



OKLAHOMA BAR JOURNAL

Volume 85 ♦ No. 20 ♦ Aug. 9, 2014

Children and the Law

ALSO INSIDE

- Labor and Employment Law
- MCLE Rule Change to Affect Lawyers Age 65
- End of Legislative Session Report

TOP TEN REASONS TO NOMINATE SOMEONE FOR AN OBA AWARD

1

Awards encourage and recognize excellence.

2

AWARDS IMPRESS POTENTIAL CLIENTS.

.....

3

A nomination is a great way to show your admiration.

4

NOMINATIONS HIGHLIGHT THE GREAT WORK BEING DONE BY OKLAHOMA JUDGES AND LAWYERS.

.....

6

AWARDS ARE AWESOME.

7

Feeling appreciated is good for health and morale.

8

Being an award-winning attorney is never a bad thing.

Awards are way better than a thank you card or pat on the back...

9

10

.....
or flowers.



AWARD NOMINATIONS DUE AUG. 15

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GableGotwals welcomes Leo J. Portman and Tom C. Vincent II

Leo J. Portman joins the Oklahoma City office as an Of Counsel attorney. He brings over thirty years of experience to GableGotwals in the areas of title examination and oil and gas law. He also practices in the areas of corporate liquidation, estate planning, and corporate and securities law. Prior to joining GableGotwals, Leo was a Sole Practitioner at Portman & Associates. He has previously served as President of an oil and gas company during bankruptcy liquidation and payment of creditors, all of whom were paid in full under his direction. He also fulfilled the role of sole practitioner for oil and gas corporations and outlined estate planning programs for clients.

Tom C. Vincent II has joined the Tulsa office as an Of Counsel attorney. Tom's practice will focus on compliance issues, particularly in the banking industry. With extensive experience in the banking industry, Tom has served in senior compliance positions in different Oklahoma banks and financial institutions. He is also a Certified Regulatory Compliance Manager with experience in corporate governance, broker-dealer, and trust/fiduciary compliance.

Welcome Leo and Tom!

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Summer Reflections and Fall Projections

By Renée DeMoss

Is it just me, or has the first half of the 2014 OBA year flown by for everyone? As summer now races by, I'd like to reflect on some significant events of the first six months of the year and highlight just a few of fall's coming attractions.

In January and February, the OBA instituted a **public education initiative** to engage our Oklahoma communities and bar members in a dialogue about the unique system of justice we enjoy. OBA lawyers must do our part to support a judiciary that is perceived by all as fair and impartial — and is free from undue pressure from politics and budgetary restrictions. Our initiative culminated in April and May with our **Day at the Capitol** and with OBA members uniting to ensure that Oklahoma lawyers continue to have a significant role in the Oklahoma judicial selection process.

Through judicial town halls, articles and speeches presented by your Board of Governors and others, the OBA has addressed the importance of a fair and impartial judiciary in meetings across the state, including Custer, Canadian, Cleveland, Garfield, Oklahoma, McCurtain, Muskogee, Seminole and Washington counties. Our initiative is not a sprint, as they say, but a marathon. We will continue to go whenever and wherever we can to speak in support of our third branch of government.

Your **24 OBA committees and 26 sections** have been hard at work with activities too numerous to capture in this column. Just a few include the Legislative Monitoring Committee, which worked tirelessly through the end of the legislative session to monitor the more than 2,500 bills carried over from 2013 and the 2,000 new ones introduced in 2014.

The 2014 OBA **Law Day** and individual county Law Day programs were extremely successful in providing legal education programs and free legal advice to Oklahomans across the state. **CLE programs** provided by sections received rave reviews. These included, among others, the Appellate College presented by the Litigation and Appellate Practice sections at the Oklahoma Judicial Center, and seminars presented by the Family Law, Bankruptcy and Estate Planning sections.

Our Law Schools Committee continues to work with our three law schools on small town practice opportunities for graduating law students. At the 15th Annual **Solo & Small Firm**

Conference held at the Hard Rock Hotel & Casino in Tulsa, the very latest in legal technology was presented to a five-year, record-breaking crowd.

In April, the OBA welcomed 76 **new law school graduates** into the Oklahoma bar and graduated 23 future OBA leaders from the OBA **Leadership Academy**. The YLD has been **extremely active** with its Bullyproof: Anti-Bullying Initiative, its Day of Service project with the Oklahoma Regional Food Bank and its incredible support of the Judicial Town Hall Project.

At the other end of the age spectrum, our new **Master Law Section** is soon to be unveiled and will be interacting with a **new task force** studying potential revisions and additions to Oklahoma rules providing protection for clients with attorneys who face problems due to age, illness, substance abuse and other issues.

There is even more in store for fall 2014. The **Human Trafficking Task Force** will present a seminar on Sept. 19 on this issue that hits Oklahoma, as a "crossroads" state, particularly hard. A seminar sponsored by the **OBA Women in Law Committee** is set for Oct. 3. It is titled, "A Dialogue on the Dynamics of a Fair and Impartial Judiciary in a Politically Charged Nation," with keynote speaker Bruce Peabody, a nationally recognized constitutional law scholar and author.

I am hopeful that in the second half of 2014, we will continue to work together on projects and services relevant to all OBA members.



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EVENTS CALENDAR

AUGUST 2014

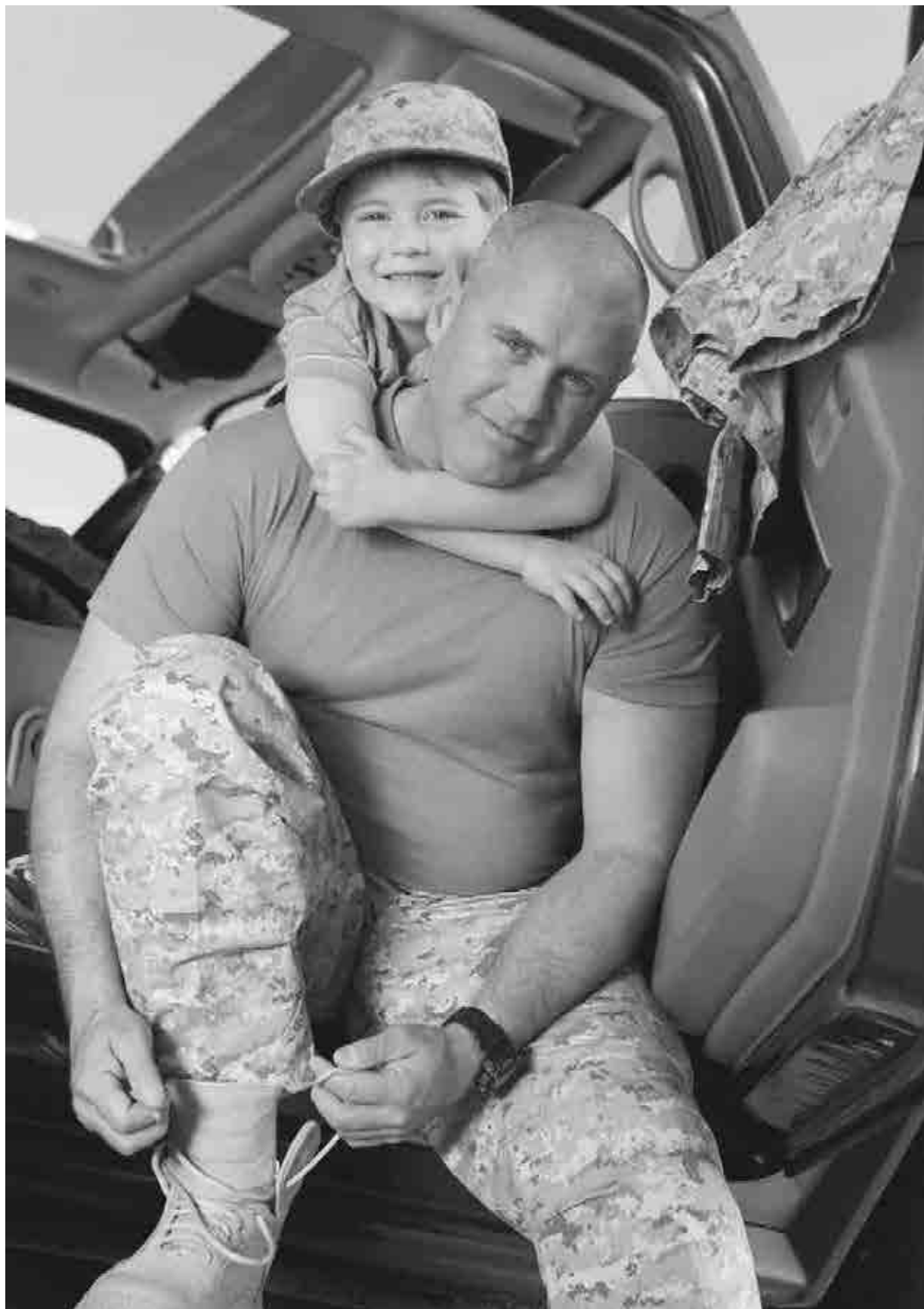
- 12 **OBA Diversity Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with tele-conference; Contact Ruth Addison 918-574-3051
OBA Legal Intern Committee meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with tele-conference; Contact Candace Blalock 405-238-0143
- 13 **OBA Law Day Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Jennifer Prilliman 405-208-5174
OBA Alternative Dispute Resolution Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa, Tulsa; Contact Jeffrey Love 405-286-9191
- 14 **Oklahoma Uniform Jury Instructions meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Chuck Adams 918-631-2437
- 15 **OBA Professional Responsibility Commission meeting**; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Dieadra Goss 405-416-7063
OBA Access to Justices Committee meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma city with OSU Tulsa, Tulsa; Contact Laurie Jones 405-208-5354
OBA Family Law Section meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact M. Shane Henry 918-585-1107
OBA Rules of Professional Conduct Committee meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Paul Middleton 405-235-7600
- 21 **Oklahoma Bar Foundation Grants and Awards Meeting**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nancy Norsworthy 405-416-7070
- 22 **OBA Board of Governors meeting**; 10 a.m.; Tulsa; Contact John Morris Williams 405-416-7000
- 23 **OBA Young Lawyers Division meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Kaleb Hennigh 580-234-4334
- 26 **OBA Women in Law Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with University of Tulsa College of Law, Tulsa; Contact Allison Thompson 918-295-3604
- 27 **OBA Work/Life Balance Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Sarah Schumacher 405-752-5565

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

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

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A Practical Guide to Representing Military Parents

A General Overview of the Deployed Parents Custody and Visitation Act, Enacted May 26, 2011

By Mark E. Sullivan & Ashley L. Oldham

Home to six military bases, Oklahoma is no stranger to custody cases in which one — or both — parent(s) serve in our country's armed forces. Military custody cases are often complicated by the possibility or reality of the servicemember-parent being ordered to temporarily relocate outside of Oklahoma. What happens to the deploying parent's custody and parenting time with the child during deployment? How will decision-making authority be allocated while one parent is absent on military orders? What happens when the deployed parent returns?

Oklahoma recognized the need to address these concerns and passed the Deployed Parents Custody and Visitation Act (DPCVA) in May 2011. Family lawyers in Oklahoma should be familiar with the act in order to best serve their military clients.

TALES FROM THE TRENCHES

In the first dozen years of the 21st century, deployed American troops found themselves on the hills, in the valleys and on the plains of Iraq, Libya, the Philippines, Afghanistan and elsewhere fighting insurgents and despots, suicide bombers and hostile tribal militias. Increasingly, they also found themselves fighting a rear-guard action, namely, custody battles on the homefront. For many of these service personnel, "obedience to the call" can mean loss of custody of (or visitation rights with) their children. Whether the call to duty involves mobili-

zation for National Guard and Reserve personnel or deployment overseas for those on active duty, it carries with it the potential for breaking the bonds of servicemembers with their children.

Mobilizations and deployments can take their toll on the family court judges who handle custody cases as well. Often it appears that there are no clear rules to guide family court judges when a family separation arises, there is a dispute over the care of children, and there is a uniformed parent. One of the biggest areas of change in family law in the last 10 years has been the movement among states to enact legislation protecting the rights of servicemembers and their children in custody and visitation matters; as of 2014, there are 48 states that have passed laws that protect military personnel in these disputes.

A troublesome example of such a homefront battle involving military custody is found in a Colorado case, *In re Marriage of Brandt*,¹ decided Jan. 23, 2012. In *In re Marriage of Brandt*, the mother was granted primary physical custody under a Maryland order but transferred physical care of the child temporarily to her ex-husband in Colorado while she was deployed to Iraq for six months.² Upon her return, the father filed a motion for Colorado to assume jurisdiction, alleging that neither the child nor any party “currently resided” in Maryland and asking the judge to modify custody and transfer primary physical custody permanently to him. Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the judges in Maryland and Colorado conferred but could not agree on which state prop-

erly had jurisdiction to modify custody under the UCCJEA.

Ultimately, the Colorado Supreme Court held the term “presently reside” in the UCCJEA is not the same as “currently reside” or “physical presence,” and that a judge must make an inquiry into the totality of the circumstances to determine a person’s permanent home or domicile. The case highlighted a growing trend where one parent seizes the opportunity to relitigate custody by winning the race to the courthouse while the other parent is absent from the issuing state due to military orders.

In addition to questions surrounding jurisdiction, family court judges also began to confront the challenge of addressing visitation privileges during deployment. If the service

Can We Take Away the Distraction of the Civil Wars the Soldier Fights at Home?

By Suzanne Woodrow Snell

Military custody, visitation and support cases can be intimidating. In the back of a lawyer’s mind, it is clear that federal law comes into play. Next, add the Department of Defense’s guidelines, policies and instructions. Finally, there is Oklahoma law for deployed service members. But there is not just Oklahoma’s law to consider. Due to the mobility of servicemembers (SMs) and their families, other state laws come into the mix and into the jurisdictional conflict.

One of the biggest changes in family law in recent years has been newly enacted state legislation protecting the rights of servicemembers and their children in custody and visitation matters. In 2011, Oklahoma enacted a version of the Uniform Deployed Parents Custody and Visitation Act.¹ The act deals with the custody, visitation and support issues in the event of deployment. The act protects the rights of the SM to

ensure custody arrangement in place before deployment will be reinstated post-deployment. There are provisions for deployment, military absences, delegated visitation, communication with the children during deployment, expedited hearings, electronic testimony in court and what happens when the SM returns. This article deals with the basic mechanics and must-know rules of the act.

Why do we need this new act? Why can’t the federal law be enough protection for custody and visitation issues under the Servicemembers Civil Relief Act (SCRA)?

In 2003, the Soldiers’ and Sailors’ Civil Relief Act was rewritten and renamed the Servicemembers Civil Relief Act.² The SCRA was enacted to enable soldiers to devote their time and energy to the defense of the nation and to provide for temporary relief by postponing or sus-

pending certain civil obligations that affect the soldiers’ civil rights during their military service.³ One of the important additions to the SCRA is the protection a servicemember has in regard to child custody in the case of divorce or separation. The SCRA assists soldiers by preventing the civilian spouse from obtaining a permanent child custody order if the soldier is unable to appear. Judges must grant stays under the SCRA but the stays are only mandatory for the first 90 days. A subsequent stay is discretionary. The soldier must be cognizant of the fact that the stay is a temporary relief. Once the deployment is over the stay will be lifted. Nothing in the SCRA gives the SM custody or visitation rights. An excellent discussion of the SCRA is SCRA: The Real “Rules of Engagement” and its Impact in Family Law Practice, *Oklahoma Bar Journal*, Aug. 11, 2012, Vol. 83, No. 20.

member is sent some distance away from their residence on military orders, their children's contact with them is virtually terminated. This is especially true if the other parent refuses to allow the child to visit with the servicemember's relatives, claiming that parenting time belongs solely to the noncustodial parent and that the courts lack the power to grant parenting time to nonparents. In 2007, Colorado recognized the concept of delegated parenting time in *In re Marriage of DePalma*.³ The Colorado Court of Appeals held that the court had the power to determine who could care for the children during his parenting time while he was on military deployment, including having the children in the father's home with his new wife during his parenting time.

THE UNIFORM DEPLOYED PARENTS CUSTODY AND VISITATION ACT

In 2010, a committee of the Uniform Law Commission (ULC) began to examine how to address the problems around custody, visitation and decision-making authority for mobile military parents. The committee addressed numerous issues, including substitution of visitation by stepparents and grandparents during deployment, as well as how to issue temporary custody orders during a military parent's deployment. In July 2012, the ULC issued the Uniform Deployed Parents Custody and Visitation Act (UDPCVA), a model statute for use by the states in improving custody and access proceedings for military families. Oklahoma enacted a version of the UDPCVA on May 26, 2011. This article provides a general overview of Oklahoma's DPCVA.

Where is this act found?

Oklahoma Statute 43 O.S. §150 et seq. is the Oklahoma Deployed Parents Custody and Visitation Act.

Who is covered by the act?

Servicemembers. This definition includes the active or reserve components of the Army, Navy, Air Force, Marine Corps or Coast Guard or the active or reserve components of the National Guard.⁴ "Deploying parent means a legal parent of a minor child or the legal guardian of a child, who is a member of the United States Armed Forces and who is deployed or has been notified of an impending deployment."⁵

What is deployment?

If the SM has orders for a temporary assignment that will last longer than 30 days and is unaccompanied, without authorization to bring dependents, the act will apply. The act defines deployment as "the temporary transfer of a servicemember in compliance with official orders to another location in support of combat, contingency operation, or natural disaster requiring the use of orders for a period of more than 30 consecutive days, during which family members are not authorized

to accompany the servicemember at government expense. Deployment shall include any period during which a servicemember is absent from duty on account of sickness, wounds, leave or other lawful cause."⁶

What happens when the military parent has deployment orders or notice of pending deployment?

The SM must give the civilian parent written notice of deployment. This is accomplished by providing a copy of the deployment orders to the civilian parent. The time frame is short, notice to the other parent must be within 10 days after receipt of notice of deployment orders. If the deployment is sooner than 10 days, a copy of the orders shall be provided immediately to the other parent. If a court order is in place that prevents the SM from contacting the civilian parent then the notification is given to the court. The court shall notify the civilian parent or the attorney if civilian parent is represented by counsel.⁷

What if the deployed parent is the custodial parent, can the deployment be used as a material change in circumstances to change custody?

No. Military deployment shall not be used as evidence of a substantial, material and permanent change of circumstances to warrant a custody modification.⁸ The act is only for temporary orders during deployment of one or more members of a military family. After the deployment is over the custody and visitation return to status quo before the deployment. The act protects the rights of deployed military parents to ensure that child custody arrangements in place before they deploy will be reinstated post-deployment.

What about jurisdiction?

Oklahoma can enter a temporary order under the Deployed Parents Custody and Visitation Act if Oklahoma has jurisdiction to enter custody and visitation orders under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).⁹

That sounds sensible, is that all there is to jurisdiction?

No. If Oklahoma enters a temporary order under the act then the deploying parent is deemed a resident of Oklahoma under the UCCJEA for the term of deployment. But, if another state has already entered a temporary order regarding custody and visitation due to

DEFINITIONS AND PRELIMINARY ISSUES

Oklahoma's DPCVA is found in 43 O.S. §§150 through 150.10. The act begins by providing the definitions necessary to acquaint lawyers and judges with the terminology associated with military mobilizations and deployments. For example, the act defines "deployment" as "the temporary transfer of a servicemember in compliance with official orders to another location in support of combat, contingency operation, or natural disaster requiring the use of orders for a period of more than 30 consecutive days, during which family members are not authorized to accompany the servicemember at government expense."⁴

Under §150.4, a deploying parent is required to notify the other parent of a pending deployment and provide a copy of the deployment orders to the other parent no later than 10 days following their receipt of the same.⁵ Following a deploying parent's receiving notice of deployment, either parent may request an expedited hearing on any matter pertaining to custodial or visitation responsibility.⁶ This hearing shall occur within 10 days or prior to deployment,

whichever occurs first.⁷ The court shall grant a request for an expedited hearing if the deploying parent's ability or anticipated ability to appear in person at a regularly scheduled hearing would be prevented by the deployment or preparation for the deployment.⁸ If the servicemember is already unavailable to appear in person and entitled to a stay in civil proceedings pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. App., §522, the DPCVA allows the servicemember to testify and present evidence electronically.⁹

TEMPORARY CUSTODY ORDERS

Upon proper motion made by the deploying or nondeploying parent, the court shall enter temporary orders regarding custody, visitation and child support.¹⁰ If a prior custody or visitation order contains provisions for custodial responsibility of the child in the event of deployment, those provisions shall not be modified by the court unless 1) a subsequent change of circumstances has occurred after the prior order was issued or 2) a showing that enforcement of the prior order would result in substantial harm to the child.¹¹ Similarly, if the

deployment, the deploying parent is deemed a resident of that state under the UCCJEA for the term of the deployment. What happens if another state has the temporary order in place for deployed parents, but the child is now in Oklahoma and there is an emergency concerning the child? An Oklahoma court is not prohibited from exercising temporary emergency jurisdiction under the UCCJEA.¹⁰

What happens after the deploying parent gives notice of deployment orders?

Either parent may request an expedited temporary order hearing on any custody, visitation or child support issue to be heard before deployment.¹¹

What does the application for temporary order need to include?

- The date deployment begins. If the date is unknown, the approximate date;
- Request for expedited hearing;

- Request for designated person to substitute for deploying parent's visitation during deployment;
- Name of the designated person and description of the relationship the person has with the child;

Expedited hearing, how fast is "expedited"?

After the SM receives notice of deployment, either parent can request an expedited hearing to be heard within 10 days or before deployment, whichever occurs first. The court is required to conduct the hearing before deployment. The court shall grant a request for an expedited hearing if the deploying parent's ability, or anticipated ability, to appear in person at a regularly scheduled hearing would be prevented by the deployment or preparation for the deployment.¹²

What is appearance by electronic means?

A deploying parent who is entitled to a stay under the SCRA can choose

to be present electronically at the temporary order hearing if unable to be physically present due to geographical restrictions. This can be any means that allows the deploying parent to participate electronically.¹³ Video conferencing, telephone, Facetime, Internet camera or Skype are certainly possibilities.

What about child support when the military parent is deployed?

The court's temporary order can include an order for payment of child support by the SM to the civilian parent. The court can require the SM enroll the child to receive military dependent benefits.¹⁴ Any support order must contain language that the order terminates upon the child's return to the SM post-deployment.

What if the parties have already addressed what to do in case of deployment in custody and visitation orders that are already in place?

The previous orders that address custody and visitation during deploy-

parents have previously agreed in writing to provisions for the custodial responsibility of the child in the event of deployment, a rebuttable presumption arises that the agreement is in the best interest of the child.¹²

The act instructs family law practitioners and judges on the contents of temporary orders granting custodial responsibility during deployment. The order should identify the nature of the deployment that is the basis for the order; specify that the order is temporary; specify the contact between the deploying parent and the child during deployment, including the means by which the deploying parent may remain in communication with the child; and provide for liberal contact between the deploying parent and child when the deploying parent is on leave or is otherwise available.¹³

DELEGATION OF VISITATION

Oklahoma's DPCVA allows a servicemember to designate a family member or another person with a close and substantial relationship with the child to exercise his visitation rights in his absence unless the court determines it is not

in the best interest of the child.¹⁴ For purposes of the DPCVA, a close and substantial relationship is defined as "a relationship in which a bond has been forged between the child and the other person by regular contact or communication."¹⁵ Any visitation granted to a third party under the DPCVA shall not exceed or be less than the amount of custodial time granted to the deploying parent under any existing order or agreement between the parents, although the court may take into account any unusual travel time required to transport the child between the nondeploying parent and the third parties allowed visitation.¹⁶

Section 43-150.8D lists three rebuttable presumptions that apply in DPCVA proceedings. There is a rebuttable presumption that it is in the best interests of the child for a stepparent to exercise the deployed parent's parental duties.¹⁷ If the person designated by the deploying parent is a family member, including a stepparent or step sibling, or another person with a close and substantial relationship with the child, there is a rebuttable presumption that it is in the best interest of the child that the person

ment will stay in effect and not be modified by a temporary order unless there is 1) a showing of subsequent substantial change in circumstances or 2) a showing that enforcement of the previous order would result in substantial harm to the child.¹⁵

Why can't the parents reach their own agreement without court involvement and the requirement of a temporary order hearing?

They can, but both parents must agree in writing to custody, visitation and support of the child if a parent is deployed. The court will uphold the agreement unless the court makes specific findings the agreement is not in the best interests of the child.¹⁶

What language must be in the temporary order issued due to deployment?¹⁷

- Identify the nature of the deployment that is the basis for the order;
- Specify the order is temporary;

- Provide for liberal communication between the deploying parent and child during the deployment, including electronic means;
- Provide for liberal contact between the deploying parent and child when the deployed parent is on leave unless against the best interest of the child;
- Identify the deploying person's designated person;
- Identify the designated person's visitation;
- Provide for dispute resolutions between the nondeploying parent and designated person;
- Provision that the nondeploying parent or anyone who has custody, visitation or limited contact shall notify the court of any change of address until the temporary order terminates;
- Specify the temporary order terminates 10 days after notice to the nondeploying parent of the end of deployment.

Does the Parental Kidnapping Prevention Act (PKPA)¹⁸ play a role somewhere if mom moves to, let's say, Wyoming?

The PKPA is a federal act that gives a state continuing jurisdiction if a state has jurisdiction under its own law, UCCJEA and this act, and a parent is a resident of the state. Oklahoma has jurisdiction under its own law, but dad is overseas and mom is in Wyoming. The PKPA will have to determine if the act's definition of residency will be enough to satisfy the PKPA requirement of residency in original state. The act would designate Oklahoma as the residence of dad because that is where the temporary order was issued under the act. But now mom wants Wyoming to have jurisdiction because dad does not actually live in Oklahoma, and he is not a resident under the PKPA. If dad actually has to live in Oklahoma to satisfy residency requirements, the PKPA will preempt the act.

receive visitation.¹⁸ Finally, there is a rebuttable presumption that visitation by a family member who has perpetrated domestic violence or is a registered sex offender is not in the best interest of the child.¹⁹

If the court delegates the deploying parent's visitation rights to a third party, the court must: set out a process to resolve any disputes that may arise between the person receiving visitation and the nondeploying parent; identify the nature of the deployment that is the basis for the order; and specify that the order is a temporary order that shall terminate 10 days after notice has been provided to the nondeploying parent of the end of deployment.²⁰

A nonparent given caretaking authority, decision-making authority or limited contact by an agreement entered pursuant to the DPCVA has standing to enforce the agreement only while the agreement remains in effect. Consistent with U.S. Supreme Court jurisprudence, the designation derives from the deploying parent's own right to custodial responsibility and does not create an independent, continuing right to custodial responsibility in the

individual to whom custodial responsibility is given under the order.²¹

CHILD SUPPORT

If a temporary custody order is entered pursuant to this act, a court is authorized to enter a temporary order for child support consistent with the custodial arrangements in the order and the jurisdictional requirements of the Uniform Interstate Family Support Act (UIFSA).²² The order can require the deploying parent to enroll the child to receive military dependent benefits.²³ The order must state that its provisions shall terminate following the child's return to the deploying parent at the conclusion of deployment.²⁴

PROCEDURAL SAFEGUARDS

The act also provides important procedural protections to the servicemember. Although the act provides for jurisdiction consistent with the UCCJEA, the statute states that the residence of the deploying parent is not changed by reason of deployment.²⁵ If Oklahoma issues a temporary order pursuant to the DPCVA, the deploying parent shall be deemed to reside in

But why doesn't the Oklahoma act apply in Wyoming?

Several states have deployed parents visitation and custody acts. However, there is not always uniformity. Oklahoma is the only state that has enacted this particular act. That means there is a significant difference in interstate jurisdictional rules between states that have other acts and between states that do not have a deployed parents custody and visitation act.

How to enforce the temporary order?

If there is a violation of a court order, a nonparent who has been granted visitation has standing to enforce the order as any other order relating to custody, visitation and support.¹⁹ Of course, the civilian parent has the same right.

What if the matter before the court is post-dissolution modification of custody or visitation? Can the court enter a modification order during deployment?

In the absence of risking irreparable harm to the child, the court shall not modify any prior custody of visitation order until the deployment ends.²⁰

What about the child's relationship with the SM's family and friends during deployment?

What if family, stepparents, step-siblings or friends from the deployed parent's side want to see the children during the deployment? The SM must designate who they want to step into their shoes for visitation while they are deployed.²¹ It does not have to be a family member. The person does have to be an adult and have a close, significant relationship with the child. This person must be someone the child has had regular contact and communication with and a strong relationship.²² This person must be identified in the motion for temporary order and expedited hearing. The designated person must appear at the temporary order hearing. If it is in the best interest of the child:

- The visitation in the temporary order will be the visitation the SM would have exercised under an existing visitation agreement or order. The court can take into consideration unusual travel time to transport child from civilian parent to the designated person;
- There is a rebuttable presumption that if the designated person has a close, substantial relationship with the child, it is in the best interest of the child for the designated person to receive visitation;
- There is a rebuttable presumption in post-dissolution cases the stepparent will exercise the SM's parental duties if it is in the best interest of the child;
- There is also a rebuttable presumption that it is not in the best interest of the child to allow a family member who has committed domestic violence or is subject to the requirement of the Sex Offenders Registration Act to have visitation with the child.

Oklahoma for the purposes of the UCCJEA during the duration of the deployment. Similarly, if a court of another state issues a temporary custody order pursuant to deployment, Oklahoma shall deem the deploying parent to reside in the issuing state for purposes of the UCCJEA during the duration of the deployment. This prevents the nondeploying parent from citing the servicemember's absence from the state as a reason for a change of jurisdiction — the issue in *In re Marriage of Brandt* as discussed above.

RETURN FROM DEPLOYMENT

The deploying parent must notify the nondeploying parent of completion of deployment.²⁶ Temporary orders entered under the DPCVA terminate by operation of law 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 are automatically reinstated.²⁷

CONCLUSION

A key concept in the UDPCVA is thinking ahead to anticipate "military absence." Military

absences can include deployment, temporary duty assignments or remote tours of duty. Such absences require military parents to prepare a temporary plan for custody and visitation arrangements during their absence. While the military has long directed members to make these plans in the form of a document called a Family Care Plan, states around the country are now recognizing the need for formal agreements and court orders addressing these possibilities. Family law practitioners must be familiar with the UDPCVA in order to effectively assist their clients in the drafting, negotiating and litigating of agreements and court orders in the event of a parent's mobilization or deployment.

1. *In re Marriage of Brandt*, 268 P.3d 406 (Colo. 2012).
2. *In re Marriage of Brandt*, 268 P.3d 406 (Colo. 2012).
3. *In re Marriage of DePalma*, 176 P.3d 829 (Colo. Ct. App. 2007).
4. Okla. Stat. tit. 43 §150.1(4).
5. Okla. Stat. tit. 43 §150.4(A).
6. Okla. Stat. tit. 43 §150.5.
7. *Id.*
8. *Id.*
9. Okla. Stat. tit. 43 §150.6B.
10. Okla. Stat., tit. 43 §150.6A.
11. Okla. Stat. tit. 43 §150.6D(1).
12. Okla. Stat. tit. 43 §150.6D(2).

Why should there even be a need for this provision?

It is an untenable situation for a SM to struggle to keep a relationship with his children through his family and new spouse when access to the children is denied by the civilian parent. The service member is unavailable, often out of the country, so the family and spouse are left to maintain the relationship with the children by dealing with an uncooperative civilian parent. Courts have found it necessary to delegate or substitute visitation with family members during deployment.²³

But is giving the designated person visitation rights in violation of a civilian parent's constitutional rights?

If mom objects to the designated person having visitation, will the act survive the constitutional attack?²⁴ That answer will have to come from our appellate courts.

How do you stop the temporary orders?

The SM will notify the civilian parent of the completion of deployment. The temporary orders expire by an operation of law 10 days after notice to the civilian parent of the completion of deployment.²⁵

Are there any "teeth" if there is noncompliance with the act?

Either party acting in bad faith or deliberate noncompliance with the act or orders pursuant to the act by either party can be assessed attorney fees and costs and order any other appropriate sanctions.²⁶

CONCLUSION

This act will be the guideline for custody, visitation and support issues of deployed servicemember parents. There is potential for attacks to the act in reconciliation with the PKPA, jurisdictional issues with other states and the constitutionality of the designated person. But until the appellate courts examine the provisions

of the act, the Deployed Parents Custody and Visitation Act is what we have to work with to protect the custody, visitation and support issues in regard to deployed parents.

1. 43 O.S. §150-150.10
2. 50 U.S.C. App. §501 et seq.
3. 50 U.S.C. App. §502
4. 43 O.S. §150.1(7)
5. 43 O.S. §150.1(3)
6. 43 O.S. §150.1(4)
7. 43 O.S. §150.4
8. 43 O.S. §112.7
9. 43 O.S. §551-101 through 551-401 of Title 43.
10. 43 O.S. §150.2
11. 43 O.S. §150.6
12. 43 O.S. §150.5
13. 43 O.S. §150.6B
14. 43 O.S. §150.7
15. 43 O.S. §150.6 (D)(1)
16. 43 O.S. §150.6 (D)(2).
17. 43 O.S. §150.6 E
18. 28 U.S.C. §1738A
19. 43 O.S. §150.8 E
20. 43 O.S. §150.6 G
21. 43 O.S. §150.8
22. 43 O.S. §150.1
23. *Webb v. Webb*, 148 P.3d 1267 (Ida. 2006); *Settle v. Galloway*, 682 So. 2d 1032 (Miss. 1996); *In re Marriage of DePalma*, 176 P.3d 829 (Colo. App. 2008); *In re Marriage of Sullivan*, 795 N.E.2d 392 (Ill. App. Ct. 2003); *McQuinn v. McQuinn*, 866 So. 2d 570 (Ala. Civ. App. 2003). But see *Lubinski v.*

13. Okla. Stat. tit. 43 §150.6E (1-4).
14. Okla. Stat. tit. 43 §150.3A.
15. Okla. Stat. tit. 43 §150.1(2).
16. Okla. Stat. tit. 43 §150.8B.
17. Okla. Stat. tit. 43 §150.8D1.
18. Okla. Stat. tit. 43 §150.8D2.
19. Okla. Stat. tit. 43 §150.8D3.
20. Okla. Stat. tit. 43 §150.6F(1-3).
21. Okla. Stat. tit. 43 §150.3B.
22. Okla. Stat. tit. 43 §150.7A.
23. Okla. Stat. tit. 43 §150.7A.
24. Okla. Stat. tit. 43 §150.7B.
25. Okla. Stat. tit. 43 §150.2.
26. Okla. Stat. tit. 43 §150.9A.
27. Okla. Stat. tit. 43 §150.9B.

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Lubinski, 761 N.W.2d 676 (Wis. Ct. App. 2008) (not allowing stepmother to exercise father's physical placement rights when he is on military duty)

20. *Craig v. Craig*, 2011 OK 27, 253 P.3d 57(2011) „(Grandparents are not entitled to visitation rights delegated from son, they can only be obtained from grandparent visitation statutes).

20. 43 O.S. §150.9
20. 43 O.S. §150.10

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The Basics on DHS Records for the Family Law Practitioner

By Jimmy Oliver

The Department of Human Services (DHS) in Oklahoma has broad power to investigate allegations of abuse of minor children reported to it by the public. DHS conducts investigations that substantiate or unsubstantiate the allegations it receives. In the process of these investigations, records are compiled and reports are created related to the minor children involved. These records and reports can be relevant not only in contested custody cases, but also in criminal matters, protective orders and other types of civil litigation.

In 2009, the Legislature overhauled the method of obtaining and disseminating DHS records in child custody, criminal, civil and administrative proceedings. In child custody proceedings, a specific form is required, and the in-camera review by the trial judge or any other judge has been eliminated. In criminal, civil and administrative proceedings, both a judicial review and a specific order regarding the necessity of the records are required. And yet, both practitioners and the trial bench continue to use outdated methods with regard to the DHS records.

Under Oklahoma statutes, DHS records are confidential and cannot be disclosed to the general public or attorneys without a court order.¹ A subpoena or a subpoena *duces tecum* request is not sufficient for the purposes of obtaining DHS records.² The service of a subpoena on DHS or on an individual DHS worker will not be honored nor will it result in the production of the requested documents.

Title 10A O.S. §1-6-102 provides two separate procedures for the production of DHS records. The first step a practitioner must take is to

determine which section of the statute applies to the records needed for his or her situation. Subsection D governs records that are relevant for custody or visitation matters and Subsection E provides the procedure for criminal, civil and administrative proceedings.

CUSTODY & VISITATION PROCEEDINGS

Because DHS routinely investigates all allegations of abuse or neglect, the information obtained in the investigation of a particular child is directly related to the child's best interest and is relevant when a court must determine custody or visitation of the child. If custody is an issue in the case and there was a DHS investigation involving the parties' children, a practitioner should request the pertinent DHS records.

Title 10A O.S. §1-6-102(D) requires that DHS safety analysis records be produced to the court in a proceeding where child custody or visitation is at issue. To obtain these records, the party seeking the records must file a motion

for production that contains the following averments:

- a) the movant is a parent, legal guardian, or child who is the subject of the safety analysis records,
- b) child custody or visitation is at issue,
- c) that upon receipt from the court, the safety analysis records shall be kept confidential and disclosed only to the movant, the attorneys of the movant, those persons employed by or acting on behalf of the movant and the attorneys of the movant whose aid is necessary to the prosecution or defense of the child custody or visitation issue, and
- d) that a copy of the motion is being provided to the parties, the attorney of the child, if any, and the guardian ad litem, if any.³

Once the motion is filed the court has authority to enter an *ex parte* order for the production of the safety analysis records. The Legislature has provided the format and wording of this order, and it must be substantially similar to the form found in 10A O.S. §1-6-102(D)(3). DHS must be given at least five judicial days to deliver the records to the court and be provided with the names and other identifying information about the subjects of the safety analysis records.⁴

It is important to remember that this procedure only allows for the production of the safety analysis records. Safety analysis records contain DHS responses to a report of abuse or neglect and include both assessment reports and reports to the district attorney, including all attached supporting documentation and addendums.⁵ Any order obtained that requires DHS to produce all agency records will be deemed to require only the production of the safety analysis records.⁶

In-camera review by the trial judge or any judge has been eliminated in records produced for custody or visitation issues. Once the records are received by the court, they are to be immediately distributed to the litigants in the case, subject to a statutory protective order.⁷ This protective order limits the distribution of the records to the litigants only.

CRIMINAL, CIVIL & ADMINISTRATIVE PROCEEDINGS

DHS records can be helpful to a practitioner if he or she is representing a client charged with criminal abuse, neglect or molestation of a child. The allegation of abuse to a child will typically trigger an investigation by law enforcement and DHS. Both agencies keep their own records of the investigation. DHS records should be compared to other reports to determine if there are any irregularities or discrepancies between the agencies. Similarly, DHS records could be useful to a practitioner involved in a protective order relating to allegations made by a child or an adoption proceeding when a person's parental rights are being terminated.

Upon a finding that DHS records are relevant in a criminal, civil or administrative proceeding, the court can authorize the inspection, release, disclosure, correction or expungement of these records. The court must conduct a judicial review of the documents and make a specific determination that such records are necessary.⁸

To obtain records in this situation, the practitioner must file a motion that specifically describes the records requests and provides a detailed, compelling reason why these records need to be inspected or released.⁹ The statute provides that if the level of specificity is not satisfactory to the court the petition may be dismissed on its face.

Once a petition requesting DHS records is filed, the court must set a date for a hearing. This hearing must provide at least 20 days' notice to the following people, if applicable:

- a) the agency or person holding the records
- b) the person who is the subject of the record if such person is 18 years of age or older
- c) the parents of a child less than 18 years of age who is the subject of the record
- d) the attorneys, if any, of such person, child or parents and any other interested party as ordered by the court

The statute provides that the hearing time may be shortened if there are exigent circumstances. Additionally, the court may enter an *ex parte* order requiring the agency in possession of the records to either produce the records on or before the hearing date or file an objection to

the production of the records.¹⁰ From a practical standpoint, if the records are received and reviewed by the court prior to the hearing date, then the court could immediately release the records after the hearing, providing the records were deemed relevant to the litigation. This would be particularly helpful due to the lengthy notice period required by this statute before the hearing can be held.

FEES AND COSTS

The agency, entity or person required to produce the confidential records under this statute can require payment of fees from the party requesting the records before the records are produced. These fees can include a research fee of not more than \$20 per hour, a copying fee of no more than 50 cents per page and no more than \$5 per copy of a video tape or disk. These fees can be waived in a criminal matter if the defendant is determined to be indigent. Additionally, DHS cannot assess these fees for records requested in a custody or visitation matter.¹¹

In conclusion, DHS records can be a helpful tool to a practitioner in many situations. The statutes provide that these records can be released and used in various types of litigation. It is important to know which section applies to the records that are being sought and that

the correct procedure is used. Failure to follow the proscribed rules can lead to unnecessary delays and frustrations to the practitioner, the court, DHS and the clients.

1. 10A O.S. §1-6-102(A).
2. 10A O.S. §1-6-102(D)(2).
3. 10A O.S. §1-6-102(D)(2).
4. 10A O.S. §1-6-102(D)(5), (6).
5. 10A O.S. §1-6-101(B)(3).
6. 10A O.S. §1-6-102(D)(8).
7. 10A O.S. §1-6-102(D)(7).
8. 10A O.S. §1-6-102(E).
9. 10A O.S. §1-6-102(E)(1).
10. 10A O.S. §1-6-102(E)(2).
11. 10A O.S. §1-6-102(G).

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Children and Their *De Facto* Parents Past, Present and Future Third-Party Custody and Guardianship Law in Oklahoma

By Donelle H. Ratheal

In 1910, Oklahoma statutory law granted the custodial parent specific rights and obligations regarding his child. The parent had the right to the custody, control and care of his child, the right to his child's services and the right to receive the monies that his child earned.¹ The parent could not, however, abuse his parental authority. The trial court could free the child from the parent's dominion, place the child with one of the persons identified in the statute and enforce the parent's duties of support and education.²

HISTORICAL LAWS AND JUDICIAL POLICIES

The parent had a duty to take care of his child's day-to-day needs. If the parent failed or refused to do his duty, the trial court could require the parent to reimburse individuals who had assumed his duty and supported his child.³

The parent could relocate his child to another town or state. But if the relocation prejudiced the child's rights or welfare, the trial court could prevent the relocation.⁴

Oklahoma decisions governing third-party custody and guardianship from statehood until 1984 were generally consistent with the above legislative theme. When the parent fulfilled his parental duties, third parties were not allowed to interfere with his decisions regarding his child.⁵ When the parent failed or refused to fulfill his parental duties, the child's right to enjoy a stable, wholesome environment with a loving parental figure took precedence.

The cases focusing on the child's rights generally involved two fact patterns. The first fact pattern involved a nonparent who assumed the parent's role for an extended period of time and the child was emotionally attached to the nonparent. The second fact pattern was when the parent was specifically found to be unfit.⁶

*Garlin v. Garlin*⁷ involves the first fact pattern. In *Garlin*, the mother and father divorced. While the father initially disputed custody in the divorce, he and the mother agreed to leave their child in her parents' custody. A few years later, the father filed a motion to modify custody of the child to him, when the maternal grandparents refused to give the child to him.

The trial court found that the mother was unfit. While it did not find the father unfit, it denied the father's motion. As the basis for its ruling, the trial court cited to the father's original agreement to allow the maternal grandparents to raise the child, the length of time that the father had left the child with them and the

child's close relationship with them. The Oklahoma Supreme Court affirmed, holding that a "parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. It will never be enforced where its enforcement will obviously destroy the happiness and well-being of the child."⁸

Another example is *Osburn v. Roberts*.⁹ In *Osburn*, the mother died giving birth to the couple's daughter. The father gave the child to her maternal aunt two days after she was born, who raised her. He visited the child approximately once every other month and provided minimal financial support for her. Approximately three years later, he filed a *habeas corpus* action for his daughter's custody when the aunt refused to relinquish her.

The trial court denied his petition. The Oklahoma Supreme Court affirmed.¹⁰ It held that "there are three rights or interests that are to be given consideration in the following order of importance: 1) that of the child, 2) that of the parent and 3) that of those who have for years discharged all the obligations of parents."¹¹ It found the child's emotional bond with her maternal aunt and uncle to be a significant factor, holding "when asked to take the custody from those who have for a considerable period of time nurtured and cared for the child and to restore it to the parent, it is proper for the courts to consider the ties of love and confidence that have grown up between the child and its foster parents and whether it is best for the child not to disturb that relationship."¹²

The *Osburn* court also found significant the father's relinquishment of physical custody to the maternal aunt. It held that "children are not, like chattels, subject to an irrevocable gift, barter or sale, though the fact that a parent has relinquished custody of his child to others should be given due consideration."¹³

The standard for custody disputes between nonparents was the child's best interests. In *In re Borcharding's Custody*,¹⁴ the mother was awarded custody of the parties' child in their divorce. She moved in with her parents for a short time. She left the child in their care when she moved.

The 12-year-old lived with his maternal grandparents, rural tenant farmers, for most of his life, although he had initially lived with the paternal grandparents for a short period, continuing to visit them. Neither parent was overly involved in the child's life.¹⁵

The trial court awarded custody to the paternal grandparents, citing the opportunity for the child to attend city schools. The Oklahoma Supreme Court reversed.¹⁶ It recited a number of factors, including the child's intelligent, articulate responses to the trial judge and his clear preference to remain with his maternal grandparents.¹⁷ It held that it was in the child's best interests to remain with his historical caregivers and maintain continuity in his life.¹⁸

Subsequent appellate decisions relating to custody disputes between a parent and non-parent generally used the same standards until 1984. If the parent was unfit, and refused or failed to fulfill his parental obligations, the appellate court focused primarily on the child's best interests. If the parent was fit and substantially fulfilled his parental obligations, the appellate court focused on the parent's right to the custody, care and control of his child.

In 1972, the Oklahoma Supreme Court established the two-prong test for a parent to terminate the nonparent's guardianship of her child in *In re Guardianship of Hatfield*.¹⁹ The parent was entitled to present evidence of 1) her changed conditions in life that qualified her as a fit person, and 2) placing the children in her custody was in the children's best interests.²⁰ The two-part test was a slight shift from the original language, found in *Grose v. Romero*,²¹ which required a finding that returning the child to the parent was not inimical to the child's welfare.²²

POLICY SHIFTS IN OKLAHOMA LAW

In 1984, the Oklahoma Supreme Court decided *Application of Grover*.²³ *Grover* involved maternal grandparents attempting to adopt their granddaughter over the father's objection. The mother was awarded custody in the divorce, and the father had no contact with her or the child afterward. The mother moved in with her parents and died three months later. The grandparents were the child's sole caregivers and providers for two years before filing for adoption.

The father became aware of the adoption, objected and filed a petition for *habeas corpus*. The trial court found that either home was a fit environment for the child, but denied the father's petition, finding that other factors supported leaving the child with her grandparents.

The Oklahoma Supreme Court reversed. It held that the law required the child to be

returned to her father's custody if there was no specific finding that he was unfit, because a grandparent had no rights to custody or visitation with a child except by statute.²⁴ It did not reference or acknowledge the "abuse of parental authority" statute in its decision.

The *Grover* court cited to the "three rights" standard²⁵ and reiterated the principle that the overriding consideration is the child's best interests.²⁶ However, it found that the father's fundamental right to the custody of his child outweighed all other factors if he was deemed a "fit" person.²⁷ It noted that the record was silent regarding the child's preference, but then held that a child's "whims, wants and desires" regarding where she should reside should be disregarded.²⁸ The court clearly did not find the father's failure to fulfill his parental duties to be of any significance, and minimized the issue of the child's emotional bond with her grandparents.

One year later, the Oklahoma Supreme Court discussed the importance of a child's emotional development, but within the context of a contested adoption. It held:

The Constitution protects only parent-child relationships of biological parents who have actually committed themselves to their children and have exercised responsibility for rearing their children. . . Children are not static objects. They grow and develop, and their growth and development requires more than day-to-day satisfaction of their physical needs. Their growth and development also require day-to-day satisfaction of their emotional needs, and a primary emotional need is for permanence and stability. Only when their emotional needs are satisfied can children develop the emotional attachments that have independent constitutional significance. This court recognizes that a child's need for permanence and stability, like his or her other needs, cannot be postponed. It must be provided early.²⁹

In 1994, the Oklahoma Supreme Court decided *McDonald v. Wrigley*.³⁰ *McDonald* involved a grandmother's attempt to intervene in her daughter's divorce, seeking custody of her grandchild. The trial court dismissed the grandmother's request to intervene.

The *McDonald* court reversed. It held that the grandmother had standing to intervene in her daughter's divorce because a grandparent is

listed in the preferences statute as an eligible guardian or custodian of a child.³¹

However, the *McDonald* court continued beyond the issue of intervention. It first held that all grandparent custody orders were temporary in nature, due to the parent's fundamental right to the companionship, care, custody and management of his child.³² Second, it held that there had to be a compelling interest before the trial court could sever the parent-child relationship, because the parent's right was protected by both the U.S. and Oklahoma Constitutions.³³ *McDonald* was devoid of any language regarding the "three rights" test or the child's best interests.

The *McDonald* court cited to the U.S. Supreme Court decision, *Lehr v. Robertson*,³⁴ as the basis for its holding. The *Lehr* decision involved a parental rights termination hearing. Nevertheless, the *McDonald* court likened the grandmother's quest for custody, which it had held was temporary in nature, to have the same effect as a termination of one's parental rights, which permanently severs the parent-child relationship.³⁵

OKLAHOMA LAW FROM 1994 TO 2002

Appellate decisions after *McDonald* were fairly consistent in treating a parent's right to the care and custody of his child as inviolate, with few exceptions. The nonparent bore the burden of proving the parent "affirmatively unfit" by "clear and convincing" evidence in both custody and guardianship cases.

The parent's relinquishment of custody and parental obligations to the nonparent were not relevant factors. Neither the child's emotional attachment to the nonparent nor the length of time that the child had lived with the nonparent was a relevant factor.³⁶

*Matter of Guardianship of M.R.S.*³⁷ is an example. In *M.R.S.*, the custodial father agreed to give guardianship of his daughter to a couple when she was an infant, in the midst of a multi-day guardianship trial. There was no finding in the agreed order that he was unfit. The order gave him visitation and imposed child support.

The couple raised the child for approximately six years. The father paid his child support and exercised most of his visitation. He filed a motion to terminate the guardianship when the couple refused to relinquish custody to him.

The trial court denied the father's motion, citing the following factors: 1) the couple had been the child's daily caregivers for most of her life, 2) the child expressly stated that she wished to remain with them, 3) there was a strong bond between the couple and the child, and 4) the father had not shown a permanent and material change of circumstances necessitating a termination of the guardianship.

The Oklahoma Supreme Court reversed, holding that the trial court improperly placed the burden of proof upon the father, because he had not previously been found unfit.³⁸ All he was required to prove was that the conditions necessitating the guardianship no longer existed.³⁹ The guardians were tacitly required to prove why the guardianship should remain in place.

The *M.R.S.* court cited to the father's regular child support payments, exercising most of his visitation, his shorter work hours, a new wife and his stated desire to have the child in his home as the relevant factors to terminate the guardianship.⁴⁰ It acknowledged that the change could be "unsettling and upsetting" to the child, but that she was entitled to her father's love and affection.⁴¹

The child's testimony that she wanted to remain with the couple was not a relevant factor. The court did not consider the psychological relationship between the child and her parental figures, or her psychological relationship with her father, as important factors. Once the father proved that he was a "fit" person to have custody, his legal relationship with the child prevailed over all other factors.⁴²

The *M.R.S.* court did reiterate the *Hatfield* standard that the parent bore the burden of proof that he was now a fit parent if the trial court had previously found him to be unfit.⁴³ For all other cases, when the parent was not deemed unfit (common in agreed guardianship orders), the policy seemed to be that the guardian bore the burden of proof that the circumstances necessitating the guardianship still remained.

One exception is *Lively v. Lively*, decided in 1993.⁴⁴ In *Lively*, the mother and father were not married. The father died approximately three months before their child was born.

When the child was four years old, the paternal grandparents filed a petition for custody under the "abuse of parental authority" stat-

“The court did not consider the psychological relationship between the child and her parental figures, or her psychological relationship with her father, as important factors.”

ute.⁴⁵ The mother objected, asserting that only the state could terminate her parental rights. The trial court agreed and dismissed the grandparents' case.

The appellate court reversed, relying on the "abuse of parental authority" statute as a basis for grandparent custody, noting the recent amendment to include a grandparent in the class of individuals who could file the petition on the child's behalf.⁴⁶ It reviewed the history of cases that discussed the statute, either in dissenting opinions or in *dicta*, and held that the statute gave the grandparents the right to file a private civil action and present sufficient evidence to satisfy the "clear weight of the evidence" standard.⁴⁷

In 1998, the Oklahoma Legislature passed legislation allowing grandparent custody through abandonment. The statute was amended in 1999 and repealed in 2009.⁴⁸

TRENDS IN OTHER JURISDICTIONS

The Oklahoma Supreme Court's requirement that a nonparty show "clear and convincing evidence" of a parent's "unfitness" to acquire custody or guardianship of a child was consistent with the majority of jurisdictions through approximately 1980. The terms "parental unfitness," "abandonment" or "compelling reasons" were used to describe a parent's inability or unwillingness to assume parental responsibility for his child justifying a custody or guardianship award to a nonparent.⁴⁹

Beginning in 1980, however, legislatures and the judiciary became aware that traditional legal standards regarding child custody and access were inadequate to effectively respond to significant changes in the family structure. The trial court's authority was expanded to include the child's psychological well-being

and emotional attachments as relevant factors in custody and access decisions.

Two legislative examples are Hawaii and Oregon. In 1995, the Hawaii Legislature revised its custody statutes to allow the trial court the authority to award custody of a child to a nonparent, contrary to the normal parental preference, if it is in the child's best interests.⁵⁰ The statute includes a preference for a nonparent who has had *de facto* custody of the child in a stable home, over a noncustodial parent.⁵¹

In 2001, the Oregon Legislature revised its custody statutes to expand the scope of persons eligible to seek custody to include a "psychological parent." A "psychological parent" is someone who has "established emotional ties creating a parent-child relationship."⁵²

The trial court is tasked with making two determinations in awarding the child to the "psychological parent" over the biological parents: 1) the individual has a parent-child relationship with the child, and 2) the custody award is in the child's best interests.⁵³ The nonparent does not have to prove either of the biological parents unfit.⁵⁴

The parent-child relationship is defined as "a person having physical custody of a child or residing in the same household as the child; supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, with interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs."⁵⁵ The parent-child relationship must exist or have existed within six months of filing.⁵⁶

Other states adopted a similar definition, by statute and decisional law.⁵⁷ Some jurisdictions adopted the terms "equitable parent"⁵⁸ and "person acting *in loco parentis*"⁵⁹ to incorporate the child's psychological welfare into the "best interests" standard to support a nonparent custody award.⁶⁰ Forensic mental health evaluations and evaluator testimony gave trial courts the opportunity to include empirical evidence of the child's psychological status as part of the "best interests" inquiry.⁶¹

In 2005, the Washington Supreme Court held that a *de facto* parent had standing to seek custody of a child who was neither adoptive nor

biologically related.⁶² It defined a *de facto* parent as one whom: 1) the natural or legal parent consented to and had fostered the parent-like relationship, 2) the individual and the child lived together in the same household, 3) the individual assumed obligations of parenthood without expecting financial compensation, and 4) the individual had been in a parental role for a sufficient length of time that the child and the individual had formed a bonded, dependent relationship, like a parent-child relationship.⁶³ Its response to the legal parent's argument that there was no legislative provision that created or allowed an individual to become a *de facto* parent was:

We cannot read the legislature's pronouncements on this subject to preclude any potential redress to [the partner of the child's mother]. In fact, to do so would be antagonistic to the clear legislative intent that permeates this field of law - - - to effectuate the best interests of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state.⁶⁴

Other jurisdictions began to recognize the state's interest in protecting children's psychological welfare as similar to its interest in protecting their physical welfare. An example is the Maine Supreme Court, which held:

The cessation of contact with a grandparent whom the child views as a parent may have a dramatic, and even traumatic, effect upon the child's well-being. The State, therefore, has an urgent, or compelling, interest in providing a forum for those grandparents having such a 'sufficient existing relationship' with their grandchildren.⁶⁵

The Maine Supreme Court used the "compelling" interest to ensure that the grandchildren who had lived with their grandparents for the majority of their lives had consistent, regular visitation with their historical caregivers. The Maine Court imposed the visitation schedule on the parents who qualified as an "intact nuclear family" under *Troxel v. Granville*.⁶⁶

EMERGING POLICIES IN OKLAHOMA LAW

In 2003, the Oklahoma Supreme Court accepted an appeal regarding a termination of a guardianship. In *In re Guardianship of A.G.S.*,⁶⁷ the maternal grandmother was appointed the

child's guardian a few months after his birth. The trial court did not find the mother unfit and did not attach conditions to the guardianship's termination.

Approximately four years later, the maternal grandmother filed a request for child support. The mother filed a motion to terminate the guardianship in response. The trial court terminated the guardianship, holding that the law required its termination because the mother had not been found unfit and there were no conditions to her regaining custody.⁶⁸ The Oklahoma Supreme Court reversed.

The A.G.S. court held that a natural parent must satisfy two requirements before the trial court could terminate a guardianship: 1) the conditions that required the guardianship no longer exist, and 2) termination of the guardianship is not inimical to the child's welfare.⁶⁹ It revived the second prong of the guardianship termination test as the basis to keep the guardianship in place.

The A.G.S. court held that termination of the guardianship would be inimical to the child's welfare under the circumstances.⁷⁰ It identified several factors for its decision: 1) the length of the guardianship, 2) the relationship between the child and his guardian, 3) the mother's failure to have meaningful contact with her son, 4) her failure to provide any financial support to the guardian for her son, 5) her election to leave the child with the guardian until she received the notice of child support collection, and 6) the original condition for the guardianship (her possible imprisonment) had been removed years ago.⁷¹

The A.G.S. court found that the mother could not satisfy her statutory duty to her child, to provide the support and education suitable to her circumstances.⁷² Although there was no evidence that the child had been abused while in the mother's care, her failure to protect her elder daughter from abuse (resulting in her death) and evidence of ongoing domestic violence in her home provided the basis for a finding that terminating the guardianship would be "inimical" to the child's welfare.⁷³

In 2009, the Oklahoma Legislature made legislative changes to make it easier for third parties to formalize their psychological relationship with a child and afford more stability in the child's family structure. It recodified Section 21.1 of Title 10 as Section 112.5 of Title 43, and amended it to allow a grandparent or other

individual identified in the statute to assume custody of a child under certain circumstances.⁷⁴ In its previous form, the individual could only seek custody if the custodial parent died or lost custody.

The same year, it also enacted provisions for a permanent kinship guardianship within the context of a deprived proceeding. In 2010, the appellate court discussed the respective rights of a child and his parent in *In re C.L.D.*,⁷⁵ a kinship guardianship connected to a juvenile deprived action. In *C.L.D.*, the father appealed the order appointing the maternal grandparents as guardians of his son. The appellate court affirmed the guardianship.⁷⁶

The father raised his constitutional rights as a father as part of his appeal.⁷⁷ The *C.L.D.* court responded, holding that "the parent's constitutional interests, however, are not the only constitutional rights at stake."⁷⁸ It further held:

The interest of children in a wholesome environment has a constitutional dimension no less compelling than that the parents have in the preservation of family integrity. In the hierarchy of constitutionally protected values both interests rank as fundamental and hence be shielded with equal vigor and solicitude.⁷⁹

The welfare specialist's testimony that the child would "likely face emotional harm if removed from the long-term foster placement with Grandparents"⁸⁰ was a significant factor in the court's analysis. The father's failure to regularly pay child support, his long working hours and a lack of transportation were also important factors.⁸¹

Other than the above decisions, Oklahoma decisional law in guardianship and third-party custody cases has remained substantially the same: the parent's biological relationship to the child has priority over all other factors, unless the parent can be found "unfit" under the "clear and convincing" standard.⁸²

In 2010, the Oklahoma Legislature amended the guardianship statutes to include a grandparent or other "qualified relative" to seek custody of a child by filing a petition for "custody by abandonment."⁸³ The statute requires the grandparent/relative to provide the majority of support for the child, and to have contacted the custodial parent in writing, requesting that the parent reclaim custody. It defines "abandonment" according to Section 1-1-105 of

the Children's Code, which includes a parent's intention by word or action to refuse to care for the child, and a parent's failure to maintain a significant parental relationship.⁸⁴

The statute is the most recent legislative mechanism for third-party custody, reviving some portions of Section 21.3 of Title 10, which was repealed in 2009. The trial court must base its findings on the child's best interests and the following factors: 1) the duration of the abandonment and integration of the child into the relative's home, 2) the child's preference, if of sufficient maturity to express one, 3) the child's mental and physical health, and 4) other factors the trial court deems necessary under the circumstances.⁸⁵ The test is the same as the one set out in the previously repealed Section 21.3 of Title 10, and cited to by the A.G.S. court to support its decision.⁸⁶ There is no published case to date that discusses or construes third party custody under the 2010 statute.

THE CURRENT DEFINITION OF 'PARENT' IN OTHER JURISDICTIONS

One question that arises is whether a biological parent's failure to create or maintain a psychological relationship with her child falls within the definition of "parental unfitness." Another question that arises is what makes an adult a parent? Many other jurisdictions have recognized that a child's "psychological" parent is not necessarily a biological parent.

The number of states enacting statutes expanding the scope of who can seek custody of a child continues to expand.⁸⁷ Montana statutes were amended in 2009 to include a nonparent in the list of individuals who may file a petition for a parenting plan, if the nonparent has established a parent-child relationship with the child.⁸⁸

California statutes give the trial court authority to award custody of a child to a nonparent, over a parent's objection. It requires the trial court to make two findings to support the custody award: 1) granting custody to a parent would be detrimental to the child, and 2) granting custody to the nonparent is necessary to serve the child's best interests.⁸⁹

The phrase "detrimental to the child" includes "the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs

for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents."⁹⁰

In 2009, Delaware statutes were amended to allow the trial court to award custody of a child to her "*de facto*" parent, regardless of other individuals' biological or legal claims.⁹¹ The individual is a "*de facto*" parent for purposes of awarding custody if the following factors are proven: 1) the individual has had the support and consent of the child's parent or parents who fostered the formation and establishment of the parent-like relationship between the child and individual; 2) the individual has exercised parental responsibility for the child; and 3) the individual has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.⁹²

"Parental responsibility" is defined as "the care, support and control of the child in a manner that provides for the child's necessary physical needs, including adequate food, clothing and shelter, and that also provides for the mental and emotional health and development of such child."⁹³

The Delaware statute survived a constitutional challenge in 2011 in *Smith v. Guest*,⁹⁴ a custody dispute between a same-sex couple whose child had one adoptive parent. The Delaware Supreme Court rejected the adoptive mother's argument that the statute impermissibly infringed on her fundamental liberties to raise her child:

Troxel does not control these facts. The issue here is not whether the Family Court has infringed Smith's fundamental parental right to control who has access to ANS by awarding Guest co-equal parental status. Rather, the issue is whether Guest is a legal "parent" of ANS who would also have parental rights to ANS-rights that are co-equal to Smith's. This is not a case, like *Troxel*, where a third party having no claim to a parent-child relationship (e.g., the child's grandparents) seeks visitation rights. Guest is not "any third party." Rather, she is a (claimed) *de facto* parent who (if her claim is established, as the Family Court found it was) would also be a legal "parent" of ANS. Because Guest, as a legal parent, would have a co-equal "fundamental parental interest" in raising ANS,

allowing Guest to pursue that interest through a legally-recognized channel cannot unconstitutionally infringe Smith's due process rights. In short, Smith's due process claim fails for lack of a valid premise.⁹⁵

THE CURRENT DEMOGRAPHICS OF 'FAMILY' AND 'PARENT'

The average American child's family structure today, including her parental figures, has changed dramatically in the past 50 years, with the greatest changes occurring in the last 10 years. The 2010 U.S. Census Bureau reported that unmarried partner households increased by 41 percent, approximately four times the growth rate of all households.⁹⁶ In the unmarried partner households, unmarried same-sex households increased by approximately 80 percent, and opposite-sex households increased by approximately 40 percent.⁹⁷

The U.S. Census Bureau also reported the household arrangements for children under 18 years old in 2012, nationally and by state. Of the approximate 74,000,000 children included in the 2012 census, roughly 47,000,000 children (64 percent) lived with both parents. The remaining 27,000,000 children (36 percent) lived in nontraditional households. Approximately 20,000,000 children (27 percent) lived with one parent. Of the remaining 10 percent, approximately 4,000,000 children (6 percent) lived with unmarried domestic partners, and approximately 3,000,000 children (4 percent) lived with a nonparent.⁹⁸ Grandparents comprised 50 percent of the "nonparent" category.⁹⁹

In Oklahoma, of the 937,000 children included in the 2012 census, 604,000 children (64 percent) lived with both parents. The remaining 333,000 children (36 percent) lived in nontraditional households.

109,000 children (12 percent) lived with a single parent who did not cohabit. 71,000 children (8 percent) lived with unmarried domestic partners, 57,000 children (6 percent) lived in a household where neither parent resided, 45,000 children (5 percent) lived in a household with their grandparents, 41,000 children (4 per-

cent) lived in a household with a relative other than a grandparent, and 9,975 children (1 percent) lived with foster parents.¹⁰⁰

A total of 16 percent of Oklahoma children lived in a nonparent household in 2012, compared to national average of 4 percent of children in nonparent households. The non-traditional household category percentages for Oklahoma children were: single parent (30 percent), unmarried domestic partners (22 percent), unrelated adult (18 percent), grandparent (14 percent), other relative (13 percent) and foster care (3 percent).

Family structure has been impacted by factors other than divorce and couples' decision to cohabit rather than marry. Assisted reproductive techniques have allowed opposite-sex and same-sex couples, married and unmarried, the ability to have a child who has both parents' genetic history.¹⁰¹

Children of divorced parents often become part of a blended family through marriage, and the stepparent is the child's psychological parental figure. The same situation occurs in a partnership where one partner is the legal parent, but the other partner is the emotional parent from the child's perspective.

Custody disputes between same gender partners, in and out of the marriage bond, are sure to increase given the status of successful DOMA¹⁰² challenges, which now includes Oklahoma.¹⁰³ Unless the U.S. Supreme Court overturns the majority of federal appellate decisions regarding same-sex marriages, the definition of "family" will most certainly experience significant change in the near future.

The American Law Institute,¹⁰⁴ the ABA Family Law Section¹⁰⁵ and the Uniform Law Commission¹⁰⁶ recognize the legal consequences of the sociological and demographic changes to the family structure in the second half of the 21st century. In response, they have either crafted proposed changes to custody and access statutory law, or are in the process of preparing proposals for model laws, to attempt uniformity among the jurisdictions.

“The average American child's family structure today, including her parental figures, has changed dramatically in the past 50 years, with the greatest changes occurring in the last 10 years.”

Oklahoma legislative policy has expanded the pool of individuals who can legally qualify to become caregivers for children even if the parents' rights are not terminated. Legislative policy changes appear to recognize that a disproportionate percentage of Oklahoma children are being cared for by relatives and non-relatives, because the parents have relinquished parental obligations.

When a child's biological parent fails to establish or maintain the emotional relationship necessary to the child's psychological development, Oklahoma legislative policy supports third-party custody. The legislative policy includes the opportunity for the biological parent to have visitation, provide financial support, and to resume custody if the emotional relationship is restored.

In contrast, Oklahoma judicial policy, with few exceptions, appears to remain consistent with its policies pronounced from 1984 through 1994. Recent third-party custody decisions continue to focus on whether a nonparent can prove by clear and convincing evidence that the parent is unfit. There is no meaningful discussion about the emotional consequences of removing a child from her psychological parental figures. There is no acknowledgment that the biological parent is responsible for his failure to establish or maintain the necessary emotional relationship with his child.

Oklahoma legislative policy is consistent with the state's historical *parens patriae* obligation: to protect its citizens otherwise unable to invoke the law.¹⁰⁷ The 2009 and 2010 statutory amendments include the child's psychological well-being as a relevant factor in a custody decision. They give the trial judge the authority to allow child to remain with the individuals who have raised her, and whom she perceives as her psychological parental figures. The remaining question is whether the Oklahoma Supreme Court will do the same.

1. R.L. §4368 (1910). The territorial statute was adopted from the Dakotas code, and later recodified as 10 O.S. §5. The statute's original language was stricken and grandparent visitation language substituted in 1997.

2. *Id.*, §4372. The statute was recodified as 10 O.S. (Supp. 2008) §9, and was repealed in 2009.

3. *Id.*, §4376. The statute was recodified as 10 O.S. (Supp. 2008) §13, and subsequently recodified as 43 O.S. §209.2 (2011).

4. *Id.* §4382. The statute was recodified as 10 O.S. (Supp. 2009) §19 and subsequently recodified as 43 O.S. §112.2A (2011).

5. See *Scroggin v. Griffin*, 1939 OK 345, 94 P.2d 244 (wife died when child was few months old; husband rented out his home and lived with maternal grandparents to be with child, as grandmother watched him; trial court's order for shared custody between newly remarried husband and grandparents reversed because he was fit parent); see also, *Alexander v. Kennedy*, 1941 OK 392, 119 P.2d 823 (paternal grand-

mother had periodic visitation with grandchildren during father's life and sought visitation from custodial mother after his death; trial court's grant of weekend custody reversed because no evidence that mother was unfit); see also, *Hood v. Adams*, 1964 OK 217, 396 P.2d 483 (child awarded to mother in divorce; father moved out of state when mother remarried, visited child infrequently and infrequently paid child support; child lived with mother and her new spouse until she died and visited maternal grandmother often; father awarded guardianship because he was of good character, both he and his new wife were highly educated, child would have her own bedroom and attend wife's elementary school; court notes that parent's character should be determined as of filing of petition).

6. See *Tyler v. Oden*, 1941 OK 147, 114 P.2d 447 (custody of young child awarded to maternal grandparents after mother's death; mother divorced father on basis of failure to support and extreme cruelty, and moved in with her parents after divorce; father failed to support child during divorce or after, rarely visited the child, and evidence presented of his spending the night with woman for "immoral purpose"); see also *Phillips v. Phillips*, 1954 OK 66, 267 P.2d 597 (trial court's award of custody of little girl to maternal grandparents in parents' divorce case affirmed; either parent could apply for change of custody when child was older, and court could determine if fit custodian for child).

7. 1932 OK 52, P. 2d 463.

8. *Id.* at ¶8, citing *Bishop v. Benear*, 1928 OK 553, 270 P. 569. The Bishop Court reversed a trial court's custody award to the father of three children, after he had left them with the maternal grandparents for seven years, on the basis of the "three rights" test, noting that the judge did not allow the children to state their preferences.

9. 1946 OK 129, 169 P.2d 293.

10. *Id.* at ¶6.

11. *Id.* at ¶3, *supra*, citing *Bishop*.

12. *Id.*

13. *Id.*

14. 1945 OK 247, 162 P.2d 184.

15. The opinion recites that the parents were estranged and separated, and the father died. The mother had not remarried, and returned to her parent's home occasionally as her employment took her away.

16. *Id.* at ¶11.

17. *Id.* at ¶8.

18. *Id.* at ¶10.

19. 1972 OK 10, 493 P.2d 819.

20. *Id.* at ¶10. The statute governing a termination of guardianship, 58 O.S. §876, recodified as 30 O.S. §4-804 (2011), states: "[T]he guardian of an incapacitated or partially incapacitated person or minor may be discharged by the court when it appears to the court, on the application of the ward or otherwise, that the guardianship is no longer necessary." The trial court instead required the mother to present evidence relating to 30 O.S. §18, recodified as 30 O.S. §4-801 (2011), which are the grounds to remove a guardian.

21. 1948 OK 120, 193 P.2d 1014.

22. *Id.* at ¶11.

23. 1984 OK 20, 681 P.2d 81.

24. *Id.* at ¶18.

25. *Id.* at ¶8.

26. *Id.* at ¶10.

27. *Id.* at ¶9.

28. *Id.* at ¶17.

29. *In re Baby Boy D.*, 1985 OK 93, ¶¶45-47, 742 P.2d 1059, 1067-1068.

30. 1994 OK 25, 870 P.2d 777.

31. *Id.* at ¶7. The preferences statute was 10 O.S. §21.1. At the time of the *McDonald* ruling, the preferences statute allowed a nonparent to obtain custody or guardianship over a parent only if the custodial parent died or lost custody, and under the enumerated circumstances. It was amended several times to add different grounds for third party custody, and was recodified in 2009 as 43 O.S. §112.5. The 2009 amendment removed the requirements that the custodial parent die or lose custody.

32. *Id.* at ¶13.

33. *Id.* at ¶9.

34. 463 U.S. 248, 77 L.Ed.2d 614 (1983).

35. *McDonald*, *supra* at ¶12.

36. See *Matter of Adoption of R.W.S.*, 1997 OK 148, 951 P.2d 83 (child's father was incarcerated and his mother asked grandparents to adopt him, changing her mind four years later; trial court's order returning child to mother affirmed; father's failure to pay any support while incarcerated excused by a temporary order reserving child support, despite adoption and divorce statutes relating to nonpayment as basis for terminating parental rights; mother's relinquishment of all parental responsibilities for four years not a relevant factor).

37. 1998 OK 38, 960 P.2d 357.

38. *Id.* at ¶27.

39. *Id.* at ¶26.
 40. *Id.* at ¶24.
 41. *Id.*
 42. *Id.* at ¶26.
 43. *Id.* The Court also affirmed the second prong of the *Hatfield* test, but returned it to the original language, that the award of custody to the parent must not be “inimical” to the child’s welfare. *M.R.S.* at ¶26.
 44. 1993 OK CIV APP 62, 853 P.2d 787 (approved for publication by Supreme Court).
 45. The statute had been amended in 1991 to include a grandparent as an eligible party to file under the statute. The statute was repealed in 2009.
 46. *Lively*, *supra* at ¶13.
 47. *Id.* at ¶18.
 48. Title 10 O.S. §26. The statute was recodified as 10 O.S. §7202.1 in 1998, recodified as 10 O.S. §21.3 in 1999, and repealed in 2009.
 49. Atkinson, Jeff, “Rights of Third Parties to Seek Visitation and Custody of Children,” 47 *Fam. Law Q.* 1 (2013).
 50. Haw. Rev. Stat. §571-46(2) (1995).
 51. *Id.*
 52. Or. Rev. Stat. §109.119 (1999).
 53. *Id.* at §109.119(3)(a).
 54. *In re Marriage of Sorenson*, 906 P.2d 838 (Or. Ct. App. 1995).
 55. Or. Rev. Stat. §109.119(6)(a).
 56. *Id.* There are different time frames for foster parents seeking custody and for nontraditional parents seeking visitation.
 57. *Supra* n.49.
 58. *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995).
 59. *Bupp v. Bupp*, 718 A.2d 1278 (Pa. Super. Ct. 1998).
 60. *Supra* n.49.
 61. *Id.*
 62. *In re L.B.*, 89 P.3d 271 (Wash. 2005).
 63. *Id.*
 64. *Id.*
 65. *Rideout v. Rideout*, 761 A.2d 291, 294-295 (Me. 2000). The case was a grandparent visitation case. The parents married very young, had difficulties, and ceded physical custody of the children to the grandparents for several years. The parents ultimately reconciled, had a stable lifestyle and sought their children’s return. They refused to give the grandparents regular visitation or access. The Court ordered grandparent visitation based upon the children’s interests.
 66. *Troxel v. Granville*, 530 U.S. 57, 147 L.Ed.2d 49.
 67. 2003 OK 1, 65 P.3d 587.
 68. *Id.* at ¶12.
 69. *Id.* at ¶¶13-14.
 70. “Inimical” is defined as “hostile” or “harmful.” *Oxford Dictionary* 340 (1980). It is also defined as “having the disposition or temperament of an enemy” or “viewing with disfavor.” *Webster’s Third New Int’l Dictionary* 1163 (2002).
 71. *Id.* at ¶15.
 72. *Id.*
 73. *Id.* at ¶20.
 74. 43 O.S. (Supp. 2009) §112.5. The statute’s most recent version will go into effect Nov. 1, 2014, but remains essentially the same as to the applicable persons and grounds to invoke the statute.
 75. 2010 OK CIV APP 54, 238 P.3d 966.
 76. *Id.* at ¶29.
 77. *Id.* at ¶17.
 78. *Id.*
 79. *Id.* The court also reasoned that the kinship guardianship case was less intrusive than a parental termination case, because the father’s parental rights had “residual” parental rights and duties, and had limited visitation, inferring that the same protections afforded a parent facing permanent severing of the parent-child relationship were not necessary. A kinship guardianship is a mechanism allowed by statute in a deprived action where the parent’s rights cannot be terminated. 10 O.S. §1-4-709 (2011). The kinship guardianship can be terminated under limited circumstances. *Id.*, §1-4-711.
 80. *Id.* at ¶14. The “long-term” placement with the grandparents was approximately eighteen months.
 81. *Id.* at ¶¶22-24.
 82. There are some indications that the Oklahoma appellate courts are more open to considering a child’s psychological welfare when the dispute involves two parents. See *Ynclan v. Woodward*, 2010 OK 29, 237 P.3d 145 (purpose of *in camera* interview is to lessen the ordeal for the child, lower the child’s stress and protect the child from the harm that cross-examination and adversarial system could cause); *Kilpatrick v. Kilpatrick*, 2008 OK CIV APP 94, 198 P.3d 406 (whether child’s psycho-

logical and emotional needs and development will suffer due to parents’ joint custody arrangement).
 83. Title 30 O.S. §2-117 (2011).
 84. Title 10A O.S. §1-1-105 (2011).
 85. *Id.*, §2-117(j)(2). There are no published cases construing the statute as of this date.
 86. *A.G.S.*, *supra* at ¶¶18-19.
 87. *Supra* n.49.
 88. Mont. Code §40-4-211(4)(b) (2009 & Supp. 2013). The statute was upheld as constitutional in *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009).
 89. Cal. Fam. Code §3041(a) (West 2012).
 90. *Id.* at §3041(c).
 91. Uniform Parentage Act, 13 Del. Code §8-201(c) (2009 & 2012).
 92. *Id.*
 93. *Id.* at §1101(10).
 94. *Smith v. Guest*, 16 A.2d 920 (Delaware 2011). The Delaware Supreme Court previously held that the non-adoptive parent did not qualify as a *de facto* parent under the state’s paternity statutes. The Legislature amended the statutes to include the *de facto* parent category, and made the statute retroactive. The non-adoptive parent filed her second petition for custody and prevailed.
 95. *Id.*
 96. U.S. Census Bureau, “Households and Families: 2010” (April, 2012). See also www.census.gov/prod/2013pubs/p20-570.pdf.
 97. *Id.* at “America’s Families and Living Arrangements: 2012.”
 98. *Id.*
 99. *Id.*
 100. The Oklahoma statistics were derived from both the U.S. Census Bureau and www.datacenter.kidscount.org.
 101. *Supra* n.49.
 102. The acronym stands for “Defense of Marriage Act.”
 103. The United States 10th Circuit Court struck down Utah’s DOMA on June 25, 2014. It struck down Oklahoma’s DOMA on July 17, 2014 in *Bishop v. Smith*, 14-5003 (10th Cir. 7-18-2014), a case originating in Tulsa County. The federal appeals court has stayed its ruling to allow an appeal to the United States Supreme Court. Similar cases are pending in Idaho, Indiana, Kentucky, Michigan, Nevada, Ohio, Tennessee, Wisconsin, Arkansas, Texas and Colorado. Same-sex marriage is now legal in 19 states and the District of Columbia.
 104. American Law Institute: *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).
 105. The Family Law Section of the ABA formed a drafting committee in 2010 to prepare a Model Third-Party Custody and Visitation Act, 47 *Fam. Law Q.* 25 (2013). The committee prepared a draft of the act but ceased when the Uniform Law Commission announced that it would draft a uniform law.
 106. The ULC committee members include Texas Supreme Court Justice Debra Lehrmann as its chair. Justice Lehrmann is a member and former chair of the ABA Family Law Section. She was the chair of the ABA-FLS Model Third-Party Custody and Visitation Act drafting committee before it ceased its work.
 107. *McIntosh v. Dill*, 1922 OK 35, ¶28, 205 P. 917, *cert. denied*, 260 U.S. 721.

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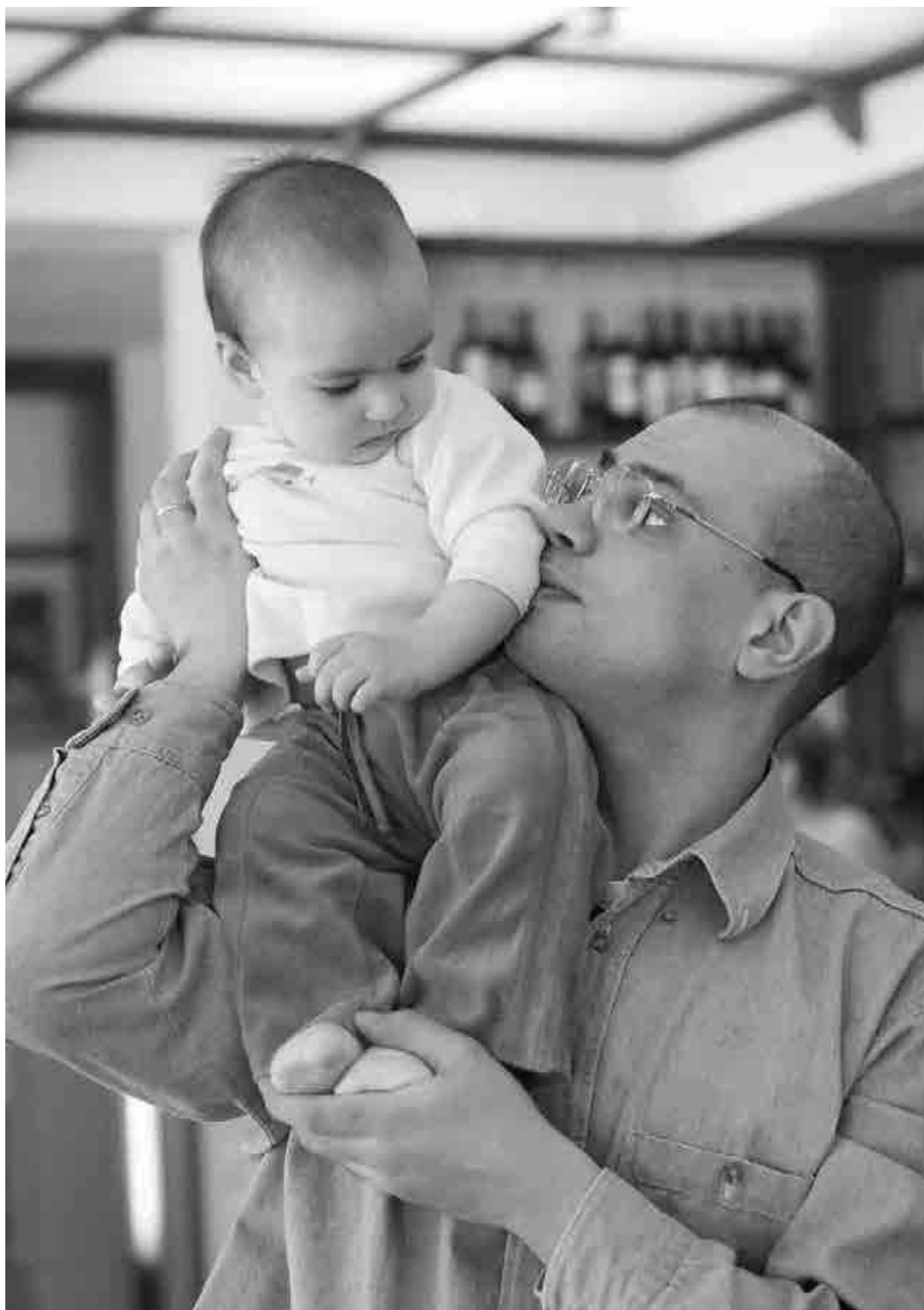
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Paternity: How to Establish and How to Challenge

By Ann Keele

Under Oklahoma law, parents of children born outside of marriage have different automatic rights and obligations than those born of a marital relationship. Generally, if a child is born of a marriage, both parents have legal rights and responsibilities, as the husband is presumed to be the father of the child. Conversely, mothers of children born outside of marriage have custody by default, and unwed fathers have no automatic rights to custody or visitation.¹ The Uniform Parentage Act, found in 10 O.S. §7700, *et seq.*, applies in paternity proceedings.

THE BASICS - ESTABLISHING A FATHER'S RIGHTS TO A CHILD BORN OUTSIDE OF MARRIAGE

A father of a child born outside of marriage must take action to legally establish himself as the father. He may file an acknowledgement of paternity with the Oklahoma Department of Human Services (DHS) to create the legal presumption that he is the father of the child.² However, simply signing an acknowledgement of paternity form does not establish rights to custody or visitation; rather, only an obligation to pay child support. A paternity action must be filed in district court if a father seeks to establish rights to custody or visitation. Only a district court may enter orders concerning custody and visitation issues. Child support may be ordered through the district court or through Oklahoma DHS Office of Child Support Services via administrative proceedings; however, custody and visitation issues cannot be addressed in the administrative courts.

If there is any question as to whether the child is his biologically, an acknowledgement of paternity should not be signed because the legal presumption of paternity is created by signing such form. Thus, when in doubt, a father may request genetic testing to confirm that he is the biological father, either within a DHS administrative action brought against him for child support or in a district court paternity action.³ Once paternity has been established, the district court will make determinations regarding custody, visitation and child support. This determination is based on the best interests of the child standard, applying not only the Uniform Parentage Act, but also Title 43, just as any other proceeding concerning custody and visitation, such as a divorce action or post-decree modification.

It takes affirmative action to establish a father's parental rights for a child born outside of marriage. It may require more effort to establish his rights, but once established, he is on a level playing field with those parents with children born of a marriage.

ADJUDICATING A LEGAL PRESUMPTION OF PATERNITY

An action to adjudicate where there is already a presumptive father must be brought pursuant to 10 O.S. §7700-607(C), which states:

A. Except as otherwise provided in subsection B of this section, a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father shall be commenced not later than two (2) years after the birth of the child.

B. A proceeding seeking to disprove the father-child relationship between a child and the child's presumed father may be maintained at any time in accordance with Section 7700-608 of this title if the court, prior to an order disproving the father-child relationship, determines that:

1. The presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and
2. The presumed father never openly held out the child as his own.

C. A proceeding seeking to disprove the father-child relationship between a child and the child's presumed or acknowledged father may be maintained at any time if the court determines that the biological father, presumed or acknowledged father, **and** the mother agree to adjudicate the biological father's parentage in accordance with Sections 7700-608 and 7700-636 of this title. If the presumed or acknowledged father or mother is unavailable, the court may proceed if it is determined that diligent efforts have been made to locate the unavailable party and it would not be prejudicial to the best interest of the child to proceed without that party. In a proceeding under this section, the court shall enter an order either confirming the existing father-child relationship or adjudicating the biological father as the parent of the child. A final order under this section shall not leave the child without an acknowledged or adjudicated father. (emphasis added)

Thus, if a proceeding to adjudicate paternity of child is filed within two years of the child's birth, then it may be brought by the presumed father, the mother, or another individual, such as a man who believes that he may be the bio-

logical father of the child. If the proceeding is filed after the child's second birthday and there is a presumed father, then in order to be able to adjudicate parentage, the circumstances must fit within the exceptions found in 10 O.S. §7700-607(B) or (C). Accordingly, if the presumed father held the child out as his own and either cohabited or engaged in sexual relations with the mother, then the only way to disprove paternity of the presumed father would be if there was an agreement to adjudicate the parentage by the mother, the biological father and the presumed/acknowledged father. All three parties must be in agreement if the action commences after the child's second birthday. If one of the parties is not in agreement, then the presumed father remains the legal father under Oklahoma law.

Case law has interpreted the statutes as such. The Oklahoma Court of Civil Appeals applied the §607 analysis in *Friend v. Tesoro*, 2007 OK CIV APP 78, 167 P.3d 978, as follows:

§7700-204 A. A man is presumed to be the father of a child if:

5. For the first two (2) years of the child's life, he resided in the same household with the child and openly held out the child as his own.

B. A presumption of paternity established under this section may be rebutted only by an adjudication under Article 6 of the Uniform Parentage Act.

10 O.S. 2006 Supp. §7700-607 provides:

A. Except as otherwise provided in subsection B. of this section, a proceeding brought by a presumed father, the mother or another individual to adjudicate the parentage of a child having a presumed father shall be commenced not later than two (2) years after the birth of the child.

B. A proceeding seeking to disprove the father-child relationship between a child and the child's presumed father may be maintained at any time if the court, prior to an order disproving the father-child relationship, determines that;

1. The presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and

2. The presumed father never openly held out the child as his own.

In our view, these provisions were enacted to cover the exact situation we have here. The action was not commenced within the two-year restriction. According to the petition, Friend was a presumed father under §7700-204(A)(5). Challenges against a presumed father must be brought within two years of the child's birth. §7700-607(A). This paternity action was commenced July 9, 2002, more than two years after N.F.T.'s birth (August 18, 1999). Therefore, if Friend's allegations are true, it appears he is the presumed father of N.F.T., which presumption cannot be rebutted. *Id.* at ¶4-5.

The finding in *Friend v. Tesoro* confirms the notion that unless there is an agreement by all parties, once a child reaches age two, the presumed father will be deemed to be the legal father under Oklahoma law.

Let's apply the law to a hypothetical situation: Trixie was dating both Fabio and Ned, though neither man knew about the other. Trixie married Ned a couple of months later and discovered she was pregnant. Trixie gave birth to a healthy baby, and Ned was listed proudly as the father on the baby's birth certificate. Trixie and Ned remained married for several more years. Trixie and Ned start arguing, and in a fit of rage, Trixie decides she is going to go find Fabio and reveal that Fabio is really the baby-daddy. The child is now 14 years old. Trixie finds Fabio and rings his doorbell. Ding dong. "Hello, Fabio! Remember our torrid love affair almost 15 years ago? Well, let me introduce you to our child!" Fabio is shocked. He didn't even know that Trixie had a child since he lost touch with her after she married Ned. Fabio files a paternity action stating that he believes that he is the biological father of the child, and seeks custody and visitation rights. Ned gets served with Trixie's divorce petition and Fabio's paternity petition and is heartbroken and dismayed. This is the child he has raised for 14 years as his own! How can this be happening? What should Ned do?

Ned is the presumed legal father. The child was born during his marriage to Trixie. He is named as the child's father on the birth certificate, plus he and Trixie had a sexual relationship and held the child out to be his own. Thus, he is clearly the presumed legal father under 10 O.S. §7700-204. In applying 10 O.S. §7700-607, the child is over age two, thus one of the exceptions in (B) or (C) would need to apply. Paragraph (B) does not apply since Ned cohabitated and had sexual relations with Trixie, and Ned held the child out as his own for 14 years. Thus, unless Ned agrees to do a swap with Fabio, Ned's presumption of paternity is not rebuttable.

In conclusion, there is a presumption of paternity for a child born of a marriage. A biological father of a child born outside of marriage must take affirmative action to establish a legal presumption of paternity. Once established, the presumption is rebuttable until the child's second birthday. After that time, the presumption is not rebuttable unless the presumed father, mother and biological father all agree to adjudicate the paternity of the child. If there is a doubt, the father should take legal action before the child's second birthday and request genetic testing to prove the biological connection, otherwise it will be difficult if not impossible to overcome the presumption of paternity.

1. 10 O.S. §7800.
2. 10 O.S. §7700-301.
3. 10 O.S. §7700-502.

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Strickland's Children

By Paula D. Wood & Rick Goralewicz

In 1984, the U.S. Supreme Court set forth the standard under which claims of ineffective assistance of counsel in criminal cases are still judged in most jurisdictions in the case of *Strickland v. Washington*.¹ As the right to counsel has expanded to encompass certain civil issues, the standard of effective assistance of counsel has likewise been expanded to those civil proceedings. This article will identify the standards set forth in *Strickland*, examine the application of the same in civil cases and recognize its civil progeny.

Strickland required consideration of proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence be set aside because counsel's assistance at the trial or sentencing was ineffective.² *Strickland* reviewed previous jurisprudence on the topic and analyzed the issue from a constitutional perspective, as well as scrutinizing the facts and theories of the case. The court held that:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a

trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.³

The defendant has the burden of proof and if he is unable to meet either prong, his appeal will fail. Accordingly, the reviewing court is not required to analyze the case in any particular order, or even to address both components if the defendant is unable to meet his burden on one.⁴

Recognizing the wide range of reasonable professional strategy in a given situation, the court opined that the defendant has the burden to overcome the presumption that counsel's tactics were sound. The court also emphasized that the appellate court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective **at the time.**"⁵

The court clarified that “representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”⁶

Like all states, Oklahoma retains a huge reservoir of power to act in defense of the vulnerable. This power exist under the doctrine of *parens patriae*⁷ — the sovereign’s parental role over its vulnerable citizens. Even within the contours of statutory pronouncement and procedures, this power is formidable, and in the case of many citizens, irresistible. Additionally, in some cases, such as adult guardianships, a great deal rests upon judicial discretion⁸. These decisions come before an appellate court weighted with substantial deference⁹ and, therefore, likely to stand as originally decided. That structure exists by design.

We do not argue that the basic structure of the system is flawed. However, if the doctrine that “the King can do no wrong” ever had validity, it no longer holds currency¹⁰. The risk of error is profound. As noted in the guardianship context:

A guardianship proceeding poses the risk to the prospective ward of a massive curtailment of liberty, as well as of the infliction of adverse social consequences. The ward’s freedom to choose his place of residence, to travel, and to carry on relationships with others is limited or terminated. Numerous statutory disabilities are placed upon a ward including the loss of the right to remain licensed to practice a profession, to marry, to own or possess firearms, to operate a motor vehicle, to serve as a juror, and to remain registered to vote.¹¹

Similar considerations attend the termination of parental rights. It has been held, for example that “parental rights are too precious to be terminated without the full panoply of protections afforded by the Oklahoma Constitution.”¹² In reaching this conclusion, the court relied in part on the U.S. Supreme Court’s holding in *Stanley v. Illinois*:

The Court has frequently emphasized the importance of family. The rights to raise one’s children have been deemed “essential.”¹³

Parental rights have also been held “far more precious than property rights” and among “the basic civil rights of man.”¹⁴ This interest is

defined as a “liberty interest” for 14th Amendment purposes.¹⁵

If any of the foregoing sounds familiar to criminal law practitioners who have never entered a domestic, juvenile or probate court, it should. Under both state and federal constitutional criminal procedure, the right to counsel rests upon similar principles. Thus, for example, in *Argersinger v. Hamlin*, extending the right to counsel to misdemeanors in which one’s liberty is threatened, the Supreme Court held:

[I]n those cases that end up in the actual deprivation of a person’s liberty, the accused will receive the “guiding hand of counsel” so necessary where one’s liberty is in jeopardy.¹⁶

Earlier, the U.S. Supreme Court held:

[The Sixth Amendment] embodies a recognition of the obvious truth that the average defendant does not have the professional legal skill to protect life or liberty, when the prosecution is [re]presented by experienced and learned counsel.¹⁷

Adopting the application of a *Strickland* standard in termination proceedings in *Matter of D.D.F.*,¹⁸ the Oklahoma Supreme Court acknowledged that provision of counsel carries with it the expectation of competent and effective representation. Particularly:

The right to counsel would be of no consequence if counsel were not required to represent the parent in a manner consistent with an objective standard of reasonableness.¹⁹

Although, the Oklahoma Supreme Court itself has not revisited the issue since *DDF*, the Oklahoma Court of Civil Appeals (COCA) has carried it forward and fleshed it out in the years since. In *Matter of K.L.C.*,²⁰ the court began by citation to *D.D.F.*, and then briefly analogized child deprivation litigation to the criminal process. It then enunciated the *Strickland* standard as follows:

[A] criminal’s claim that representation was so deficient so as to require reversal must show (1) that the attorney’s performance was deficient and (2) that the deficient performance prejudiced the defense.²¹

While other appellate cases have adopted *K.L.C.*’s explication of *Strickland*, extant Oklahoma case law provides nothing in the way of alternate standards, little in the way of the

mechanics of raising the claim and, of course, no definitive further holdings of the Oklahoma Supreme Court. We will explore those issues below.

RAISING THE ISSUE

In the Oklahoma cases to date, the issue of ineffective assistance has come before the appellate court on direct appeal. This will likely remain the most common method of adjudicating these claims. It is also the most efficient. We must remember that, unlike the criminal justice system, the state of Oklahoma must balance a civil litigant's right of parenthood, or an adult's right to personal autonomy, with the need to expeditiously protect the vulnerable.

“We must remember that, unlike the criminal justice system, the state of Oklahoma must balance a civil litigant's right of parenthood, or an adult's right to personal autonomy, with the need to expeditiously protect the vulnerable.”

In many cases, ineffective assistance of counsel requires a fact-based analysis not usually involved in appellate practice. The Oklahoma Supreme Court may address this issue under its rule-making power.²²

Direct appeal provides the best vehicle in terms of meeting the twin goals of expediency and fairness. In many cases of guardianship and termination, the equivalent of an extensive (and seemingly interminable) post-conviction relief process is simply not feasible. On the other hand, appellate courts are not set up to be fact-finding bodies and, on occasion, ineffective assistance claims require fact-intensive analysis.²³ Development of the issues during the appellate process does not pose an insurmountable hurdle to appellate review.

A number of states have addressed the need for fact-intensive review by remand in accord with their rules governing criminal procedure.

The rules governing criminal appeals in Oklahoma provide as follows:

- 1) When a claim of ineffective assistance of counsel for failure to properly utilize evidence or investigate facts is raised, appellate counsel may submit an application for an evidentiary hearing supported by affidavits.
- 2) The application and affidavits must contain sufficient information to show the court by clear and convincing evidence that counsel was ineffective in failing to use or identify the complained of evidence.
- 3) If the court finds that a strong possibility of ineffective assistance exists, it remands to the trial court to conduct an adversary, evidentiary hearing of such scope as the appellate court may direct.
- 4) The trial court then makes findings of fact and conclusions of law as to the availability and effect of evidence and witnesses, or their non-use, and whether it would impact the ultimate result. While appellate court reviews the findings deferentially, it makes the ultimate decision.
- 5) Either party may file a 10-page supplemental brief addressing the issue in the supplemented record.²⁴

In most cases, the procedure outlined above will allow a complete review when viewed in conjunction with the main record. There is no practical or jurisprudential reason that this rule could not be engrafted onto the rules of the Supreme Court as well. The disruption and delay would be minimal, particularly when viewed in light of the interests at stake.²⁵

A word needs to be said about situations in which trial counsel and appellate counsel are the same. At least one court presumes that in such a situation, appellate counsel would be incapable of presenting the issue of ineffective trial counsel on direct appeal.²⁶ This also recognizes the possibility that, in certain situations, the client may not recognize the deficiency. After all, part of the reason for the right to counsel is the recognition of “the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty.”²⁷ In such circumstances, particularly in the case of a disabled person resisting a guardianship, the expectation that they can discern between “ineffective assistance” and “unsuccessful strategy” seems unrealistic.

Civil procedural statutes regarding vacation of judgments provide one avenue of relief.²⁸ Under this regime, the grounds of “unavoidable casualty,” “excusable neglect” or “procedural irregularity” may suffice to get the issue before the court.²⁹ In Texas, for example, the issue may be raised in a post-trial motion.³⁰ The same is true in Wisconsin which allows a post-trial motion for the purpose of taking testimony to determine the underlying reasons for the trial counsel’s acts or omissions. Florida, in contrast, allows for relief via *habeas corpus*.³¹

In devising a vehicle for bringing a claim of ineffective assistance before the appellate courts, we cannot discount the time factor. The civil justice system operates on the assumption that litigation must, at some point, come to an end.³² In termination cases, the need becomes more acute given the need for new familial relations to gel on the one hand, and the effect of absence on the parents’ relations with the child on the other. In the case of adult guardianships, the adjudication may come as a prelude to institutionalization or isolation from access to a “second look” attorney. It has not escaped notice that adults placed under guardianship often “vanish.” Therefore, any collateral procedure must carry with it a reasonable time frame. Though governed by statute³³ and constitutional provisions,³ *habeas corpus* nonetheless remains a creature of equity.³⁵ Therefore, laches may apply, and the court may establish guidelines for assessing reasonableness of the delay and prejudice.³⁶ Under the new trial/vacation regime in the Code of Civil Procedure, the time frames are set out by statute.³⁷

APPLYING THE STANDARD

Now that we’ve determined that *Strickland* applies and the mechanics of raising it, how do we apply it? Not surprisingly, courts differ on the parameters of the standard and the means of the evaluation. Keep in mind that recognizing ineffective assistance as a concern in termination and guardianship proceedings does not mean a deluge of satellite litigation and reversals. Situations in which violations of *Strickland*’s standards will mandate reversal prove the exception rather than the rule.

At the outset, the court must apply a strong presumption of competence. That is, the court will presume trial counsel’s actions rose from sound tactical choices. As *Strickland* itself demands: “the defendant must overcome the presumption that, under the circumstances,

the challenged action might be considered sound trial strategy.”³⁸ To prove ineffective assistance of counsel, a parent must show both defective performance **and** prejudice to the defendant as judged against a standard of objective reasonableness.³⁹



The extreme cases stand out and require little analysis. Those would fall into the “potted plant” category where the poor performance falls to the level of no assistance at all. Thus, the U.S. Supreme Court has dispensed with a full-blown *Strickland* inquiry “When the defendant can establish that counsel was not merely incompetent but inert.”⁴⁰ This would include the case of sleeping counsel,⁴¹ and those in which counsel wholly failed to investigate, discuss the law with their client, or failed to advise of the consequences of a particular plan or action.⁴² Obviously, there is no reasonable justification for an attorney to sit passively, and allow a client’s fundamental parental rights or liberty and self-determination to be lost upon scant or inadmissible evidence. The key to effective assistance is that, whether successfully or not, the attorney “requires the prosecution’s case to survive the crucible of meaningful adversarial testing.”⁴³ More often, however, the court must make a qualitative analysis to determine whether counsel’s performance crossed the line from just unsuccessful to a constructive denial of counsel. In such cases,

the performance of counsel must be evaluated in terms of the proceedings as a whole.⁴⁴

Representative of this standard, in *Matter of S.S.*,⁴⁵ mother's assigned attorney appeared at a criminal trial in another county. She sent another attorney from her firm to request a continuance. When the court denied the continuance, mother had to proceed *pro se*. Later that afternoon, a second attorney from the attorney's firm appeared. She, in turn, had minimal preparation time and little time for the mother to debrief her of what transpired that morning. At the close of the case, the court terminated mother's parental rights.

On appeal, mother's attorney, the same attorney missing in action at trial, did not raise the claim of ineffective assistance of counsel. Rather, COCA raised it, *sua sponte*, declaring "if a fundamental constitutional right is violated, it is the duty of this court to raise the issue *sua sponte*."⁴⁶ In essence, COCA found the ineffective assistance claim included under her due process claim.⁴⁷ COCA began its analysis quoting from *D.D.F.*, stating:

The deprivation of [parental] rights is a serious matter, and failure to provide counsel may result in a deprivation of due process . . . [S]uch proceedings **shall not be held** without the parent's having an opportunity to be represented by counsel.⁴⁸

From here, COCA noted that, indisputably, mother lacked counsel for the first half of the state's case in chief, and that the substitute counsel had only minutes to consult and prepare. Thus, from the record before it, lack of meaningful representation became a virtual *res ipsa loquitur*.⁴⁹ The state argued that the request for continuance lacked merit, was not properly raised, and, in any event, the court had discretion to grant or deny the continuance. COCA disposed of the theory stating:

Absence of counsel is not made one of the statutory grounds for a continuance. If, however, the trial court's action in overruling an application on this ground **resulted in depriving the defendant of the benefit of counsel, or even if it appeared from the record that the defendant had a substantial defense to the charge which he was unable to present by reason of the absence of counsel**, this court would unhesitatingly set aside a conviction for failure to grant a reasonable continuance.⁵⁰

In rejecting the state's argument, COCA recognized both the state's interest in obtaining permanency for a minor child and the court's interest in controlling its docket. As to the latter, it ruled "that the court has other methods at its disposal for controlling attorneys who do not follow the court's rules and procedures and who fail to appear for trial leaving clients to fend for themselves."⁵¹ In final analysis, COCA held: "we find that rights are too precious to be terminated without full panoply of protections afforded by the Oklahoma Constitution. We know that the best interest and welfare of the child is the primary consideration but we also know that **this goal is best achieved by full compliance with the law.**"⁵²

Matter of S.S. presented the appellate court with problems within the actual structure of the trial proceeding. As such, the court did not need to do a qualitative analysis of the trial lawyer's performance. We look to two such cases now.

In *Matter of K.S.*,⁵³ mother appealed the termination of her rights on the basis of ineffective assistance. Mother complained of what she deemed a lack of adequate preparation. Specifically, she stated that her attorney did not try to contact her until one week prior to trial and spoke to her for less than 40 minutes. The trial court found appellant herself responsible for the lack of communication. COCA first observed "there is no hard and fast rule setting forth how much time an attorney needs to adequately prepare for a given case."⁵⁴ That said, the court stated that "while the instant case was one of utmost importance, neither the facts nor the law were complex or difficult."⁵⁵

The court next examined the counsel's legal performance. As to the lawyer's failure to sever mother's case from that of her common law husband, the court found that each party had representation and had an opportunity to "present his or her own story."⁵⁶ So saying, COCA declined to speculate whether severance would have made a difference. Similarly, it rejected the assertion that mother's attorney did not file a witness list or interview the witnesses she wished to call. However, the court observed that the lawyer had an opportunity to interview the witnesses, and all but one of his unlisted witnesses testified. In a somewhat unsatisfying conclusion, the court stated that "Where an attorney takes no action on behalf of a client, there is a legal presumption of prej-

udice However, the lawyer in question [in this case] did more than nothing.”⁵⁷

In contrast to the findings in *Matter of S.S.*, the Supreme Court of Alaska addressed the ineffective assistance of counsel issue in *David S. v. State*.⁵⁸ There, David S. appealed the termination of parental rights to his daughter Hannah. The state had acquired custody during David’s incarceration. While on parole, he visited her regularly for a period of about five months. He then turned fugitive and eluded capture for a period of nine months at the end of which he returned to prison. During his time on the run, the state initiated termination proceedings. Subsequently, following a trial at which David had benefit of counsel, the court found it in Hannah’s best interest that David’s rights be terminated.

David raised the issue of ineffective trial counsel in a post-trial motion. Specifically, he asserted “that his attorney was overly “passive” during trial and did not adequately pursue David’s goal of placing Hannah with his mother.” The trial court found that “although trial counsel could and should have done more,” the “factual findings upon which termination was premised in 2009 are largely undisputed.”⁵⁹

The Alaska Supreme Court began its analysis with a brief review of its having adopted the standards for ineffective assistance from its criminal jurisprudence into its juvenile law. Those standards comport with *Strickland*. The court noted in particular that:

An integral component of the presumption of competence is the further presumption that trial counsel’s actions were motivated by sound tactical considerations. The duty of rebutting this presumption is part and parcel of the accused’s burden of proof: “[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.”⁶⁰

David first complained that his attorney suggested relinquishment of his parental rights at their first meeting and that he should have met with him more, thus, apparently, displaying an insufficient zeal or enthusiasm for the case. However, the attorney explained that, under Alaska law, with relinquishment he would retain some visitation rights while with termination he would have none. Given David’s history and the evidence against him, this appeared a sound strategic consideration. In

“ **The Alaska Supreme Court began its analysis with a brief review of its having adopted the standards for ineffective assistance from in its criminal jurisprudence into its juvenile law.** ”

addition, counsel noted that he had tried to contact David several times during his fugitive period and that David knew how to contact him. The Supreme Court did not further consider this ground.

David’s next complaint stemmed from his not having received an opportunity for a “dry run” prior to trial. Testimony at the post-trial stage indicated that rehearsal was standard practice. Looking at the record made during the post-trial hearing — at which expert legal testimony was introduced on David’s behalf — the Supreme Court concluded:

In this case, trial counsel demonstrated a willingness to work with David and respond to his concerns. He offered strategic reasons for his trial decisions, and David did not prove otherwise. Although the superior court found that counsel’s performance was substandard insofar as he did not conduct a run-through of David’s testimony prior to his taking the stand, it is unclear that this mistake “fell outside of the range of reasonable actions which might have been taken by an attorney skilled in the . . . law.”⁶¹

The court next looked at trial counsel’s closing argument, the brevity of which David’s expert called “shocking.” In its entirety, counsel stated as follows:

I have just a few brief comments. We believe that [David], if given the opportunity, would be a suitable parent for his child. And he’s been struggling, rightly, with his addictions and he’d usually do — he often does fairly well, and we think with more effort, that he could be a suitable parent.”⁶²

As to this, the court observed that the state’s closing was brief, touching only upon the ele-

ments required to establish termination. In the final analysis:

David did not show how an improved or more aggressive performance would have made a difference in the outcome of his case. At the conclusion of closing arguments, the superior court noted: "This is in my view not a close case." Nonetheless, David argues that his "trial counsel could have raised the issue that David had an adequate plan in place for Hannah's care during his incarceration." But incarceration was only one of the three grounds on which the superior court found Hannah to be a child in need of aid. And David did not dispute the factual bases for the superior court's rulings on the other two grounds: abandonment based on his nine-month flight from the authorities and substance abuse based on his methamphetamine and marijuana use. ...David does not specify how he thinks the trial would have been different if his counsel had taken a different approach.⁶³

Finally, the court took up the issue of whether counsel performed too passively in the matter of Hannah's placement with David's mother. In sum:

David argues that an attorney in a CINA case acts as "both an advocate for and a counselor to a client" and that his attorney failed in this latter role. David contends that his attorney should not have advised him to stipulate that Hannah was a child in need of aid in April 2008 when she was taken into custody by the State. David also argues that his counsel "failed to advocate for the placement of Hannah with her paternal grandmother, Claire." David relies on his expert witness' statement that "[the] attorney's failure to advocate for placement adequately with Claire fell below the standards of representation."⁶⁴

The Supreme Court viewed it differently. "The opportunity to place Hannah with Claire seems to have been robustly explored, and it is unclear what additional advocacy for this option would have accomplished."⁶⁵ The opinion notes that, apparently, the Offices of Children's Services itself made efforts to place the child with Claire and, the court did not see the relevance of placement with Claire to the issue of termination. In passing, the court also suggested that an attorney has no obligation to

pursue a futile or frivolous strategy simply because a client desires it.⁶⁶

Obviously, the lawyer in *David S.* had both a difficult case and a difficult client. Yet, difficulty alone does not excuse poor lawyering. *Interest of J.M.B.*,⁶⁷ for example, proceeded to trial in the absence of the child's mother. The decision does not explain that absence, other than to note that she later contested notice of the hearing, which the court found not plausible. As to her trial attorney's performance, however, the appellate court determined:

While mother's absence made counsel's duty more difficult to fulfill and is not condoned by this Court, it did not abrogate mother's right to effective assistance. Rather, mother's absence made the need for effective assistance of counsel even more important, especially in light of the awesome power wielded by a court in severing the parent-child relationship.⁶⁸

The appellate court characterized the state's argument that the attorney in this case did more on behalf of his client than the attorney in a precedential case "misplaced," inferentially ruling that the effectiveness of counsel is determined from the totality of the record in the case before the court rather than on some sort of comparative standard. In effect, the court seemed concerned with this case serving as a mandate for a lowest common denominator standard. The court also cited to a New York case, *In re Guardianship of Orneika J.*,⁶⁹ in which the court found ineffective assistance of counsel despite mother's absence and the attorney's inability to communicate with her, where the attorney simply stood mute after his request for continuance was denied. The obvious takeaway is that attorneys cannot use the negative qualities of their clients to justify their own lack of performance.

We must point out at this point that not all ineffective assistance claims stem from an attorney's apathy, incompetence, or indolence. In some cases, it can arise from a positive impulse of an attorney to "do what's best" for the client despite the client's wishes. Thus, we have attorneys conflicted between adopting a "best interest" or "zealous advocacy" stance. In *Matter of M.R.*,⁷⁰ the court had before it the case of a 22-year-old adult, presenting moderate mental retardation and Down Syndrome. While no one challenged the need for guardianship, the divorced parents each sought custody. MR

herself wished to move out of her mother's home and into her father's. Mother introduced two experts who opined that MR lacked capacity to make the choice. While this case raises interesting questions regarding degrees of capacity and autonomy, it is the analysis of the performance of MR's attorney which makes it relevant to this discussion. Father appealed placement with the mother, in part because he alleged that MR's attorney did not zealously defend her right to choose. The court began by enunciating the proper role of the court:

As guardians of personal rights, courts have a special responsibility to protect the right of self-determination. Concerning developmentally-disabled citizens, we have declared that the public policy of this State is "to maximize the developmental potential of [developmentally-disabled persons] while affording them the maximum feasible personal liberty."⁷¹

The court then explored the difference between a court-appointed attorney (a zealous advocate for his client's goals) and a guardian *ad litem* (a neutral set of eyes for the court to assist in determining best interest). It then declared:

Advocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system. An attorney proceeds without well-defined standards if he or she forsakes a client's instructions for the attorney's perception of the client's best interests. Further, "if counsel has already concluded that his client needs 'help,'" he is more likely to provide only procedural formality, rather than vigorous representation. ([The court here noting that] "[i]f the attorney is directed to consider the client's ability to make a considered judgment on his or her own behalf, the attorney essentially abdicates his or her advocate's role and leaves the client unprotected from the petitioner's allegations"). Finally, the attorney who undertakes to act according to a best-interest standard may be forced to make decisions concerning the client's mental capacity that the attorney is unqualified to make.⁷²

This decision comports with Oklahoma's current ethical rules concerning clients under a disability:

a) When a client's capacity to make adequately considered decisions in connection

with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.⁷³

The Committee for Public Counsel Services, a Massachusetts agency, has offered a set of guidelines on this issue which include the following:

The role of counsel is to diligently and zealously advocate on behalf of his or her client, within the scope of the assignment, to ensure that the client is afforded all of his or her due process and other rights. To that end, only in exceptional circumstances may counsel stipulate to the client's incapacity; provided, however, that in proceedings in which a substituted judgment determination is required, counsel must oppose the petition and present 'all reasonable alternatives' to the proffered treatment for the court's consideration.⁷⁴

To achieve this, counsel must, at minimum:

During the hearing the attorney shall act as a zealous advocate for the client, insuring that proper procedures are followed and that the client's interests are well represented. To that end, the attorney shall: (a) file any and all appropriate motions and legal memoranda, including but not limited to motions regarding the assertion of privileges and confidential relationships, and the admission, exclusion or limitation of evidence; (b) present and cross-examine witnesses, and provide evidence in support of the client's position; (c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and (d) take any and all other necessary and appropriate actions to advocate for the client's interests."⁷⁵

CONCLUSION

It's hard to overstate the importance of the parent-child bond, and it is difficult to appreciate the importance of autonomy to the elderly and vulnerable. Some people say that one's children and/or autonomy represent their most precious assets. We say that description is inadequate in both regards, reducing these intangibles to things. Therefore, we agree with those courts characterizing both as fundamental liberty interests. That said, we also acknowledge that not all can handle these freedoms. *Parens patriae* — both in its statutory and common law forms — thus remains a necessary concomitant of state power. But it must also remain a tool wielded with surgical precision — a goal best ensured by attorneys prepared to “require the prosecution’s case survive the crucible of meaningful adversarial testing” before cutting begins.

Currently, a perfect storm is brewing. While adopting *Strickland*, the Oklahoma Supreme Court has had little opportunity to advance or expend its application in published opinions to date. COCA has visited the issue several times, but many cases suffer from a paucity of facts displaying the analytical process. Obviously, the last word remains unwritten. Given the national sweep of the civil *Gideon* movement, the issue will likely arise with more frequency in the foreseeable future. Specifically, proponents of that movement urge courts and legislators to take a hard look at life-altering civil cases to assess the need for appointed counsel and to ensure that counsel be competent.⁷⁶

Oklahoma declares itself a jurisdiction in which “both the appearance and reality of fairness” is preserved.⁷⁷ We constitutionally declare our courts fair and open,⁷⁸ and our jurisprudence guarantees that mandate as more than “an empty formality.”⁷⁹ It is therefore imperative that we, as civil practitioners, understand both the depths and mechanics of our professional obligations in these most critical of civil matters.

Authors’ Note: Special thanks to Sonya Patterson for her editorial assistance.

1. 466 U.S.668(1984)

2. *Id.* It is interesting to note that the ineffective assistance of counsel of which the defendant complained was in the sentencing phase, after the defendant had entered a plea of guilty to three murders, each of which was committed during perpetration of a felony. The guilty pleas were entered against advice of his counsel and the defendant was sentenced to death on all three murders.

3. *Id.* at 687.

4. *Id.* at 697.

5. *Id.* at 689, emphasis added

6. *Id.* at 693.

7. *McIntosh v. Dill*, 1922 OK 35, 205 P. 917, 925 as quoted in *Matter of Baby Girl L.* 2002 OK 9, ¶22, 51 P.3d 544.

8. *Songer v. Austin*, 2011 OK CIV APP 82, ¶3, 262 P.3d 384.

9. *Matter of Guardianship of Holly*, 2007 OK 53, ¶19, 164 P.3d 137.

10. By way of example, from 1989 through 2010, there have been 289 DNA exonerations in the United States. Approximately twenty (20%) percent of these raised ineffective assistance of counsel claims. Eighty (80%) percent of those were initially rejected by appellate courts. Source: The Innocence project, www.innocenceproject.org/docs/Innocence_Project_IAC_Report.pdf (Last accessed 5/4/2012).

11. *Town v. Hubbard*, 2000 OK 30, ¶12, 3 P.3d 154.

12. *A.E. v. State*, 1987 OK 76, ¶22, 743 P.2d 1041.

13. 405 U.S. 645, 651 as quoted in *A.E. v. State*, supra at ¶30.

14. *Matter of State in the Interest of A.W.*, 2011 OK CIV APP 27, ¶22, 250 P.3d 343.

15. *Id.*

16. *Argersinger v. Hamlin*, 405 U.S. 25 (1972).

17. *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

18. 1990 OK 89, 801 P.2d 703, 707.

19. *Id.*

20. 2000 OK CIV APP 98, 12 P.3d 478.

21. 2000 OK CIV APP 98 at ¶9.

22. See, e.g.: *In re Geist* 796 P.2d 1193, 1208 (OR 1990)(responsibility of court to fashion mechanisms of review so that right to counsel not illusory); *Unah By and Through Unah v. Martin*, 1984 OK 2, 12,676 P. 2d 1366 (“The court bears the responsibility to change a court-made rule of law where it deems the change necessary in the interest of justice.”)

23. *In re JMS*, 43 S.W.3d 60, 64 (TX2001) (noting that limited review in the record may not fully reflect counsel’s performance).

24. Condensed from 22 O.S. App, Rules of the Court of Criminal Appeals, Rule 3.11(B)(3)(b).

25. *Town*, supra, note 11.

26. *In re Whiteman*, 1993 WL241729*15 (Ohio APP 6th District).

27. *Johnson v. Zerbst*, supra 304 U.S. at 462.

28. See generally 12 O.S. 1031 et seq. (2011).

29. 12 O.S. 1031.

30. *JMS*, supra., note 23.

31. *L.W. v. Department of Children and Families*, 812 SO 2d 551, 557 (FLA. APP. 2002); accord: *In re Kristin H.*, 54 CAL. Reporter 722.

32. *Chandler v. Denton*, 1987 OK 109, ¶15, 747 P.2d 938; See also: *Tibbets v. Sight and Sound Appliance Centers*, 2003 OK 72, ¶15, note 28, 77 P.3d 1042 (Opala, J. dissenting).

33. 12 O.S. 1331 et seq. (2011).

34. OKLA. CONST. ANN. Article V11, § 4.

35. *Ex parte Yahola*, 1937 OK 36, ¶14, 71 P.2d 968.

36. *Ex parte Matthews*, 1947 OK CR 130, 186 P.2d 840 (Syl.7).

37. 12 O.S. 1036 (2011).

38. *Strickland*, supra 466 US at 689.

39. *Matter of S.S.*, 2004 OK CIV APP 33, 11-12, 90 P.3d 571.

40. *United States v. Cronin*, 466 U.S. 653 (1984).

41. *Burdine v. Johnson*, 262 F. 3d 336, 338 (5th Cir. 2001).

42. *Childress v. Johnson*, 103 F. 3d 1221, 1226 (5th Cir. 1997).

43. *Cronic*, op. cit. at 656.

44. *Matter of R.S.*, 2002 OK CIV APP 90, ¶18, 56 P.3d 381.

45. 2004 OK CIV APP 33, 90 P.3d 571.

46. 2004 OK CIV APP 33 at 7 (emphasis added).

47. *Id.*

48. *Id.* at ¶8 (emphasis and ellipsis by COCA).

49. At this point COCA cited to *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct 55(1932) (emphasize court appointed counsel must be appointed in sufficient time for counsel to be effective.

50. 2004 OK CIV APP 33 at paragraph 17 (emphasis by COCA), quoting *Anderson v. State*, 1922 OK CR 21, 207 pp. 977, 983.

51. *Id.*

52. *Id.* at 20 (emphasis and footnotes omitted by COCA).

53. 2000 OK CIV APP 98, 12 P.3D 478.

54. 2000 OK CIV APP 98 at ¶11.

55. *Id.*

56. *Id.* at ¶12.

57. *Id.*

58. __ P.3d __, Alaska Sup. Ct. Case #6647 (2012) (Slip Opinion accessed at <http://courts.alaska.go/ops/sp-6647.pdf> (Last accessed 5/4/2012).

59. *Id.* at 33.

60. *Id.* at 34.

61. *Id.* at 38.

62. *Id.* at 36.

63. *Id.* at 38-39.

64. *Id.* at 39.

65. *Id.* at 40.

66. Compare: *Birchfield v. Harrod*, 1982 OK CIV APP 2, ¶12, 640 P.2d 1003: "The thing that stands out the most in this *pro se* pleading is Birchfield's admission that she attempted to act as her own lawyer and demanded that Harrod carry out her orders. . . . Aside from the fact that a series of legal conclusions bereft of facts are pleaded, a brand new concept in professional malpractice has been unveiled in the pleading — subjection of a lawyer to liability for failure to follow the legal advice of his client."

67. 939 SW 2d 53 (MO. App 1997).

68. 939 SW 2d at 56.

69. 491 NYS 2d 639, 640-41 (1985) referenced at 939 SW 2d at 57, note 4.

70. 638 A.2d 1274, 135 NJ 155 (NJ 1994).

71. 135 NJ at 166 (citations omitted).

72. *Id.* at 176-77. Accord: *Gross v. Rell*, 304 Conn. 234, 269 (2012) ("governing standard for the representation of impaired adult clients is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences. This is true even if the Probate Court has appointed a conservator for the client"); *Estate of Leonard v. Swift*, 656 N.W.2d 132, 142 (Iowa 2003) ("In summary, the guardian *ad litem* advocates for the best interests of the ward, whereas an attorney advances the wishes of the ward"); *In re Lee*, 132 Md. App. 696, 718, 721 (2000) ("The duties of an attorney may at times directly conflict with the duties of a guardian *ad litem*").

73. *Oklahoma Rules of Professional Conduct*, 5 O.S. APP 3-1, Rule 1.14.

74. *Committee for Public Counsel Services Guidelines*, Guideline 1 (2012)

75. *Id.* Guideline 12.

76. Boston Bar Association. *Gideon's New Trumpet*, pp. 12-17 (2008).

77. *Pierce v. Pierce*, 2001 OK 97, ¶18, 39 O.3d 791.

78. OKLA.CONST.ANN Art.II, Sec.3.

79. *Woody v. State ex rel. Department of Corrections*, 1992 OK 45, ¶9, 833 P.2d 257.

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Labor and Employment Law Section

Limitations on Damages Under the Oklahoma Anti-Discrimination Act Upheld by the Oklahoma Supreme Court

By Kimberly Lambert Love and J. Miles McFadden

In 2011, the Oklahoma Legislature made significant changes to the Oklahoma Anti-Discrimination Act (OADA). These changes include the elimination of status-based *Burk* public policy tort claims, the creation of an exclusive statutory cause of action for plaintiffs asserting violations of the OADA and the trimming of remedies available to successful plaintiffs under the OADA. Specifically, monetary damages under the revised OADA are limited to back pay and an additional amount as liquidated damages, designed to compensate the injured party.¹ Any interim earnings or amounts that could have been earned with reasonable diligence by the party discriminated against are deducted from these damages.^{2,3} Emotional distress and punitive damages are not mentioned in the revised OADA.

Recently, in *MacDonald v. Corporate Integrus Health*, the Oklahoma Supreme Court was asked to decide whether the new limitation on damages violates the Oklahoma Constitution as a special law. Guindelee MacDonald brought suit against her former employer alleging that she was discriminated against on the basis of her age and gender in violation of the OADA and federal anti-discrimination laws when she was terminated.⁴ MacDonald filed her action in the Western District of Oklahoma.⁵ MacDonald's complaint and amended complaint stated that the limits on damages available under the OADA were unconstitutional because the limits were special laws prohibited by the Oklahoma Constitution.⁶ MacDonald contended she was "entitled to the full range of normal tort damages," including punitive damages,

with her OADA claim.⁷ The defendant maintained that the damages were limited to those specifically enumerated in the amended OADA.⁸ Because there was no Oklahoma precedent on the matter, the Western District certified the issue to the Oklahoma Supreme Court.⁹

The Supreme Court applied its standard test to determine if the law is a "special law" that violates the Oklahoma Constitution.¹⁰ That test examines "whether the statute operates on an entire class of actionable claims that are similarly situated."¹¹ MacDonald argued that all victims of wrongful termination must be provided the same remedies because they are a similarly situated class of tort victims.¹² MacDonald asserted that limiting the remedies for victims of status-based discrimination would therefore violate the Oklahoma Constitution because similarly situated individuals (those bringing a non-status based wrongful discharge tort claim) are treated differently.¹³

The court rejected MacDonald's argument, finding there was no violation of the special law provisions by limiting the damages available to plaintiffs bringing status-based claims.¹⁴ Importantly, the court drew on its previous decisions finding that victims of discrimination based on status are a single, unified class, apart from the larger category of wrongful termination victims.¹⁵

The court reasoned that the public policy driving a status-based claim is not the same as the public policies driving other wrongful discharge claims, such as whistleblower claims.¹⁶ The public policies underlying whistleblower

claims, for instance, are preventing corruption in, and preserving the integrity of, state government for state employees and protecting public health and safety in the case of private employees.¹⁷ Protecting an individual from discharge because of his or her protected status does not advance the same public policy.¹⁸ Because the OADA operates on an entire class of actionable claims — those asserting status-based discrimination — it is not a special law that violates the Oklahoma Constitution.¹⁹ As a result, the remedies provided in the OADA are the exclusive remedies available to victims of status-based discrimination for claims brought under the OADA.²⁰

1. Okla. Stat. tit. 25, §1350.

2. *Id.*

3. Section 1350 also authorizes a court to enjoin discriminatory practices and grant affirmative relief such as reinstatement.

4. *MacDonald v. Corporate Integris Health*, 2014 OK 10, ¶1, __ P.3d __.

5. *Id.* at ¶2.

6. *Id.* at ¶3.

7. *Id.*

8. *Id.*

9. *Id.* at ¶0.

10. The sections of the Oklahoma Constitution at issue in *MacDonald* were Art. 5, §46 and 59. The relevant portion of Art. 5, §46 provides: The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: . . . Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate; [and] . . . For limitation of civil or criminal actions . . .

The relevant portion of Art. 5, §59 provides:

Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.

11. *Id.* at ¶4 (quoting *Reynolds v. Porter*, 1988 OK 88, ¶18, 780 P.2d 816, 823).

12. *Id.* at ¶5.

13. *Id.*

14. *Id.* at ¶6.

15. *Id.* at ¶7 (citing *Smith v. Pioneer Masonry, Inc.*, 2009 OK 82, ¶10, 226 P.3d 687, 689; *Shepard v. CompSource Oklahoma*, 2009 OK 25, ¶10, 209 P.3d 288, 292; *Kruchowski v. Weyerhaeuser Co.*, 2008 OK 105, ¶9, 202 P.3d 144, 148; *Saint v. Data Exchange Inc.*, 2006 OK 59, ¶6, 145 P.3d 1037, 1038; and *Collier v. Insignia Financial Group*, 1999 OK 49, ¶14, 981 P.2d 321, 326-27).

16. *Id.*

17. *Id.* at ¶9.

18. *Id.* at ¶7.

19. *Id.* at ¶11.

20. *Id.*

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A Dialogue on the Dynamics of a Fair and Independent Judiciary in a Politically Charged Nation

By Allison Thompson and Alison Cave

The OBA Women in Law Committee is proud to bring a six-hour CLE presentation on the timely topic, "A Dialogue on the Dynamics of a Fair and Independent Judiciary in a Politically Charged Nation" on Friday, Oct. 3. The conference is being hosted by the University of Tulsa College of Law in Tulsa.

The conference will begin with a kick-off breakfast event for "Legally Pink" with Judge James Caputo and the Tulsa County Bar Association Bench and Bar Committee to celebrate cancer survivors and promote awareness.

Our keynote speaker is Dr. Bruce Peabody, a constitutional law scholar at Fairleigh Dickinson University, and author of *The Politics of Judicial Independence*. Dr. Peabody will discuss the interplay and at times conflict between politics and the judiciary.

Dr. Peabody will also moderate a panel discussion with Bob Burke, author of a new book on court reform in Oklahoma, Judge Geary Walke, who has written a series of articles on the history of court reform in Oklahoma, and Rep.

Jon Echols, who currently represents District 90 in the House of Representatives and serves on the Conference Committee on the Judiciary.

Supreme Court Vice-Chief Justice John Reif will discuss issues regarding a fair, impartial and independent judiciary. Judge Brad Taylor with the Oklahoma Workers' Compensation Court of Existing Claims will deliver his informative and highly entertaining presentation on ethics.

The Indian Law Section has recruited a panel discussion concerning judicial independence in Indian Country, which will be moderated by



Dr. Bruce Peabody

Chad Smith, former principal chief of the Cherokee Nation, and panel members Dianne Barker-Harrold, a former tribal judge for 13 different tribes in Oklahoma; Judge Marsha Harlan, a district court judge for the Kickapoo Tribe and the Seminole Nation, as well as an associate justice on the Pawnee Nation Supreme Court and a Supreme Court justice for the Miami Tribe; and Judge Sherry Abbot Todd, special judge of the Chickasaw District Court.

The conference will also include a special trivia luncheon called "So You Think You're Smarter than an Appellate Judge" with participation of several appellate judges

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and justices. We will conclude the day with a reception following the CLE portion of the conference.

The conference is planned annually by the OBA Women in Law Committee and is made possible by the generous support of sponsors. The conference is priced at \$125 to participate in the CLE and

luncheon (that's the early-bird discount rate which expires four days before the conference) or \$30 to attend the luncheon only.

HOW TO REGISTER

The easiest way to register is online at www.okbar.org/members/CLE. Register online to receive a \$10 discount.

Another option is to register by telephone. Call Renee Montgomery at 405-416-7029 or 800-522-8065.

Allison Thompson and Alison Cave serve as co-chairpersons of the 2014 Women in Law Committee.

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OFFICERS

PRESIDENT-ELECT

MAC K. K. MARTIN, OKLAHOMA CITY

Nominating Petitions have been filed nominating Mack K. Martin for election of President Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2015.

A total of 477 signatures appear on the petitions.

Nominating Resolutions have been received from the following counties: Cleveland and Comanche.

GARVIN ISAACS JR., OKLAHOMA CITY

Nominating Petitions have been filed nominating Garvin Isaacs Jr. for President Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2015.

A total of 388 signatures appear on the petitions.

Nominating Resolutions have been received from the following counties: Beckham, Choctaw, Coal, McCurtain and Pushmataha.

2015 OBA Board of Governors Vacancies

Nominating Petition deadline: 5 p.m. Friday, Sept. 12, 2014

OFFICERS

President-Elect

Current: David A. Poarch Jr., Norman
Mr. Poarch automatically becomes
OBA president Jan. 1, 2015
(One-year term: 2015)

Nominees:

Mack K. Martin, Oklahoma City
Garvin Isaacs Jr., Oklahoma City

Vice President

Current: Susan S. Shields, Oklahoma City
(One-year term: 2015)

Nominee: **Vacant**

BOARD OF GOVERNORS

Supreme Court Judicial District One

Current: Linda S. Thomas, Bartlesville
Craig, Grant, Kay, Nowata, Osage, Ottawa,
Pawnee, Rogers and Washington counties
(Three-year term: 2015-2017)

Nominee: **Vacant**

Supreme Court Judicial District Six

Current: Kimberly Hays, Tulsa
Tulsa County
(Three-year term: 2015-2017)

Nominee: **Vacant**

Supreme Court Judicial District Seven

Current: Bret A. Smith, Muskogee
Adair, Cherokee, Creek, Delaware, Mayes,
Muskogee, Okmulgee and Wagoner counties
(Three-year term: 2015-2017)

Nominee: **Vacant**

Member At Large

Current: Nancy S. Parrott, Oklahoma City
(Three-year term: 2015-2017)

Nominee: **Vacant**

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.

Elections for contested positions will be held at the House of Delegates meeting Nov. 14, during the Nov. 12-14 OBA Annual Meeting. Terms of the present OBA officers and governors will terminate Dec. 31, 2014.

Nomination and resolution forms can be found at www.okbar.org/members/bog/bogvacancies.

SOVEREIGNTY SYMPOSIUM 2014

OKLAHOMA CITY • JUNE 4-5

THE 27TH SOVEREIGNTY SYMPOSIUM WAS DEDICATED TO THE LIFE AND WORK OF THE LATE JUSTICE RUDOLPH HARGRAVE



From left Oklahoma Supreme Court Justice Noma Gurich; former OBA President Cathy Christensen; symposium keynote speaker and Canadian Chief Justice Beverley McLachlin; Oklahoma Supreme Court Justice Yvonne Kauger; OBA President Renée DeMoss and OBA member Jonna Kauger Kirschner

*All photos
by Stu Ostler*



W. Richard West (left), president and CEO of Autry National Center and founding director of the Smithsonian's National Museum of the American Indian, and California attorney Gary Judd



From left Suzanne Edmondson; Oklahoma Supreme Court Justice James Edmondson; Frank McArdle, Canadian Superior Courts Judges Association executive director; and Oklahoma Supreme Court Justice Joseph M. Watt



From left Oklahoma Supreme Court Chief Justice Tom Colbert, Justice Steven Taylor and Gov. Mary Fallin at the opening ceremony.



Oklahoma City University President Robert Henry (left) and OCU School of Law Dean Valerie K. Couch (right) present an honorary doctorate to Chief Justice McLachlin.



Gregory E. Pyle, retired Chief of the Choctaw Nation of Oklahoma and 2014 Sovereignty Symposium Honored One



From left Oklahoma Supreme Court Vice Chief Justice John Reif and Oklahoma Court of Criminal Appeals Vice Presiding Judge Clancy Smith



Indigenous Peoples' Right to Self-Determination Panel members from left Associate Professor Kristen Carpenter, University of Colorado School of Law; Professor Angela R. Riley, UCLA School of Law; 2014 Sovereignty Symposium Award winner Professor Alexander T. Skibine, University of Utah College of Law; panel moderator and Court of Civil Appeals Judge Jerry Goodman; Professor Robert Miller, Arizona State University Sandra Day O'Connor College of Law



From left East Central University President John R. Hargrave; Mrs. Madeline Hargrave and retired Oklahoma Supreme Court Justice Robert Lavender



Retired Court of Criminal Appeals Judge Reta M. Strubhar, winner of the 2014 Ralph B. Hodges - Robert E. Lavender Award for Judicial Excellence



Trust Land-Sites for Economic Development and Global Impact Panel members from left (standing) are panel moderator Leah Harjo-Ware; Kilpatrick Townsend attorney David Smith; Oglala Sioux Tribe General Counsel Bernice C. Delorme; BIA Realty Officer Sharlene Roundface, Southern Plains Division; panel moderator and Oklahoma Supreme Court Justice Douglas Combs; from left (seated) National Congress of American Indians Chief Counsel David Mullon; Texas Tech University School of Law Faculty Services Librarian Eugenia Charles-Newton; Deputy Director of Field Operations Jim James, Office of the Special Trustee for American Indians; Professor David English, University of Missouri School of Law; Professor Kathleen Guzman, OU School of Law



From left retired District Judge Donald Worthington, winner of the 2013 Ralph B. Hodges - Robert E. Lavender Award for Judicial Excellence, Justice Joseph Watt and Chief Justice McLachlin



Attorney and Sovereignty Symposium publication editor Kyle Shifflett (left) presents Steven Hager, Oklahoma Indian Legal Services, with his second Hargrave Prize for faculty writing.



OBA member and General Counsel to the President Pro Tempore of the Oklahoma Senate Jonathan Nichols (left) and Chief Justice McLachlin



Members of the Seminole Nation of Oklahoma from left flag bearer Barney Mitchell; Chief Leonard M. Harjo; Oklahoma Rep. Anastasia Pittman; Assistant Chief Lewis Johnson. Johnson, from Justice Hargrave's hometown of Wewoka, presented a memorial speech and a flute solo in honor of Justice Hargrave.



Gayleen Rabakuk (left), author of "Art of the Oklahoma Judicial Center" and her daughter, Ann Langthorn, at the reception honoring the book's publication.

Photographer Terry Zinn (right) speaks with OBA member William C. Sellers Jr., son of the late artist and attorney William C. Sellers Sr., whose work is featured in "Art of the Oklahoma Judicial Center."



MCLE Rules Changes to Take Effect

This Change Will Only Affect Members Who Reach Age 65 in 2015 and Beyond

By Beverly Petry Lewis

You may have read or heard about the Mandatory Continuing Legal Education (MCLE) Commission's proposed change to the MCLE Rules that will eliminate the age 65 exemption from the MCLE requirements. The proposed change was approved by the Oklahoma Supreme Court on April 7, 2014, with an effective date of Jan. 1, 2015. The actual amendment to the MCLE rules was published in the April 19 and May 24 issues of the *Oklahoma Bar Journal*.

It is important to note that this change will only affect members who reach age 65 in 2015 and beyond. Members who celebrated their 65th birthday prior to Jan. 1, 2015, will retain their MCLE exemption and are not required to earn and report any CLE credit.

For everyone else, if you will be 65 in 2015 and beyond and are continuing to practice law in Oklahoma, you are no longer eligible to report an MCLE exemption based on your age. You are required to earn and



report a minimum of 12 OBA MCLE-approved credits, which must include at least one approved legal ethics credit, by Dec. 31 of each year. The OBA CLE Department will continue to offer a discounted registration fee of \$50 for most six-hour, "live" seminars for members age 65 and older.

If you become 65 during 2015 and beyond, but have done nothing during the calendar year that would be considered practicing law in Oklahoma, you are eligible to report a "not practicing law in Oklahoma" exemption. Exemptions can only be

OBA members age 65 and older receive a senior discount on OBA CLE. Pay only a registration fee of \$50 for most six-hour live seminars.

reported after the year concludes. It's really quick and easy to report an MCLE exemption online using my.OKBar.org.

QUESTIONS?

If you have questions concerning this change or any other MCLE-related matter, please contact the MCLE Department at 405-416-7009 or mcle@okbar.org. More MCLE information can also be found online at www.okbar.org/members/MCLE.

Ms. Lewis is the OBA's MCLE administrator.

End of Legislative Session Report

By Duchess Bartmess

The 54th Oklahoma Legislature is now history. Of the more than 2,000 bills and joint resolutions filed in 2014, the governor has approved more than 400. The following is a list of measures enacted by the Legislature and approved by the governor which could be of significance to OBA members. This list includes many of the 489 measures which were reviewed and tracked by the Legislative Monitoring Committee during the legislative session.

The measures are listed by the appropriate Legislative Monitoring Committee subcommittees.

CHILDREN AND FAMILY LAW

HB 1384 New law; creates Parents' Bill of Rights.

HB 2249 Divorce; modifies definition of incompatibility, adds new requirements.

HB 2526 Domestic violence; directs peace officers to make assessment for potential danger.

HB 2536 Permits parent or guardian to execute power of attorney to delegate care.

HB 2604 Adoption; permits venue where termination proceedings took place.

HB 2667 Parental rights; modifies listed acts requiring termination.

HB 3472 Child custody; limits court as to persons eligible to be awarded custody or guardianship.



SB 1182 Child abuse investigations; permits D.H.S. to contract with retired peace officers.

SB 1779 Provides procedures regarding guardian *ad litem* for child if genetic testing is ordered.

SB 1784 Child support arrearage; modifies enforcement authority of court.

SB 1993 Modifies procedures for establishing support to include both mother and father.

SB 2046 Domestic abuse; makes second or subsequent convictions subject to restrictions.

SB 2088 Adding recognitions of interests of child in placement group homes.

CIVIL LAW AND PROCEDURE

HB 2325 Adds persons providing shelter to civil immunity during time of emergency.

HB 2338 New law; expands civil immunity during time of emergency.

HB 2366 Civil procedures; creates Oklahoma Citizens Participation Act.

HB 3365 Product liability; provides rebuttable presumptions and scope of liability.

HB 3375 Amends discovery laws regarding initial discovery methods.

SB 1421 Limits persons permitted to petition for change of name.

COMMERCIAL LAW, BUSINESS ENTITIES, CONTRACTS AND INSURANCE

HB 2837 Patent infringement; prohibiting bad-faith patent infringement claims.

HB 3280 Authorizes the creation of nonprofit health maintenance organization corporations.

HB 3282 Repeals the Health Insurance High Risk Pool Act.

SB 1799 Corporations; shareholder's derivative action expenses.

SB 2025 Premium reserve for domestic title insurers.

SB 2045 Insurance; standard valuation law; standard nonforfeiture law; principle-based valuation

CONSTITUTIONAL LAW

SJR 33 Legislative-proposed amendment to Constitution does not need governor approval. This amendment exempts prohibition of dual office holding for specified military personnel.

HB 2093 Defines, by statute, terms used in Constitution regarding special and local laws.

COURTS, JUDICIARY AND ATTORNEYS

HB 1077 Requirements regarding attorney's lien on real property.

HB 2568 Attempted jury influencing changed from misdemeanor to felony.

HB 2591 Authorizes child witnesses to testify accompanied by therapeutic dog.

HB 2774 Jurors; modifies exemptions from jury duty.

CRIMINAL LAW AND PROCEDURE

HB 2342 Authorizes search warrants by telephone or electronic mail.

HB 2353 Adds human trafficking to list of persons required to serve 85 percent of sentence and increases fine.

HB 2614 Deletes penalties regarding firearms stored in motor vehicle on school property.

HB 2859 Directs procedures for decisions by mental health court judges.

HB 3159 Clarifies probation requirements.

HB 3254 Provides separate time limitation applicable in assertions of a claim of ineffective assistance of counsel.

SB 989 Adds payment made to a landlord under a lease or rental agreement to bogus check definition.

SB 1845 Provides for exception to denial of eligibility for a handgun license of mentally incompetent person.

SB 1875 Expungement of records; modifies requirements for sealing records.

SB 2140 Expungement of records; modifying requirement for seeking and exceptions for access.

EDUCATION - COMMON AND HIGHER

HB 2414 Modifies procedures for scholarships for students with disabilities.

HB 2497 Authorizes exemptions from school testing requirements.

HB 2548 Teacher competency examinations for non-native-English speaker.

HB 2571 Amends 70 O.S. 2011, Section 1-113, regarding school district residency.

SB 1377 Also amends 70 O.S. 2011, Section 1-113, regarding school district residency.

HB 2730 New law: creates Extracurricular Activities Accountability Act, limiting membership in school athletic associations.

HB 2921 New law: recognizes Native American language as an art, and authorizes teaching in school education programs.

HB 3006 New law: limits agricultural education programs to grades 8 through 12.

SB 436 New law: establishes Regional Education Administrative Districts [READS] to provide education on administrative services available to state schools.

SB 1461 Requires charter schools to submit statements of income and expenditures to State Board of Education.

ENERGY, OIL, GAS, MINERALS, ENVIRONMENT AND NATURAL RESOURCES

HB 2378 Allows "Good Samaritan" exemption for voluntary reclamation project or water pollution abatement project.

HB 2533 New law: creates Underground Facilities Damage Prevention Act.

HB 2562 Changes gross production tax levies.

HB 3297 New law: transfers powers, duties, responsibilities, records and equipment of Corporation Commission relating exclusively to the regulation of compressed natural gas fueling stations to the Department of Labor.

SB 78 Amends Shale Reservoir Development Act authorizing multiunit horizontal wells.

SB 1187 Requires Department of Environmental Quality shall receive, review and evaluate permit applications for discharges to water bodies for water reuse projects.

SB 1336 Modifies permitting for solid waste disposal sites and vegetation plans and directs Corporation Commission to promulgate rules to implement oil and gas operators disposing of any oil field waste materials.

GENERAL GOVERNMENT - LOCAL AND STATE

HB 2405 Governmental Tort Claims Act: modifies definition of tort.

HB 2620 Cities and towns; creates the Protect Property Rights Act.

HB 2998 New law: requires court records to be considered as public records; makes exceptions.

HB 2999 Administrative Procedures Act: adds new language for individual proceedings regarding deliberations and evidence.

SB 1719 Central Purchasing Act; makes lowest cost controlling in awarding sole-source bids.

SB 1737 Modifies standards for city and county jails.

SB 1744 Modifies campaign contribution definitions and application.

SB 1745 New law: requires campaign financial disclosures for cities and towns.

PROBATE, GUARDIANSHIP AND TRUSTS

HB 2790 Probate procedure; summary administration; expanding timing for final hearing.

SB 1904 Family Wealth Preservation Act; modifying trust requirements.

PUBLIC HEALTH, SAFETY, AND WELFARE

HB 2831 Mental health; authorizes sale of real property trust.

HB 3156 New law: creates First Informer Broadcast Act.

REVENUE AND TAX

HB 3188 Prohibits increase in fair cash value based upon designated improvement.

SB 1621 Modifies conditions for tax deductions for married persons filing separately for expenses incurred to provide care for a foster child.

TRANSPORTATION AND MOTOR VEHICLES

HB 1112 Forfeiture of motor vehicles after third or subsequent felony offense and distribution of sale proceeds to lienholder of record.

HB 1516 New law: creates Oklahoma Crusher Act.

This is by no means a complete list of all the measures that may be of interest to OBA members. As always, I encourage each OBA member to look at the list of all 400 plus measures to determine if any one or more not listed here which could be of interest in their practice.

Each member of the Oklahoma Bar Association is encouraged to make two commitments for the next legislative session. This effort will keep you informed on the issues which will be subject to legislation during the first session of the 55th Oklahoma Legislature:

- watch for the date and details concerning the Legislative Reading Day prior to the beginning of this next session and
- attend the next OBA Day at the Capitol.

For further information or help, please do not hesitate to contact me.

ABOUT THE AUTHOR



Ms. Bartmess practices in Oklahoma City and chairs the Legislative Monitoring Committee. She can be reached at duchessb@swbell.net.

Just Some Stuff

By John Morris Williams

It's time that all eyes are on the OBA Annual Meeting. Please get out your calendar and put down — 2014 ANNUAL MEETING, NOV. 12-14 TULSA. HYATT REGENCY. This is a meeting NOT to miss. This year we will have an internationally recognized speaker on the future of the practice of law. For some time, I have heard predictions and forecasts on the future of our profession. I am beginning to see some of those predictions come true. I used to think the "trends" were East Coast or West Coast and not Oklahoma. I don't think that way anymore.

Outsourced legal work, online forms, fewer job opportunities, value billing and much more are at our doorstep. Come to the Annual Meeting and hear one of the leading minds on the future of the practice of law. Of course, there will be much more to the meeting. As usual, great CLE, fun events and, of course, a great time to be with your friends in the profession.

I was filled with a bit of anxiety before we launched our new association management software recently. More than four years ago we conducted a technology audit. The Bar Asso-

ciation Technology Committee, through a competitive bidding process, hired a nationally recognized firm to conduct the audit. One of the audit recommendations was to replace our "homegrown" system that was launched in 1999 and go with an off-the-shelf product. Our

- **Annual Meeting**
- **New Software Installed**
- **Group to Study Transitions**
- **Committees 2015**

previous system was totally customized for the OBA. While the new system has many features, it represents a big change for us. Making a transition of this size is difficult, and challenges were expected as we converted a huge amount of data into the new system. Please be patient as we undergo this enormously complex and time-consuming transition. In the end, this will be a great tool.

President DeMoss has put together a working group to

create solutions for lawyers who transition out of practice by choice, disability or death. Not a pleasant thought, but necessary to avoid harm to the public and leaving families and friends of deceased or disabled lawyers a mess to clean up. With the majority of our members over 50 years of age and in solo or small firm practices, the time has come to study this issue. There are some very good minds working on this topic. Be looking for their report in the months to come.

Lastly, President-Elect David Poarch is in the process of finalizing his plans for next year. If you want to serve on a committee or wish to take advantage of one of the many volunteer opportunities, now is the time to let him know. You can sign up for committees on the OBA website at www.okbar.org with just the click of your mouse.

I hope you have had a great summer and are tanned, rested and ready for a great fall!



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

Recent Technology News and Developments for 2014

By Jim Calloway

There's been quite a lot of technology-related news over the last several months. Some of it is directly related to the legal profession. Much of it is at least indirectly related to the legal profession. There have also been some interesting court rulings related to technology. Rather than featuring just a few items, I decided to do a roundup of many of these items with a few comments.

THE RIGHT TO BE FORGOTTEN

A European Union court, in a ruling that most Americans found perplexing at best, created (or recognized) a "right to be forgotten," based on a Spanish citizen's request to have Google remove accurate search results about him that he found objectionable. Now Google is processing many requests along this line from EU citizens.¹

Comment: One would assume that the First Amendment would prevent a similar result from occurring in this country. But some authoritarian nations now block large parts of the Internet from access by their citizens. It is just another reminder that the Internet is not the same for everyone. Lawyers should understand that if they are traveling in the EU, their version of Google is no longer the same as our Google.

CELL PHONE SEARCHES

In *Riley v. California*,² the U.S. Supreme Court unanimously held that police may not search the cell phones of criminal suspects without a warrant. In the court's syllabus, it was stated, "A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intru-

well extend beyond papers and effects in physical proximity of an arrestee.

Comment: The opinion was noteworthy both for its unanimity and its rather broad language. The concluding paragraph is worthwhile for all lawyers to read, even if they do not practice in the criminal law arena:

"Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life,' *Boyd, supra*, at 630.³ The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant."⁴



sion on privacy beyond the arrest itself may make sense as applied to physical items, but more substantial privacy interests are at stake when digital data is involved." It was also noted as a complicating factor that the data a user views on many modern cell phones may not be stored on the device itself so that the search might

This is one instance where advances in technology changed the substantive law. It was previously allowable to search an arrestee's wallet or pockets, but cell phones contain much more information than the drafters of the Constitution could have contemplated. It seems unlikely that there will be many problems with

law enforcement obtaining a warrant in appropriate cases. It also seems likely that “let me see your license, registration and unlock your phone for me” could have become quite common in roadside stops had the opinion gone in another direction.

SOLO CONFERENCE

The 2014 OBA Solo & Small Firm Conference was held June 19-21 at the Hard Rock Casino Resort in Catoosa.

Comment: As always, the OBA Solo & Small Firm Conference provided a mix of practice management, law office technology and substantive CLE offerings. One of our speakers was Illinois lawyer Bryan M. Sims who discussed the many ways that he used technology in his law practice, including remote access tools. There was quite a large group at the breakout session titled “Social Media, Internet and Email Evidence at Trial: Admissibility of Electronic Evidence,” taught by OBA Family Law Section Chair Shane Henry. It’s probably worth noting that by now most family lawyers have had to deal with Facebook in some way, and Facebook wasn’t even opened to the general public until September 2006.

FACEBOOK

Many were horrified at the revelation this year that Facebook had been running psychological tests on its users to gauge their reactions to stimuli and to generate negative emotions.

Comment: Many thought that had been the purpose of Facebook all along.

IPHONE NEWS

The Annual Apple Worldwide Developers Conference often generates big news. Your iPhone and iPad will get improvements this fall with iOS 8 upgrades to notifications, support for third-party keyboards, an upgrade to auto-correct called QuickType and a new health-tracking component called Health.

Comment: Perhaps the most significant items were the ones left unsaid. The company did not confirm that the iPhone 6 will be released this fall with larger redesigned form factor including 4.7-inch and 5.5-inch diagonal screens (that likely will be announced by the time you read this in print). And there was no announcement of an iWatch. The stock market did not like that omission.

ANDROID WEAR

Meanwhile the Android Wear platform has already given rise to two newly released Android “smart watches,” G Watch from LG and Gear Live⁵ from Samsung.

Comment: Do you think you will ever use wearable technology devices? The article at the endnote above is very positive on the Google Now parts of Android Wear. There have also been some less-than-glowing reviews, however. But this technology is still early in development. Wearable technology will certainly fall into common usage at some point. It will be simpler to answer the phone or see a brief text message on the face of your watch than to dig the phone out of a pocket or purse. There is already much discussion about a personal area network (PAN) related more to an individual instead of a location. Contrast this with the local

area network (LAN) that most law offices now have.

In case you are assuming this doesn’t really relate to you, you should appreciate that wearable technology and a wireless PAN will record a huge amount of data about an individual’s location and actions. Just like mobile phone data, it will not be too long before lawyers have to deal with discovery of wearable technology information.

THE INTERNET OF THINGS

A *Forbes Magazine* feature in early July was titled “Here’s Why Retailers Are Betting Big On Internet Of Things.”⁶

Comment: I am often asked to guess what the next big development is going to be. Most everyone who pays attention to such matters is focusing on this concept called “The Internet of Things.” This involves more devices, particularly household devices, connected to the Internet with instructions to take certain actions or give notices to the owners when certain conditions occur. Some of these ideas may seem a little silly right now, like the olfactory sensor in the refrigerator telling you when the eggs have gone bad. But some of us of a certain age can remember when things like buying your books online or using a credit or debit card at the gasoline pump seemed silly too.

It won’t be too long until controlling your door lock or the heating and air-conditioning unit with your smart phone seems about as routine as sliding a debit card through a gas pump. Some of these ideas may save energy as well, with the home keeping the temperature at one level when it is empty and changing the

temperature when it notes that the occupant's smart phones appear to be headed home.

At some point, that data too, will be sought by some lawyer to prove or disprove some very important fact.

MERGERS AND ACQUISITIONS

A lot of big technology companies that you have heard of bought technology companies that you have never heard of, paying millions or sometimes billions of dollars for the privilege.

Comment: My fearless prediction is that these investments will work out in some instances and will be failures in others.

THE FUTURE OF LAW PRACTICE

There have been several conferences this year about the future of law and disruption in the legal services delivery model.⁷

Comment: GPSOLO magazine has posted its May/June 2014 issue online. The magazine theme is Law Practice 2020.⁸ If you aren't able to attend a conference about the future of law, reading this magazine will give you a lot of information. Your attention in particular is directed to the cover story "How Technology Is Changing the Practice of Law"⁹ by Blair Janis. Lawyers who are interested in online marketing should also read "Innovative Marketing Tactics That Really Attract New Clients"¹⁰ by Terrie S. Wheeler. And, of course I have to note that I was asked to be a guest

columnist for this issue's GP Mentor column directed to new lawyers. The title of my column is "The Future Ain't What It Used to Be."¹¹

Oklahoma lawyers have an outstanding opportunity to hear noted author and futurist Richard Susskind discuss the future of law practice on Nov. 14 at the OBA Annual Meeting in Tulsa. Don't miss this great opportunity to hear the leading international authority on this subject.

DRIVERLESS CARS

Google has convinced many that driverless cars will be a reality someday soon (by the way, the preferred term is now the much less threatening "self-driving cars"). Google co-founder Sergey Brin has gone public with his belief that self-driving cars will decrease the need for individual car ownership in the future.¹²

Comment: The changes to society and the law created by the deployment of these vehicles would be profound. Imagine a society where many people no longer owned a car with its expenses for purchase, upkeep, repairs and insurance. When you needed a vehicle, you would just summon a rental with your phone. There would be no need to hunt for a parking place. For important occasions, you would reserve one in advance. Instead of dealing with the frustrations of driving and traffic jams, you could read, listen to music, nap or have conversations with your companions while the car drives.

Would some sort of no-fault system be developed to handle the damages if two self-driving cars collide or would those collisions essentially cease happening? Would auto manufacturers and dealers be imperiled if infrequent drivers began to compare the costs of automobile ownership with just summoning a self-driving vehicle as needed? What would happen to automobile insurance companies? This is potentially as big a change to society as the popularization of the Internet.

IN CLOSING

Let me end by noting that my blog, Jim Calloway's Law Practice Tips, has a new web address, www.lawpracticetipsblog.com. The old web address will still work. You are reminded that you can visit the blog one time and subscribe to the email update service so that you can receive all of the blog posts by email after they are posted.

Mr. Calloway is OBA Management Assistance Program director. 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. <http://goo.gl/N1QgLI>
2. 573 U.S. __ (2014), <http://goo.gl/Wd7w3T>
3. *Boyd v. United States*, 116 U.S. 616 (1886).
4. *Riley*, *supra* (Slip Opinion page 28).
5. www.wired.com/2014/07/android-wear/
6. <http://goo.gl/5wlyzz>
7. <http://reinventlawlondon.com/>, <http://goo.gl/HaVgte>
8. <http://goo.gl/E6pWRc>
9. <http://goo.gl/YplQsj>
10. <http://goo.gl/npF99X>
11. <http://goo.gl/wsHuKo>
12. <http://goo.gl/KRcjd3>

Comprehensive Topical Ethics Opinion Index Posted

By Travis Pickens

A comprehensive topical ethics opinion index has now been posted online to the OBA website. The index consists of 32 single-spaced pages, covering more than 80 topics. There are more than 325 opinions indexed, going back to 1931. Several opinions are indexed under more than one topic. The opinions have historically been cited by assignment of a single number denoting the order the opinion was issued, starting with number one. For now, the opinions are indexed using that historical citation, but will shortly be re-cited using the citation style of ____ OK LEG ETH ____, to reflect the year and order of issuance. In addition to that change, another improvement will include numbering the paragraphs within each opinion. Of course, the index will be updated periodically to reflect new opinions or editorial improvements.

A short description of the topic follows each opinion. The descriptive language included for each opinion is meant as a research aid only, not the conclusion or “holding” of the ethics panel on that particular topic, and it may not include every subject touched on by the opinion. Like case law, each opinion should be read in its entirety.

The date, or best known date, of issuance is included in parentheses after each opinion.

The opinions will shortly be made available through the Oklahoma Supreme Court Network (OSCN). This will be effected by means of a link from the OSCN research pages to the OBA website. For now, opinions can be retrieved by typing the opinion number into the search box on the “Ethics Opinions” page found at okbar.org/members/EthicsCounsel/EthicsOpinions.

The law of lawyering, our laws of ethics, has changed over the years, so attention must be paid to the time in which the opinion was written and authorized. For example, there was a day when advertising was universally seen as distasteful and was prohibited for lawyers. Of course, that

thinking has changed, and the ethics opinions reflect that evolution. You will be pleased to know that some aspects of lawyering, (e.g. integrity) have never changed. That, too, is reflected in the opinions.

The new ethics opinion index may be accessed by going to okbar.org/members/EthicsCounsel and clicking on “Ethics Opinion (Topical Index.)” Any suggestions or comments to improve the quality of the index are welcome and may be sent directly to me at travisp@okbar.org.

*Mr. Pickens is OBA ethics counsel. Have an ethics question? It's a member benefit, and all inquiries are confidential. Contact him at travisp@okbar.org or 405-416-7055; 800-522-8065. See *Tips from the OBA Ethics Counsel* at www.okbar.org/members/EthicsCounsel.*



Meeting Summaries

The Oklahoma Bar Association Board of Governors met at the Idabel Chamber of Commerce and Agriculture in Idabel on Friday, April 25, 2014.

REPORT OF THE PRESIDENT

President DeMoss reported she attended numerous meetings, activities and interviews and wrote press releases relating to the opposition of SJR 21 (Judicial Nominating Commission). She attended OBA Day at the Capitol, Custer County town hall, Idabel town hall, Oklahoma County Bar Association CLE in Nevada, OBA Appellate Advocacy Seminar at the Oklahoma Judicial Center, presentation of Law Day awards to student contest winners, Tri-County Law Day event in Idabel and taped a segment for the *Ask A Lawyer* Law Day TV program. She also wrote the presidential article for the *Oklahoma Bar Journal*, planned and attended the Litigation Section meeting and prepared a Leadership Academy presentation.

REPORT OF THE VICE PRESIDENT

Vice President Shields reported she attended the Diversity Committee meeting, Oklahoma Judicial Conference meeting, YLD board meeting, Idabel town hall meeting, committee meetings at the Legislature, conferences with attorneys, non-attorneys and legislators. She spoke at the swearing in of new admittees and at an Oklahoma County

Bar Association CLE. She sent messages via email and social media and made telephone calls regarding SRJ21.

REPORT OF THE PRESIDENT-ELECT

President-Elect Poarch reported he attended OBA Day at the Capitol, special Board of Governors meeting, April Cleveland County Bar Association meeting, met with John Williams and Debbie Brink regarding 2015 president's plans and worked on legislative matters.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the YLD board meeting, Idabel town hall meeting, Oklahoma Judicial Conference meeting, swearing in of new admittees, committee meetings at the Legislature, and several meetings regarding legislative matters. He spoke at the Oklahoma County CLE in Nevada.

BOARD MEMBER REPORTS

Governor Dexter reported she attended the March board meeting and luncheon, Custer County town hall meeting and Law Day Committee meeting. She reviewed assigned legislation for the Legislative Monitoring Committee and worked on legislative matters that included telephone conference calls, emails, social media and miscellaneous telephone calls. **Governor Gifford** reported he attended an Oklahoma County Bar Association meeting,

March Board of Governors meeting, special board meeting and OBA Human Trafficking Task Force meeting. He also reported that OCU will be doing a special program next year in conjunction with the 20th anniversary of the Oklahoma City bombing. **Governor Hays** reported she attended the March Board of Governors meeting, special board meeting via telephone, Tulsa County Bar Association board of directors meeting, TCBA Family Law Section meeting, Women in Law Committee meeting, Section Leadership Council meeting, Family Law Section (FLS) Trial Advocacy Institute planning session and FLS monthly meeting for which she prepared and presented the budget report. She communicated with the TCBA regarding legislative activities, assisted the Professionalism Committee regarding CLE planning and worked on legislative matters. **Governor Jackson** reported he attended the March board meeting and luncheon, April 17 special board meeting by telephone and Custer County town hall meeting. He spoke to the Enid Kiwanis about the Judicial Nominating Commission. He also attended the Audit Committee meeting and met with auditors. **Governor Kinslow** reported he participated in the Board of Governors special meeting by conference call on April 17 and attended the Member Services Committee and Clients' Security Fund meetings. **Governor Knighton**

reported he participated in a Law Day presentation to gifted talented middle school students in the Norman Public School District, worked to help maintain judicial independence regarding legislation and attended the April 17, 2014, special meeting. **Governor Marshall** reported he attended the March Board of Governors meeting, April 17 special board meeting, Legal Intern Committee meeting via telephone and worked on various legislative matters. He said the OCU Innocence Project has run out of grant funds and may be in jeopardy of being discontinued and reported that the Pottawatomie County Bar Association will be meeting and electing new officers soon. **Governor Parrott** reported she attended the attorney rally at the Capitol on April 24, Idabel town hall meeting on Friday and worked on legislative matters by contacting attorneys, friends and legislators in person, by phone and via email. **Governor Sain** reported he attended the McCurtain Memorial Hospital Foundation board meeting and McCurtain County Bar Association luncheon. He coordinated the Idabel town hall meeting, spoke at the Lions Club luncheon and Idabel High School for Law Day, and conducted auctions for the Home & Community Education Civic Group and for the Valliant High School Special Olympics program. **Governor Smith** reported he attended the March Board of Governors meeting, special board meeting, planning meeting for Muskogee County Bar Association banquet and made various calls and had conversations regarding judicial reform. **Governor Stevens**

reported he attended the March Board of Governors meeting, special board meeting, April Cleveland County Bar Association meeting, Rules of Professional Conduct Committee meeting and OBA Day at the Capitol. He also worked on legislative matters. **Governor Thomas**, unable to attend the meeting, reported via email she attended the special Board of Governors meeting via telephone, Washington County Bar Association monthly meeting and Section Leaders Council meeting via telephone. She participated in OBA Day at the Capitol and worked on legislative matters via in-person, email, telephone and Facebook with legislators, lawyers and non-lawyers throughout her district.

YOUNG LAWYERS DIVISION REPORT

Governor Hennigh reported he attended the Garfield County Bar Association meeting, YLD April Board of Directors meeting, YLD executive conference, OBA Day at the Capitol, House Judiciary Committee meeting, worked on legislative matters, appeared at the Capitol on April 24 regarding SJR 21 and attended the new admittee reception. He spoke at the swearing-in ceremonies for OU/OCU and TU new admittees. Additionally, the YLD will conduct a community service project with the Regional Food Bank for Law Day in conjunction with their Saturday, May 10 meeting.

COMMITTEE LIAISON REPORTS

Governor Stevens attended a Rules of Professional Conduct Committee meeting at which a proposed amendment to Rule 3.8 and comments was

approved. The proposed amendment relates to prosecutor's duties in relation to wrongful convictions. Governors Hays reported the OBA Women in Law Committee held meet and greet networking events in Oklahoma City and Tulsa. The committee's fall conference will be Oct. 3, 2014, at the University of Tulsa College of Law, and the theme will be A Dialogue on an Independent Judiciary. Keynote speaker will be Bruce Peabody, author of *The Politics of Judicial Independence*. She shared other event details. Women in Law Committee members participated in a community service event for Lawyers Fighting Hunger in Tulsa. They collected individually wrapped candy and plastic eggs to distribute to about 500 families. Committee members will participate in community service projects May 23 in Oklahoma City and Tulsa. A group in Oklahoma City will be working with ReMerge, a comprehensive female diversion program designed to transform pregnant women and mothers facing incarceration into productive community citizens. A group in Tulsa will be making some decorative photo boards and/or do some scrapbooking with participants in Women in Recovery. The OBA Professionalism Committee continues its search for speakers for its December symposium and is working with OBA Educational Programs Director Susan Krug. The TCBA Law Day luncheon will be May 2 and feature OCU President and CEO Robert Henry as the keynote speaker. The county bar will also help staff the statewide *Ask A Lawyer* hotline on May 1 from 9 a.m. to 9 p.m. The TCBF Community Outreach Committee is spon-

soring a household item drive benefiting the Tulsa Day Center for the Homeless that will last until May 23. The OBA Family Law Section voted to be an OBF Community Fellow for 2014 and its Trial Advocacy Institute will take place at the Oklahoma Bar Center July 21 - 26. The section decided to hold its annual meeting on Wednesday during OBA Annual Meeting activities and will hold the meeting at a different location other than the hotel where OBA events will take place. Vice President Shields reported the Diversity Committee is working on selecting a speaker for the fall conference.

TOWN HALL MEETING REPORT

President DeMoss reported she attended a town hall meeting earlier in the day in Idabel and 37 people were present for her presentation.

LEGISLATIVE UPDATE

President DeMoss and Executive Director Williams reported that SJR 21 had failed in the House of Representatives.

OKLAHOMA BAR ASSOCIATION EXPENSE POLICY

President DeMoss reported there were a few minor changes that needed to be made to the policy. Most of the changes were grammatical and there was also a change in the approval process, which was to reflect current practice. The board approved the recommended changes to the policy.

APPOINTMENT TO THE COUNCIL ON JUDICIAL COMPLAINTS

President DeMoss stated that it was her preference to appoint Cathy M. Christensen, Oklahoma City, to the Council

on Judicial Complaints. The board approved her recommendation.

PROFESSIONAL RESPONSIBILITY TRIBUNAL APPOINTMENT

President DeMoss recommended that Neal E. Stauffer, Tulsa, be reappointed for an additional term, and the board approved her recommendation.

EXECUTIVE SESSION

The board voted to go into executive session, met in session and voted to come out of executive session.



The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, May 23, 2014.

SWEARING-IN CEREMONY

Justice Kauger administered the oath of office to new board member Rickey Joe Knighton II, Norman, who was appointed to fill the vacancy for District 5 created upon the resignation of Jim Drummond, who moved to Texas.

REPORT OF THE PRESIDENT

President DeMoss thanked Governor Sain and his county bar association for their hospitality at the previous meeting. She reported she attended the Tri-County (Choctaw, McCurtain and Pushmataha) Bar Association Law Day dinner, Pittsburg County Law Day event, Tulsa County Law Day luncheon, Oklahoma County Law Day luncheon, Annual Meeting planning meeting, Judicial Nominating Commission appreciation dinner, various meetings and discussions

regarding pending legislation, Litigation Section meeting and Professionalism Committee meeting. She spoke at the Idabel town hall, Seminole County Law Day event and an Inn of Court chapter meeting in Oklahoma City. She taped a segment of *The Verdict* TV show and participated in planning for the Tulsa Legally Pink event and a planning meeting with the Women in Law Committee chairperson.

REPORT OF THE VICE PRESIDENT

Vice President Shields reported she attended the April board meeting in Idabel, Idabel town hall lunch meeting, tri-county reception in Idabel, Oklahoma County Law Day luncheon, OBA Communications Committee meeting and Oklahoma County Bar Association meeting.

REPORT OF THE PRESIDENT-ELECT

President-Elect Poarch reported he attended the April board meeting and tri-county reception in Idabel, JNC appreciation dinner, Communications Committee meeting and Cleveland County Bar Association meeting.

REPORT OF THE PAST PRESIDENT

Past President Stuart reported he attended the tri-county Law Day event in Idabel, Seminole County Bar Association Law Day luncheon in Wewoka and JNC appreciation dinner.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams briefed board members on legislative activities regarding judicial compensation. He reported he attended the tri-county Law Day event,

Comanche County Law Day luncheon, Seminole County Law Day event at which he spoke at the CLE, Pittsburg County Law Day event, Tulsa County Law Day luncheon, Oklahoma County Law Day luncheon, Payne County Law Day dinner, planning meeting with President-Elect Poarch, Annual Meeting planning meeting, JNC appreciation dinner, YLD board meeting, various meetings and discussion regarding pending legislation, monthly staff celebration, management staff meeting and retirement reception for Judge Kilgore in Pontotoc County. He spoke to a group of 16 visiting Chinese lawyers, met with the contractor to discuss flooding issue in Emerson Hall and other building issues and began the staff evaluation process.

BOARD MEMBER REPORTS

Governor Dexter reported she attended the April board meeting, tri-county Law Day banquet, Tulsa County Law Day luncheon and the reception honoring Rep. Fred Jordan for his help with SJR 21. **Governor Gifford** reported he attended the April board meeting in Idabel, Oklahoma County Bar Association meeting, Law Day Ask A Lawyer event and Military and Veterans Law Section meeting. **Governor Hays**, unable to attend the meeting, reported via email that she attended the April board meeting in Idabel, tri-county reception in Idabel, Tulsa County Bar Association Law Day luncheon, OBA Family Law Section Trial Advocacy Institute planning meeting, TCBA Board of Directors meeting at which she presented a report of OBA matters, TCBA Family Law Section meeting and TCBA Long-

Range Planning meeting. She communicated with OBA FLS leadership regarding the Annual Meeting and Solo & Small Firm Conference, communicated with the Women in Law Committee regarding possible 2014 conference sponsors and communicated with the OBA Professionalism Committee. **Governor Jackson** reported he attended the April board meeting, tri-county Law Day banquet and May Garfield County Bar Association meeting. **Governor Knighton** reported he attended the Idabel town hall luncheon, April board meeting in Idabel and Cleveland County Bar Association meeting. **Governor Marshall** reported he attended the Idabel town hall luncheon, April board meeting and tri-county reception, all in Idabel, Pottawatomie County Bar Association meeting, Seminole County Bar Association Law Day event in Wewoka and JNC appreciation dinner. **Governor Parrott** reported she attended the April board meeting in Idabel, town hall meeting and reception in Idabel, Pittsburg County Law Day meeting and dinner at Pete's Place and the JNC appreciation dinner. She made phone calls and sent email to legislators regarding judicial pay raises. **Governor Sain** reported he attended the board meeting and town hall meeting in Idabel and tri-county Law Day banquet in Idabel. He presented plaques to OBA coloring contest winners at Denison School and Idabel Primary South School. **Governor Smith** reported he attended the April board meeting, tri-county banquet and planning meeting for the Muskogee County Bar Association banquet. He invited board members to attend the June 26 ban-

quet. **Governor Stevens** reported he attended the April Board of Governors meeting, Tri-County Bar Association Law Day reception, May Cleveland County Bar Association meeting, Cleveland County Law Day lecture, Cleveland County Ask A Lawyer community service project and JNC appreciation dinner. **Governor Thomas** reported she followed up with a few legislators via email after the vote on SRJ 21 and attended the JNC appreciation dinner at the Oklahoma Judicial Center.

YOUNG LAWYERS DIVISION REPORT

Governor Hennigh reported he attended the Idabel town hall meeting, tri-county awards banquet, Garfield County Bar Association meeting and ABA YLD spring conference in Pittsburgh. He made an OBA Law Day presentation to Chisholm elementary students, chaired the OBA YLD board meeting and participated in the YLD public service project for the Oklahoma Regional Food Bank.

SUPREME COURT LIAISON REPORT

Justice Kauger reported the annual Sovereignty Symposium will take place June 4-5 at the Skirvin Hilton Hotel in Oklahoma City and a book signing will be held June 4 for the recently published *Art of the Oklahoma Judicial Center*.

COMMITTEE LIAISON REPORTS

President DeMoss reported the Women in Law Committee has set the date and selected the speaker and topic for its fall conference. She said the Professionalism Committee has selected Judge Wayne Alley as its symposium key-

note speaker. Governor Parrott reported the Bench and Bar Committee's attention is focused on the Legislature. President-Elect Poarch reported a discussion of a united OBA message took place at the Communications Committee meeting, and he requested that committee Chair Dick Pryor be placed on a future board agenda to discuss that topic with the board.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported it has been a busy discipline season with frequent hearings taking place. She said her department's new case management system has gone live and data conversion took place last week. The office has now converted to paperless, which is good because discipline records are required to be kept forever and storage has become an issue. The scanning of old files will begin next year.

LAW DAY REPORT

Law Day Committee Co-Chairs Jennifer Prilliman and Richard Vreeland reviewed Law Day statewide activities and results using a PowerPoint presentation. They reported the number of contest entries was down 20 percent this year; however, the quality of writing entries increased significantly. Major segments of the *Ask A Lawyer* TV show focused on how the 1960s judicial scandal shaped the current judicial selection process, human trafficking, water rights and the OBA's disaster assistance efforts. Calls for free legal advice numbered 994. More options to submit legal questions will be explored to increase the number of calls in 2015. The use of radio adver-

tising and digital billboards was expanded this year, and results show they were effective. In researching the reach of the contests, TV show and free legal advice promotion, it was estimated that the positive Law Day message reached nearly 4 million people. The chairpersons shared their ideas for changes next year that will make the project even more successful. Board members contributed their ideas and suggestions.

CLE ANNUAL REPORT

Educational Programs Director Susan Krug reviewed her report on the OBA Continuing Legal Education Department's 2013 activities. She reported the OBA remains the top CLE provider in Oklahoma in both hours provided and number of program attendees. Net revenue increased over the previous year with much effort to decrease expenses. Director Krug discussed the financial impact of free CLE and reported the number of CLE providers increased by 80 over the past two years. For the first time in 2013 the number of online registrants surpassed in-person attendees. Utilization of online programming continues to increase. She noted the switch from online provider InReach to Peach New Media has been successful, resulting in better customer service.

APPLICATION TO SUSPEND MEMBERS FOR FAILURE TO PAY 2014 DUES

Executive Director Williams explained the change in the procedure this year as requested by the Supreme Court. The board authorized Executive Director Williams to submit a recommendation to the Supreme Court to suspend

OBA members for nonpayment of 2014 dues.

APPLICATION TO SUSPEND MEMBERS FOR FAILURE TO COMPLY WITH 2013 MCLE REQUIREMENTS

The board authorized Executive Director Williams to submit a recommendation to the Supreme Court to suspend OBA members for failure to comply with 2013 MCLE requirements.

APPLICATION TO STRIKE MEMBERS FOR FAILURE TO PAY 2013 DUES

The board authorized Executive Director Williams to submit a recommendation to the Supreme Court to strike OBA members for nonpayment of 2013 dues.

APPLICATION TO STRIKE MEMBERS FOR FAILURE TO COMPLY WITH 2012 MCLE REQUIREMENTS

The board authorized Executive Director Williams to submit a recommendation to the Supreme Court to strike OBA members for failure to comply with 2012 MCLE requirements.

DOMESTIC VIOLENCE FATALITY REVIEW BOARD

The Domestic Violence Fatality Review Board annual report, provided to the OBA Board of Governors for informational purposes, states Oklahoma ranks third in the nation for women killed by men in single victim, single offender homicides. OBA member G. Gail Stricklin serves on the review board, in addition to Gene Christian with the Office of Juvenile Affairs and his designee Donna Glandon. The board is an 18-member multidisciplinary team of representatives

from state agencies and other organizations, agencies and associations with the mission to reduce the number of domestic violence deaths in Oklahoma.



The Oklahoma Bar Association Board of Governors met in conjunction with the Solo & Small Firm Conference at the Hard Rock Hotel & Casino in Catoosa on Friday, June 20, 2014.

WELCOME

President DeMoss welcomed Supreme Court Justice James Winchester, who has been appointed as the court's new liaison to the OBA.

REPORT OF THE PRESIDENT

President DeMoss reported she attended the Sovereignty Symposium, dinner event with the justice of the Canadian Supreme Court, Oklahoma Fellows of the American Bar Foundation meeting, Senior Follies and Women in Law Committee meeting with the chairperson. She participated in meetings regarding OBA Annual Meeting planning, Diversity Committee sponsorship planning, legislative matters and planning on transitions issues. She also worked on the Master Lawyer Section proposal.

REPORT OF THE VICE PRESIDENT

Vice President Shields, unable to attend the meeting, reported via email she attended the Diversity Committee meeting and had discussions with Ethics Counsel Travis Pickens regarding planning materials for lawyer succession in the event of death, disability, etc.

REPORT OF THE PRESIDENT-ELECT

President-Elect Poarch reported he attended the May board meeting and made committee appointments for next year.

REPORT OF THE PAST PRESIDENT

Past President Stuart reported he attended the May Board of Governors meeting and the Bar Center Facilities Committee meeting.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the final legislative session, various meetings on the new association management software, a meeting with President DeMoss on legislative matters, Bar Center Facilities Committee meeting, meeting with a heating/air conditioning vendor regarding mechanical issues on the west side of the building and the monthly staff celebration. He also conducted staff evaluations.

BOARD MEMBER REPORTS

Governor Dexter reported she attended the May board meeting and luncheon, OBA Law Day Committee meeting and Tulsa County Bar Foundation board meeting. She also presented a brown bag CLE seminar for the Tulsa County Bar Association. **Governor Hays** reported she attended the OBA Family Law Section Trial Advocacy Institute planning meeting, Women in Law Committee meeting and Tulsa County Bar Association Board of Directors meeting at which she presented a report of OBA matters. She communicated with OBA FLS leadership regarding the Annual Meeting

and Solo & Small Firm Conference, communicated with the OBA Professionalism Committee regarding its upcoming symposium and worked on TAI matters. **Governor Knighton** reported he attended the May board meeting and luncheon. **Governor Marshall**, unable to attend the meeting, reported via email he attended the May board meeting and luncheon. **Governor Parrott**, unable to attend the meeting, reported via email she attended the May board meeting and luncheon. **Governor Sain** reported he attended the May Board of Governors meeting and McCurtain County Bar Association meeting. **Governor Stevens** reported he attended the May Board of Governors meeting, June Cleveland County Bar Association meeting and Cleveland County Bar Association night at the ballpark.

KICK IT FORWARD TASK FORCE

Governor Hennigh said the Young Lawyers Division has an idea for a future project and wanted to share the concept with the Board of Governors. YLD Chair-Elect LeAnne McGill and past YLD Chair Jennifer Castillo will be leading the task force. Other YLD board members at the meeting introduced themselves — Bryon Will, Lane Neal, Amber Peckio Garrett, Grant Sheperd and Sarah Stewart. Governor Hennigh reported the division has established a new task force to organize a kickball tournament as a fundraising event to assist OBA members needing financial assistance to help pay their OBA dues. YLD Chair-Elect McGill shared the story of a new lawyer, who eight months after graduating from law school had not found

a full-time legal position. He was finding it difficult, like many bar members, to pay his association membership dues. This need has inspired the YLD to create a program to help. Ms. Castillo briefed board members on details of the tournament that would take place at Will Rogers Park in Oklahoma City in the spring. Governor Hennigh said the problem of bar members experiencing financial challenges is a nationwide problem, especially for new lawyers, that is being discussed at ABA YLD conferences. He requested the board authorize the addition of a contribution check off on the annual dues statement to benefit the project. More project details were shared, and questions followed. It was suggested that recipients be asked to volunteer for pro bono efforts. President DeMoss asked the YLD to prepare a formal proposal for a future board meeting agenda.

YOUNG LAWYERS DIVISION REPORT

Governor Hennigh reported he and five other division members attended the YLD 2014 Spring Conference in Pittsburgh, where there was the opportunity to share ideas. Currently, the division's efforts are focused on the development of the Kick It Forward project. Anti-bullying presentations are taking place at schools, and the YLD will hold its midyear meeting later today.

COMMITTEE LIAISON REPORTS

Governor Hays reported the Women in Law Committee will partner with the breast cancer awareness event, Legal Pink, for its kickoff at the TU

College of Law the morning of Oct. 3 in Tulsa, which will be the same day and location as the CLE seminar sponsored by the committee. Governor Smith reported the Work/Life Balance Committee is working on planning a fall CLE seminar and beefing up the content on its website. President DeMoss reported that today is the deadline for the Diversity Committee awards. The keynote speaker for the committee's awards luncheon/CLE seminar will be Paulette Brown, who will be the first woman of color to serve as ABA president. Committee members also marched in the Tulsa Gay Pride Parade. Past President Stuart reported the Bar Center Facilities Committee discussed the water leak problem on the west side of the bar center, office updating, landscaping needs and the aging west wing heat/air unit that was last updated in 1999. He said the committee will make recommendations to the Budget Committee. Governor Hays reported the Family Law Section will hold a Trial Advocacy Institute July 21-25 at the bar center. Cost is \$950 per person, and the section is subsidizing the institute to reduce the fee.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported only one case against the OBA is currently active, and she briefed the board on its status. She reported the Professional Responsibility Tribunal, which operates on a July 1 – June 30 schedule, recently held its annual meeting. Elected as chief master was M. Joe Crosthwait, Midwest City, and as vice-chief master Neal E. Stauffer, Tulsa.

PROFESSIONAL RESPONSIBILITY TRIBUNAL APPOINTMENTS

President DeMoss reappoints Louis Don Smitherman, Oklahoma City; Susan B. Loving, Edmond; Jeremy Beaver, McAlester; and Kelli M. Masters, Oklahoma City, to the PRT. Their terms will expire June 30, 2017.

COMMISSION ON CHILDREN AND YOUTH NOMINEES

President DeMoss will submit the names of Todd Pauley, Oklahoma City; Tsinena Bruno Thompson, Oklahoma City; and Judge Deborah Shallcross, Tulsa; to the governor for selection of one appointee. The term will expire Dec 31, 2016.

OKLAHOMA BAR FOUNDATION TRUSTEE APPOINTMENTS

President DeMoss appoints Gary W. Farabough, Ardmore, and Briana Ross, Tulsa, to the 2015 OBF Board of Trustees.

BUDGET COMMITTEE APPOINTMENTS

The board approved the appointment recommendations of President-Elect Poarch to the Budget Committee:

House of Delegates - Ken Delashaw, Marietta; Amelia Pepper, Norman; Betty Outhier Williams, Muskogee; and reappoint John Heatly, Oklahoma City, and Glenn Devoll, Enid

Board of Governors – Deirdre Dexter, Sand Springs, and reappoint Richard Stevens, Norman; Renée DeMoss, Tulsa; Nancy Parrott, Oklahoma City; Susan Shields, Oklahoma City; Jim Stuart, Shawnee; and Linda Thomas, Bartlesville

Additional Attorney Members – reappoint Phil Frazier, Tulsa; Chris Meyers, Lawton; Joseph Vorndran, Shawnee; Judge Richard Woolery, Sapulpa; and Cathy Christensen, Oklahoma City.

NEXT MEETING

The Board of Governors met July 25, 2014, via telephone. A summary of those actions will be published after the minutes are approved. The next board meeting will be Friday, August 22, 2014, at the Hyatt Regency Hotel in Tulsa.

FROM THE PRESIDENT

cont'd from page 1644

On Oct. 26, the **Diversity Committee** hosts its third annual CLE seminar, featuring American Bar Association President-Elect Paulette Brown, a woman who will make history when she becomes the first African-American woman to take the reins of the ABA in August 2015. Another date to save is Dec. 12, when a **Professionalism Symposium** featuring retired U.S. District Judge and former OU Law School Dean Wayne Alley will be held at the Oklahoma Judicial Center.

Finally, I want to encourage you to plan now to attend the **OBA Annual Meeting** at the

Tulsa Hyatt Regency Nov. 12-14. Intense planning is currently underway to give the Annual Meeting a new look, schedule and format that promises to be both fun and educational for all who attend.

It has been an absolute honor, a pleasure, and an education working with you and for you these past six months as OBA president. I am hopeful that in the second half of 2014, we will continue to work together on projects and services relevant to all OBA members. I invite you to participate as we continue to strive to become the best bar association we can be.

Make a Difference

Do you want a fulfilling career where you can really make a difference in the lives of people? Are you fervent about equal justice? Does a program with a purpose motivate you? **Legal Aid Services of Oklahoma, Inc. (LASO)** is searching for Advocates who are wanting to make a difference in individuals' lives.

We are a statewide, civil law firm providing legal services to the impoverished and senior population of Oklahoma. With twenty-three offices and a staff of 145+, we are committed to the mission of equal justice.

Interested Attorneys should possess litigation skills and experience and a true empathy for the impoverished. In return, the employee receives a great benefit package including paid health, dental, life insurance plan; a pension, generous leave benefits, and a loan repayment assistance program for law school loans. Additionally, LASO offers a great work environment and educational/career opportunities.

The online application can be found:

<https://legalaidokemployment.wufoo.com/forms/z7x4z5/>

Print application

http://www.legalaidok.org/documents/388541Employment_Application_Revised_10.2008.pdf

Legal Aid is an Equal Opportunity/Affirmative Action Employer.

The OBF District and Appellate Court Grant Award Program: Unique to the Core

By Dietmar K. Caudle

During our July Oklahoma Court Grant Award Committee meeting, I was again privileged to participate in a process to determine the funding of meritorious court applications that fall within our guidelines. Having been a member of this statewide trustee committee since the inception of the Court Grant Program, it is easy to be a cheerleader for the OBF. You come to thoroughly understand the compelling immediate needs of the district court applicants. You gain a unique perspective of the need for increased future funding for the Oklahoma Bar Foundation. As a G&A Trustee you exercise your fiduciary duty in the process, while using discretion as a good steward of the available funding.

This particular July morning, our Trustees from all corners of the state assembled at the bar center to thoughtfully review 13 applications. The ratio of dollars available to dollars requested is usually one to four, and the 2014 court grant requests totaled \$330,000. **The G&A Committee was able to award 11 requests totalling \$86,615.** Telephone conference interviews were conducted to hear some of the compelling needs of our various court dis-

tricts. It became very clear at the end of a long day that although all meritorious applications should be funded, only critical needs could be met. My immediate thoughts turned to the continuing need for innovative funding to be able to avoid this future dilemma. My invitation to join the OBF umbrella of giving follows later in this article.

Historically, the OBF Court Grant Program was initially funded in 2008 through a generous *cy pres* award. There have been additional *cy pres* awards to the foundation since that time with the most recent award in April 2014 from Custer County. OBF court grant-making guidelines are unique in that they provide specific funding for courtroom technology, courtroom capital improvements and extraordinary expenses that cannot be met by existing funding. The Court Grant Program is unique to Oklahoma, and there are no other programs like it across the nation.

Each year the needs have been different but consistent. In 2014, the compelling need shared by many counties was for digital courtroom recording equipment. These counties are

relying on obsolete audio cassette tape systems without an ability to get replacement tape cassettes or repairs. The need is enormous and dollars available to remedy these issues are limited. The goal of the court grants is to ultimately promote the OBF mission of administration of justice in our court system. Since 2009 this particular separate OBF grant cycle has awarded Oklahoma district and appellate courts \$450,000 in grants for essential equipment.

The 2014 OBF Court Grant Awards as approved by the OBF Board of Trustees are:

- **District Court of Blaine County:** video arraignment system for improvement of administration and better access to justice. \$12,000
- **District Court of Pittsburg County:** two digital courtroom recording systems for improvement of administration and better access to justice. \$14,050
- **District Court of Beckham County:** two digital courtroom recording systems for improvement of administration and better access to justice. \$13,000
- **District Court of Custer County:** one digital court-

room recording system and three portable units for improvement of administration to justice. \$8,300

- **District Court of Adair County:** courtroom tools upgrade for improvement of administration and better access to justice. \$3,920
- **District Court of Harper County:** one digital courtroom recording system for improvement of administration and better access to justice. \$6,770
- **District Court of Tulsa County:** 13 portable digital courtroom recording systems for improvement of administration and better access to justice. \$14,600
- **District Court of Pawnee County:** one portable digital courtroom recording system for improvement of administration and better access to justice. \$600
- **District Court of Hughes County:** one courtroom sound system for improvement of administration and better access to justice. \$5,675
- **District Court of Pushmataha County:** three courtroom portable digital recording systems for improvement of administration and better access to justice. \$1,400
- **District Court of Cleveland County:** one digital courtroom recording system for improvement of administration and better access to justice. \$6,300

JOIN THE OBF UMBRELLA OF GIVING

I would be remiss in my duty if I did not tell you about the



*Join the OBF umbrella of giving today at
www.okbarfoundation/fellows*

Fellows giving program umbrella and ask you to join with us in helping the OBF work toward our goals. **The Oklahoma Bar Foundation envisions a state where all Oklahomans and families will have access to justice and will be able to better understand their rights and responsibilities under the rule of law. Justice depends on having a fair chance to be heard, regardless of who you are, where you live or how much money you have.**

Please join us today by becoming a contributing member of the Fellow Umbrella Giving Program. Please consider upgrading your membership level to Benefactor or Sustaining if your initial pledge is complete or nearing completion. There is also the new OBF Community Fellows Programs for non-individuals — organizations and groups such as the OBA sections, county bar associations, law firms, IOLTA

banks, businesses and corporations of all types. The investment is minimal, and the rewards are substantial. The OBF website at www.okbarfoundation.org, our OBF staff at foundation@okbar.org, our OBF Trustees and myself are all your contact points.

Your OBF president's motto is that we cannot earn your continued financial support until we ask. This is my personal invitation to join the OBF umbrella of giving today and help tens of thousands of Oklahomans.

ABOUT THE AUTHOR



Dietmar K. Caudle practices in Lawton and serves as OBF President. He can be reached at d.caudle@sbcglobal.net.



2014 OBF Fellow and Community Fellow Enrollment Form

Name, Group name, Firm or other affiliation _____

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☐ Attorney ☐ Non-attorney

- | | |
|--|---|
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(initial pledge should be complete) |
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(initial pledge should be complete) | ___ My charitable contribution to help offset the Grant Program Crisis |

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THANK YOU FOR YOUR GENEROSITY AND SUPPORT!

Paupers Affidavit

By Janet D. Roloff

Here is food for thought: A grandmother who works full time for minimum wage and wants to take care of her grandchildren while both parents are in prison must pay the court clerk an amount equal to a car payment to access the court for a guardianship. A widow on social security who wants to stop the foreclosure of her home after a voidable judgment must pay the court a sum equal to her grocery allotment for the month to file a motion to vacate the judgment. A homeless mother of three toddlers who wants to divorce an absentee father must pay the court more money than she has seen at one time in years to ask the court for a divorce. All of these people are faced with a financial impossibility.

Most people who will ever read this article are genetically and situationally protected from ever personally being affected by its topic. We were born into lives where we eventually, sometimes through hardship but more often not, made it through high school, college and law school. You readers are the ones who make access to the courts available to all people in Oklahoma. You write the laws and interpret them. You make the motions and you grant them. It is like playing God.

“You readers are the ones who make access to the courts available to all people in Oklahoma.”

For every occasion there is a remedy. We lawyers were trained to believe that. In the case of people who can't afford the large fees the state of Oklahoma placed on entry to the court system, there is a remedial statute. Title 28 O.S. §152, which sets the flat fee schedule for court filings, includes in Subsection F:

In any case in which a litigant claims to have a just cause of action and that, by reason of poverty, the litigant is unable to pay the fees and costs provided for in this section and is financially unable to employ counsel, upon the filing of an affidavit in *forma pauperis* executed before any officer authorized by law to administer oaths to that effect and upon satisfactory showing to the court that the litigant has no means and is, therefore, unable to pay the applicable fees and costs and to employ counsel, no fees or costs shall be

required. The opposing party or parties may file with the court clerk of the court having jurisdiction of the cause an affidavit similarly executed contradicting the allegation of poverty. In all such cases the court shall promptly set for hearing the determination of eligibility to litigate without payment or fees or costs. Until a final order is entered determining that the affiant is ineligible, the clerk shall permit the affiant to litigate without payment of fees or costs. Any litigant executing a false affidavit or counter affidavit pursuant to the provisions of this section shall be guilty of perjury.

A very simple form for this affidavit is provided at 12 O.S. §922. Although the section refers to a repealed statute concerning court costs which was replaced with a different section number, [a matter asking for legislative housekeeping] the form provided in the statute is:

State of Oklahoma,
_____, County,
_____, in the district court of said county: I do solemnly swear that the cause of action set forth in the petition hereto prefixed is just, and I (or we) do further swear that by reason of my (or our) poverty, I am

unable to give security for costs.

This seems straightforward enough, but when a poor person tries to file an action in Oklahoma, they are faced with quite a different form and procedure. An informal survey of attorneys across the state reflects that each district court in Oklahoma has its own mostly unwritten local rules about how a poor person gets the approval to file an action without first paying court costs. The categorical breakdown is:

- 1) Some district judges will not sign an order allowing filing in *forma pauperis* at all.
- 2) Some district judges will sign an order allowing filing in *forma pauperis* but will always assess the filing fees against the poor person at the conclusion of the case. One attorney commented, "It's like they magically become unindigent at the end of all proceedings."
- 3) Some district judges will sign an order allowing the filing in *forma pauperis* but will require payment of the filing fee at the end of the case "by someone." Usually the parties split the cost.
- 4) There is a wide range of income categories that different judges feel satisfied are poor enough to waive

filing fees. In some courts the filing fee is never fully waived, even if the person has no income or only social security.

- 5) Some district judges will never sign an order allowing a *pro se* filer to file in *forma pauperis*.

Most Oklahoma cases addressing access to the court and waiver of filing fees involve incarcerated plaintiffs. Oklahoma holds more people in penitentiaries than most modern nations. These prisoners participate in a lively *pro se* court practice. There are myriad rules and forms used by the courts to try to limit this access, but this article does not address that problem.

Tulsa County, the most transparent of the courts concerning the paupers affidavit process for civil filing, has their paupers affidavit posted online interactive at www.tulsadistrictcourt.com. It can be filled out online and printed for filing. Oklahoma County court clerk's office does not provide its form online, but mentions paupers affidavits only in its question and answer page for people interested in small claims court. Most counties do not have any published local court rules concerning paupers affidavits. But all of these forms require particular information not required by the statutory paupers affidavit form. Some courts dangerously require

information that should not be public, such as social security numbers and names of children.

Maybe it is time we review our procedure. Both the U.S. Supreme Court and Oklahoma Supreme Court have said the perjury penalty is enough to protect the court from fraudulent affidavits. We should not have an insurmountable hurdle for poor people to clear to get to court. Indigents have a constitutional right to proceed in court without payment of court fees. "The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." Oklahoma Constitution, Article 2, §6. Still the law of the land.

ABOUT THE AUTHOR



Janet Roloff is a staff attorney at the McAlester office of Legal Aid Services of Oklahoma Inc. Ms.

Roloff defends foreclosures and provides legal representation to the poor in consumer and housing-related issues. She is a 1977 graduate of the OU College of Law.

Rising to Meet the Challenges Facing Young Lawyers

By Kaleb Hennigh

Young lawyers in Oklahoma are inundated daily with demands not only from the pressures of maintaining an adequate case load, meeting billable goals and satisfying client demands, but also from community leaders and local organizations seeking either financial assistance or time commitments. I'm pleased to say that time and time again, Oklahoma's young lawyers continue to rise to the challenge and satisfy those professional and community needs.

Fellow young lawyers, I commend you all for your continued devotion to our profession and our communities, and I encourage you to continue to answer the call to service and profession. Throughout our history the OBA Young Lawyers Division has proudly served an instrumental role in assuring that community commitments and public service needs are met. Young lawyers continue to sacrifice personal needs to ensure the betterment of their professional organizations and their communities.

The great work of community service will continue; however, now I am encouraging you as young lawyers to look a little closer to locate someone in need. Currently, national statistics are showing a downward trend in new associate placement and these



trends seem to be hitting close to home in Oklahoma. New lawyers are successfully completing the rigors of law school, passing the bar exam and placing themselves in the position to enter our profession, only to find a weak employment market. I have been personally contacted by members of our Oklahoma division looking for assistance in maintaining their eligibility with the bar association.

Not only do we want to ensure that our membership stays strong, but also provide an opportunity to young lawyers to maintain their eligibility to practice in Oklahoma. In seeing this trend, the YLD is working in conjunction with the OBA Board of Governors to approve and implement the

Kick It Forward program this year. The program is to provide young lawyers with financial assistance in paying their mandatory OBA bar dues.

The YLD recognizes the hardships that many of our members are facing and wants to help out our own. Upon completion and submission of an application and committee approval, a licensed young lawyer in good standing with the OBA, either working or seeking employment, will have a portion of their bar dues for the calendar year paid. The program will get "kicked off" via a kickball tournament in Wiley Post Park in Oklahoma City in the spring. Be looking for many more details to come!

Thank you for the service you continue to provide to our organization!

ABOUT THE AUTHOR



Kaleb Hennigh practices in Enid and serves as the YLD chairperson. He can be contacted at

hennigh@northwestoklaw.com.

Annual Meeting Luncheon Speaker Selected

Internationally recognized speaker Professor Richard Susskind has been selected to deliver the keynote address during the OBA 2014 Annual Meeting, set for Nov. 12-14 at the Hyatt Regency Hotel in downtown Tulsa. Mr. Susskind is a law professor based at the University of Strathclyde in Scotland as well as a visiting professor at the University of Oxford. His primary area of expertise is the future of professional legal service, particularly the way technology will change the work of lawyers. Make plans to attend now! All the details and event highlights will be available in the Sept. 13 *Oklahoma Bar Journal*.



Richard Susskind

OBA to Celebrate Constitution Day and Freedom Week 2014

The OBA Law-related Education Committee invites you to participate in this year's Constitution Day, Sept. 16; and Freedom Week, Nov. 10-14. As lawyers, you have a unique responsibility to promote civics education among the public, particularly relating to information about the third branch of government. Check out www.okbar.org/public/LRE/LREConstitutionDay to see resources you can share with your local schools and civic groups.



Pocket-sized Constitutions are available at no charge for distribution to students. These booklets make a great handout for classroom presentations by lawyers! Contact LRE Assistant Wanda Reece to order copies in bulk; WandaR@okbar.org, 405-416-7023.



Peer Mediation Training Available for Students

The PROS – Peaceful Resolutions for Oklahoma Students project is a school-based peer mediation program aimed at encouraging young people to resolve conflicts in a positive and constructive manner. The fall 2014 PROS regional training schedule has been announced. This free training equips school representatives, including students, to develop a peer mediation program in the school they represent. PROS is a collaborative effort between the OBA Law-related Education Department and Oklahoma Supreme Court Administrative Office of the Courts. OBA members are encouraged to share this information with their local schools. For more information, contact peer mediation specialist Phil Johnson, phil.johnson@oscn.net, 405-556-9802 or check out the OBA website: www.okbar.org/public/LRE/PROS.

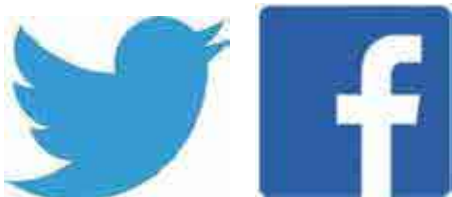
Fraud Alert

Increasingly elaborate schemes with highly sophisticated and seemingly credible paperwork and people continue to target lawyers. If you are contacted by a potential new client, take precautions to establish their legitimacy and good faith, as well as the legitimacy of any funds they wish for you to hold, whether as a retainer or otherwise. Work with your banker carefully to assure that any funds placed in your trust account are real and have come through legitimate financial channels. Be especially wary of unusual or "urgent" requests regarding holding and disbursing funds. More information about these potential scams is available at www.okbar.org/members/MAP/AvoidingScams.



Connect With the OBA Through Social Media

Have you checked out the OBA Facebook page? It's a great way to get updates and information about upcoming events and the Oklahoma legal community. Like our page at www.facebook.com/OklahomaBarAssociation. And be sure to follow @OklahomaBar on Twitter!



Aspiring Writers Take Note

We want to feature your work on "The Back Page." Submit articles related to the practice of law, or send us something humorous, transforming or intriguing. Poetry is an option too. Send submissions no more than two double-spaced pages (or 1 1/4 single-spaced pages) to OBA Communications Director Carol Manning, carolm@okbar.org.

LHL Discussion Groups

The Lawyers Helping Lawyers monthly discussion groups next meet Sept. 4 when the topic will be "Care-giving: Challenges and Resources." Each meeting, always the first Thursday of each month, is facilitated by committee members and a licensed mental health professional. There is no cost to attend and snacks will be provided. RSVPs to Kim Reber; kimreber@cabainc.com, are encouraged to ensure there is food for all.

- Tulsa meeting time: 6 – 7:30 p.m. at the TU College of Law, John Rogers Hall, 3120 E. 4th Place, Room 206.
- Oklahoma City meeting time: 6 – 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th Street.

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM

OBA Member Reinstatements

The following OBA members 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:

Lisa Karen Gold
OBA No. 19663
1741 1st Avenue S
Seattle, WA 98134

Scott Ford McKinney
OBA No. 16692
P.O. Box 18734
Oklahoma City, OK 73154-0734

Jay Eric Trenary
OBA No. 16364
1309 Lloyd Avenue
Blackwell, OK 74631

Holiday Hours

The Oklahoma Bar Center will be closed Monday, Sept. 1 in observance of Labor Day.

Kudos

McAfee & Taft attorney **Brandon Long** of Oklahoma City has been appointed to serve a three-year term on the board of directors of Southwest Benefits Association. Founded in 1975 and based in Dallas, the association is a regional industry organization for benefits professionals.

Oklahoma City lawyer **Katie Templeton** has been appointed to a seven-year term on the State Board of Osteopathic Examiners. Ms. Templeton is a 2006 graduate of the OU College of Law who practices in the area of medical malpractice defense.

William H. Hoch of Crowe & Dunlevy was recently awarded the Leadership in Law Award from the Oklahoma County Bar Association. He was one of five recipients recognized for their valuable community service. The county bar has also appointed Mr. Hoch to serve as a member of the American Bar Association's House of Delegates. He will be one of 72 Oklahoma attorneys who will establish the ABA's policy on professional and public issues.

Michael W. Simpson recently earned his Ph.D. from the University of Arizona. Mr. Simpson holds

B.A. and M.Ed. degrees from OU and earned his J.D. from the OCU School of Law in 1985.

The Oklahoma County Bar Association recently honored 10 OBA members at its annual awards luncheon. **Laura McConnell-Corbyn** received the Bobby G. Knapp Leadership Award, while **Robert H. Gilliland** received the Professional Service Award. The President's Courageous Lawyer Award went to **Seth Day** and **Susanna Gattoni**. **Don Holladay** and **James Warner III** received the OCBA Pro Bono Award. **Alisa Shaddix White** received the Briefcase Award, and the President's Professionalism Award went to **Cathy M. Christensen**. **Jon Trudgeon** and **Ken Frates** were also recognized for 50 years of service in the legal profession.

Greuel Law Firm attorney **GDeborah Reed** of Tulsa has been appointed Business Law Ambassador for the ABA Business Law Section. Ms. Reed is a 2009 graduate of the TU College of Law and focuses on real property, corporate law and Indian law.

On The Move

Hall Estill announces that **Mark Banner** has joined the firm's executive committee. Mr. Banner has been with

Hall Estill for more than 25 years, focusing on oil and gas law. He earned his J.D. from Georgetown Law in 1988.

Sara Cherry of Tulsa has been appointed statewide reentry coordinator for Legal Aid Services of Oklahoma Inc. (LASO). She began working with LASO in 2006 and was most recently named coordinator of legal services for Women In Recovery, a family and children's services program providing alternatives to incarceration. She is a 2000 graduate of the TU College of Law.

GableGotwals announces **Leo J. Portman** and **Rex E. Herren** of Oklahoma City have joined the firm as of counsel attorneys. Mr. Portman will focus on title examination, oil and gas law, and estate planning. Prior to joining the firm, he served as sole practitioner at Portman & Associates, as well as various leadership positions in the oil and gas industry. He earned a J.D. from the OU College of Law in 1980. Mr. Herren has more than 40 years of experience in the areas of title examination, oil and gas, real estate law, Indian law and probate law. He earned his J.D. from the OU College of Law in 1974 and has previously served as assistant regional solicitor with the Office of the Solicitor in Tulsa.

Matt Stacy of Oklahoma City announces the formation of a new practice, Stacy Legal Group LLP. The firm will offer expertise in the

areas of criminal defense, personal injury, estate planning and probate, business organization, real estate, family law and business valuation. Mr. Stacy holds an M.B.A. in entrepreneurship, earned his J.D. from the OU College of Law in 2013 and serves as an Army intelligence officer in the 45th Infantry Brigade.

Ronald J. Nelson has been promoted to chief contracts counsel with Vantage Drilling in Singapore. Mr. Nelson earned his J.D. from the TU College of Law in 1981.

Barrow and Grimm PC in Tulsa announces that **Anne S. Maguire** and **James R. Hicks** have joined the firm. Ms. Maguire graduated from the OU College of Law in 2012 and will focus on civil litigation, medical malpractice and business law. Mr. Hicks provides more than 28 years of experience in civil litigation, family law and estate planning and probate and currently serves as president of the Tulsa County Bar Association. He is a 1985 graduate of the TU College of Law.

Pierce Couch Hendrickson Baysinger & Green LLP announces the addition of seven new associates to their Oklahoma City office: **Katherine F. Sommer**, **Bryan E. Stanton**, **Rachel R. Shephard**, **Carson C. Smith**, **Kim A. Tran** and **C. Scott Jones**. Ms. Sommer graduated from the OCU School of Law in 2012 and will focus on workers' compensation law. Mr. Stanton advises on medical malpractice, personal injury, products liability, bad faith law, subrogation, construction law, transportation law, business law and general insurance defense. Ms. Shephard's

areas of practice include complex litigation, employer and professional liability, bad faith and insurance law. Mr. Smith's practice focuses on civil rights, employment, bad faith and insurance defense. Ms. Tran advises on products liability, commercial and business litigation, personal injury and insurance defense. Mr. Jones' practice emphasis is in the area of insurance defense including employment, medical and legal malpractice claims.

Jace H. Powell has joined the Tulsa office of **Pierce Couch Hendrickson Baysinger & Green LLP**, and will focus on the area of workers' compensation. Mr. Powell has previously worked with the Tulsa County District Attorney's Office and earned his J.D. from the OCU School of Law in 2012.

Douglas J. Shelton, **Ginger K. Maxted** and **Bryan K. Walkley** announce a new law partnership, **Shelton Maxted Walkley**. Their practice will focus on areas of nursing home negligence and abuse, personal injury, construction, insurance, real estate and general civil litigation. The firm will be located at 7701 S. Western Ave., Suite 201, Oklahoma City, 73139, and can be contacted at 405-605-8800.

Doerner, Saunders, Daniel & Anderson have added **Kaylee Davis-Maddy** as an associate in its Oklahoma City office. Ms. Davis-Maddy will assist clients in litigation, healthcare law and environmental law. She graduated from Washington University School of Law in 2013.

OBA member **J. Patrick Mensching** has joined **Doerner, Saunders, Daniel & Anderson** in Tulsa. Mr. Mensching brings more than 30 years of experience and will focus on the areas of commercial and fraud litigation, mortgage foreclosure, commercial collections and general civil litigation. He is a graduate of TU College of Law.

Richard A. Nelson announces the relocation of the Nelson Law Office to 111 N. Broadway, Suite F in Edmond. The firm is also announcing the addition of **Celeste England** to the practice, focusing on criminal defense, estate planning, family law and contract law. Ms. England is a 2012 graduate of the OCU School of Law.

Steven McCain of Houston has joined **Marlin Midstream LLC** and **Associated Energy Services LP** as their vice president and general counsel. Mr. McCain is a 1980 graduate of the TU College of Law.



Recently, the OBA Litigation Section sponsored a panel discussion on "The Use of Juror Questionnaires in State Civil and Criminal Cases: Pros and Cons." Participating OBA members were **Judge Jim Caputo** of Tulsa, **Judge Patricia Parrish** of Tulsa, and lawyers **Ken Underwood** and **Michael S. Ashworth**, both of Tulsa.

Robert M. Murphy, administrative law judge for the Washington state Office of Administrative Hearings, presented an introduction and overview for the "OAH Code of Ethics for Administrative Law Judges CLE" in Olympia, Wash. Mr. Murphy also participated in a webinar titled "Initiative 502: Legalization of Recreational Use of Marijuana and the Medical Marijuana Laws in Washington CLE."

Chris A. Paul, general counsel of Blueknight Energy Partners, provided a presentation on regulatory and legal issues related to pipeline integrity and corrosion management at the annual University of Oklahoma and NACE Corrosion Course in June.

Jonathan Reiff of Rubenstein & Pitts PLLC in Edmond recently presented a program to single mothers at Community Crossings Church in Oklahoma City. Mr. Reiff also assisted attendees in executing a durable power of attorney, a nomination of guardian and a will with asset protection trust for their children.

Eric L. Johnson of Hudson Cook LLP in Oklahoma City recently trained students at the National Automotive Finance Association's Consumer Credit Compliance

Certification Program in Dallas. Mr. Johnson also moderated a session titled "Your Business Bible: Strong Compliance, Shrewd Accounting and Innovative Technology" at the National Independent Auto Dealer Association Convention & Expo in Las Vegas.

Tulsa County Chief Public Defender Jack Zanerhaft recently spoke at the National Association of Drug Court Professionals 25th Annual Conference in Anaheim, Calif. Presenting with Assistant District Attorney **Tammy Westcott**, Mr. Zanerhaft spoke about the collaborative role of the public defender and prosecutor in therapeutic alternative courts. Also in Anaheim, Mr. Zanerhaft presented discipline-specific workshops for defense counsel in Veterans Treatment Courts at the 2nd Annual Justice for Vets Conference.

Terry Ragsdale, Dale Cottingham, David Kearney and **David Wulfers** recently presented during the Frac Law: From Land Contract Negotiations to Environmental Disputes seminar in Oklahoma City and Tulsa. Mr. Ragsdale and Mr. Cottingham presented "Drilling the Lateral Well: Elections under Modal Form JOA," while Mr. Kearney and Mr. Wulfers presented "Environmental Concerns and Remedies — Avoiding Risks."

Sid Swinson recently authored an article titled "Chapter 7 Practice from a Trustee's Perspective" that was included in the *Consumer Finance Law Quarterly Report*.

How to place an announcement: The *Oklahoma Bar Journal* welcomes short articles or news items about OBA members and upcoming meetings. If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award, or given a talk or speech with statewide or national stature, we'd like to hear from you. Sections, committees, and county bar associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (e.g., *Super Lawyers*, *Best Lawyers*, etc.) will not be accepted as announcements. (Oklahoma-based publications are the exception.) Information selected for publication is printed at no cost, subject to editing, and printed as space permits.

Submit news items via email to:

Kelli Wedd
Communications Dept.
Oklahoma Bar Association
405-416-7084
barbriefs@okbar.org

Articles for the Oct. 4 issue must be received by Sept. 8.

IN MEMORIAM

Shannon Self of Oklahoma City died July 11. Born on Oct. 17, 1956, in Thomas, he went on to earn a B.A. from OU before obtaining his J.D. from Northwestern University School of Law. During his law career he helped take the Chesapeake Energy Corp. public, where he also served as primary attorney and an original member of the board of directors. He sat on the boards for both the Westminster School and Heritage Hall in Oklahoma City, as well as the board of visitors for Northwestern University. He was involved with both First Baptist Church in Moore and Crossings Community Church. Memorial contributions can be made to Ukraine Ministries of Oklahoma at 1417 Old Mill Rd., Moore, 73160 or The Shannon Self Debate Team at OU at 100 Timberdell Rd., Norman, 73019.

Charles Eugene "Red" West of Vinita died July 13. Born Sept. 8, 1947, he attended Vinita High School. After earning a B.A. from Northeastern State University

in Tahlequah, he served as an **aircraft service commander in the Air Force and flew 44 combat missions over Vietnam, Cambodia and Laos. He reached the rank of captain and received numerous decorations for his service.**

After his military service, he enrolled at the TU School of Law, earning a J.D. in 1978. He practiced real estate law in Vinita from 1977 until his retirement in 2012. In 2011, he received a presidential appointment to the Northeast Oklahoma District Selective Service Board of Appeals. He was very active in numerous community organizations and was named Vinita's Citizen of the Year in 1992. As a lifelong member of the American Legion, he received the Outstanding Community Achievement of Vietnam Era Veterans award and served as a state delegate during the dedication of the national Vietnam War Memorial. Memorial contributions can be made to the Vinita American Legion for the benefit of the Craig County War Veterans Memorial Association.

Alfred O. "Al" Holl died July 17. He was born July 10, 1921, in Lincoln County, Kan. **In World War II, he served as a navigator in the Army Air Corps and flew 36 missions over Germany. He was awarded the Air Medal with five clusters and the European Theater Ribbon with four battle stars. He remained in the Air Force Reserve, retiring as a lieutenant colonel.** After earning a B.A. from Fort Hays State University in 1947, he went on to earn his J.D. from Washburn University in 1949. He had an active legal career in the oil and gas industry, practicing in both Atlanta and Bartlesville from 1970 to his retirement in 1984. While living in Bartlesville, he was active in community organizations, serving as commander of the Legion Post, the County Civil Defense Director and a member of the Jane Phillips Hospital Board. In addition, he was the founder, director and president of the Boy's Club. Memorial contributions can be made to Covenant Presbyterian Church in Oklahoma City.



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Do nothing

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www.attorneyatwork.com/new-balance-finding-dividing-line-life-work/

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OFFICE SHARE

SOUTH OKLAHOMA CITY LAW FIRM seeks attorney for office sharing arrangement. Rent is negotiable. The firm may refer clients, and/or have available additional legal work. Inquiries should contact Reese Allen at 405-691-2555 or by fax at 405-691-5172.

POSITIONS AVAILABLE

BOUTIQUE AV RATED OKLAHOMA CITY FIRM SEEKS ATTORNEY. The ideal candidate has 3-5 years' experience in securities law including the preparation of registration statements and private placement memorandums. A background in tax accounting or an LL.M in Taxation is preferred. Salary is commensurate with experience. Applications will be kept in the strictest confidence. Under cover letter, send résumé and law school transcripts to "Box L," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152.

DEBEE GILCHRIST, A DOWNTOWN OKLAHOMA CITY, 10 LAWYER, AV RATED FIRM SEEKS ATTORNEY in its aviation practice area, a man or woman of character (organization, determination, humility and loyalty) with 2 years or more experience in commercial transactions, real estate or finance law. Salary is commensurate with experience, plus bonus opportunity. Applications will be kept in the strictest confidence. Under cover letter, send résumé to: HR@debeegilchrist.com.

LITIGATION FIRM SEEKS ASSOCIATE ATTORNEY with 2 to 5 years' experience. Primary areas of firm are complex matrimonial law, complex probate and appellate practice. Must be able to travel throughout state. Salary and benefits commensurate with experience and qualifications. Candidates must submit résumé, 2 current writing examples and 3 references to acain1946@yahoo.com.

DOWNTOWN OKC INSURANCE DEFENSE FIRM SEEKS ASSOCIATE (0-3 years). Candidates must be motivated, detail-oriented, and work well in a fast-paced environment. Preferred strong academic background and practical litigation experience. Please send cover letter, résumé, and transcript to "Box W," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

CONNER & WINTERS, a regional full-service firm, seeks associate attorney with 2 to 4 years of experience for a full-time litigation position in Oklahoma City. The ideal candidate will possess excellent legal writing and research skills, a willingness to work closely with senior attorneys while independently taking responsibility for challenging projects and cases in a variety of industries, creativity and a strong academic background. This partnership track position is immediately available and provides top of the market compensation and benefits. Applicants should submit résumé, law school transcript and writing sample under cover letter to "Recruiting Coordinator" via email to OKCRecruiting@cwlaw.com. All applications are confidential.

PHILLIPS MURRAH P.C. IS LOOKING TO HIRE AN ERISA ATTORNEY with a minimum of 3 years' experience. The Attorney should be experienced in the areas of employee benefit law, executive compensation and estate planning. We offer an excellent compensation and benefit package. All applications will remain confidential. Please send a résumé, cover letter and law school transcript to resume@phillipsmurrah.com.

HEALTH CARE SERVICE CORPORATION, a Mutual Legal Reserve Company that does business as Blue Cross and Blue Shield in five states has an Assistant General Counsel opening in its Legal Division in Tulsa, OK: **BASIC FUNCTION:** This position is responsible for: providing legal advice, support, and coordination of complex legal matters or projects; providing legal support to divisional management on specific business issues; representing the company in dealings with applicable regulatory bodies and government agencies; providing legal advice on insurance, employer benefits, and health care law, provider contracts, ERISA, HIPAA, ACA, government contracts, small group regulatory matters such as underwriting and rating issues; reviewing and analysis of legislation and regulations; addressing general business matters and contracts; some coordination and support of dispute resolution and litigation. **JOB REQUIREMENTS:** Juris Doctor degree and a license to practice law in the state of Oklahoma, 10 years' experience as an attorney with demonstrated understanding/ experience of the health care or insurance field, clear and concise verbal and written communication skills, negotiations and diplomacy skills. **PREFERRED JOB REQUIREMENTS:** 3-5 years recent experience in health care law and/or insurance law. We are an Equal Opportunity Employer dedicated to workforce diversity and a drug-free and smoke-free workplace. Drug screening and background investigation are required as a condition of employment. Please apply online by going to www.bcsok.com.

OPPORTUNITY FOR ATTORNEY with more than six years' experience and portable business with civil defense firm in Oklahoma City. Send résumés to "Box M," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

SENIOR LEVEL LITIGATION ATTORNEY WANTED for Oklahoma City or Tulsa office of an expanding national insurance defense firm. Candidate should have a minimum of 12 years' experience in litigation and must demonstrate strong client relations skills. Construction defect, professional liability, employment, bad faith and personal injury defense work helpful. Compensation package will reward skills, experience and existing relationships. Additional information may be found at www.helmsgreene.com. We would also consider a small litigation team. Please direct inquiries to Steve Greene at sgreene@helmsgreene.com or 770-206-3371.

PRAY WALKER, PC, a full-service Tulsa firm, seeks an associate attorney with 1-3 years of experience in its energy group. The primary focus of the position will be preparation of oil and gas title opinions. Experience in rendering the same and/or comparable landman work required. Qualified candidates should submit cover letter, résumé and law school transcript to dcurtis@praywalker.com.

GROWING BRICKTOWN LAW FIRM seeks motivated and entrepreneurial-minded attorneys with the indicated experience in the following practice areas: 2+ years HR/Employment, 2+ years of general business transactions and mergers/acquisition experience; 2+ years healthcare/regulatory; 2+ years of taxation experience; 2+ years of insurance coverage, bad faith, general insurance defense, and/or trucking/transportation litigation experience. We are looking for 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 litigation. Experienced with a book of business? Young and hungry? We have room for all. 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 for 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@ResolutionLegal.com.

MID-TOWN TULSA LAW FIRM is seeking a fifth attorney to join the practice or office share. Some referrals will be available to the attorney, but an established practice would be ideal. The practice currently involves real estate, estates and estate planning, corporate transactional and some litigation. Referrals for other types of practices would be more abundant. Send résumé to "Box G," Oklahoma Bar Association; PO Box 53036; Oklahoma City, OK 73152.

EXPERIENCED CIVIL LITIGATION ASSOCIATE (3-6 years) needed by Oklahoma City firm to take on existing caseload focused on insurance defense. Salary and benefits commensurate with experience. Send cover letter and résumé to "Box P," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE



EXPERIENCED LITIGATION ASSOCIATE

(2-5 years) needed by AV-rated Tulsa insurance and transportation defense firm. Very busy, fast-paced office offering competitive salary, health/life insurance, 401k, etc. Candidates with strong academic background and practical litigation experience, please send a résumé and writing sample (10 pg. max) in confidence via email to office@gabmh.com. Gibbs Armstrong Borochoff Mullican & Hart, P.C.

PHILLIPS MURRAH PC is seeking an associate attorney with a minimum of 3 years' transactional experience and a strong academic background. We offer an excellent compensation and benefits package. All applications will remain confidential. Please send a résumé, cover letter and law school transcript to resume@phillipsmurrah.com.

DOWNTOWN OKLAHOMA CITY PERSONAL INJURY / LITIGATION FIRM seeks associate with 2-5 years' personal injury and litigation experience, possessing strong writing skills. Salary commensurate with experience. Please send résumé, writing sample, and references to Jeri Howard at jeri.howard@taylorlucas.com.

EXPERIENCED LITIGATION ASSOCIATE (2-5 years) – Downtown Oklahoma City law firm Chubbuck Duncan & Robey seeks litigation associate with experience in civil litigation to augment its fast-growing trial practice. Salary commensurate with experience. Send résumé and salary requirements to Law Office Administrator, 119 N. Robinson Ave., Ste. 820, Oklahoma City, OK 73102.

ANGELA D. AILLES AND ASSOCIATES, in-house counsel for State Farm Mutual Automobile Ins. Co., is seeking to fill a litigation attorney position. Preferred applicants must have experience in personal injury defense. Applicants must exhibit strict adherence to professionalism and ethical behavior. They must be motivated to learn new skills and work in a team environment. Excellent organizational, communication and computer skills are a must to be able to work effectively in a paperless environment. Applicants not licensed to practice law in Oklahoma will not be considered. To view the full job description and apply online, visit our career center at www.statefarm.com/careers and search by Job ID 46304.

MEDIUM-SIZED, DIVERSE LAW FIRM in Oklahoma City is looking for an established attorney with his or her own client base to join our firm. Located near the Capitol with easy access to downtown. Interested candidates may send their résumé to "Box E," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152.

An Advocate for Cindy

By Anne Sublett

Representing children under the Oklahoma Children's Code is sometimes challenging in ways distinct from the representation of adults. It often surprises those unfamiliar with this code that, with limited exceptions, the child's attorney in a case involving allegations of abuse or neglect is required to represent the child's expressed interest, not his or her best interest. In other words, most kids in such cases are the lawyer's clients like any other client with rights to direct the attorney's advocacy goals.

But, as any parent knows, nothing involving kids is that simple. Due to the imbalance in power between an adult and a child, among other things, it is not unusual for a child to want to please an adult with whom the child is communicating, including the child's lawyer. In such cases, how does the attorney determine her client's "expressed" interest?

And that was the problem — writ in bold — in representing Cindy (not her real name, of course). Until she was nine years old, Cindy was subjected to sexual abuse and beatings with belts by her stepfather, her older stepbrothers and her stepfather's friends, coupled with threats that he would kick her out of her home if she told anyone. Despite the threats, Cindy told a teacher what was happening at home, and she and all of her siblings were removed from her mother and stepfather's custody by the

state of Oklahoma. Nonetheless, the need to please others above all had been deeply imprinted onto Cindy and colored all of her interactions with adults.

When I was appointed to represent Cindy, her options were limited. Cindy had already been in state custody for five long,



troubled years. She had had 18 placements in foster homes, shelters and mental hospitals where she experienced more physical, sexual and emotional abuse. Although Cindy's mother's parental rights were still intact, her mother had a new boyfriend with whom she planned to marry and move to Florida. She clearly had no intention of derailing her romantic relationship by assuming the role of mother full time. At the same time, Cindy was in a foster home with a couple who expressed a desire to adopt her and she

expressed her desire for the same. The state had approved the couple for adoption so, after a series of conversations about what termination of her mother's parental rights meant, Cindy expressed a willingness to have her mother's parental rights terminated. I filed a motion to begin the process. As we moved toward trial, however, three things became clear: first, mother opposed termination of her parental rights; second, mother's attorney planned to call Cindy as a witness; and finally, Cindy was not going to be able to testify that she wanted her mother's rights terminated because she didn't want to displease her mother. I withdrew the motion to terminate parental rights.

After the prospective adoptive couple moved away unexpectedly and several more placements failed, Cindy disclosed to me that what she really wanted was to be with her younger brothers who were in guardianship with her mother's sister. Contrary to what the state believed and had told the court, Cindy's aunt wanted custody of Cindy as well. We were able to put Cindy in a guardianship with her aunt, and finally, she was in a safe, permanent, loving home. All because she was finally able to "express" what she wanted to her lawyer. Happily ever after? Maybe not after such a troubled past, but clearly with someone who loves and is committed to her.

Ms. Sublett practices in Tulsa.

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