, Spring Social Studies Conference held at the OBA, lecture at OCU presented by Judge David Ebel and Solo and Small Firm Conference Planning Committee meeting. She met with Executive Director Williams to review applications for the director of educational programs position, attended the Search Committee meeting, spoke at the OCU School of Law – Law Student Division chapter meeting, helped edit the YLD young adult guide, met with Heidi McComb in CLE to do site visits at the Reed Conference Center for the O'Connor banquet, taped a Law Day segment for the Ask A Lawyer TV show at OETA, conducted site visits with past presidents Reheard and Delacerda, met

with the committee to plan the 2013 Southern Conference of Bar Presidents, interviewed with OCU for OCU Beacon of Justice Award Honoree Drew Edmondson, worked on the iCivics event and planning sessions, helped staff the OETA fundraiser event and consulted with the Family Law Section leadership and the YLD regarding the solo conference.

REPORT OF THE VICE PRESIDENT

Vice President Stockwell reported she attended the Board of Governors meeting, Day at the Capitol, dinner with the governor, representatives and senators, Lawyers Helping Lawyers meetings, Awards Committee meeting, LHL banquet and auction, Search Committee meeting, Access to Justice meeting, Cleveland County Bar Association lunch and CLE meeting, McClain County Bar Association lunch and CLE meeting, Garvin County CLE and dinner, Awards Committee meeting and LHL training.

REPORT OF THE PRESIDENT-ELECT

President-Elect Stuart reported he attended the Lawyers Helping Lawyers banquet, Search Committee meeting for director of educational programs position, Bill Grimm roast in Tulsa, Pottawatomie County Bar Association meeting, ABA Bar Leadership Insti-

tute in Chicago and the Oklahoma Bar Foundation meeting. He also worked on various 2013 planning issues and chaired the Strategic Planning Committee Financial Subcommittee meeting.

REPORT OF THE PAST PRESIDENT

Past President Reheard reported she attended the board dinner with Gov. Fallin and lawyer legislators, March Board of Governors meeting, several homecoming ceremonies for members of 45th Infantry and Lawyers Helping Lawyers Foundation banquet. She chaired the Section Leaders Council and Military Assistance Committee meetings. She also spoke at a Yellow Ribbon pre-mobilization event for 175 soldiers deploying to Afghanistan in November about the OBA heroes program and Pros4Vets and also spoke at the OU College of Law Pro Bono Awards ceremony.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended Day at Capitol, dinner at the Governor's Mansion, Lawyers Helping Lawyer planning meeting, weekly CLE staff meetings, monthly staff celebration meeting, meetings with the construction company, LHL fundraiser, meeting with a new PR representative from GableGotwals, staff web meeting, staff technology meeting,

OCU Law Student Division meeting, roast of Past President Bill Grimm, Finances Subcommittee meeting, Section Leadership Council meeting, Garvin County Bar Association dinner, meeting with Justice Kauger regarding Supreme Court movie CLE programs, meeting with Stan Evans regarding military spouse admission issues, meeting with President Christensen to review director of educational programs resumes, DEP Search Committee meeting, interview with network administrator finalist, Supreme Court CLE, OBF luncheon, Solo and Small Firm Conference Planning Committee meeting, iCivics planning meeting, iCivics events and banquet. He also moderated the volunteer CLE and communicated with the Office of State Finance and various legislators regarding pending legislation.

BOARD MEMBER REPORTS

Governor Devoll reported he attended the dinner at the Governor's Mansion, Board of Governors meeting, OBA Day at the Capitol and Garfield County Bar Association April meeting. At the county bar meeting, he briefed association members on upcoming OBA-related events. **Governor Hays** reported she attended dinner at Governor's Mansion, Board of Governors meeting, OBA Day at the Capitol, OBA Family Law Section monthly meeting for which she prepared and presented the budget report, Tulsa County Bar Association Golf Committee meeting, TCBA Board of Directors meeting at which she reported OBA board matters and OBA Section Leaders Council meeting. She also served as a panelist in the Ask A Lawyer TV show. She consulted with the

OBA Solo and Small Firm Conference Planning Committee and the Law Day Committee chairperson regarding meeting events. **Governor Pappas** reported she attended the Board of Governors meeting and Logan County Bar Association meeting. She worked at the LRE Social Studies Conference, sent an email challenge to District 8 county bar presidents regarding sponsorship for iCivics, sent a letter to District 8 county bar presidents regarding the YLD Community Day of Service event with a list of their superintendents and principals, in addition to a Law Day Planning Guide, sent an email to District 8 county bar presidents regarding their YLD contact for the YLD event, sent an email to the Pottawatomie County bar president regarding having Frank Holdsclaw do CLE on upcoming electronic filing and arranged for presentations of the young adult legal guide in Stillwater High School to be done by herself and two other criminal law attorneys. **Governor Parrott** reported she attended Day at the Capitol, the dinner with the governor and legislators, Lawyers Helping Lawyers banquet and fundraiser, educational programs director Search Committee meeting, Oklahoma County Bar Association board meeting, farewell party and roast for retiring Judge Dan Owens and the OETA festival, answering the phones for the annual fundraiser. **Governor Poarch** reported he attended the board dinner at the Governor's Mansion, Board of Governors meeting and OBA Day at the Capitol. **Governor Rivas** reported he attended the board dinner at the Governor's Mansion, Board of Gov-

ernors meeting, OBA Day at the Capitol and the Grady County Bar Association monthly meeting. He also served as a judge for the University of Oklahoma Mock Trial competition. **Governor Shields** reported she attended OBA Day at the Capitol, board dinner with the governor and legislators, Lawyers Helping Lawyers banquet and Search Committee meeting for the director of educational programs position and Oklahoma County Bar Association meeting. She also worked on LHL legal matters. **Governor Smith** reported he attended OBA Day at the Capitol, board dinner with the governor, Muskogee County Bar Association meeting and Planning Committee meeting for the Muskogee bar banquet. **Governor Thomas** reported she attended March and April meetings of the Washington County Bar Association, dinner with Gov. Mary Fallin and lawyer legislators, OBA Day at the Capitol, Lawyers Helping Lawyers banquet, dinner and roast of William R. "Bill" Grimm, fundraising event for Lawyers Against Hunger and the Ann Patterson Dooley Family Safety Center, and Breakfast with Chief Justice Steven Taylor, which was a kick off event for the county bar association's Law Day events.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Kirkpatrick reported she attended the board meeting, dinner with Gov. Fallin and lawyer legislators and Lawyers Helping Lawyers banquet. She chaired the March YLD board of directors meeting, spoke at the OCU School of Law ABA Law Student Division chapter meeting

and took part in filming the YLD Young Adult Guide video. She announced that the printed guides were done, and schools were lined up for presentations as part of their Community Day of Service project. Some schools indicated they could not work in the presentations now, but requested them for the fall.

COMMITTEE LIAISON REPORTS

Governor Hays reported the Law Day Committee was wrapping up taping for the Ask A Lawyer TV show, and she served as a panelist for one of the segments. She said the Solo and Small Firm Conference Planning Committee has information about the conference on the website and in the bar journal. She said the Communications Committee will meet in May.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported her office continues to be busy. She stated Mr. Mothershed has again filed suit against the OBA, and a suit has been filed against the PRC. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for March 2012 was submitted for the board's review. She reported construction on their offices is progressing at full steam, and employees are enduring the conditions.

AWARD COMMITTEE RECOMMENDATIONS

The board approved the Awards Committee's recommendation to present the same awards as last year with no changes.

STRATEGIC PLANNING COMMITTEE'S FINANCIAL PLANNING SUBCOMMITTEE

President-Elect Stuart reported the subcommittee met on March 29 to review the report of a 2009 subcommittee that recommended a \$25 annual dues increase effective on Jan. 2, 2013. He reported the 2012 subcommittee reviewed substantial current and projected financial information, and it concluded the OBA's financial condition is good and does not believe a dues increase is needed in 2013 and should be deferred until such need arises. He said the subcommittee advises the OBA to continue monitoring the need and recommends a report be submitted to the board annually. The subcommittee suggested the investigation of discontinuing *Oklahoma Bar Journal* court issues to save expenses or to make them available to members by a separate subscription. Possibilities of other options were also discussed. The board approved the report.

PRT APPOINTMENT

The board approved President Christensen's recommendation to appoint M. Joe Crosthwait Jr., Midwest City, to replace Doug Shirley on the Professional Responsibility Tribunal. His term will expire June 30, 2015.

RATIFICATION OF VOTES TO ISSUE RESOLUTIONS

The board voted to ratify the email vote to issue a resolution supporting Judge Daman Cantrell for a position on the National Mock Trial Board. They also voted to ratify the email vote to issue a resolution supporting increased funding for Legal Services Corp. and to encourage Oklahoma's

Congressional delegation to support LSC.

SECTION LEADERS COUNCIL PROPOSED BYLAWS

Past President Reheard introduced Mike Wofford, who chairs the Environmental Law Section and chairs the SLC Bylaws Subcommittee. Past President Reheard reviewed the history and purpose of the new council. Mr. Wofford stated the proposed bylaws drafted are standard language. The board approved the bylaws.

INFORMATION TECHNOLOGY REPORT

IT Director Watson gave a brief summary of her department's activities. Governor Pappas shared a report from the Bar Association Technology Committee that met March 9, 2012.

ASK A LAWYER DAY

Communications Director Manning reported the statewide phone banks in Tulsa and Oklahoma were short on volunteers, and she encouraged board members to sign up or to help staff their county hotlines on April 26.

NEW ADMITTEE SWEARING-IN CEREMONY

Governor Kirkpatrick reported the Young Lawyers Division will host receptions following the two ceremonies on April 26.

ICIVICS EVENT REPORT

Vice President Stockwell reported the U.S. marshals protecting former Justice Sandra Day O'Connor complimented the OBA on the organization of the events saying it was the best they have experienced. Governor Pappas suggested having board members

sign the book on U.S. court-houses and sending it to her as a gift.

TRANSITION TASK FORCE

President-Elect Stuart reported as a result of notification from Judge Walkley that the Oklahoma Judicial Conference has decided to move its annual conference to July, the transition 2013 team will be meeting at 10 a.m. on May 24 to consider moving the OBA Annual Meeting to coincide. He said the task force was open to anyone who was interested in serving. Governors Parrott and Thomas asked to be added.

The Oklahoma Bar Association Board of Governors met at the Mayo Hotel in Tulsa on Friday, May 18, 2012.

REPORT OF THE PRESIDENT

President Christensen reported she attended Justice O'Connor events at the OBA, OCU and the banquet, new admittee swearing-in ceremonies, Leadership Academy graduation, Tulsa County Bar Association Law Day lunch, tri-county Law Day lunch, Oklahoma County Law Day lunch, Comanche County Law Day lunch, Seminole County Law Day lunch, Pittsburg County Law Day dinner, director of educational programs Search Committee interviews and Woodward County Bar Association lunch to present a membership anniversary pin to a bar member.

REPORT OF THE VICE PRESIDENT

Vice President Stockwell reported she attended the Justice O'Connor/Chief Justice Taylor conversation, Justice O'Connor banquet, April

board meeting, Cleveland County Bar Association Ask A Lawyer event, CCBA Law Day party and interviews for the OBA director of educational programs position.

REPORT OF THE PRESIDENT-ELECT

President-Elect Stuart reported he attended the April board meeting, Sandra Day O'Connor banquet, Law Day events in Comanche, Seminole, Pittsburg and Lincoln counties, two interview sessions for OBA director of educational programs, OBA Communications Committee meeting and a conference with Executive Director Williams and Debbie Brink in Shawnee regarding his presidential year in 2013. He also chaired meetings of the Transition 2013 and Strategic Planning Committees.

REPORT OF THE PAST PRESIDENT

Past President Reheard reported she attended April board meeting, Muskogee County Law Day banquet, Seminole County Law Day luncheon and Pittsburg County Law Day banquet. She also presented CLE to the Ottawa and Delaware County Bar Associations. She shared with the board that she will be reducing her OBA activities while her husband is undergoing medical treatment. She reported Roy Tucker will assume leadership of the Section Leaders Council, and Governor Smith will chair the Military Assistance Committee.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the Justice O'Connor presentation at the OBA and banquet, new admittee swearing in ceremony,

Leadership Academy final class and graduation, TCBA Law Day luncheon, tri-county Law Day dinner, Clear Vantage software presentation, CLE staff weekly staff meetings, Oklahoma County Law Day lunch, Comanche County Law Day lunch, Seminole County Law Day lunch, Pittsburg County Law Day dinner, meeting with President-Elect Stuart to review the president's notebook for 2013, Diversity Committee meeting, movie night at the Supreme Court CLE, meeting with Dick Beale to discuss new long-term care products, director of educational programs interviews, meeting with representative from IMIS software company, monthly staff celebration, directors meeting and second interviews for director of educational programs.

BOARD MEMBER REPORTS

Governor Devoll reported he attended the Justice O'Connor presentation and banquet, April board meeting and Garfield County Bar Association meeting. **Governor Hays** reported she attended iCivics events, April BOG meeting, Tulsa County Bar Association Law Day luncheon, TCBA Golf Committee meeting, TCBA Board of Directors meeting at which she provided a report of Board of Governors matters, Women in Law Committee meeting, Legal Aid Services of Oklahoma Inc/TCBA Pro Bono Reception for Family Law Section/DVIS Pro Bono Project and swearing-in ceremony for Tulsa County District Judge Mark Barcus. She consulted with the OBA Solo and Small Firm Conference Planning Committee chair and Law Day Committee chair. She chaired the OBA Family Law Section

monthly meeting at which she presented the budget report and chaired the TCBA Family Law Section meeting. **Governor Pappas** reported she attended the Board of Governors meeting, banquet for Justice Sandra Day O'Connor, April board meeting in Oklahoma City, OBA staff appreciation lunch and Payne County Bar Association Law Day banquet. She dropped off reference guides for Logan and Payne counties to use during Ask A Lawyer free legal advice project, drafted an article for an upcoming *Oklahoma Bar Journal*, set up and sent letters to all District Eight county bar presidents, superintendents and principals regarding the Hatton W. Sumners Institute. She also spoke at Stillwater High School during each of three class hours with another attorney each time, in support of the YLD's project promoting the newly revised legal guide for young adults. **Governor Parrott** reported she attended the Oklahoma County Bar Association Law Day luncheon, Justice Sandra Day O'Connor iCivics program and banquet, May 9 all-day interviews for OBA educational programs director vacancy, April board meeting, OCBA Board of Directors meeting and the second round of interviews for the OBA position vacancy. **Governor Poarch** reported he attended the Justice O'Connor dinner and April Board of Governors meeting. **Governor Rivas**, unable to attend the meeting, reported via email that he attended the Sandra Day O'Connor event, April board meeting and Grady County Bar Association meeting. **Governor Shields** reported she attended Justice O'Connor's iCivics presentation, April board meeting, Oklahoma

County Law Day lunch and participated in meetings for hiring the director of educational programs. Governor Smith reported he attended the Justice O'Connor dinner, April Board of Governors meeting and Muskogee County Bar Association banquet. **Governor Thomas** reported she attended the Justice Sandra Day O'Connor banquet April board meeting and Ask A Lawyer at OETA in Oklahoma City.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Kirkpatrick reported she attended the April OBA YLD meeting, Justice O'Connor banquet, April Board of Governors meeting, swearing-in ceremonies, Leadership Academy graduation, OBA YLD Community Day of Service, Oklahoma County Bar Association Law Day luncheon, ABA YLD spring conference in Nashville, Tenn. and OBA YLD welcome to the bar reception in Oklahoma City.

COMMITTEE LIAISON REPORTS

Past President Reheard reported MAC members will staff Yellow Ribbon events that will be held weekly during June. Governor Hays reported the Communications Committee is collecting TV news clips as part of a CLE on dealing with the media. The committee is also reaching out to the Law Day Committee to offer assistance and to President-Elect Stuart who would like to implement a program promoting the good things lawyers do in their communities.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx briefed the board on the status

of litigation against the OBA. She said her department's offices are in the final week of remodeling with a second wave of office furniture coming soon. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for March and April 2012 was submitted for the board's review.

COMMITTEE REQUEST TO SUNSET

President Christensen said she talked to the OBA Lawyers with Physical Challenges chairperson, who has requested the committee be discontinued. Courthouses seem to be up to speed on accommodations, and the committee has received few complaints that need to be addressed. The board voted to sunset the committee.

PRT APPOINTMENTS

The board approved President Christensen's recommendation to appoint Mary Quinn Cooper, Tulsa, to replace Dietmar Caudle; Tom Gruber, Tulsa, to replace James Sturdivant; and Deirdre Dexter, Tulsa, to replace Luke Gaither, on the Professional Responsibility Tribunal. Their terms will expire June 30, 2015.

OBF TRUSTEE APPOINTMENTS

President Christensen announced she has reappointed Stephen Beam, Weatherford, and appointed Kara A. Smith, Newalla, and Jeff Trevillion, Oklahoma City, for three-year terms on the Oklahoma Bar Foundation Board of Trustees expiring Dec. 31, 2015.

LAW DAY REPORT

Communications Director Manning reported Law Day

Committee Chair Tina Izadi was not able to attend the board meeting, so she shared highlights of the committee's report in her place. The total number of contest entries was 1,414, down slightly from last year. The one-hour Ask A Lawyer TV show on OETA featured segments on families in transition (divorce), dealing with disaster, residential rights and the Oklahoma Lawyers for America's Heroes program. For the Ask A Lawyer statewide free legal advice hotline, 197 attorneys volunteered and answered questions from 1,141 people. These figures were from 28 counties. It was noted the number of phone calls received was down dramatically. Ms. Manning reported a 23-minute interview on a Spanish-language public affairs program that aired multiple times on the Univision/Telemundo cable stations in both Oklahoma City and Tulsa helped produce 20 calls from Spanish speakers, the most ever. Radio advertising was also added this year, and preliminary results indicate it was helpful. She explained that the Communications Department supports the committee's efforts and is responsible for all Law Day promotion in addition to many other tasks. Copies of the many newspa-

per clippings about the free legal advice were included in the report. She noted that even though people might not take advantage of the free advice, the positive public relations generated by all media (print, radio and TV) was significant. She shared ideas of things the committee and the department could do to make next year's effort even more successful.

VISION 2020 EDUCATIONAL CONFERENCE

President Christensen reported the Department of Education will hold a statewide conference in June in Oklahoma City. The OBA will have a booth to promote law-related education resources, Law Day contests and the High School Mock Trial Program.

OSBI AUDIT

General Counsel Hendryx reported in January the Oklahoma State Bureau of Investigation conducted a noncriminal justice use of national criminal history information audit at the OBA. Its purpose is to evaluate compliance with state statutes and federal regulations. The OSBI found that the OBA was in full compliance with all federal and state requirements. She explained the Office of the General Counsel using the

OSBI to investigate people wanting to be reinstated to practice law.

LAW-RELATED EDUCATION TRACKING LIST

President Christensen shared a list of schools showing what materials are being requested. She encouraged board members to contact schools in their districts to urge them to utilize the available free materials.

EXECUTIVE SESSION

The board voted to go into executive session, met and voted to come out of executive session.

NEW EDUCATIONAL PROGRAMS DIRECTOR

The board voted to approve the hiring of Susan Damron Krug as OBA educational programs director.

NEXT MEETING

The Board of Governors met in Durant on June 22, 2012, and in Stillwater on July 20, 2012. A summary of those actions will be published after the minutes are approved. The next meeting of the board will be held Aug. 17, 2012, at the Oklahoma Bar Center in Oklahoma City.

No, Really — OBF Does Not Receive a Share of Your OBA Dues

By Shon T. Erwin and Nancy Norsworthy

When you pay your Oklahoma Bar Association dues, you are paying annual rent for your license to practice law in Oklahoma, and you are paying for the many valuable services your bar association provides to the legal profession and to the citizens of our state. However, when you pay your OBA dues you are *not* making a payment of any kind to the Oklahoma Bar Foundation.

The Oklahoma Bar Foundation has made over \$10 million in grants, awards and scholarship payments. Funding for these grants, awards and scholarships comes from four sources: 1) trust accounts of Oklahoma lawyers through the Interest On Lawyer Trust Accounts (IOLTA) program, 2) interest on endowments and other invested OBF funds, 3) the Fellows program and other generous contributions; and 4) *Cy Pres* and residual balance awards.

OBF funding has steadily declined since 2009 along with the economy. The 2012 OBF grant funding program is in crisis because income is down by almost 50 percent from this same time last year. Much of the 2012 revenue decline is attributed to unan-

anticipated decreases in IOLTA receipts. Federal funds target rates have not changed in many months, and this dramatic decrease was not expected by IOLTA programs across the nation. This dire situation is not likely to improve for at least another two or three years, provided that federal rates do increase.

“The 2012 OBF grant funding program is in crisis because income is down by almost 50 percent from this same time last year.”

What will the dramatic decline mean for organizations funded by OBF? The 2012 OBF grant cycle is currently underway with 21 organizations making requests totaling \$675,000. Given the loss of income, your OBF must dramatically cut grant award amounts and possibly elimi-

nate some organizations completely from the grant process. This means that many Oklahomans will go without vitally needed legal services. This means that law-related education programs in schools will go unfunded. This means that children and vulnerable adults in Oklahoma will suffer.

What will the dramatic decline mean for you? Oklahoma lawyers will be expected to take on more pro bono roles because more Oklahomans will be seeking help, and many will not be able to find it. The need is great, but greater is the capacity for Oklahoma lawyers to give their time and money to help the most vulnerable among us.

The next time you pay your OBA dues, think about what your payment does *not* include.

Judge Erwin is Oklahoma Bar Foundation president and can be reached at Judge_Shon_T_Erwin@okwd.uscourts.gov, and Ms. Norsworthy is Oklahoma Bar Foundation executive director and can be reached at nancyn@okbar.org.

**You can now make
OBF contributions online at:
WWW.OKBARFOUNDATION.ORG**

Service Casts YLD in Spotlight

By Jennifer Heald Kirkpatrick

I recently returned from the ABA Annual Meeting in Chicago which I attended with other OBA YLD officers, Chair Elect Joe Vorndran, Treasurer Kaleb Hennigh and Secretary LeAnne McGill. At the ABA YLD Assembly held on Aug. 4, 2012, the OBA YLD was recognized with not one, but two, ABA YLD Awards of Achievement. The OBA YLD took first place - Comprehensive for overall activities and achievements during the 2011 - 2012 bar year and second place for Outstanding Service to the Public Project for the young adult guide project that was rolled out this past April and May. I want to extend my thanks and congratulations to all those who participated in and supported OBA YLD activities, specifically including Immediate Past Chair Roy Tucker, current YLD officers named above and the current YLD Board of Directors. I also want to thank all the law firms across the state that have supported the participation of young lawyers in these projects and activities, especially my employer, Hall, Estill, Hardwick, Gable, Golden & Nelson PC.

While in Chicago for the Annual Meeting, the other YLD officers and I participated in lively debate with almost 200 other young lawyers from across the country; discussing issues impacting the practice of law, including whether sharing legal fees and ownership or control of the practice of law by non-lawyers is consistent with the core values of the legal profession. I was also honored to represent



OBA YLD officers accepting Awards of Achievement in Chicago (from left), Joe Vorndran, Shawnee; LeAnne McGill, Edmond; Jennifer Kirkpatrick, Oklahoma City; and Kaleb Hennigh, Enid.

Oklahoma in the larger ABA House of Delegates with other distinguished attorneys from the great state of Oklahoma, including OBA President Cathy Christensen, President-Elect Jim Stuart, Vice President Peggy Stockwell, Jimmy Goodwin, Joe Crosthwait, Bob Farris, Mark Robertson, Judge Jequita Napoli and Dwight Smith. I was also delighted to have the opportunity to spend some time with Bill Paul, past ABA president from Oklahoma.

I left Chicago not only proud to be chair of the OBA YLD and a member of the OBA, but inspired by the work being done across the country by my fellow attorneys and the ABA. For example, the OBA YLD will be rolling out an ABA YLD project this fall focused on educating young Americans about the generations who struggled to guarantee our right to vote and inspire all Americans to participate in the election process. The OBA YLD will be taking the American Voter Project to communities across Oklahoma this fall, which includes a 30-minute

documentary produced by the Texas Young Lawyers association highlighting the struggle to ensure the right to vote in the United States, as well as hands-on activities and voter registration drives. To request a rollout of the project in your community, or to volunteer to assist the OBA YLD, please contact me at jkirkpatrick@hallestill.com.

Finally, I want to encourage all young lawyers in solo practice or considering solo practice to register for a new YLD CLE "Taking Care of Business: An Everyday Approach in Your Solo/Small Firm Law Practice" to be held Sept. 26 in Tulsa and on Oct. 3 in Oklahoma City. This CLE has been specifically designed for young lawyers in solo or small firm practice with the more practical aspects of organizing your day, keeping finances on track and handling difficult clients. For more details, please go to www.okbar.org/cle.

Ms. Kirkpatrick practices in Oklahoma City and chairs the YLD. She can be reached at jkirkpatrick@hallestill.com.

Calendar

August

- 15 OBA Women in Law Committee meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Dierdre Dexter 918-584-1600
- 16 Access to Justice Committee meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Rick Rose 405-236-0478
OBA Justice Commission meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Carrie Bullard 405-235-5500
- 17 OBA Board of Governors meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000
Oklahoma Association of Black Lawyers meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Brittini Jagers 405-314-0611
- 18 OBA Real Property Law Section Title Examination Standards meeting;** 10 a.m.; Stroud Conference Center, Stroud; Contact Chris Smith 405-919-6876
- 21 OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact David Swank 405-325-5254
OBA Civil Procedure and Evidence Code Committee meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU-Tulsa, Tulsa; Contact Jim Milton 918-594-0523
- 23 Oklahoma Bar Foundation meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nancy Norsworthy 405-416-7048
OBA Men Helping Men support group meeting; 5:30 p.m.; The University of Tulsa College of Law, 205 John Rogers Hall, 3120 E. 4th Place, Tulsa; RSVP to Kim Reber kimreber@cabainc.com
OBA Work/Life Balance Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Sara Schumacher 405-752-5565
- 25 OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Jennifer Kirkpatrick 405-553-2854

- 27 OBA Alternative Dispute Resolution Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Michael O'Neil 405-236-1012
- 28 OBA Communications Committee and OBA Law Day Committee joint meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Dick Pryor 405-740-2944



September

- 3 OBA Closed** – Labor Day observed
- 4 OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Tamar Scott 405-521-2635
- 6 OBA Men Helping Men support group meeting;** 5:30 p.m.; The Oil Center – West Building, Suite 108W, Oklahoma City; RSVP to Kim Reber kimreber@cabainc.com
OBA Women Helping Women support group meeting; 5:30 p.m.; The University of Tulsa College of Law, 205 John Rogers Hall, 3120 E. 4th Place, Tulsa; RSVP to Kim Reber kimreber@cabainc.com
- 7 OBA Board of Bar Examiners meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Cheryl Beatty 405-416-7022
OBA Lawyers Helping Lawyers Assistance Program meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Thomas Riesen 405-843-8444



The July Board of Governors meeting was held in Stillwater, and the Payne County Bar Association welcomed state bar leaders with a reception, dinner and tour of the OSU athletic facilities. Photographed here, PCBA President Brandon Meyer and Pistol Pete greet OBA President (and OSU alumna) Cathy Christensen at Boone Pickens Stadium.

Oklahoma City Attorney Joins Office of the General Counsel



Tina Izadi

The Office of the General Counsel welcomed a new assistant general counsel over the summer, but as an active lawyer volunteer, she's already a familiar face to many OBA staff members. Tina L. Izadi has chaired the OBA Law Day Committee for the past four years, and has recently served on President Cathy Christensen's Special Committee on Public Education (SCOPE). Ms. Izadi most recently served as assistant general counsel for the Oklahoma Department of Mental Health and Substance Abuse Services; during her career she has also served as an Oklahoma assistant attorney general, an associate with Riggs, Abney, Neal, Turpen, Orbison & Lewis, staff attorney with Legal Aid of Western Oklahoma Inc. and as the staff attorney for the ACLU of Oklahoma. As Law Day Committee chairperson, she was honored with the 2009 OBA Golden Gavel Award. She has also been published in the *Oklahoma Bar Journal* and was the 2005 winner of the Maurice Merrill Golden Quill Award. In

her spare time, she is runner and recently completed the Oklahoma City Memorial Half-Marathon. She is a 1999 graduate of the OU College of Law.

OBA to Celebrate Constitution Day – Save the Date!

Sept. 17 is Constitution Day across the U.S., and the OBA is celebrating by webcasting a replay of "A Conversation with Justice O'Connor and Oklahoma Supreme Court Chief Justice Steven Taylor" at four different times during the day. The presentation (originally webcast live in April) is aimed at lawyers and classrooms alike, and features the justices answering questions from Oklahoma middle and high school students. The event highlights the importance of civic literacy among students. For more information, or to sign up visit www.okbar.org/s/icivics or call Debra Jenkins at 405-416-7023.



*Retired Justice
Sandra Day O'Connor*

OBA Welcomes New Educational Programs Director

Oklahoma lawyers can expect to see a new face at the bar center as former Assistant Attorney General Susan Damron Krug recently took the reins of the OBA Continuing Legal Education Department. Ms. Krug, whose name is pronounced “kroog,” brings more than 30 years of professional experience to the position, having become a member of the bar after graduating from OCU School of Law in 1993. In her new role, she will continue the development of high-quality educational opportunities for OBA members.

Her career has been primarily devoted to work involving advocacy for victims, including more than six years serving as victim services unit chief for the Oklahoma Office of Attorney General. There, she oversaw the implementation of several programs and services such as VINE, a criminal justice tracking and notification service aimed at keeping citizens updated on an offender’s legal status. She is most proud of having developed Oklahoma’s first victim assistance academy, an intensive week-long course of study designed to improve quality of services that help survivors gain control of their lives.



Susan Krug

Ms. Krug said, “Public service has always been a passion for me. Advocating for victims is about ensuring justice and protecting and enforcing rights of those who were victimized by crime. It’s about empowering those who are vulnerable with the tools they need to protect themselves. After 30 years in state service, it was time to try something new. I’m so excited about this new challenge as I embark on my career with the bar association. It’s a great opportunity to do innovative things.”

Ms. Krug is the first to say she has some big shoes to fill as she takes over the department from former director Donita Bourns Douglas, who recently left the OBA after 11 years to accept another position.

“Donita left this department in great shape, and I certainly don’t want to try to fix anything that’s not broken,” Ms. Krug said. “So my challenge is to continue the standard of excellence while identifying areas where we can improve. I also inherited a great staff, and my plan is to listen to them and solicit their ideas and input as we move forward. You always want to leave something better than you found it.”

Although she enjoys travel and attending concerts, Ms. Krug says her main hobby for the time being is trying to keep up with her daughter, Katie, a high school junior and competitive soccer player. She also has a son, Mak, who just finished his first year at OSU. Their family also enjoys the company of two beloved dogs, Bell, a wire-haired dachshund, and Zoey, a rescue golden retriever. In her continued quest to advocate for victims of all kinds, she was recently enlisted as a foster family for the Central Oklahoma Humane Society, sheltering unwanted dogs waiting to find permanent homes.

She says while she values hard work, she also believes it is important for employees to have fun while they work, and recognizes the importance of laughter in the workplace.

“From the first interview on, I had the sense that I would fit right in,” she said. “Now I’m just ready to hit the ground running and offer great services and great value to our members.”

OBA CLE Recognized for Marketing Achievement

The OBA Continuing Legal Education Department was recently presented with the 2012 Award of Outstanding Achievement in Marketing by the Association for Continuing Legal Education. The department was honored for its publication, *MYOBACLE*, which features information about CLE programming along with a mix of law office management advice, technology tools, feature stories, law-related human interest stories and entertainment in a slick magazine format. The Association for Continuing Legal Education is an international association founded in 1964 that is devoted to improving the performance of CLE professionals worldwide through leadership, education and development.

Accepting the ACLEA Award for Outstanding Achievement in Marketing are OBA CLE Assistant Director Heidi McComb and Marketing Production Specialist Brandon Haynie. The award was presented at the association's recent annual meeting in Denver.



OBA Member Reinstatements

The following members of the OBA suspended for nonpayment of dues or noncompliance with the Rules for Mandatory Continuing Legal Education have complied with the requirements for reinstatement, and notice is hereby given of such reinstatement:

Joseph Michael Sherrod
OBA No. 11992
904 N. Peters Ave.
Norman, OK 73069

Leona Irene Shoffit
OBA No. 19570
1420 Coronado Drive
Pampa, TX 79065-4602

Jan Edwards Singelmann
OBA No. 21815
Suite 500 West
1100 New York Ave., N.W.
Washington, DC 20005

Oklahoma Teacher Honored for LRE Efforts



*Middle School Teacher
of the Year
Donna Hickman*

The American Lawyers Alliance has named Donna Hickman its 2012 Middle School Teacher of the Year. Ms. Hickman teaches at the Union 8th Grade Center in Broken Arrow, and she is a frequent and longtime participant in numerous OBA Law-related Education programs including PACE and We the People. ALA President-Elect Barbara Smallwood will present Ms. Hickman with a \$1,500 cash award at the Tulsa County Bar Association Annual Meeting on Aug. 23. The

alliance is a national association whose membership is comprised of the spouses of ABA members.

OBA Member Resignations

The following members have resigned as members of the association and notice is hereby given of such resignation:

Nina Nitinkumar Chudasama, OBA No. 20305
433 E. Las Colinas Blvd., Suite 860
Irving, TX 75039

Holiday Hours

The Oklahoma Bar Center will be closed Monday, Sept. 3 in observance of Labor Day.

Kudos

Donita Bourns Douglas has been elected president-elect of the Association of Continuing Legal Education. ACLEA is an organization for trainers, managers, educators, publishers, programmers and meeting professionals. The international association was established in 1964 and is devoted to improving the performance of CLE professionals. Ms. Douglas, former OBA educational programs director, is vice president of professional services for InReach, a provider of online CLE software and services.

Oklahoma City attorney **Cynda Ottaway** was elected as a member of the International Academy of Estate and Trust Law, and she was also elected as an officer by the American College of Trust and Estate Counsel. Both honors recognize her contributions to estate planning, as well as planning for family businesses. The academy is a national organization of approximately 2,600 lawyers elected to membership by demonstrating the highest level of integrity, commitment to the profession, competence and experience as trust and estate counselors.

Hall Estill, with offices located in Oklahoma City and Tulsa, announces that five of their shareholders were elected to their first term on the firm's board of directors. **Larry G. Ball** of Oklaho-

ma City joined the firm in 2003, and he practices in the areas of bankruptcy, creditor/debtor rights, insolvency and reorganization, and bankruptcy litigation. **Daniel J. Glover** of Oklahoma City practices primarily in the areas of banking and commercial finance. He joined the firm in 1992. **Mark Banner** of Tulsa, who joined the firm in 1988, has served as an adjunct settlement judge in the U.S. District Court for the Northern District of Oklahoma for more than 12 years. **Robert F. Dougherty** of Tulsa joined the firm in 1996 and practices primarily in the corporate and commercial arena, including real estate, telecommunications, and oil and gas work. **Michael J. Lissau** of Tulsa practices in the areas of labor and employment, healthcare litigation and general litigation. He joined the firm in 2001.

Hall Estill also announces that shareholders **Stephen W. Ray** and **Elaine R. Turner** were elected to their first term on the firm's executive committee. Mr. Ray, who joined the firm in 1992, has served for 10 years as corporate secretary for an NYSE-listed company, and has expertise in governance and compliance issues. He earned his J.D. from the OU College of Law. Ms. Turner joined the firm in 1989, and is frequently interviewed by local media to provide her legal opinion on various employment law topics. She earned her J.D. from the OCU School of Law.

Matt Paque was recently promoted to assistant

general counsel for Tronox, a global chemical company. He joined the company in 2008, and he will continue to focus on global environmental, legal and regulatory matters while providing general corporate and commercial support to the company. He will also be primarily responsible for providing legal support to the company's mineral sands business unit. He will work out of Tronox offices in Oklahoma City and Stamford, Conn. He earned his J.D. from the OU College of Law in 2003.

Miles Tolbert has been named the new chairman of the board of directors for the Oklahoma City Public Schools Foundation. He has served as a foundation director since 2008, and he previously served as Oklahoma secretary of the environment. He leads the environmental practice group at Crowe & Dunlevy.

The Oklahoma Attorneys Mutual Insurance Co. (OAMIC) announces the elections of Chairman **Michael C. Mayhall** of Lawton and Vice Chairman **Mart Tisdal** of Clinton to the company's board. Mr. Mayhall is a shareholder with the firm Godlove Mayhall Dzialo and Dutcher PC, and has served in many legal and civic organizations. He currently serves on the Board of Investors of the Oklahoma Tobacco Settlement endowment trust, the OU College of Law Board of Visitors, and is McMahon Foundation board of trustees secretary/treasurer. Mr. Tisdal is a partner with the firm Tis-

dal & O'Hara PLLC, with offices in Clinton and Edmond. He has served in many legal and civic organizations, which include the OBA Board of Governors, president of the Oklahoma Bar Foundation, OU College of Law Board of Visitors and chairman of the Oklahoma Wildlife Conservation Commission.

Four central Oklahoma area attorneys were announced winners of the *OKCBiz* "Forty Under 40." **Christopher Papin, Bryan Evans, LeAnne McGill** and **Evan Taylor** were recognized by the Oklahoma City publication, which created the list to highlight central Oklahoma's outstanding young professionals. Mr. Papin practices at Burnett & Brown PLLC in Oklahoma City and earned his J.D. from the OCU School of Law. Mr. Evans practices at Evans & Davis PLLC in Edmond. He earned his J.D. from the OU College of Law. Ms. McGill practices family law at McGill & Rodgers, Attorneys and Counselors at Law in Edmond and earned her J.D. from OCU School of Law. Mr. Taylor practices family law at Evan Taylor Law Office PLLC in Norman and graduated from the OU College of Law.

On The Move

Shelton Voorhees Law Group announces that **Brittany J. Byers** has joined as an associate. She received her license to practice law in 2012. Her practice areas include collections, real estate, probate, guardianship,

estate planning, business and commercial, employment law, personal injury and general civil litigation. She is a 2011 graduate of the OU College of Law.

Graham Allen & Brown PLLC announces **Ryan Roberts** has joined their firm. Mr. Roberts is an experienced personal injury and workers' compensation attorney. Originally from Washington state, he earned his undergraduate degree in accounting from OSU. He graduated from the TU College of Law in 2003. He is admitted to practice in all state and federal district courts of Oklahoma and has been admitted to practice before the U.S. Supreme Court. He is also admitted to practice in the courts of the Cherokee Nation. He will office in the firm's Claremore location but is available to help people with claims throughout northeastern Oklahoma.

Judge **Timothy R. Henderson** took the oath of office as Oklahoma County district judge in July. He is a 1987 graduate of the OU College of Law. Since 1996, he has engaged in private practice with the firm of Huddleston, Pike, Henderson, Cusack and Parker. Prior to his legal career, he served as a police officer in Edmond.

Hall Estill announces the addition of **Casey Ross-Petherick** to the firm's Indian Law practice in Oklahoma City. Ross-Petherick joined Hall Estill in June, though she will maintain her position at OCU School of Law, where she is the current clinical professor of the American Indian Wills Clinic. She earned her J.D. from OCU in 2003. She

served as the senior legislative officer for the Cherokee Nation in Washington D.C. from 2003 to 2005 and has taught in the Indian Law program at OCU School of Law since 2009. She is a citizen of the Cherokee Nation.

Amir **Farzaneh** has recently relocated his practice to 1800 Interstate Dr. Suite 201 in Norman. Mr. Farzaneh, who graduated from OCU School of Law, has been practicing immigration law for more than 16 years. He may be reached at 405-528-2222, or at www.farzaneh.com.

Legal Aid Services of Oklahoma Inc. announces **Adrienne Watt** has been named statewide director of advocacy. She was previously the lead attorney for the Medical-Legal Partnership for Children, a collaboration between Legal Aid and the OU-Tulsa School of Community Medicine. She is a 2004 graduate of Georgetown University Law Center and a graduate of the 2009-2010 OBA Leadership Academy. She will be located in the Tulsa Law Office. It has also been announced that **Mary Mosshammer** will assume the duties of assistant deputy director for Legal Aid Services of Oklahoma. She joins the Executive Management Team and will supervise all statewide managing attorneys. She will be located in the Hugo Law Office. In addition, Legal Aid announces the selection of its Advocacy Team, established to ensure the most effective deployment of Legal Aid's services in a manner that is responsive to changing community needs. The team will spearhead strategic litigation initiatives and community collabora-

rations that address the underlying causes of poverty in Oklahoma. Newly assigned to the team are **Kimberly Waite-Moore**, Tulsa, housing advocacy coordinator; **Richard Vreeland**, Norman, family law advocacy coordinator; **Polly Goodin**, Ardmore, consumer advocacy coordinator. **Richard Goralewicz** of Oklahoma City and **Linda Lepak** of Tulsa have also been named to the Advocacy Team.

Pignato, Cooper, Kolker & Roberson PC announces that **R. Greg Andrews** has become of counsel to the firm. Mr. Andrews, a 2001 graduate of the OU College of Law, practices a wide range of commercial litigation matters including business torts, contract matters and insurance disputes in both state and federal courts, as well as various arbitration forums. He also has experience litigating product liability claims and construction disputes, both commercial and residential.

Pierce, Couch, Hendrickson, Baysinger & Green LLP announces the addition of nine attorneys to its Oklahoma City and Tulsa offices. **Kari Y. Hawkins** received her J.D. from TU in 2003. Her previous employment includes the Oklahoma Attorney General's Office and as an assistant general counsel for the Oklahoma Department of Corrections. In addition to insurance defense, her practice includes civil rights litigation. **Seth D. Coldiron** received his J.D. from OCU in 2003 and was formerly an associate with the Ryan, Whaley, Coldiron, Shandy PLLC law firm. His practice includes insurance defense and environmental law. **Robert L. Betts** received his J.D.

from TU in 2007. His practice includes insurance defense and environmental law. **Shannon E. Bickham** received her J.D. from OCU in 2007, and her practice includes medical malpractice and insurance defense. **Matthew C. Russell** received his J.D. from OU in 2010. His practice includes insurance defense and family/domestic law. **Benjamin S. Saunier** and **Jeffrey D. Nachimson** graduated from OCU School of Law, both receiving their J.D. degrees in 2011. Mr. Saunier's practice includes general civil litigation, and Mr. Nachimson practices in workers' compensation. **Amy Bradley-Waters** has joined the Tulsa office as an of counsel attorney. Ms. Bradley-Waters has worked as a litigation attorney for Shelter Mutual Insurance Co. in Columbia, Mo., and obtained her chartered property and casualty underwriter (CPCU) designation in 2002. **Nate Nebergall** has also joined the Tulsa office and received his J.D. from the University of Tulsa in 2011. His practice is primarily civil litigation.

GlassWilkin PC in Tulsa announces the addition of two associate attorneys to its firm. **Jeffrey E. Niese** practices primarily in general business, construction law, estate planning, family law, insurance defense and personal injury. He earned his J.D. from the TU College of Law and has served as a clerk for Magistrate Judge Paul J. Cleary. **L. Ryan Collins** practices primarily in the areas of healthcare law, general business transactions and employment law. He earned his J.D. from the OU College of Law. During law school, he served

in the Oklahoma Court of Civil Appeals for Judge Deborah Barnes.

Tulsa attorneys, **Mike Manning**, **Jill Webb** and **Hugh Hood** have formed The Street Law Firm PLLC and have moved to a new location: 400 S. Boston Ave., Suite 1100W, Tulsa, 74103. Mr. Manning is a graduate of the TU College of Law and is a former staff attorney with the Tulsa County Public Defender's Office. He is a member of the Tulsa County Criminal Defense Lawyers Association and the Oklahoma Criminal Defense Lawyers Association. Ms. Webb is a graduate of the Chicago Kent College of Law and is also a former staff attorney with the Tulsa County Public Defender's office. She is a member of the Tulsa County Criminal Defense Lawyers Association and a board member of the Oklahoma Criminal Defense Lawyers Association. Mr. Hood is a graduate of the TU School of Law and is a former state's attorney for the Department of Human Services. He is a member of the Oklahoma Academy of Collaborative Professionals and the Oklahoma Criminal Defense Lawyers Association. Their firm's website is www.thestreetlaw.com; phone number is 918-856-5373. The firm will focus on criminal defense, personal injury, mediation and bankruptcy.

CSteven Hager, the director of litigation at Oklahoma Indian Legal Services Inc. has been named chief judge of the Tribal District Court for the Kansas Kickapoo Tribe located in Horton, Kan. Mr. Hager has worked at OILS since 1990. He is the author of *The Indian Child Welfare Act: Case and Analysis*,

now in its 16th edition. He also serves on the Supreme Court for the Kaw Nation of Oklahoma.

GableGotwals announces that **Timothy Thompson** will be joining the firm's Tulsa office as a new of counsel attorney. Mr. Thompson will focus on business and commercial transactions, particularly in the areas of oil and gas: midstream and downstream natural gas pipeline and transportation. He also has experience in the areas of mergers and acquisitions, real estate and FERC regulations. He spent six years with the Williams Companies in Tulsa, and an additional nine years with Southern Star Central Gas Pipeline in Owensboro, Ky., as a staff attorney. The past year, he has served as associate general counsel with Southern Illinois University in Carbondale, Ill. He received his J.D. from the TU College of Law in 1994.

Marc Calvin Fleischer announces the formation of Fleischer Law PLLC, an oil and gas title-focused firm located in Oklahoma City. Mr. Fleischer spent the past seven years as an attorney with Chesapeake Energy Corp. He is a 2005 *cum laude* graduate of the OCU School of Law.

Doerner Saunders welcomes domestic relations attorney **Megan M. Beck** to its Tulsa Office. She comes to the firm from Chicago, where she focused in domestic relations law. She also is a former domestic relations division attorney in the Circuit Court of Cook County, Ill., administering the Cook County Child Representative Program and providing support for nearly

50 domestic relations division judges. She graduated from the University of Missouri — Kansas City School of Law.

The Tulsa law firm of Sneed Lang Herrold PC announces that **Maren Minnaert Lively** has joined the firm. She earned her J.D. from Georgetown University Law Center in 2004 and brings several years of skilled experience to the firm in the areas of family law, domestic relations, probate and estate planning. She may be reached by email at mlively@sneedlangherrold.com.

The Senior Law Resource Center of Oklahoma City announces the appointment of **Sarah C. Stewart** as executive director. The Senior Law Resource Center is a nonprofit organization that provides free and low-cost legal services and free legal information to seniors and their families, as well as professionals working with the elderly, in central Oklahoma. She earned her J.D. from OCU School of Law. The organization may be reached at 405-528-0858 or by visiting www.senior-law.org.

Ryan J. Johannes has been appointed a U.S. administrative law judge for the Social Security Administration Office of Disability Adjudication and Review for its Toledo, Ohio, office. He previously served as a senior-attorney advisor for their San Diego office. He is a 1996 graduate of the OU College of Law.

Ty Johnson has formed the new law firm Strong, Slater & Johnson, located at 1701 N. Market St., Suite 200, Dallas, Texas, 75202. Mr. Johnson may be reached by email at tjohnson@strongnolan.com.

He is a 2002 graduate of Vanderbilt Law School.

Fellers Snider announces that **Heather Lehman** has been hired as an associate at the firm. She is a litigator who handles all aspects of workers' compensation cases, including discovery, trials and appellate work for corporations, small businesses and educational facilities. She also focuses on issues surrounding human resource issues such as labor and employment. She also has experience in the area of social security disability. She is licensed and has been practicing before the United States District Courts for the Eastern and Western Districts of Oklahoma for a number of years. She is a 2007 graduate of the OU College of Law.

Andrews Davis announces that **Randy C. Smith** has accepted a position of counsel with the firm. He is an oil and gas attorney with experience in oil and gas litigation in addition to leasing, construction law, title work, business and commercial litigation, and the creation of business entities as well as estate planning. He also has experience representing mineral owners in royalty disputes and lease negotiations. His practice continues to focus on these areas with a specific concentration in oil and gas matters and other property damage matters. He is a 2007 graduate of the OCU School of Law.

Oklahoma City law firm Wiggins Sewell & Ogle-tree PC announces **Lane O. Krieger** has been named a partner in the firm. He is a 2004 graduate of the OU College of Law. He may be reached at the firm's offices

at 3100 Oklahoma Tower, 210 Park Ave., Oklahoma City, 73102, or by phone at 405-232-1211.

Crowe & Dunlevy announces **Zach Allen** has joined the firm's Oklahoma City office as a director in the real estate practice group. His practice is concentrated in commercial real estate lending, leasing, development and sales transactions. He is licensed and actively practices in both Oklahoma and Texas and regularly handles multi-state matters. Prior to joining the firm, he was a partner with Mock, Schwabe, Waldo, Elder, Reeves & Bryant. He is a 1988 graduate of Southern Methodist University School of Law.

Crowe & Dunlevy also announces **Kari Hoffhines** has joined the firm's Oklahoma City office as an associate in the banking and financial institutions practice group. She gained a variety of experience in the banking industry serving several roles for Legacy Bank and serving as the bank's trust office for more than two years. During that same time, she worked in Legacy's legal department, where she assisted the general counsel with loan document preparation, contract drafting, bankruptcies, foreclosures, garnishments, levies and various lawsuits. She is a 2011 graduate of OCU School of Law.

The Law Firm of Pignato, Cooper, Kolker & Roberson PC announces that **Greg Andrews** has become of counsel to the firm. He is a 2001 graduate of the OU College of Law. His practice covers a wide range of commercial litigation matters

including business torts, contract matters and insurance disputes in both state and federal courts, as well as various arbitration forums. He also has experience litigating product liability claims and construction disputes, both commercial and residential.

Four new Oklahoma Workers' Compensation Court judges took the oath of office in June. **Margaret A. Bomhoff** of Edmond was sworn into Position 9. She most recently worked for the Fellers, Snider, Blankenship, Bailey and Tippens law firm in downtown Oklahoma City, where she defended employers and insurance carriers in claims filed at the court. **Michael W. McGivern** will serve at Position 5. He worked for the Tulsa law firm of Perrine, McGivern, Redemann, Berry & Taylor PLLC, with 20 years of experience in the field of workers' compensation law, and he served as chairperson of the OBA Workers' Compensation Section. In Position 8, **Carla Snipes** of Oklahoma City will serve. She was most recently with the Vassar Law Firm in Oklahoma City. She is the previous owner of Legacy Estate Liquidation LLC, and she has also previously worked at the State Insurance Fund. She has represented clients at more than 2,000 trials, primarily in workers' compensation court. **L. Bradley Taylor** of Tulsa was sworn into Position 4. He most recently worked for the Tulsa law firm of Perrine, McGivern, Redemann, Berry & Taylor PLLC. He has worked in the field of workers' compensation law representing both workers and employers since 1994, giving

more than 100 presentations on workers' compensation law, and he is also a published author on the subject.

At The Podium

Matthew D. Stump, an immigration lawyer with Stump & Associates in Oklahoma City, served as an expert panelist and speaker at the Annual Conference for the American Immigration Lawyers Association in Nashville. He spoke on the topic of employment-based immigration to hundreds of attendees from across the United States and other countries. In addition, Mr. Stump was selected by the 12,000-member organization to serve on the United States Citizenship & Immigration Services Vermont Service Center Liaison Committee. He began serving the committee as an employment-based immigration law expert in June of 2012 and will continue until June of 2013.

T Douglas Stump, an immigration lawyer with offices in Oklahoma City and Tulsa, was recently a featured speaker at the 2012 Federal Bar Association 9th Annual Conference on Immigration Law held in Memphis, Tenn. He served on a panel of experts that addressed immigrant visa processing and hardship waivers at US Consuls in Mexico, Canada, Guatemala, Honduras, El Salvador and other posts abroad.

Amir Farzaneh, of Farzaneh Law Firm in Norman, recently gave a

presentation for the Southern Oklahoma HR Association in Chickasha, speaking on immigration-related human resources issues.

Mitchell Cohen, general counsel at the Illinois Department of Natural Resources, recently spoke before the Illinois State Bar Association's Environmental Law Conference on "Pollution-Caused Fish Kill Investigations for Natural Resource Damage Claims in Chicago." He also gave a presentation in Columbus, Ohio, in May for the Midwest Environmental Enforcement Association and the Northeast Environmental Enforcement Project titled "Geology for Environmental Attorneys." He also recently spoke before the Illinois State's Attorneys Association at their summer conference on "Conservation Police Officer Authority and Prosecuting Conservation Violations" in Chicago.

Kelli Stump of Stump & Associates, with offices in both Tulsa and Oklahoma City, spoke at the American Immigration Lawyer's conference in Albuquerque on complex deportation and immigration court practice. She was also a panelist on three panels for the 9th Annual Federal Bar Association Immigration seminar. Topics from the seminar included post-conviction relief, ethics and waivers of removal in immigration court.

Eric L. Johnson, a consumer financial services attorney with Phillips Murrah PC, moderated the legal committee panel at the 16th Annual National Automotive Finance Association's Non-Prime

Auto Finance Conference, held in Ft. Worth. Topics included: leasing and non-prime lease issues; the Servicemembers Civil Relief Act; state law auto finance issues with audits; conditional delivery and document preparation fees; holder liability; repossessions, rights and obligations; and vendor management under the CFPB. He was also the featured speaker at a recent gathering of the Credit Union Association of Oklahoma, where his presentation at the Second Quarter Compliance Council was titled, "New International Remittance Transfer Rule Under Regulation E."

Mark Christiansen of McCrowe & Dunlevy recently spoke at the Annual Meeting of the American Association of Professional Landmen in San Francisco, where he provided a litigation update on oil and gas royalty class actions and other recent oil and gas industry lawsuits. He also spoke at the Third Annual Law of Oil and Gas Shale Plays Conference in Fort Worth, sponsored by the Dallas-based Center for American and International Law, where he participated in a panel of industry lawyers from five states, discussing current litigation trends and developments in the major oil and gas jurisdictions.

Kim D. Parrish recently served as an instructor for two newly appointed classes of Social Security administrative law judges in Falls Church, Va.

McAfee & Taft attorney Mary Ellen Ternes recently presented "Shale

Development: Air Quality Permitting Challenges and Compliance Strategies" during the Air and Waste Management Association and American Institute of Chemical Engineers nationally broadcast webinar. She was also a panelist for a session titled "Rethink: Impacts of Social Media" during the 2012 Oklahoma Brownfields Conference in May.

McAfee & Taft attorney Chris Paul presented "Pipeline Integrity Record-keeping and Other Legal Issues" at the American Gas Association's Operations Spring Conference in May in San Francisco. He also presented "Legal Issues for Corrosion and Pipeline Integrity Management Personnel" at the 59th Annual Corrosion Course sponsored by the University of Oklahoma OUTREACH in Norman in June. In addition, he presented "Pipeline Integrity: Data and Records in a TVC World" at the American Gas Association's Legal Forum in San Diego in July.

McAfee & Taft attorney Matthew Gibson presented "Patent Law Protection" for an OBA CLE seminar titled "Intellectual Property Law: What You Don't Know Can Hurt You" in May.

McAfee & Taft attorney Dara Wanzer was a featured presenter during an OBA/CLE webcast titled "Oklahoma's Public Policy on Employment: Procedural and Substantive Issues from Both Sides of the Aisle" in May.

McAfee & Taft attorney Charlie Plumb was the featured speaker for the nationally broadcast webinar

titled "ADA-Safe Job Descriptions: HR's How-To for Defining Essential Functions," presented by HR Hero in June. He also presented "Americans with Disabilities Act: ADA Danger Zone" during the Oklahoma Municipal League Employment Seminar at Rose State College in July.

McAfee & Taft attorneys Roberta Fields, Chris Paul and Nathan Whatley were the featured panelists for the nationally broadcast webinar titled "Avoiding the hazards of workplace safety

programs," presented by EmployerLINC in June.

McAfee & Taft attorney Bill Freudenrich was a featured presenter for the nationally broadcast webinar titled "Hostage or Hero: Taking Control of the Renewal Process," presented by EmployerLINC in June.

McAfee & Taft attorney Tony Puckett presented "Employment Update" during the Oklahoma Municipal League Employment Seminar at Rose State College in July.

McAfee & Taft attorneys Kathy Neal and Sharyl Whiting-Ralston were the featured panelists for the nationally broadcast webinar titled "Handling Harassment (or Similar Types of) Complaints," presented by EmployerLINC in July.

Submit news items via email to:
Lori Rasmussen
Communications Dept.
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Articles for the Sept. 8 issue must be received by Aug. 13.

IN MEMORIAM

Norma "Jo-Ann" Askins of Oklahoma City died July 27. She was born on Jan. 26, 1932, in Tulsa. She graduated from OCU School of Law in 1963 and engaged in an active law practice until shortly before her death. When she joined the bar in 1963, she was one of very few women who practiced criminal law in Oklahoma. In addition, she enjoyed her position at Hertz Corporation where she worked as a reservationist for the last 19 years. She was a member of Council Road Baptist Church for more than 38 years and enjoyed participating in the church choir. She was also an accomplished musician, playing the organ, piano, accordion and violin. She loved gardening, needlepoint, crochet, dancing, animals of all kinds, playing video games, spending time with her children and grandchildren, and family gatherings.

Steven "Reggie" Barnes died May 25. He was born Jan. 31, 1953, in Oklahoma

City and attended Deer Creek Schools. He earned a degree in political science from OCU in 1975, and received his J.D. from the OU College of Law in 1980. He practiced law in the Oklahoma City metro area for 20 years.

James B. Blevins of Oklahoma City died June 4. He was born July 20, 1927, and was a lifelong resident of Oklahoma City, graduating from Capitol Hill High School. **He was inducted into the U.S. Army and served until the end of World War II. He later joined the 45th Infantry Division and served on active duty during the Korean Conflict.** After returning to civilian life he completed his studies, earning a bachelor's degree and a law degree from OCU. He practiced with the firm of Blevins and York until he was appointed district judge, serving from 1984 until his retirement in 1998. He was a Mason for 69 years, Boy Scout leader and a past president of the Capitol Hill Kiwanis Club. He was an ordained elder and

deacon, and a member of the board of trustees for Westminster Presbyterian Church. Memorial donations may be made to Goodland Academy, P.O. Box 1056, Hugo, 74743.

John Breathwit of Oklahoma City died July 4. He was born Dec. 21, 1953, in Lawton and attended Lawton High School. He was a standout basketball player at both OU and Louisiana State University, and he earned a J.D. from the OU College of Law in 1982. He began his law career at the Andrews Davis law firm, and in 2000, he formed the law firm of Breathwit & Patton. He considered the season he volunteered as a basketball coach for inner-city kids one of his finest accomplishments. Among his survivors is his wife and law partner, OBA member Babette Patton. Memorial donations may be made to Fraxa Research Foundation, 45 Pleasant Street, Newburyport, Mass., 01950.

Carol Ann Tyree Burris of Muskogee died Feb. 13. She was born in Muskogee on Jan. 10, 1937, and graduated from Muskogee Central High School in 1955. She earned a B.S. in education from NSU in 1965 and a master's degree in gifted education in 1981, teaching for 15 years before attending law school. She graduated from the TU College of Law in 1984, first working as a trust attorney for a Muskogee bank and later entering private practice. She was a member of numerous educational organizations as well as the Muskogee County Bar Association, and she served as past president of the Oklahoma Judicial Conference Auxiliary. Among her survivors is her husband, OBA member and retired Judge Lyle Burris. Memorial contributions may be made to Oklahoma Medical Research Foundation.

Donald Lew Cooper of Oklahoma City died June 20. He was born July 28, 1932, in Tulsa, and he graduated from Will Rogers High School in 1950. He graduated from Oklahoma A&M (OSU) in 1954 and earned his law degree from the OU College of Law in 1959. **He served in the U.S. Air Force and Air Force Reserve.** As an attorney, he practiced law in the municipal counselor's office of the City of Oklahoma City and later became a partner in the law firm of Rainey, Flynn, Ross, Rice and Binns, practicing for more than 50 years. His hobbies included hunting, fishing and hiking with his sons, reading and crossword puzzles. Memorials may be made to the Parkinson's Foundation or Village Christian Church.

H.C. "Hank" Cooper of Oklahoma City died July 6. He was born Sept. 6, 1938, and attended Capitol Hill High School and the University of Oklahoma. He was a 1964 graduate of the OCU School of Law. After graduation, he joined the Oklahoma County District Attorney's Office. Later he entered private practice and maintained a successful law practice throughout his lifetime. He was a lifelong member of Putnam City Baptist Church and a dedicated member of the India Shrine Center. He greatly enjoyed boating, fishing, hunting, reading and spending time with his family. Memorial contributions may be made to the building fund at Putnam City Baptist Church.

Gail Craytor of Broken Bow died May 22. He was born April 18, 1932, in Leoti, Kan. **He served for four years as a member of the U.S. Navy during the Korean Conflict.** Following his military service, he earned a bachelor's degree in electrical engineering at Colorado University. He later earned a law degree from the University of Denver College of Law. He practiced law for six years before running for district judge, serving Oklahoma's 17th Judicial District until his retirement in 1995. He was a member of the First Baptist Church and a Mason.

Mark W. Hayes of Oklahoma City died May 21. He was born Aug. 19, 1957. He was a 1999 graduate of the OCU School of Law.

CWayne Litchfield of Oklahoma City died July 6. He was born Oct. 29, 1933, in Wynnewood and attended

Wynnewood High School. He attended Southern Methodist University on a football scholarship. He was a CPA after he graduated, and he earned a J.D. from the OU College of Law in 1960. He loved the law and was an avid OU football fan. Memorial donations can be made to City Care's Whiz Kids, an organization dedicated to teaching inner-city children how to read.

James Wilson McCall of Hillsborough, Calif., died July 13. He was born in Norman March 10, 1953, and graduated from OU in 1974 with a B.A. in letters. He earned his J.D. from the OU College of Law in 1977. He also earned an M.B.A. from the Harvard Business School in 1984. His work experience included McKinsey, Goldman Sachs and Security Pacific/Bank of America Venture Capital Group. He joined Intel Corporation in Santa Clara, Calif., in 1997 where he remained until his death. He was an avid golfer member and belonged to the Society of the Cincinnati, whose members are descendants of the officers who served in General George Washington's Revolutionary Army. Memorial contributions may be made to The Cancer Center, Stanford University Medical Center, 875 Blake Wilbur Drive, Stanford, Calif., 94305.

Robert E. Miles of Tulsa died May 26. He was born March 27, 1925, in Garber and graduated from Ponca City High School in 1943. After farming and ranching in the Ponca area, he attended TU. He worked his way through TU College of Law and graduated in 1965. He practiced for 30 years before retiring.

His pride and joy were his children and grandchildren.

Floyd Kelsey Propps of Edmond died May 14. He was born July 8, 1950, in Woodward and graduated from Mangum High School in 1968. He earned a bachelor's degree at Phillips University in Enid, a master's at OU and a J.D. from the OCU School of Law in 1990. He practiced health care law in Oklahoma and Florida and assisted nursing home owners in obtaining the necessary permits for sales and expansion projects. He also taught future nursing home administrators in their education program. He enjoyed playing music and performed oldies rock and roll with his band, "The Changing Times." Memorial contributions may be made to the Mangum High School Alumni Scholarship, P.O. Box 8, Mangum, 73554.

Joe Brett Reynolds died May 8. He was born in Oklahoma City on June 29, 1967, and graduated from Moore High School. He earned a degree in finance from OU in 1990. As an undergraduate, he was NCAA wrestling champion and a two-time All-American. He was a 1992 graduate of the OCU School of Law, and he practiced in the area of criminal defense. He was known as a zealous advocate for his clients. Outside the practice of law, his primary focus was his three children.

Retired Judge Robert J. Scott of Pawnee died May 19. He was born Nov. 22, 1924, in Arkansas City, Kan. **He entered the U.S. Air Force out of high school and served as an aerial gunner during World War II.** He later

completed his studies at OU, earning a law degree in 1953. He established a firm in Pawnee in that same year, and maintained his practice until he became district judge of Tulsa and Pawnee Counties in 1983, serving until 1993. He was a member of the Board of Bar Examiners from 1969 until 1976. He was a member of the First Christian Church of Pawnee where he served as deacon, elder emeritus and trustee.

Elton Edward Thompson of Poteau died May 12. He was born August 29, 1925, in Harmony and was a graduate of Wister High School. **He was a veteran of the U.S. Marine Corps, serving in World War II in the South Pacific on Okinawa and Peleliu Island, in action in defense of New Guinea, Cape Gloucester and New Britain, and the occupation of China.** He was a graduate of OSU and received his law degree from the University of Arkansas in 1951. He practiced law in LeFlore County for 61 years.

Jennifer Lee Thompson of Oklahoma City died on July 10. She was born on Oct. 24, 1974, in Oklahoma City and attended Casady School. She attended Southern Methodist University, graduating with a double degree in French and geology. She graduated from the OU College of Law in 2000. She practiced primarily in the area of family law for almost 10 years. She was also active in the Oklahoma County Bar Association. Among her survivors is her mother and law partner, Carolyn S. Thompson. Memorial donations may be made to the Peggy and Charles Stephen-

son Cancer Center at the OU Health Sciences Center.

Judge Donnita Weinkauf Wynn of McAlester died July 31. She was born Nov. 29, 1957, in Stillwater and raised in Oklahoma City and Tulsa, graduating from Central High School in 1975. She attended OU and graduated from TU in 1979, earning a B.S. in finance. She earned her J.D. from the TU College of Law in 1982. From 1986 to 1992, she served as vice president and manager of land development for Weinkauf Petroleum Inc. in Tulsa. From 1992 to 1994, she entered private practice in McAlester and was hired as an assistant district attorney in 1994 for Pittsburg County. She was appointed district attorney for Haskell and Pittsburg counties, serving from 1995 to 1999. After returning to private practice, she was appointed Pittsburg County special judge in 2005 and continued in that position until her death. She served as secretary of the Tulsa Landman's Association and was president of the Junior Association of the Tulsa Boys Home. She was a member of the Pittsburg County Bar Association and has been a member of the Oklahoma Department of Corrections Community Sentencing Council for Pittsburg County since her appointment to the bench in 2005. She was also involved in numerous community and civic organizations as well as St. John Evangelist Catholic Church in McAlester. Memorial donations may be made Oklahoma Medical Research Foundation — Cancer or Pulmonary Research, 825 Northeast 13th Street, Oklahoma City, OK, 73104.

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The qualified candidate will possess a law degree and must have 3 to 5 years of legal experience in either real estate, banking or residential mortgage servicing with a law firm or financial institution. Candidate must be licensed in Oklahoma or be willing to pursue same immediately. The successful candidate will have excellent academic credentials, strong drafting, negotiation and oral communication skills and must possess the ability to manage large numbers of projects simultaneously in a variety of legal areas. The candidate must be able to work under pressure and have good judgment and the ability to identify potential legal issues. Good writing, research and communication skills are required.

If you are interested in this position, please visit our website to complete an online application:
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IMMEDIATE OPENING FOR LEGAL SECRETARY position for small central Oklahoma City oil and gas law firm. Exemplary computer skills in Excel, PowerPoint and Word required. Leasehold title experience a plus. 3 years' minimum experience. Salary commensurate with experience. Please send résumé and salary requirement to: "Box AA" Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

ASSISTANT ATTORNEY GENERAL. Experienced attorney in General Counsel Section of the Attorney General's Office. Strong research and writing skills required. Duties include representation of State in administrative disciplinary proceedings against health professionals and in appellate proceedings arising from such actions. Send résumé and writing sample to resumes@oag.ok.gov. Excellent benefits, including state pension program. Salary is commensurate with experience. EOE.

SOCIAL SECURITY DISABILITY ATTORNEY NEEDED for busy Tulsa firm. 3+ years' experience required. Competitive salary and benefits package. Please submit résumé to "Box CC" Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

OKLAHOMA CITY MORTGAGE COMPANY seeks full-time in-house counsel, licensed to practice in Oklahoma, to deal with regulatory compliance and to provide legal counsel on a variety of issues. Must be detail oriented, and have familiarity with banking, consumer finance, and lending regulations at both the state and federal level. Prior job experience in banking or the mortgage industry a plus. Salary based upon experience. Send résumé with references and salary requirements to 1016atty@gmail.com.

THE UNIVERSITY OF OKLAHOMA, Office of Legal Counsel, seeks an attorney licensed in the State of Oklahoma with five or more years of licensed legal practice to fill the position of Director of University Collections. Responsibilities include oversight and management of the University's delinquent accounts portfolio, filing and representing the University in approximately 1,200 collection and/or forcible entry and detainer actions each year throughout the state, management of an 8-10 person support staff; prepare and operate within an administrative budget, coordinate with University department heads regarding services, administer tax intercept services, and general legal research, writing, and services as assigned. All applicants must have a J.D. from an ABA accredited law school, court room experience, excellent academic credentials, valid driver's license, superior communication skills, ability to multitask while being detail oriented, strong analytical and writing skills, and proficiency navigating WestLaw. Preference will be given to candidates with experience in collections, bankruptcy, and tax law. For additional information or to apply, go to: www.jobs.ou.edu/ applicants. The Position requisition number is 14485. The University of Oklahoma is an Affirmative Action/Equal Opportunity employer.

FULL TIME POSITION AS ASSOCIATE ATTORNEY for large Tulsa law firm. Must be fluent in Spanish, have a broad knowledge of the law and good telephone skills. Send résumés to: Human Resources Dept. P.O. Box 1046, Tulsa, OK 74101.

OKLAHOMA CITY WORKERS COMPENSATION DEFENSE FIRM seeks associate with 3-5 years experience. Please submit résumé and cover letter with salary requirements to "Box I" Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

ASSOCIATE ATTORNEY POSITION: IMMIGRATION/FAMILY LAW:

North Oklahoma City Law Firm has two full time openings for associate attorneys with 1 to 5 years of experience in immigration and /or family law. Spanish a plus. Salary and compensation commensurate with experience.

Send Résumés to LawFirmOklahoma@gmail.com.

GROWING BRICKTOWN LAW FIRM seeks motivated and entrepreneurial-minded attorneys with the indicated experience in the following practice areas: 2+ years of general business transactions and mergers/acquisition experience; 2+ years of taxation experience; 2-3 and/or 5+ years of insurance coverage, insurance bad faith, general insurance defense, and trucking/transportation litigation experience. We are looking for a select few resourceful individuals who want to be part of a unique team of lawyers and work on a wide variety of business, banking, real estate, and international transactions as well as defense litigation. Tired of working long hours for just a salary? Our compensation package allows ultimate flexibility with regard to income and work load. Want to actually see a reward from generating business? We have a great origination policy, too. Send résumé and cover letter/video correspondence clip outlining practice area experience and why you are ready to work in a different kind of firm, to Employment@PalmerWantland.com.

SMALL REGIONAL LAW FIRM SEEKS EXPERIENCED LEGAL ASSISTANT. Responsibilities include drafting documents, scheduling appointments/court dates, client contact, billing and administrative duties. Applicants must be proficient with Microsoft Office Suite as well as billing and litigation software. Please direct résumés to tulsalawfirmjobs@gmail.com.

LEGAL SECRETARY WITH 1-3 YEARS EXPERIENCE for small NW OKC office. Must be able to work independently and have stable job history. Health and dental insurance provided. Please fax résumé and salary requirements to 405-242-2228.

SOUTH TULSA LAW FIRM is seeking a paralegal with background experience in insurance defense, trucking experience would be a plus. The duties involve the management of all of the documents related to the defense of personal injury case. The ability to request, organize and review medical records is a must. The duties also include preparing matters for significant events such as a deposition, mediation or trial. Candidate should have excellent organization skills. If interested, please send résumé to amy@cgmlawok.com.

PARALEGAL. Oklahoma Health Care Authority, \$41.8K to \$71K + State Benefits! Requires a Bachelor's degree, or 4years paralegal/legal assistant experience, or an equivalent combination of education and experience. Submit application & questionnaire from website. Deadline: August 20. www.okhca.org/jobs. EOE.

POSITIONS AVAILABLE

MCAFFEE & TAFT IS SEEKING TWO ASSOCIATE ATTORNEYS to join its expanding Business Transactions practice group for the following positions: BUSINESS TRANSACTIONAL ASSOCIATE with 2-4 years of experience in the areas of mergers and acquisitions, debt and equity financings, entity formation and restructuring, complex business transactions and contracts. Ideal candidates will have experience in preparing transactional documents, operating agreements and corporate documentation and in conducting due diligence and legal research. Prior business or financial experience a plus. OIL AND GAS ASSOCIATE with at least two years experience. Ideal candidates will have experience in the acquisition, disposition and/or development of oil and gas properties, drafting or reviewing title opinions, and negotiating and preparing energy industry contracts, including oil and gas leases, joint operating agreements, farmout agreements, participation agreements, marketing agreements, surface damages agreements, pipeline right-of-way agreements, equipment leases and master service agreements. All inquiries will be treated confidentially. Top academic performance, strong writing and analytical skills, interpersonal skills, and the ability to work in a team environment are required. Please submit résumé and law school transcript to Rodney Hunsinger at McAfee & Taft A Professional Corporation, Tenth Floor, Two Leadership Square, 211 N. Robinson, Oklahoma City, OK 73102. No emails or phone calls, please.

DOWNTOWN OKC LAW FIRM seeks paralegal/legal assistant for busy insurance defense department. A minimum of three years' experience in workers' compensation a must. Competitive salary and great benefits. Please send résumé and salary requirement to: "Box BB" Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITION WANTED

EXPERIENCED LAWYER SEEKING POSITION in an intellectual property practice or in other areas – anticipates moving to Oklahoma from Illinois – résumé available on request – contact John Thompson Brown at 23777 Hillfarm Court, Lake Barrington, Illinois 60010, phone 847-842-1684 or email johnthompsonbrown@yahoo.com.

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Camp Barnabas Isn't a Place, It's a Gift

By Paul R. Thomas

This past June my wife Julie and I loaded up the white van and headed toward Shell Knob, Mo. We were taking our son Matthew, who has autism and will be a high school senior this fall, to camp for the very first time.

If we could actually leave him, he would be there from Monday through Saturday without us. It seemed only weeks ago we had dropped Matt off for his first day of kindergarten. I said to myself, "We can do this, we can do this; he is ready for this big step." From time to time on the drive, I glanced over and noticed that Julie was breathing deliberately -- convincing herself that she could do it. Can you hear the "I think I can" refrain from *"The Little Engine that Could"*?

Matt prefers to stay at "the brick house" with his iPad and his cell phone — he is a teenager after all. Matt prefers, also, to sleep in his own "comfy" bed. If you know anything about people with autism, you know that change is hard — this would be a slight understatement.

When we mentioned to Matt that he would be going to camp, he didn't have the expected meltdown. He just seemed to go with the idea. That is until about halfway there. Matt realized that he was actually, really, definitely, going to camp. The dammed-up moaning broke free and Matt's lamentations about the lonely brick house and the unoccupied comfy bed flooded the white van. As we got closer, with some sense of reservation, Matt said, "I don't think we're in Oklahoma anymore."

As we finally passed the entry gate and into the designated unloading area, both sides of the road were



lined with cheering camp counselors welcoming the campers and their families. It was beautiful. Matt's cabin was pretty rustic, no air conditioning (giant attic fans) — but with a great view of Table Rock Lake. Julie and I kind of wanted to stay — just for the view — really. Anyway, we got Matt's stuff situated and chatted a bit with Kailey — a pretty, energetic young woman from Texas — about being Matt's counselor for the week. Julie and I talked over each other trying to get out 19 years' worth of Matt-experience so Kailey (and Matt's parents) would be able to survive the week. She listened patiently and said, "We're going to have a great week aren't we, Matt?" Matt said, "You bet," but his response was Eeyore-like and lacked Kailey's enthusiasm.

Already time for goodbyes. Matt and Kailey and the other campers and counselors all gathered in the center of camp for parent dispersal. But what about his bedtime routine? He burns easily; will you make sure he gets plenty of sunscreen? Be a brave camper Matt, will you? Julie asked me, "Do you think we can do this?" Yes, I think we can.

During the week, we fretted and fussed and wondered as you might expect. We were able to send emails

and received updates that seemed a little too generic. "Your camper is doing well, has participated, and is eating and sleeping well." Really? That's it?

The scene on pick-up day was a lot like drop-off day without the cheering. We found Matt alive, not sunburned, and approximately the same weight he was when we dropped him off. It was clear that he had made new friends.

We met for the closing ceremony that included music, prayer and a video of the week's activities. We saw that Matt had canoed, jumped on a trampoline, sung and danced, and rode the barn swing — a two-story leap of faith on a rope. As Kailey had predicted, they had a great week. We saw the counselors as real super heroes. These fearless volunteers have chosen to serve kids with special needs and their families. Their service is a lavish and much-appreciated gift.

As Julie, Matt and I walked to the white van, I am quite sure I heard through the rustling leaves of the beautiful Ozark hills — "I thought I could, I thought I could." When asked about whether he would like to go to camp next year, Matt simply said, "Never you mind about next year." Matt is right, next year will be here soon enough.

If you know someone who cares for a loved one with disabilities, please let them know about the super heroes of Camp Barnabas. Check it out for yourself at www.campbarnabas.org.

Mr. Thomas is a trial attorney for the Office of the U.S. Trustee in Tulsa.

Divorce: Back to the Basics

September 6, 2012
Oklahoma Bar Center, OKC

September 7, 2012
Renaissance Hotel, Tulsa

Planner/Moderator:

Ron W. Little, Doerner Saunders Daniel & Anderson, LLP, Tulsa

www.okbar.org/cle

8:30 a.m.

Registration and Continental Breakfast

9

UCCJEA and UIFSA Jurisdiction in Custody and Support Actions

M. Shane Henry, Fry & Elder, Tulsa

9:50

Break

10

Modifications of Custody Plans

Ron W. Little

10:50

The Nuts and Bolts of Property Division

Tulsa Program

Benjamin D. Aycock, James R. Gotwals and Associates, Inc., Tulsa

Oklahoma City Program

Tracey D. Martinez, Mullins Hirsch Edward Heath White & Martinez, P.C., Oklahoma City

11:40

Networking lunch (included in registration)

12:10

The Hows and Whys of Support Alimony

Tulsa Program

Sam P. Daniel, Doerner Saunders Daniel & Anderson, LLP, Tulsa

Oklahoma City Program

Laura McConnell-Corbyn, Hartzog Conger Cason & Neville, LLP, Oklahoma City

1

Ethical Considerations in the Use of Third Parties in the Discovery Process (ethics)

Heather Flynn Earnhart, Hall Estill Hardwick Gable Golden & Nelson, P.C., Tulsa

1:50

Break

2

Psychological Evaluations in Custody Litigation

Robert "Hap" Fry, Fry & Elder, Tulsa

2:50

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