THE OKLAHOMA BAR
Journal
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Court Issue

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Jon L. Hester, Program Planner and Moderator

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Norman: OU College of Law, February 16, 2018

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2017 OK 94

In Re: Rules Creating and Controling the Oklahoma Bar Association

SCBD ~~4483~~. December 4, 2017
As Corrected December 6, 2017

ORDER

This matter comes on before this Court upon an Application to Amend Art. II Section 2 of the Rules Creating and Controlling the Oklahoma Bar Association, 5 O.S. ch. 1, app. 1, Creating a New Member Category and Suspending Further Application for Senior Member Category. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto effective January 1, 2018.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 4th day of December, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Exhibit A

ARTICLE II
Section 2 Members Classified

Members of the Association shall be divided into ~~three~~ four classes, namely, (a) ~~active members~~Active Member, (b) ~~senior members~~ Senior Member, (c) ~~associate members~~ Associate Member and (d) Retired Member. No other categories of membership may be allowed. The annual dues shall be paid according to Art. VIII, § 1. Tweedy v. Oklahoma Bar Assoc., 624 P.2d 1049, 1052 (Okla. 1981); R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 415 (Okla. 1972); In re Integration of State Bar, 185 Okla. 505, 95 P.2d 113 (1939).

(a) Active Members. Active ~~members~~ Members shall be all members not enrolled as ~~senior members~~ Senior Members, Retired, or ~~associated members~~ Associate Members.

(b) ~~SENIOR MEMBERS~~ Senior Member. An ~~active member~~ Active Member in good standing who ~~is~~ was seventy (70) years of age as of the first day of January ~~of the then current year~~ 2018, ~~may become a senior member~~ and previously became a Senior Member by filing with the Executive Director his or her statement, setting forth the month, day and year of ~~his~~ birth and requesting ~~senior membership~~ Senior Member classification. Thereafter, he or she shall be entitled to all the privileges and advantages of an Active Member ~~active membership~~ in the Association without payment of further dues, with the exception that he or she shall not receive the Bar Journal free of charge. If a ~~senior member~~ Senior Member desires to receive the Bar Journal, ~~the senior~~ he or she shall pay for an annual subscription, the cost of which shall be based upon production and mailing costs. No additional members shall be added to this classification after January 1, 2018. After January 1, 2018, all members who are seventy (70) years of age or older, who are actively engaged in the practice of law, and who are not Senior Members, Associate Members or Retired Members shall pay dues in the amount specified for those in practice for more than three (3) years.

(c) Associate Member. A member in good standing who files, or on whose behalf there is filed, with the Executive Director, a statement that, by reason of illness, infirmity, or other disability, he or she is unable to engage in the practice of law shall become an ~~associate member~~ Associate Member of the Association for the duration of such illness, infirmity or other disability ~~and~~ until ~~he is~~ restored to ~~his~~ the former classification. An ~~associate member~~ Associate Member shall not engage in the practice of law or be required to pay dues during such period. He or she may, on annual request, receive the Bar Journal during his or her disability. The member, on causing an appropriate showing thereof to be made to the Executive Director, shall be reclassified to be an Active Member ~~the membership held prior to such illness, infirmity or other disability~~ and shall be required to pay the dues applicable thereto beginning January 2nd next following such reclassification and to pay the cost of the Bar Journal during such disability if he or she has elected to receive it.

(d) Retired Member. An Active Member in good standing who reaches age seventy (70) on, or after January 2nd, 2018 and is no longer engaged in the practice of law may notify the Executive Director, in writing, that he or she wishes to be designated as a "Retired Member." Such request shall include a statement that the member is not engaged in the practice of law in any jurisdiction. Members who request Retired Member classification shall be relieved from paying dues and may purchase the Bar Journal and other member benefits that might be made available at a price equal to the cost to the Oklahoma Bar Association in providing the member benefit. An Active Member requesting Retired Member classification must have reached age seventy (70) prior to January 2nd of the year he or she is requesting to be reclassified to Retired Status and relieved from paying dues. Those members who were previously classified as Senior Members prior to the adoption of this subsection may change their classification to Retired Member if a request in writing is submitted to the Executive Director with a request for the reclassification and a statement that the requesting member is no longer engaged in the practice of law.

~~(d)~~ (e) Reclassification to Active Membership – Showing Competence. Whenever a member seeks restoration to ~~active membership~~ Active Member classification after the lapse of two (2) years or less, he or she may be reinstated as provided in Rule 11.8 of the Rules Governing Disciplinary Proceedings. After the lapse of more ~~that~~ than two (2) years, an ~~associated member~~ Associate Member may be restored to ~~active membership~~ Active Member classification upon compliance with Rule 11.1 through Rule 11.7 of the Rules Governing Disciplinary Proceedings.

~~(e)~~ (f) Voting Members Defined. Active and ~~senior members~~ Senior Members shall constitute the voting members of the Association. Associate and Retired Members shall not be Voting Members.

2017 OK 103

In re: Amendments to Rules For Mandatory Judicial Continuing Legal Education

No. SCAD-2017-91. December 18, 2017

ORDER

Pursuant to our general superintending control over all inferior courts, Okla. Const., art. 7, § 4, and our general administrative authority over state courts, Okla. Const., art. 7, § 6, we hereby amend Rules 1, 2, and 3 of the Rules for Mandatory Judicial Continuing Legal Education, 5 O.S., ch. 1, app. 4-B. The amended rules are set out in the attachments hereto, with Exhibit "A" showing markup and Exhibit "B" a clean copy of the new rules.

It is therefore ordered that the amended Rules for Mandatory Judicial Continuing Legal Education are hereby approved and adopted and shall be effective from January 1, 2017. It is further ordered that the Rules for Mandatory Judicial Continuing Legal Education as amended shall be included in the official publication of the Oklahoma Statutes.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 18th day of December, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR

Exhibit "A"

Rules for Mandatory Judicial Continuing Legal Education
Chapter 1, App. 4-A
Rule 1. Judges Who Must Obtain Annual Judicial Continuing Legal Education.

All Judges of the Oklahoma District Courts, the Court of Civil Appeals, Court of Criminal Appeals, and Justices of the Oklahoma Supreme Court, shall complete at least twelve (12) hours annually of Mandatory Judicial Continuing Legal Education (MJCLE). Credit may be earned through teaching in an approved continuing legal education program or approved judicial continuing legal education program. Presentations accompanied by thorough carefully prepared written materials will qualify for MJCLE credit on the basis of six (6) hours of credit for each hour of presentation.

Rules for Mandatory Judicial Continuing Legal Education
Chapter 1, App. 4-A
Rule 2. Approved Courses for Mandatory Judicial Continuing Legal Education.

The hours of Mandatory Judicial Continuing Legal Education must be obtained by attendance at MJCLE courses or programs provided by the Administrative Office of the Courts, or a National Judicial College course, or programs

presented at monthly meetings of the Oklahoma Chapters of the American Inns of Court, or any other program specially approved by the Chief Justice of the Oklahoma Supreme Court for MJCLE. General continuing legal education programs or courses may not be used to satisfy no more than six (6) hours of the MJCLE requirement.

Rules for Mandatory Judicial Continuing Legal Education
Chapter 1, App. 4-A
Rule 3. Judicial Continuing Education Programs at Meetings of the Oklahoma Judicial Conference.

The Administrative Office of the Courts shall provide MJCLE courses or programs at all meetings of the Oklahoma Judicial Conference, and at other times as scheduled by the Administrative Office of the Courts. The Administrative Office of the Courts shall maintain records of those Judges and Justices attending MJCLE programs and courses provided ~~by the Administrative Office of the Courts~~.

Exhibit "B"

Rules for Mandatory Judicial Continuing Legal Education
Chapter 1, App. 4-A
Rule 1. Judges Who Must Obtain Annual Judicial Continuing Legal Education.

All Judges of the Oklahoma District Courts, the Court of Civil Appeals, Court of Criminal Appeals, and Justices of the Oklahoma Supreme Court, shall complete at least twelve (12) hours annually of Mandatory Judicial Continuing Legal Education (MJCLE). Credit may be earned through teaching in an approved continuing legal education program or approved judicial continuing legal education program. Presentations accompanied by thorough carefully prepared written materials will qualify for MJCLE credit on the basis of six (6) hours of credit for each hour of presentation.

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2017 OK 104

In re: Amendments to Rule 7.3, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A

No. SCAD-2017-92. December 18, 2017

ORDER

Rule 7.3 of the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A, is hereby amended as shown with markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 18th day of December, 2017.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR

Exhibit "A"

Rules Governing Disciplinary Proceedings.
Chapter 1, App. 1-A
Rule 7. Summary Disciplinary Proceedings Before Supreme Court.
§7.3. Interim Suspension from Practice.

Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment

or information and the judgment and sentence, the Supreme Court ~~shall~~may by order immediately suspend the lawyer from the practice of law until further order of the Court. In ~~its~~an order of suspension the Court ~~shall~~may direct the lawyer to ~~appear at a time certain~~file a statement, to show cause, if any ~~he~~the lawyer has, why the order of suspension should be set aside. Upon good cause shown, the Court may set aside its order of suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession.

Alternatively, upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court may direct the lawyer to file a statement, to show cause, if any the lawyer has, why an order of immediate interim suspension from the practice of law should not be entered. Upon good cause shown, the Court may decline to enter an order of immediate interim suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession. If good cause is not shown, the Court may by order immediately suspend the lawyer from the practice of law until further order of the Court.

Exhibit "B"

Rules Governing Disciplinary Proceedings.
Chapter 1, App. 1-A
Rule 7. Summary Disciplinary Proceedings Before Supreme Court.
§7.3. Interim Suspension from Practice.

Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court may by order immediately suspend the lawyer from the practice of law until further order of the Court. In an order of suspension the Court may direct the lawyer to file a statement, to show cause, if any the lawyer has, why the order of suspension should be set aside. Upon good cause shown, the Court may set aside its order of suspension when it appears to be in the interest of justice to do so, due regard being had to maintaining the integrity of and confidence in the profession.

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2018 OK 1

In the Matter of the Adoption of: M.A.S., a minor child. Michael Cruce, Appellant, v. Stephen Cullen Asbell, Appellee.

No. 114,237. January 17, 2018

ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION II

¶0 Biological father appealed the decision of the District Court of Creek County, Oklahoma, Sapulpa Division, Honorable Richard Woolery, declaring the minor child eligible for adoption without the biological father's consent. The Court of Civil Appeals, Division II, affirmed the trial court's decision, and this Court granted certiorari review.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT ORDER REVERSED AND REMANDED WITH INSTRUCTIONS.

Carla R. Stinnett, G. Gene Thompson, Stinnett Law, Sapulpa, Oklahoma, for Appellant.

Ashley Jacobs, Bristow, Oklahoma, for Appellee.

China Matlock, Tulsa, Oklahoma, for the Minor Child.

Colbert, J.

¶1 The question presented for review is whether the trial court's order declaring M.A.S. eligible for adoption without the biological father's consent, pursuant to Okla. Stat. tit. 10, § 7505-4.2(B)(1) and (H)(2011),[1] was supported by clear and convincing evidence. We find that it was not.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Bristow Division

¶2 M.A.S. was born on September 27, 2007, to Michael Cruse (Father) and Whitney Asbell (Mother). The couple never married. By an Agreed Decree of Paternity, Father was declared to be M.A.S.'s natural father on October 31, 2008. The order awarded mother sole custody of M.A.S. and Father unsupervised visitation which Father exercised. Mother later married Stephen Asbell (Stepfather) on May 2, 2009.

¶3 On April 8, 2011, a court ordered Father to pay monthly child support in the amount of $447.91. The court also determined that Father did not owe any past-due child support for the time period of November, 2008 through and including April, 2011. Thereafter, Father tendered monthly payments. But, at times, Father paid less than the full amount owed. Father, however, paid larger sums in the subsequent months.

¶4 On January 8, 2014, Mother sought and obtained an ex parte emergency order that prohibited unsupervised visitation between M.A.S. and Father. On January 13, 2014, the court modified its emergency order to permit Father weekend supervised visitation with M.A.S. upon successfully passing a drug test. However, no overnight visitation would be permitted. Specifically, the order stated:

> [I]f the Petitioner test positive for illegal substances then he shall reimburse the Respondent for the cost of the test within five (5) days . . . The results of the drug test shall be faxed to Petitioner's . . . and Respondent's lawyer . . . Petitioner shall submit to the test within 24 hours from this order . . . If Petitioner passes his drug test then to have nonovernight visitation to be monitored . . . at the Respondent's expense . . . [T]ime with the child shall be on Saturdays from 8am to 8pm and Sundays from 8am to 8pm.

¶5 Father filed a motion to modify custody on January 16, 2014. In it, Father disputed the allegations that gave rise to the court's emergency order. Father also asserted that a material change in circumstances had occurred that adversely affected M.A.S.'s best interests. Father sought full custody subject to the granting of "reasonable visitation to the [Mother]." The record is silent regarding the disposition of Father's motion. On March 6, 2014, Father filed a subsequent motion to enforce visitation and requested a hearing. In it, Father alleged full compliance with the court's order; that he successfully passed the drug test; yet, Mother continued to deny Father any contact or visitation with the minor child. The record is also silent concerning the disposition of that motion.

¶6 On April 21, 2014, Mother filed an application for a contempt citation against Father, contending that he failed to pay child support from January through April of 2014. The record is silent concerning the disposition of Mother's application. On April 22, 2014, the proceeding was reassigned to the Honorable Richard Woolery, Creek County Division, "for all further proceedings in this cause."[2]

B. Adoption Proceeding – Present Appeal

¶7 On January 6, 2015, Stepfather filed an application to adopt M.A.S. without Father's consent in the Sapulpa Division of the Creek County District Court.[3] Stepfather alleged that Father had not substantially complied with the court's child-support order and that Father had failed to maintain a substantial and positive relationship with M.A.S. Because of this, Stepfather asserted, Father's consent is not required in accordance with the terms of Okla. Stat. tit. 10 § 7505-4.2(B)(1) and (H)(2011). Stepfather alleged further that M.A.S. is eligible for adoption without Father's consent and, that it is in M.A.S.'s best interests if Father's rights are terminated. Father denied all allegations contained in the application for adoption without consent.

¶8 The parties stipulate the relevant period for review to be January 6, 2014 to January 6, 2015 – the twelve consecutive months of the last fourteen months prior to filing the petition for adoption. The stipulated fourteen-month window was November 6, 2013 to January 6, 2015. According to the Department of Human Services (DHS) record of payments and litigation time line – to which the parties stipulated – Father paid the following amounts during the fourteen month relevant window: November 2013, $440; December 2013, $440; August 2014, $103.36; September 2014, $310.08; and January 2015, $517. In February of 2015, Father made an additional payment of $4,144.44. In all, Father tendered $5,954.88 in support payments.

¶9 The parties appeared before the trial court and submitted their respective briefs on April 6, 2015. By agreement of the parties and in lieu

of a hearing, the trial court stated it would rule upon the issues by minute order, which the trial court entered on April 20, 2015. In it, the trial court stated that,

> [The Court] has reviewed the briefs and case law submitted by the parties, the agreed upon litigation time line submitted to aid the court, as well as the applicable statutes. The court finds that the Respondent/Natural Father has not substantially complied with a valid child support order within the statutorily contemplated time frame; and the Respondent/Natural Father has not maintained a significant relationship with the child within the statutorily contemplated time frame. The court acknowledges that there may have been some obstacles interposed to make maintaining such a relationship difficult but this court established parameters whereby visitation could occur and the Respondent / Natural Father has not taken advantage of those opportunities, which conduct this court finds to be willful. Therefore, the Petitioner's application for an order declaring this child to be eligible for adoption without the consent of the Natural Father is sustained.

A subsequent order was issued on August 10, 2015, declaring M.A.S. eligible for adoption without Father's consent. Father appealed and the Court of Civil Appeals, Division II, (COCA) affirmed. Father sought certiorari review which this Court granted.

II. STANDARD OF REVIEW

¶10 A parent's fundamental right to the care, custody, companionship and management of his or her child is a right protected by the United States and Oklahoma Constitutions. In re Adoption of D.T.H., 1980 OK 119, ¶ 18, 615 P.2d 287, 290 (overruled on other grounds). The law presumes that both biological parents must consent before an adoption of their minor child may be effectuated. In re Adoption of C.D.M., 2001 OK 103, ¶ 13, 39 P.3d 802, 807, cert. den. 535 U.S. 1054, 122 S.Ct. 1911, 152 L.Ed.2d 821. But, if both parents fail to consent to the adoption of a child, the petitioner must file an application to the court stating the reason that the consent or relinquishment of a parental right is unnecessary. Okla. Stat. tit. 10, § 7505-4.1. The Oklahoma Legislature has prescribed certain adoption situations, found at Okla. Stat. tit. 10, § 7505-4.2, where prior parental consent is unnecessary, "which effectively terminates that parent's rights." In re Adoption of C.D.M., ¶ 13, 39 P.3d at 807.

¶11 Adoption statutes in derogation of a biological parent's rights must be strictly construed in favor of the biological parent. In re Adoption of C.M.G., 1982 OK 156, ¶ 9, 656 P.2d 262, 265. The burden rests on the party who seeks to destroy the parent-child bond to establish, by clear and convincing evidence, that an adoption without consent or termination of parental rights is warranted. In re Adoption of V.A.J., 1983 OK 23, ¶ 6, 660 P.2d 139, 141. The requisite "[c]lear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." In re C.G., 1981 OK 131, ¶ 17 n. 12, 637 P.2d 66, 71 n. 12.

¶12 This Court examines the trial court's conclusion – finding a minor child eligible for adoption without the biological parent's consent – to determine if that conclusion is supported by the clear weight of the requisite clear and convincing evidence. In re Adoption of R.W.S., 1997 OK 148, ¶ 10, 951 P.2d 83, 86; In re Adoption of J.L.H., 1987 OK 25, ¶ 12, 737 P.2d 915, 918; In re Adoption of K.P.M.A., 2014 OK 85, ¶ 13, 341 P.3d 38, 43. So, unless the trial court's determination rests on clear and convincing evidence, that determination will be reversed. In re Adoption of C.D.M., ¶ 13, 39 P.3d at 807. This Court examines issues of fact under a "clear and convincing" standard and reviews issues of statutory construction, a matter of law, de novo. Lang v. Erlanger Tubular Corp., 2009 OK 17, ¶ 5, 206 P.3d 589, 590.

III. DISCUSSION

¶13 We note first that the proceedings below were extremely unusual. No evidentiary hearing was held concerning the application for adoption without consent or the child's best interests; and thus, no evidentiary testimony was gathered concerning Father's ability or inability to comply with the court-ordered support obligation during the relevant period. Rather, the parties agreed that the trial judge's ruling would be based solely on the parties' stipulations and briefs. That, it cannot do. Briefs and the references to the proof contained therein do not constitute evidence. See Willis v. Sequoyah House, Inc., 2008 OK 87, ¶ 12, 194 P.3d 1285, 1290, fn. 14.[4] As termination of Father's parental rights are subsumed in Stepfather's application

for adoption without consent, an evidentiary hearing is not only warranted, it is mandatory.

¶14 Preadoption proceedings to terminate parental rights must conform to sections 7505-2.1[5] and 7505-4.1. See 7505-4.2. The relevant subsections, 7505-2.1(H) governing Petitions Terminating Rights of Putative Father and 7505-4.1(G) governing Termination of Parental Rights Without Consent – Process, are virtually identical and mandate that: "A proceeding pursuant to this section for determination of necessity of parental consent or for termination of parental rights shall be **heard** by the court without a jury." § 7505-4.1(G) (emphasis added). We interpret those mandates to mean that the trial judge becomes a trier of fact, Soldan v. Stone Video, 1999 OK 66, ¶ 6, 988 P.2d 1268, 1269, and an evidentiary hearing must occur before a trial court may terminate fundamental parental rights and declare the minor child eligible for adoption. In proceedings of this magnitude, it is the trial court's sole prerogative to make specific findings of the ultimate facts as well as conclusions of law upon which the trial court's order is based. See §§ 7505-2.1, 7505-4.1; See also, In re Adoption of K.P.M.A., 2014 OK 85, 341 P.3d 38. For the reasons discussed herein, the trial court's summary proceedings were improper.

1. Failure to Pay Support

¶15 According to § 7505-4.2(B), parental consent is not required when the parent has willfully failed, refused or neglected to contribute to the support of the minor "for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding . . . a petition for adoption of a child or a petition to terminate parental rights . . . [i]n substantial compliance with an order . . . adjudicating the duty, amount, and manner of support; . . .." The burden rests with the party that filed the adoption without consent to demonstrate that parental consent is not required. In re Adoption of K.P.M.A., ¶ 13, 341 P.3d at 43. The statute, strictly applied, requires any failure on Father's part to substantially comply with the support order to occur for twelve consecutive months and the failure must also be willful. The statute's "willfulness" and "substantial compliance" terms are discrete provisions this Court will address separately.

¶16 The term "willfully" is understood to modify all verbs in the series that follow the term. Whether the requisite willfulness exists is a fact question to be determined on a case by case basis. In re Adoption of L.D.S., 2006 OK 80, ¶ 12, 155 P.3d 1, 5. A parent's financial ability to pay a support obligation is relevant in determining whether the parent "willfully" failed, refused, or neglected to pay child support. See In re Adoption of J.L.H., ¶ 14, 737 P.2d at 920. A parent, financially responsible for child support then, may not be in substantial compliance; but, at the same time, not willfully so. In re Adoption of C.D.O., 2002 OK CIV APP 9, ¶ 16, 39 P.3d 828, 832. This Court has held previously that the "willfulness requirement of the statute is intended to prevent an arbitrary application of the statute and a parent's inability to comply with a support order would always be relevant to show an absence of willfulness." In re Adoption of D.T.H., ¶ 19, 615 P.2d 287, 291.

¶17 According to COCA, the stipulated evidence presented below led it to conclude that Father's failure to pay was willful and not based on an inability to pay support. COCA, relying on the sparse record and insufficient stipulations, drew the inference that Father's failure to pay was willful based on Father's abrupt change in meeting his support obligation and the sizable payment after the application for adoption was filed. We cannot agree.

¶18 First, for a part of the critical period – the year immediately preceding the filing of the adoption petition – Father tendered 3 support payments. Although the 3 support payments were less than the full amount, there is no clear and convincing evidence that Father had the financial ability to pay support or that he incapacitated himself in order to evade the support obligations.

¶19 Second, the record supports the alternative conclusion that Father's change in meeting his support obligation was not abrupt, as the courts below concluded, but instead consistent with Father's pattern of payments tendered since April 8, 2011. From April 2011 to January 2014, the date immediately preceding the adoption petition, Father tendered payments but at times less than the full amount owed. However in the subsequent months, Father paid larger sums – just as he did in February 2014 when Father tendered the $4,144.44 – approximately nine times the monthly amount required.

¶20 Neither the parties' briefs nor the references to the proof contained therein constitute the clear weight of the requisite clear and convincing evidence. Although the parties stipu-

lated to the self-authenticating Department of Human Services's record of payments, that record, standing alone, fails to provide any evidentiary insight into Father's ability or inability to comply with his support obligation. As stated previously, a parent's ability or inability to provide financial support is always relevant to the issue of willfulness. In re Adoption of J.L.H., 1987 OK 25, 737 P.2d 915; In re Adoption of V.A.J., 1983 OK 23, 660 P.2d 139.

¶21 Absent a showing of an obligor's ability to meet a court-ordered child-support obligation, a record of payments may be sufficient to determine the factual question of whether Father was in substantial compliance with a support order. However, it is insufficient for a clear and convincing determination that Father's nonpayment was due to a willful failure, refusal or neglect in accordance with the § 7505-4.2 terms. Hence, any inference that may be drawn from Father's, albeit "abrupt", change in the discharge of his support obligation without an evidentiary hearing to determine his ability to meet his court-ordered support obligation, does not rise to the level of clear and convincing evidence required – where as here – the fundamental right of a parent-child relationship is implicated. Further, an order that merely recites statutory language and concludes that Father "has not substantially complied within the statutorily contemplated time frame . . . which this court finds to be willful," does no more to facilitate a meaningful judicial review than merely stating "petition granted."

¶22 Based on the dearth of evidence, deficient record and irregular proceedings below, the trial court's finding of Father's willful failure, refusal or neglect to contribute to the support of the minor child was not supported by the clear weight of the requisite clear and convincing evidence. Because willfulness was not established by clear and convincing evidence, we need not reach the issue of substantial compliance. The trial court's ruling was in error.

2. Substantial and Positive Relationship

¶23 "A parent's consent to adoption is also not required from a parent who fails to establish and/or maintain a substantial and positive relationship with the minor child," In re Adoption of G.D.J., 2011 OK 77, ¶ 19, 261 P.3d 1159, 1164 – 65, "**for . . . twelve (12) consecutive months** out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of a child." Okla. Stat. tit. 10, § 7505-4.2(H)(1) (emphasis added). Here, the relevant fourteen month window, from which the twelve consecutive month period is derived, runs between January 6, 2015 and back to November 6, 2013. Section 7505 – 4.2(H)(3) delineates the "substantial and positive relationship" requirement as either "frequent and regular visitation or frequent and regular communication" between a parent and child, or some other exercise of "parental rights and responsibilities."

¶24 The record indicates that Father had exercised his right to visitation with M.A.S. since October 31, 2008, when the first visitation schedule was entered, until January 6, 2014. On January 8, 2014, Mother obtained an ex parte emergency order suspending Father's visitation. Father conceded that he has not had contact with M.A.S. since the emergency order was entered. Based on the sparse record and Father's concession, Father has failed to maintain a substantial and positive relationship with M.A.S. as defined by the statute from January 8, 2014 to January 6, 2015. However, there exists a two-day gap within the requisite twelve month period – January 6, 2014 to January 8, 2014 – where the evidence does not clearly and convincingly establish that Father did not exercise visitation. Notwithstanding Father's concession, the requisite twelve consecutive months of no contact have not been met. Adoption statutes in derogation of a biological parent's rights must be strictly construed in favor of the biological parents. In re Adoption of C.M.G., ¶ 9, 656 P.2d 262, 265. Strictly construing and applying the statute and the constitutional basis for strict construction, we find that the record does not demonstrate by clear and convincing evidence that there have been twelve consecutive months of no contact between Father and M.A.S.

¶25 Even assuming that the twelve consecutive month requirement was satisfied, Father avers that the emergency order completely prevented his contact with M.A.S.; and therefore, denied him the opportunity to maintain the established father-child relationship he and M.A.S. once enjoyed. Father's evidence consisted of the stipulated litigation time line, listing Mother's request for the emergency order, and the various motions filed by the parties – all of which precedes the notice of hearing on Stepfather's petition for adoption without consent.

¶26 Section 7505-4.2(H)(2) permits a defense to the "establish[ing] and/or maintain[ing] a

substantial and positive relationship" requirement. To successfully utilize this defense, the parent must prove that,

> prior to the notice of the hearing on the application for adoption without consent, the parent can **prove to the satisfaction of the court** that he or she has **taken sufficient legal action** to establish and/or maintain a substantial and positive relationship with the minor child. Such action is based on the parent being denied the opportunity to have a relationship with the minor child due to the actions of the custodian.

In re Adoption of G.D.J., ¶ 19, 261 P.3d at 1165 (emphasis added).

¶27 Mother is the legal custodian of M.A.S. Upon Mother filing the emergency order on January 8, 2014, and for the next five days thereafter, Father was prohibited from "frequent and regular visitation" with M.A.S. as contemplated by the statute. Thereafter, on January 13, 2014, the trial court modified its order to permit limited visitation if certain conditions were met. Beyond this, the record is silent as to any further judicial pronouncements or determinations on the matter. It is patently clear that on two occasions Father attempted to resume visitation with M.A.S. well before the adoption petition was filed. First, when Father filed his motion to modify custody on January 16, 2014, three days after the modified emergency order was entered; and second, when Father filed a motion to enforce visitation on March 6, 2014. Based on the record, the trial court's orders and Father's contentions contained in his motions, this Court concludes that an impediment to the parent-child relationship existed. Clearly, Father had taken legal action, but whether such actions were "sufficient" was the issue before the trial court.

¶28 The provision, proof "to the satisfaction of the Court" requires Father to prove that he took sufficient legal action against a denial of opportunity to maintain a substantial and positive relationship with M.A.S. by the custodian prior to the date of notice of the hearing on the adoption without consent. In re Adoption of G.D.J., ¶ 27, 261 P.3d at 1166-67. In Steltzlen v. Fritz, 2006 OK 20, 134 P.3d 141, this Court construed an identical provision in the context of a putative father and the discovery of parenthood. In Steltzlen, the trial judge found that the father had made a sufficient attempt to determine whether he had fathered a child, out of wedlock, by offering to take a DNA test. ¶ 15, 134 P.3d at 145. This Court affirmed the trial court's ruling and recognized that the mere offering of a DNA test satisfied the proof "to the satisfaction of the Court" requirement in that case. Here, the record demonstrates that Father pursued visitation and custody by filing motions in a separate action. If volunteering to take a DNA test satisfies the statute, surely Father's motion to modify custody and motion to enforce visitation does as well.

¶29 We reiterate that adoption statutes in derogation of a biological parent's rights must be strictly construed in favor of the biological parent. In re Adoption of C.M.G., ¶ 9, 656 P.2d at 265. Strictly construing and applying the statute and the constitutional basis for strict construction, we find that the record in this matter does not demonstrate by clear and convincing evidence that Father's visitation and custody filings were insufficient legal actions at maintaining a substantial and positive relationship with M.A.S.

3. The Best Interests of the Child

¶30 "The best interests of the child serve as the polestar in all adoption proceedings." In re Adoption of M.J.S., 2007 OK 44, ¶ 30, 162 P.3d 211, 222. Statutes governing hearings for termination of parental rights and adoption without consent require the trial court to determine that the termination of parental rights or adoption without consent be in the child's best interests.[6] In addition to the statutory requirement, this Court requires that any adoption or termination of parental rights promote the child's best interest. In re Adoption of C.D.M., ¶ 22, 39 P.3d at 810. Unlike the statutory grounds for granting adoption without consent, there is no time constraint, or relevant period, for best interests of the child analysis.

¶31 It is incumbent on the trial court to determine whether the adoption would be in the child's best interests prior to declaring the child eligible for adoption. In re Adoption of C.D.M., ¶ 23, 39 P.3d at 810. Here, there is nothing in the record to support the trial court's order finding that the adoption, without Father's consent, was in the child's best interests. Rather, the trial court decided this case on submitted briefs and failed to hold an evidentiary hearing. We hold that the stipulations and allegations within those briefs do not rise to the level of clear and convincing evidence that the

adoption, absent Father's consent, would be in M.A.S.'s best interests.

IV. CONCLUSION

¶32 From all we have said thus far, it should be clear that it is imperative that a trial court's grant of an adoption petition without a parent's consent must be supported by clear and convincing evidence. The requisite evidence cannot be demonstrated in a summary proceeding absent an evidentiary hearing. Because granting an adoption petition without parental consent necessarily obviates parental consent, the trial court **shall** have an evidentiary hearing.

¶33 For the reasons discussed herein, we hold that the trial court's August 10, 2015 Order declaring M.A.S. eligible for adoption was not supported by clear and convincing evidence. Accordingly, we reverse the trial court's order, but remand with the instruction to hold an evidentiary hearing to determine Father's ability or inability to comply with the support order and whether any failure on Father's part was willful.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT ORDER REVERSED AND REMANDED WITH INSTRUCTIONS.

CONCUR: Combs, C.J., Gurich, V.C.J., Edmondson, Colbert, and Reif, JJ.

CONCUR IN RESULT: Kauger, J.

DISSENT: Winchester and Wyrick, JJ.

Colbert, J.

1. The relevant portions of § 7505-4.2 states:

B. Consent to adoption is not required from a parent who, for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of a child or a petition to terminate parental rights pursuant to Section 7505-2.1 of this title, has willfully failed, refused, or neglected to contribute to the support of such minor:

1. In substantial compliance with an order entered by a court of competent jurisdiction adjudicating the duty, amount, and manner of support; . . .

H. 1. Consent to adoption is not required from a parent who fails to establish and/or maintain a substantial and positive relationship with a minor for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of the child.

2. In any case where a parent of a minor claims that prior to the receipt of notice of the hearing provided for in Sections 7505-2.1 and 7505-4.1 of this title, such parent had been denied the opportunity to establish and/or maintain a substantial and positive relationship with the minor by the custodian of the minor, such parent shall prove to the satisfaction of the court that he or she has taken sufficient legal action to establish and/or maintain a substantial and positive relationship with the minor prior to the receipt of such notice.

3. For purposes of this subsection, "fails to establish and/or maintain a substantial and positive relationship" means the parent:

a. has not maintained frequent and regular contact with the minor through frequent and regular visitation or frequent and regular communication to or with the minor, or

b. has not exercised parental rights and responsibilities.

Okla. Stat. tit. 10.

2. The relevant section of Okla. Stat. tit, 10, §7503-3.2(B)(2011) requires the consolidation of proceedings,

[i]f a proceeding for adoption or for termination of parental rights of the putative father and a paternity action by the putative father regarding the same minor are both pending in the courts of this state, upon motion of any party, the court having jurisdiction over the paternity action shall transfer the paternity proceeding to the court in which the adoption or termination proceeding is pending, whereupon the two proceedings may be considered.

Here, Stepfather's application alleged Mother requested the pending motions and applications be transferred and consolidated with Stepfather's application for adoption in the Sapulpa Division. The record appears incomplete. In addition to requesting that M.A.S be declared eligible for adoption without the Father's consent, Stepfather's application for adoption requests that Father's parental rights be terminated. The record does not contain a petition for adoption. It does contain Father's response to this petition wherein he denies the allegations contained therein.

3. On March 16, 2015, Stepfather amended his application but made no substantive changes.

4. In Willis v. Sequoyah House, Inc., 2008 OK 87, ¶ 12, 194 P.3d 1285, 1290, this court discussed the four different forms of acceptable proof that may be submitted as evidence, three of which are authorized by statute. Namely – "(1) evidence from oral proceedings by living (viva voce) testimony, (2) by deposition and (3) by affidavit. The fourth was developed by the common law. That form permits in some proceedings the use of acceptable evidentiary substitutes." (internal citations omitted).

5. The relevant terms of § 7505-2.1 provide:

A. 1. Prior to the filing of a petition for adoption, a child-placing agency, attorney, or prospective adoptive parent to whom a parent having legal custody has executed a consent to adoption or has permanently relinquished a minor born out of wedlock may file a petition for the termination of the parental rights of a putative father or a parent of the child. The petition shall be filed with the district court of the county in which the relinquishment was executed or in the county in which the putative father, a parent, the petitioner, or the minor resides at the time of the filing of the petition.

2. The affidavit of expenses required by subsection A of Section 7505-3.2 of this title is not required to be attached to a petition filed pursuant to this section, nor must it be filed prior to issuance of an order terminating parental rights entered in a proceeding brought under this section.

B. 1. Notice of the hearing on the petition to terminate parental rights and a copy of the petition shall be served upon such putative father or a parent in the same manner as summons is served in civil cases, not less than fifteen (15) days prior to the hearing.

2. The notice shall contain the name of the putative father or parent, or if unknown, the name of the minor, the date of birth of the minor, the date of the hearing, and the ground or grounds for which termination of parental rights is sought. The notice shall apprise the putative father or parent of his or her legal rights and shall include a clear statement that failure to appear at the hearing shall constitute a denial of interest in the minor which denial may result, without further notice of this proceeding or any subsequent proceeding, in the termination of his or her parental rights and the transfer of the care, custody or guardianship of the minor or in the adoption of the minor.

3. If the identity or whereabouts of a putative father or parent is unknown, the court must determine whether the putative father or parent can be identified or located. Following an inquiry pursuant to Section 7505-4.3 of this title, if the court finds that the identity or whereabouts of the putative father or parent cannot be ascertained, and this fact is attested to by affidavit of the consenting or permanently relinquishing person or the legal custodian or guardian of the child, it shall order that notice be given by publication and, if the identity is known, that a copy be mailed to the last-known address of the putative father or parent. The notice shall be published once pursuant to the laws relating to service of notice by publication, in the county in which the action to terminate parental rights is brought, and the hearing

shall not be held for at least fifteen (15) days after publication of the notice. When notice is given by publication, the order terminating parental rights shall not become final for a period of fifteen (15) days from the date of the order.
4. A putative father or parent may waive the right to notice pursuant to this section. The waiver shall be in writing and shall include a statement affirming that the person signing the waiver understands that the waiver shall constitute grounds for the termination of the parental rights of such person pursuant to the provisions of this section and Section 7505-4.2 of this title. A putative father or legal or biological father may also waive his right to notice pursuant to this section, by signing an extrajudicial consent pursuant to Section 7503-2.6 of this title, or by waiving notice on a form filed with the Paternity Registry of the Department of Human Services, or by failing to register with the Paternity Registry of the Department of Human Services after receiving a Notice of Plan for Adoption pursuant to Section 7503-3.1 of this title.
C. When a putative father or parent appears at the hearing and desires counsel but is indigent and cannot for that reason employ counsel, the court shall appoint counsel. In all counties having county indigent defenders, the county indigent defenders shall assume the duties of the representation in such proceedings.
D. At the hearing on the petition to terminate parental rights brought pursuant to this section, the court may, if it is in the best interest of the minor:
1. Accept a permanent relinquishment or consent to adoption executed by the putative father or parent of the minor pursuant to Sections 7503-2.1, 7503-2.3 and 7503-2.4 of this title; or
2. Terminate any parental rights which the putative father or parent may have upon any of the grounds provided in Section 7505-4.2 of this title for declaring a consent unnecessary.
E. 1. If the court at the hearing determines that the putative father is the biological father of the minor, that the adoption requires the consent of the putative father, that the putative father will not consent, and the court does not terminate the parental rights of the putative father or does not terminate the rights of the other parents, then the court shall schedule a separate hearing to issue an appropriate order for the legal and physical custody of the minor according to the best interests of the minor, if the court has jurisdiction to issue a custody order. Provided, no such hearing shall be scheduled if a preexisting custody order remains in effect.
2. The court shall certify that the child-placing agency or the attorney who filed the petition to terminate parental rights, the putative father, the parent, and any prospective adoptive parents have received notice of the date of the custody hearing at least fifteen (15) days prior to the date of the hearing. A parent having legal custody who has signed a consent or permanent relinquishment must be served with notice of the date of the custody hearing, by the party who filed the petition for termination, in the same manner as summons is served in civil cases at least fifteen (15) days prior to the date of the hearing.
3. Upon motion to intervene, the court shall join any person or entity entitled to notice under paragraph 2 of this subsection who is not already a party to the proceeding.
4. At the hearing, the court may award custody to the biological mother, the biological father, the biological parents, if they are married, a parent, the prospective adoptive parent, or the Department of Human Services or other licensed child-placing agency, if the Department or agency had legal custody when the petition was filed, according to Section 21.1 of this title, in the best interests of the child.
5. The child shall be represented at this hearing by an attorney pursuant to Section 7505-1.2 of this title.
F. The court shall terminate the rights of a putative father or parent if the person fails to appear at the hearing on the petition to terminate parental rights or if a waiver of notice pursuant to paragraph 4 of subsection B of this section has been filed with the court.
G. No order of the court shall be vacated, set aside, or annulled upon the application of any person who was properly served with notice in accordance with this section but failed to appear unless the applicant can establish by clear and convincing evidence that such failure to appear was due to unavoidable circumstances. Such application must be filed within ten (10) days of the date of the hearing at which the applicant failed to appear. No order of the court shall be vacated, set aside, or annulled upon the application of any person who waived notice pursuant to paragraph 4 of subsection B of this section.
H. A proceeding pursuant to this section for termination of parental rights shall be heard by the court without a jury.
I. An appeal may be taken from any final order, judgment, or decree rendered pursuant to this section to the Supreme Court by any person aggrieved thereby, in the manner provided for appeals from the court as provided in this subsection.
1. In an appeal concerning the termination of parental rights pursuant to this section, the designation of record by the appellant shall be filed in the trial court within ten (10) days after the date of the judgment. The counter designation of record by the appellee shall be filed in the trial court ten (10) days after designation of record by the appellant is filed in the trial court.
2. All appeals of cases concerning the termination of parental rights pursuant to this section shall be initiated by filing a petition in error in the Supreme Court within thirty (30) days of the filing of the order, judgment, or decree appealed from. The record on appeal shall be completed within thirty (30) days from the filing of the petition in error. Any response to the petition in error shall be filed within twenty (20) days from the filing of the petition in error.
3. The briefing schedule is established as follows:
a. the brief in chief of the appellant shall be filed twenty (20) days after the trial court clerk notifies all parties that the record is complete and such notice has been filed in the office of the Clerk of the Supreme Court,
b. an answer brief of the appellee shall be filed fifteen (15) days after the brief in chief of the appellant is filed, and
c. a reply brief of the appellant may be filed within ten (10) days after the answer brief of the appellee is filed.
J. The pendency of an appeal shall not suspend the order of the district court regarding a minor, nor shall it remove the minor from the custody of that court or of the person, institution, or agency to whose care such minor has been committed, unless the Supreme Court shall so order.
K. Any appeal when docketed should have priority over all cases pending on said docket. Adjudication of the appeals and in any other proceedings concerning the relinquishment of the child or the termination of parental rights pursuant to this section shall be expedited by the Supreme Court.
L. 1. The preadoption termination of parental rights pursuant to this section terminates the parent-child relationship, including the right of the parent to the custody of the child and the right of the parent to visit the child, the right of the parent to control the training and education of the child, the necessity for the parent to consent to the adoption of the child, the right of the parent to the earnings of the child, and the right of the parent to inherit from or through the child. Provided, that this subsection shall not in any way affect the right of the child to inherit from the parent.
2. Termination of parental rights shall not terminate the duty of the putative father or parent whose rights have been terminated to support the child unless the court determines the person is not the parent. The duty of a putative father or parent to support the minor child shall not be terminated until such time as a final decree of adoption has been entered.

Okla. Stat. tit. 10.

6. Okla. Stat. tit. 10 §§ 7505-2.1(D); 7505-4.1(E) (2001).

2018 OK 2

Establishment of Uniform Mileage Reimbursement Rate for Expenses Paid from the Court Fund

SCAD-2018-6. January 16, 2018

ORDER

By reason of the inconsistency in mileage reimbursement rates between the State Travel Reimbursement Act, Title 74 O.S. § 500.4 and the rate of reimbursement for state employees, Title 74 O.S. § 85.45l, for expenses paid from the court fund, the Court directs that uniform rate should be established for the purpose of

consistency to assist the accounting and budgeting process in the district courts.

Pursuant to this order all mileage which is reimbursed by the court fund, including, but not limited to jurors, interpreters and witnesses, shall be computed at the standard mileage rate prescribed by the State Travel Reimbursement Act, Title 74 O.S. § 500.4.

The 2018 mileage rate prescribed in the State Travel Reimbursement Act is 54.5 cents per mile.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 16th day of January, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER, WINCHESTER, EDMONDSON,

COLBERT, REIF, and WYRICK, JJ.

2018 OK 3

In re: Amendments to the Code of Judicial Conduct, 5 O.S. 2011, ch. 1, app. 4.

SCAD-2018-7. January 16, 2018

ORDER

Rule 4.6 of the Code of Judicial Conduct, 5 O.S. 2011, ch. 1, app. 4, is hereby amended as shown with markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 16th day of January, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER, WINCHESTER, EDMONDSON,

COLBERT, REIF, and WYRICK, JJ.

Exhibit "A"

Code of Judicial Conduct

Chapter 1, App. 4

Rule 4.6 STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

RULE 4.6

STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

(A) In all judicial elections within ten (10) days after formally announcing and/or qualifying for election or reelection (whichever is earlier) to any judicial office in the State of Oklahoma, all candidates, including incumbent judges, shall forward written notice of such candidacy, together with the candidate's correct mailing address, current telephone number, e-mail address, facsimile (telefax) number and actual physical address to the Administrative Director of the Courts.

(B) Upon receipt of the notice, the Administrative Director shall by Certified Mail, Return Receipt Requested, or by electronic mail, read receipt requested, cause to be distributed to each candidate who has filed a notice copies of the following:

(1) The Code of Judicial Conduct

(2) Summaries of all previous Formal Advisory Opinions, if any, issued by the Judicial Ethics Panel which relate in any way to campaign conduct and practices.

(3) The Acknowledgment Form

(C) The Acknowledgment Form shall be executed and returned by regular mail by the candidate to the Administrative Director of the Courts within ten (10) days of its delivery to the candidate as shown by the Certified Mail Receipt or by the electronic mail, read receipt.

(D) The Acknowledgment Form shall certify that the candidate has received, has read, and understands the requirements of the Oklahoma Code of Judicial Conduct and agrees to comply with and be bound by the Code during the course of his/her campaign for the judicial office. The Acknowledgment Form shall be in substantially the following form:

STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

I, _____, a candidate for judicial office in the State of Oklahoma, have received, have read, understand and agree to comply with the Oklahoma Code of Judicial Conduct during the course of my campaign for judicial office. I specifically understand that if I were to violate the terms of the Code I would be subject to ~~dicipline~~discipline under the Code or under the Rules of Professional Conduct for lawyers.

Date

_____

Signature of Candidate

(E) The failure of a candidate to file the notice as required in Rule 4.6(A) or to file the Acknowledgment Form as required in Rule 4.6(C) shall constitute a Per Se Violation of Canon 4 of the Oklahoma Code of Judicial Conduct and will be a basis for discipline under the Code.

(F) Upon request, the documents executed by a candidate for judicial election in accordance with this Rule shall be made available to the Oklahoma Supreme Court, The General Counsel of the Oklahoma Bar Association, The Professional Responsibility Panel on Judicial Elections and the Council on Judicial Complaints.

Exhibit "B"

Code of Judicial Conduct

Chapter 1, App. 4

Rule 4.6 STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

RULE 4.6

STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

(A) In all judicial elections within ten (10) days after formally announcing and/or qualifying for election or reelection (whichever is earlier) to any judicial office in the State of Oklahoma, all candidates, including incumbent judges, shall forward written notice of such candidacy, together with the candidate's correct mailing address, current telephone number, e-mail address, facsimile (telefax) number and actual physical address to the Administrative Director of the Courts.

(B) Upon receipt of the notice, the Administrative Director shall by Certified Mail, Return Receipt Requested, or by electronic mail, read receipt requested, cause to be distributed to each candidate who has filed a notice copies of the following:

(1) The Code of Judicial Conduct

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(D) The Acknowledgment Form shall certify that the candidate has received, has read, and understands the requirements of the Oklahoma Code of Judicial Conduct and agrees to comply with and be bound by the Code during the course of his/her campaign for the judicial office. The Acknowledgment Form shall be in substantially the following form:

STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

I, _____, a candidate for judicial office in the State of Oklahoma, have received, have read, understand and agree to comply with the Oklahoma Code of Judicial Conduct during the course of my campaign for judicial office. I specifically understand that if I were to violate the terms of the Code I would be subject to discipline under the Code or under the Rules of Professional Conduct for lawyers.

_____

Date

_____

Signature of Candidate

(E) The failure of a candidate to file the notice as required in Rule 4.6(A) or to file the Acknowledgment Form as required in Rule 4.6(C) shall constitute a Per Se Violation of Canon 4 of the Oklahoma Code of Judicial Conduct and will be a basis for discipline under the Code.

(F) Upon request, the documents executed by a candidate for judicial election in accordance with this Rule shall be made available to the Oklahoma Supreme Court, The General Counsel of the Oklahoma Bar Association, The Professional Responsibility Panel on Judicial Elections and the Council on Judicial Complaints.

2018 OK 4

In re: Amendments to the Rules for Management of the Oklahoma Court Information System, 20 O.S. 2011, ch. 18, app. 2.

SCAD-2018-8. January 16, 2018

ORDER

Rule 3 of the Rules for Management of the Oklahoma Court Information System, 20 O.S. 2011, ch. 18, app. 2, is hereby amended as shown with markup on the attached Exhibit "A." A clean copy of the new rule is attached as Exhibit "B." The amended rule is effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 16th day of January, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

CONCUR: COMBS, C.J., GURICH, V.C.J., KAUGER, WINCHESTER, EDMONDSON,

COLBERT, REIF, and WYRICK, JJ.

Exhibit "A"

District Courts shall pay the Oklahoma Court Information System the installation, operation, maintenance, repair, and access costs for its services. The funds shall be paid from the court fund of the District Court or from the District Court Clerk Revolving Fund to the Administrative Director of the Courts, and those funds shall be deposited in the Oklahoma Court Information System Revolving Fund. 20 O.S.Supp. 1994 § 1316.

In addition to payment for necessary equipment and its installation the District Courts shall be charged fees for: 1. Access to a telecommunications network known as OneNet; 2. Access to the Wide Area Network provided by O.C.I.S.; and 3. Case-tracking services. The amount of the fees shall be reasonable and set by the Administrative Director of the Courts upon approval by the Chief Justice of the Supreme Court. 20 O.S.Supp.1994 § 1315. The Administrative Director of the Courts shall issue a monthly statement to each District Court receiving services from the Oklahoma Court Information System. Id.

Access to O.C.I.S. or any of its services by county law libraries in counties having a population of less than three hundred thousand (300,000) shall be in accordance with the Rules for Management of County Law Libraries, 20 O.S.Supp.1998 Ch. 17, App. Access to O.C.I.S. or any of its services provided by O.C.I.S. to a county law library in a county having a population of three hundred thousand (300,000) or greater shall be pursuant to an agreement approved by the Chief Justice. The Administrative Director of the Courts shall establish reasonable fees for providing access to O.C.I.S. or any of its services to county law libraries in counties having a population of 300,000 or greater, and such fees shall be subject to the approval of the Chief Justice.

Exhibit "B"

District Courts shall pay the Oklahoma Court Information System the installation, operation, maintenance, repair, and access costs for its services. The funds shall be paid from the court fund of the District Court or from the District Court Clerk Revolving Fund to the Administrative Director of the Courts, and those funds shall be deposited in the Oklahoma Court Information System Revolving Fund. 20 O.S.Supp. 1994 § 1316.

In addition to payment for necessary equipment and its installation the District Courts shall be charged fees for: 1. Access to a telecommunications network known as OneNet; 2. Access to the Wide Area Network provided by O.C.I.S.; and 3. Case-tracking services. The amount of the fees shall be reasonable and set by the Administrative Director of the Courts upon approval by the Chief Justice of the Supreme Court. 20 O.S.Supp.1994 § 1315. The Administrative Director of the Courts shall issue a monthly statement to each District Court receiving services from the Oklahoma Court Information System. Id.

Access to O.C.I.S. or any of its services by county law libraries in counties having a population of less than three hundred thousand (300,000) shall be in accordance with the Rules for Management of County Law Libraries, 20 O.S.Supp.1998 Ch. 17, App. Access to O.C.I.S. or any of its services provided by O.C.I.S. to a county law library in a county having a population of three hundred thousand (300,000) or greater shall be pursuant to an agreement approved by the Chief Justice. The Administrative Director of the Courts shall establish reasonable fees for providing access to O.C.I.S. or any of its services to county law libraries in counties having a population of 300,000 or greater, and such fees shall be subject to the approval of the Chief Justice.

2018 OK 5

STATE OF OKLAHOMA ex rel., OKLAHOMA BAR ASSOCIATION,

Complainant, v. PHILIP M. KLEINSMITH, Respondent.

SCBD-6585. January 17, 2018

ORIGINAL PROCEEDING FOR ATTORNEY DISCIPLINE

¶0 The complainant in this matter, the Oklahoma Bar Association, brought an attorney disciplinary proceeding pursuant to Rule 7.7 of the Rules Governing Disciplinary Proceedings, 5 O.S. Supp. 2015, ch. 1, app. 1-A, following the respondent's disbarment from the practice of law by the Supreme Court of the State of Colorado for knowingly misappropriating client funds. The Oklahoma Bar Association asserts the respondent attorney should be disbarred from the practice of law in Oklahoma. The respondent attorney has not responded to the complainant's recommendation.

RESPONDENT DISBARRED AND NAME STRICKEN FROM ROLL OF ATTORNEYS EFFECTIVE FROM THE DATE OF THIS OPINION

Katherine M. Ogden, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

COMBS, C.J.:

¶1 Respondent Philip M. Kleinsmith (Respondent), OBA No. 13857, is an attorney licensed to practice law in the State of Oklahoma and was admitted to the Oklahoma Bar Association on October 12, 1989. This disciplinary matter comes before the Court pursuant to Rule 7.7 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. Supp. 2015, ch. 1, app. 1-A,[1] based upon an opinion of the Supreme Court of the State of Colorado affirming Respondent's disbarment from the practice of law.

¶2 The Supreme Court of Colorado determined that Respondent violated Colorado Rules of Professional Conduct (Colo. RPC) 8.4(c) and 1.15A (as well as the former Colo. RPC 1.15(b)), by committing knowing conversion misappropriation.[2] The court determined Respondent knowingly misappropriated roughly $57,338. The amount in question was billed to Respondent's firm Kleinsmith & Associates, PC (in which he was a solo practitioner) by First American Title Company, LLC and First American Title of Montana, Inc. (collectively, First American) for title services in connection with Respondent's representation of a client, U.S. Bank. Respondent obtained the $57,338 from his client U.S. Bank by billing for "title commitment" but proceeded to use the funds U.S. Bank gave him for his firm's unrelated operating expenses rather than paying First American the amount it was owed. First American subsequently filed a lawsuit and obtained a judgment for $55,782 against Respondent's firm, which it has been largely unable to collect.[3]

¶3 After the instigation of disciplinary proceedings, respondent was disbarred by the Hearing Board and ordered to pay restitution to First American. Respondent subsequently appealed. The Supreme Court of Colorado rejected Respondent's arguments that he did not knowingly convert funds from U.S. Bank because under the Colo. RPC those funds were the property of his firm, not First American. The court also rejected Respondent's constitutional claims concerning his rights to due process and equal protection under the law.

¶4 The opinion of the Supreme Court of the State of Colorado, submitted to this Court by the Complainant pursuant to Rule 7.7(b), RGDP, constitutes the charge and is prima facie evidence that Respondent committed the acts described therein. Rule 7.7(b), RGDP, 5 O.S. Supp. 2015, ch. 1, app. 1-A; *State ex rel. Okla. Bar Assoc. v. Wintory*, 2015 OK 25, ¶16, 350 P.3d 131; *State ex rel. Okla. Bar Ass'n v. Rymer,* 2008 OK 50, ¶4, 187 P.3d 725; *State ex rel. Okla. Bar Ass'n v. Henderson*, 1999 OK 29, ¶4, 977 P.2d 1096. The burden is placed on Respondent to show that the findings forming the basis of the Colorado disbarment were not supported by the evidence or that the findings are not sufficient grounds for discipline in Oklahoma. *Rymer,* 2008 OK 50 at ¶4; *Henderson,* 1999 OK 29 at ¶4. In an order filed on November 14, 2017, this Court directed Respondent to show cause in writing by December 5, 2017, why a final order of discipline should not be imposed. The November 14, 2017, order also gave Respondent the opportunity to submit a brief or evidence in mitigation as well as a transcript to challenge the Colorado findings. Respondent has failed to respond in any capacity.[4]

¶5 This cause is not the first time Respondent has found himself subject to reciprocal disciplinary proceedings before this Court pursuant to Rule 7.7, RGDP. *In State ex rel. Okla. Bar Ass'n v. Kleinsmith,* this Court publicly censured Respondent based upon discipline in Arizona for negligently filing improper arbitration certificates and for failing to notify the General Counsel of

his discipline in Arizona as required by Rule 7.7, RGDP. 2013 OK 16, ¶6, 297 P.3d 1248.

¶6 The Supreme Court of Oklahoma possesses a nondelegable, constitutional responsibility to regulate the practice of law and the licensure, ethics, and discipline of legal practitioners in this state. *State ex rel. Okla. Bar Ass'n v. Wintory,* 2015 OK 25, ¶14, 350 P.3d 131; *State ex rel. Okla. Bar Ass'n v. Wilcox*, 2014 OK 1, ¶2, 318 P.3d 1114; *State ex rel. Okla. Bar Ass'n v. McArthur,* 2013 OK 73, ¶4, 318 P.3d 1095. In disciplinary proceedings, this Court acts as a licensing court in the exercise of our exclusive original jurisdiction. *Wintory,* 2015 OK 25 at ¶14; *Wilcox,* 2014 OK 1 at ¶2; *State ex rel. Okla. Bar Ass'n v. Garrett,* 2005 OK 91, ¶3, 127 P.3d 600.

¶7 In a reciprocal disciplinary proceeding, it is within this Court's discretion to visit the same discipline as that imposed in the other jurisdiction or one of greater or lesser severity. *Kleinsmith*, 2013 OK 16 at ¶4; *State ex rel. Okla. Bar Ass'n v. Patterson*, 2001 OK 51, ¶33, 28 P.3d 551. We also strive to impose a quantum of discipline upon an offending lawyer that is consistent with that imposed upon other lawyers for similar acts of professional misconduct. *State ex rel. Okla. Bar Ass'n v. Hyde,* 2017 OK 59, ¶30, 397 P.3d 1286; *Kleinsmith*, 2013 OK 16 at ¶4. Complainant asserts that the record is complete and sufficient for this Court's de novo review, and further asserts that disbarment is warranted under these circumstances. We agree.

¶8 This Court has previously noted that the version of Colo. RPC 8.4(c) in effect at the time of Respondent's misconduct[5] is identical to Rule 8.4(c) of the Oklahoma Rules of Professional Conduct (ORPC), 5 O.S. 2011, ch. 1, app. 3-A.[6] *Rymer,* 2008 OK 50 at ¶5. Colo. RPC 1.15A(a)[7] is also substantially similar to Rule 1.15(a), ORPC, 5 O.S. 2011, ch. 1, app. 3-A.[8]

¶9 Respondent's disbarment for knowing misappropriation egregious enough to violate Colo. RPC 8.4(c) is consistent with the discipline imposed by this Court in similar cases involving misappropriation of funds. This Court recognizes three levels of culpability when evaluating the mishandling of funds: 1) commingling; 2) simple conversion; and 3) misappropriation, i.e., theft by conversion or otherwise. *State ex rel. Okla. Bar Ass'n v. Parsons,* 2002 OK 72, ¶12, 57 P.3d 865; S*tate ex rel. Okla. Bar Ass'n v. Taylor,* 2000 OK 35, ¶17, 4 P.3d 1242. These levels of culpability apply regardless of whether the funds in question were those of a client or those of a third party. *Parsons,* 2002 OK 72 at ¶¶11-12; Taylor, 2000 OK 35 at ¶¶16-18; *See* Rule 1.15(a), ORPC, 5 O.S. 2011, ch. 1, app. 3-A.

¶10 Concerning, misappropriation, this Court noted in *State ex rel. Okla. Bar Ass'n v. Parsons:*

> The third, and most serious infraction, occurs when funds are misappropriated. This happens when an attorney purposefully deprives a client or third person of money by way of deceit and fraud. *See State ex rel. Oklahoma Bar Ass'n v. Johnston, 1*993 OK 91, 863 P.2d 1136. For an attorney to engage in conduct involving dishonesty and deceit is professional misconduct. Rule 8.4(c), ORPC.

2002 OK 71 at ¶14.

A lawyer found guilty of intentionally inflicting grave economic harm in mishandling clients' funds is deemed to have committed this most grievous degree of offense. *Taylor,* 2000 OK 35 at ¶17 n.25; *State ex rel. Okla. Bar Ass'n v. Johnston,* 1993 OK 91, ¶25, 863 P.2d 1136.

¶11 This Court has previously held that conversion of funds by a Colorado attorney in violation of Colo. RPC 8.4 merits disbarment in Oklahoma. In *State ex rel. Okla. Bar Ass'n v. Rymer,* this Court determined disbarment was the appropriate discipline for an attorney who was disbarred in Colorado for knowingly converting/misappropriating $268,247.95 in trust funds, an act this Court deemed in violation of Rule 8.4(c), ORPC. 2008 OK 50 at ¶5. *See People v. Rymer,* 180 P.3d 443, 447 (Colo. 2007). We explained:

> Rule 8.4(c) of the Oklahoma Rules of Professional Conduct, 5 O.S.2001 & Supp. 2008, ch. 1, app. 3-A, is the same as Rule 8.4(c) of the Colorado Rules of Professional Conduct, the rule which served as the basis for disbarment there. The misconduct for which Rymer was disbarred by the Colorado Supreme Court, converting trust funds, constitutes a violation of Rule 8.4(c) of the Oklahoma Rules of Professional Conduct. Disbarment is consistent with discipline imposed by this Court in similar cases. *State ex rel. Okla. Bar Ass'n v. Arnold,* 2003 OK 31, 72 P.3d 10 (disbarment proper discipline for converting money entrusted to a lawyer by a client).

Rymer, 2008 OK 50 at ¶5.

¶12 The record before this Court is clear that Respondent engaged in deceitful billing practices that resulted in his client paying $57,338 for First American's services. That amount was then knowingly misappropriated by Respondent and instead used for other purposes, causing substantial harm to First American. The conduct for which Respondent was disbarred in Colorado warrants disbarment in Oklahoma, given Respondent's failure to contest the Complainant's recommendation, the lack of mitigating circumstances, and Respondent's prior disciplinary history. It is hereby ordered that Respondent Philip M. Kleinsmith be disbarred and his name stricken from the roll of attorneys. As Complainant did not file an application to recover the costs of this disciplinary proceeding, no costs are assessed.

RESPONDENT DISBARRED AND NAME STRICKEN FROM ROLL OF ATTORNEYS EFFECTIVE FROM THE DATE OF THIS OPINION

CONCUR: COMBS, C.J., KAUGER, WINCHESTER, EDMONDSON,

COLBERT, REIF, and WYRICK, JJ.

CONCUR IN JUDGMENT: GURICH, V.C.J.

COMBS, C.J.:

1. Rule 7.7, RGDP, 5 O.S. Supp. 2015, ch. 1, app. 1-A, provides:
(a) It is the duty of a lawyer licensed in Oklahoma to notify the General Counsel whenever discipline for lawyer misconduct has been imposed upon him/her in another jurisdiction, within twenty (20) days of the final order of discipline, and failure to report shall itself be grounds for discipline.
(b) When a lawyer has been adjudged guilty of misconduct in a disciplinary proceeding, except contempt proceedings, by the highest court of another State or by a Federal Court, the General Counsel of the Oklahoma Bar Association shall cause to be transmitted to the Chief Justice a certified copy of such adjudication within five (5) days of receiving such documents. The Chief Justice shall direct the lawyer to appear before the Supreme Court at a time certain, not less than ten (10) days after mailing of notice, and show cause, if any he/she has, why he/she should not be disciplined. The documents shall constitute the charge and shall be prima facie evidence the lawyer committed the acts therein described. The lawyer may submit a certified copy of transcript of the evidence taken in the trial tribunal of the other jurisdiction to support his/her claim that the finding therein was not supported by the evidence or that it does not furnish sufficient grounds for discipline in Oklahoma. The lawyer may also submit, in the interest of explaining his/her conduct or by way of mitigating the discipline which may be imposed upon him/her, a brief and/or any evidence tending to mitigate the severity of discipline. The General Counsel may respond by submission of a brief and/or any evidence supporting a recommendation of discipline.

2. The opinion of the Supreme Court of Colorado uses both "knowing conversion" and "knowing misappropriation" to refer to Respondent's misconduct. *Matter of Kleinsmith*, 2017 CO 101, ¶¶13-15, --- P.3d ----. It is evident from the *Kleinsmith* opinion and other Colorado precedent that the two terms are equivalent:

> Knowing conversion or misappropriation occurs when a lawyer takes money that has been entrusted to him or her by a client or third party, knowing that it is the client or third party's money and that the client or third party has not authorized the taking, regardless of whether the attorney intended to deprive the client or third party of that money permanently.

Kleinsmith, 2017 CO 101 at ¶14. See People v. Varallo, 913 P.2d 1, 10-11 (Colo. 1996).

3. The Supreme Court of Colorado noted that as of the date of its decision, First American had been able to collect only $1,179.20 from Respondent's firm through bank garnishments. *Matter of Kleinsmith*, 2017 CO 101 at ¶5.

4. The Proof of Service of Notice of Order of Discipline submitted to this Court by the Complainant on November 30, 2017, indicates Respondent received a copy of the Notice of Order of Discipline via certified mail, signed for on November 17, 2017.

5. The version of Colo. RPC 8.4 in effect at the time of Respondent's misconduct provided:

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or
(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.

Rule 8.4 was amended by order effective September 28, 2017, and Rule 8.4(c) now provides:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

6. Rule 8.4, ORPC, 5 O.S. 2011, ch. 1, app. 3-A, provides:

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

7. Colo. RPC 1.15A(a) provides:
(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in trust accounts maintained in compliance with Rule 1.15B. Other property shall be appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer in compliance with Rule 1.15D.

8. Rule 1.15(a), ORPC, 5 O.S. 2011, ch. 1, app. 3-A, provides:
(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the written consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

2018 OK 6

GLORY STRICKLAND, Special Administrator of the Estate of David Chambers, Sr., Plaintiff/Respondent, v. STEPHENS PRODUCTION COMPANY; and STEPHENS PRODUCTION COMPANY CONTINENTAL PROPERTIES, LLC, Defendants/Petitioners, ERICK FLOWBACK SERVICES, LLC; DMR ON-SITE SERVICES LLC; and DUSTIN ROLLINS, Defendants.

Case No. 115,635. January 23, 2018

CERTIORARI TO THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA, HONORABLE THOMAS E. PRINCE

¶0 An employee of a trucking company was killed while on the job at an oil-well site. The employee's surviving daughter brought a wrongful death action in the District Court of Oklahoma County against the owner and operator of the well site, Stephens Production Company. Stephens Production Company moved to dismiss the case pursuant to 85A O.S. Supp. 2013 § 5(A), which provides that "any operator or owner of an oil or gas well … shall be deemed to be an intermediate or principal employer" for purposes of extending immunity from civil liability. The district court denied the motion to dismiss, finding that § 5(A) of Title 85A was an unconstitutional special law. The court certified the order for immediate interlocutory review, and we granted certiorari review. We conclude that the last sentence of § 5(A) of Title 85A is an impermissible and unconstitutional special law under Art. 5, § 59 of the Oklahoma Constitution. The last sentence of § 5(A) shall be severed from the remainder of that provision.

AFFIRMED

Micheal L. Darrah, E. Edd Pritchett, Jr., David L. Kearney, Durbin, Larimore & Bialick, Oklahoma City, OK, for Defendants/Petitioners

T. Luke Abel, Abel Law Firm, Oklahoma City, OK, for Plaintiff/Respondent

Mithun Mansinghani, Michael K. Velchik, Office of the Attorney General, Oklahoma City, OK

GURICH, V.C.J.

Facts & Procedural History

¶1 On October 6, 2014, David Chambers, who was an employee of RDT Trucking, Inc., was dispatched to an oil-well site in Crescent, Oklahoma, to pick up waste water. Stephens Production Company and Stephens Production Company Continental Properties, LLC (SPC) were the owners and operators of the well. Upon arrival at the well, Mr. Chambers worked on or around a device known as a "heater treater." During this work, Mr. Chambers suffered severe burns, which eventually led to his death.[1] Glory Strickland, Mr. Chambers' surviving daughter and Special Administrator of the Estate, filed a wrongful death lawsuit against SPC and others in the District Court of Oklahoma County,[2] alleging negligence for failure to properly operate, maintain, and inspect the well, and failure to properly warn of dangerous conditions at the well site.[3]

¶2 SPC filed a motion to dismiss, claiming immunity under the exclusive remedy doctrine found in § 5 of the Oklahoma Administrative Workers' Compensation Act (OAWCA), which provides in part that "any operator or owner of an oil or gas well . . . shall be deemed to be an intermediate or principal employer" for purposes of extending immunity from civil liability. As the owner and operator of the well, SPC argued it was statutorily immune from suit in the district court. Strickland responded to the motion to dismiss and argued that § 5 was an unconstitutional special law. Strickland also argued that the Legislature's factual determination that all oil and gas well owners and operators are principal or intermediate employers, for purposes of immunity from civil liability, violated the constitutional principle of separation of powers.[4]

¶3 The district court denied the motion to dismiss and found that § 5 is an unconstitutional special law prohibited by Art. 5, § 46 of the Oklahoma Constitution. The court found "no distinctive characteristics or reasonable basis" to justify the different treatment afforded by § 5 to oil and gas well owners and operators.[5] The court specifically found, however, that SPC was not precluded from rearguing exclusive remedy protections pending further discovery and submission of additional facts on the issue of whether SPC was actually Mr. Chambers' principal employer at the time of his injuries. The district court certified the order denying the motion to dismiss for immediate interlocutory appeal. SPC filed a Petition for Certiorari to Review the Certified Interlocutory Order. We granted certiorari on

February 6, 2017, and briefing was completed on May 19, 2017.[6]

Standard of Review

¶4 At issue in this case is the constitutionality of 85A O.S. Supp. 2013 § 5(A). "Issues of a statute's constitutional validity, construction, and application are questions of law subject to this Court's *de novo* review." Lee v. Bueno, 2016 OK 97, ¶ 6, 381 P.3d 736, 739. "*De novo* review involves a plenary, independent, and non-deferential examination of the trial court's legal rulings." Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, ¶ 3, 315 P.3d 359, 361. In considering a statute's constitutionality, "courts are guided by well-established principles, and a heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality." Lee, 2016 OK 97, ¶ 7, 381 P.3d at 740. "The party seeking a statute's invalidation as unconstitutional has the burden to show the statute is clearly, palpably, and plainly inconsistent with the Constitution." Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Tr., 2010 OK 48, ¶ 15, 237 P.3d 181, 188.

Analysis

¶5 Section 5(A) of Title 85A provides:

> The rights and remedies granted to an employee subject to the provisions of the Administrative Workers' Compensation Act shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone else claiming rights to recovery on behalf of the employee against the employer, or any principal, officer, director, employee, stockholder, partner, or prime contractor of the employer on account of injury, illness, or death. Negligent acts of a co-employee may not be imputed to the employer. No role, capacity, or persona of any employer, principal, officer, director, employee, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this act, and the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have. *For the purpose of extending the immunity of this section, any operator or owner of an oil or gas well or other operation for exploring for, drilling for, or producing oil or gas shall be deemed to be an* ***intermediate or principal employer*** *for services performed at a drill site or location with respect to injured or deceased workers whose* ***immediate employer*** *was hired by such operator or owner at the time of the injury or death.*[7]

Title 85A does not define the terms "intermediate employer," "principal employer," or "immediate employer" as used in § 5(A). However, under previous versions of the workers' compensation statutes, principal employers, or statutory employers as they were known, were secondarily liable to an injured worker for workers' compensation benefits and immune from tort liability in the district court if a statutory employment relationship existed between the injured worker, his immediate employer, and the principal employer.[8] To determine whether a statutory or vertical employment relationship existed,[9] this Court applied a three-tiered test which asked:

> [W]hether the work being performed by the independent contractor is specialized or non-specialized. If the work is specialized *per se*, then the hirer is not the statutory employer of the independent contractor. If the work is not specialized *per se*, the second tier asks whether the work being performed by the independent contractor is the type of work that, *in the particular hirer's business*, normally gets done by employees or normally gets done by independent contractors. If the work normally gets done by independent contractors, then the hirer is not the statutory employer of the independent contractor. If the work is normally performed by employees, the third tier focuses on the moment in time the worker was injured, and asks whether the hirer was engaged in the type of work being performed by the independent contractor *at the time the worker was hurt*. If not, then the hirer is not the statutory employer of the independent contractor.[10]

¶6 This test, commonly referred to as the necessary and integral test, was codified in 2011 when the Legislature enacted the Workers' Compensation Code.[11] In 2011, the Legislature also determined, by statutory enactment, that all oil and gas well owners or operators were principal employers for purposes of immunity from civil liability.[12] In 2014, with the enactment of the OAWCA and the repeal of the Workers' Compensation Code, the Legislature removed the provision found in the 2011 Code that codified the necessary and integral test, but kept the provision from the 2011 Code that

determined all oil and gas well owners or operators are intermediate or principal employers for purposes of immunity from civil liability. See 85A O.S. Supp. 2013 § 5(A).

¶7 The term "principal employer" only appears twice in Title 85A – in § 5(A), referred to above, wherein oil and gas owners and operators are deemed principal employers, and § 5(E), which states that immunity does not extend to other employers on the same job site as the injured worker "if such other employer does not stand in the position of intermediate or principal employer to the immediate employer of the injured or deceased worker." See 85A O.S. Supp. 2013 § 5(E). Absent those exceptions, the Legislature substituted the term "prime contractor" for principal employer.[13] The term "prime contractor" appears in § 5(A). See 85A O.S. Supp. 2013 § 5(A) ("The rights and remedies granted to an employee subject to the provisions of the Administrative Workers' Compensation Act shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone else claiming rights to recovery on behalf of the employee against the employer, or any principal, officer, director, employee, stockholder, partner, or *prime contractor* of the employer on account of injury, illness, or death.") (emphasis added). The term "prime contractor" also appears in § 2(43) in the definition of "subcontractor." See 85A O.S. Supp. 2013 § 2(43) ("'Subcontractor' means a person, firm, corporation or other legal entity hired by the general or *prime contractor* to perform a specific task for the completion of a work-related activity[.]") (emphasis added). "Primary Contractor Liability" is discussed at length in § 36, which lays out a vertical liability structure similar to that pertaining to principal employers found in previous laws. See, e.g., 85A O.S. Supp. 2013 § 36(A) ("If a subcontractor fails to secure compensation required by this act, the prime contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage.").

¶8 However, Title 85A does not define principal employer, intermediate employer, or immediate employer. Thus, we must assume that when the Legislature enacted Title 85A it was "familiar with the extant judicial construction [of those terms] then in force."[14] "'Unless a contrary intent clearly appears or is plainly expressed, the terms of amendatory acts retaining the same or substantially similar language as the provisions formerly in force will be accorded the identical construction to that placed upon them by preexisting case law.'"[15] The question then becomes whether the Legislature can statutorily determine that certain employers, namely owners or operators of an oil or gas well, are principal employers for purposes of extending immunity from civil liability regardless of the actual employment relationship between the operator or owner, the immediate employer, and the injured employee.

¶9 Article 5, § 59 of the Oklahoma Constitution provides that "[l]aws of a general nature shall have uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted."[16] To determine whether a statute is a prohibited special law under Art. 5, § 59, we ask: (1) Is the statute a special or general law? (2) If special, is there a general law applicable? (3) If a general law is not applicable, is the statute a permissible special law? Grant v. Goodyear Tire & Rubber Co., 2000 OK 41, ¶ 4, 5 P.3d 594, 597 (citing Reynolds v. Porter, 1988 OK 88, ¶ 13, 760 P.2d 816, 822).

¶10 We have said that a statute is a general law if it relates to persons or things as a class rather than relating to particular persons or things, and a statute is a special law where a part of the entire class of similarly affected persons is separated for different treatment. Goodyear Tire, 2000 OK 41, ¶ 5, 5 P.3d at 597; Reynolds, 1988 OK 88, ¶ 14, 760 P.2d at 822. Section 5(A) operates uniformly on all employees and employers, but for the last sentence. The last sentence of § 5(A) carves out a special subclass of employers, specifically oil and gas employers, who are *automatically* deemed principal employers and given immunity in the district court regardless of whether the employer would be considered a principal employer under the facts of the case. All other employers seeking immunity from civil liability under the principal employer doctrine must present factual proof that a statutory employment relationship exists pursuant to the necessary and integral test.[17]

¶11 Thus, the question becomes whether the last sentence of § 5(A), an evident special law, is a *permissible* special law. Under Art. 5, § 59, we have said that a permissible special law is one that is reasonably and substantially related to a valid legislative objective. Goodyear Tire, 2000 OK 41, ¶ 9, 5 P.3d at 599; Reynolds, 1988

OK 88, ¶ 16, 760 P.2d at 822. In determining whether a special law is reasonably and substantially related to a valid legislative objective, we look for a distinctive characteristic that warrants differential treatment and furnishes a practical and reasonable basis for discrimination. Goodyear Tire, 2000 OK 41, ¶ 10, 5 P.3d at 599. Without a distinctive characteristic that actually warrants differential treatment, the distinction is considered arbitrary and will not withstand constitutional scrutiny. Id.

¶12 SPC argues that oil and gas production involves complex processes including exploration, drilling, and production, and that such processes are routinely performed by different specialists subcontracted by the owner of the well, making the oil and gas industry unique. However, many other industries also engage in complex processes and utilize subcontractors for specialized work. Thus, without more, we cannot conclude that the use of complex processes or the use of subcontractors to perform certain specialized work is distinct to the oil and gas industry so as to warrant differential treatment.

¶13 SPC also argues that oil and gas well owners and operators need "certainty" regarding their exposure to civil liability.[18] But employers in other industries would, in all likelihood, also prefer to have certainty regarding their exposure to liability. Thus, certainty regarding immunity from liability is not a distinctive characteristic of the oil and gas industry that warrants special treatment. SPC has not presented any evidence specific to the oil and gas industry that would warrant differential treatment or furnish a practical and reasonable basis for discrimination. The last sentence of § 5(A) is an unconstitutional special law under Art. 5, § 59 of the Oklahoma Constitution.

Severability

¶14 In determining whether a "non-offending statutory provision[] may survive as valid after the clause[] rejected as invalid [is] separated from the whole,"[19] we ask whether the voided provision was "'so inseparably connected with and so dependent upon'" the remaining portions of the statute such that "'the surviving provisions would not have been otherwise enacted.'"[20] Section 5(A) of the OAWCA provides the exclusive remedy doctrine, which is "at the heart of the essential Grand Bargain between employers and employees . . . [and] is workers' compensation." Vasquez v. Dillard's, Inc., 2016 OK 89, 381 P.3d 768 (Gurich, J., concurring specially ¶ 26). Thus, we must conclude that the Legislature undoubtedly would have enacted the remaining portion of § 5(A) without the invalid, last sentence. Therefore, we sever only the last sentence of § 5(A) and leave the remainder of § 5(A) intact.[21]

Conclusion

¶15 This case is no different from Goodyear Tire,[22] a case decided by this Court more than fifteen years ago, wherein the Legislature singled out one specific industry for special treatment under the workers' compensation system. This Court disapproved of such special treatment in that case because no valid reason existed for the distinction. We adhere to the teachings of Goodyear Tire today and find no valid reason exists for the special treatment of the oil and gas industry as displayed by the last sentence of § 5(A). The last sentence of § 5(A) of Title 85A is an impermissible and unconstitutional special law under Art. 5, § 59 of the Oklahoma Constitution, and it shall be severed from the remainder of that provision. On remand, SPC is not precluded from rearguing exclusive remedy protections pending further discovery and submission of additional facts on the issue of whether SPC was actually Mr. Chambers' principal employer at the time of his injuries.

AFFIRMED

¶16 Combs, C.J., Gurich, V.C.J., Kauger, Winchester, Edmondson, Colbert, Reif, JJ., concur.

¶17 Wyrick, J., recused.

GURICH, V.C.J.

1. The record is unclear as to how exactly Mr. Chambers was injured, but both parties agree that the fatal injuries were sustained at the well site in the course of his employment.

2. Strickland also sued Erick Flowback Services, LLC, DMR On-Site Services, LLC, and Dustin Rollins. These Defendants are not parties to this appeal.

3. Strickland sought actual damages in excess of $300,000 and punitive damages for the gross, wanton, and willful acts of SPC and other defendants.

4. SPC replied on November 14, 2016, contending the statute was constitutional and arguing it was entitled to dismissal of the claims against it as the owner and operator of the well.

5. Record on Appeal at 38.

6. The Attorney General gave notice of his intent to exercise his right to be heard on the constitutional issues, and his brief was filed on May 12, 2017. Respondent Strickland filed a response to the Attorney General's brief on May 19, 2017.

7. 85A O.S. Supp. 2013 § 5(A) (emphasis added).

8. In Smalygo v. Green, 2008 OK 34, ¶ 10, 184 P.3d 554, 558, we said:

> Since 1923, section 11 of Oklahoma's Workers' Compensation Act has allowed an injured employee of an uninsured independent contractor to pursue a workers' compensation claim against the general contractor, or an intermediate contractor, without regard to the liability of the independent contractor. The injured worker [could] proceed up the chain of independent contractors to reach

an intermediate or a general contractor which maintain[ed] compensation coverage through insurance or through one of the other means enumerated in section 61 of the Act for securing compensation.

9. Smalygo, 2008 OK 34, ¶ 10, 184 P.3d at 558; Bradley v. Clark, 1990 OK 73, ¶ 15, 804 P.2d 425, 430.

10. Hammock v. United States, 2003 OK 77, n.6, 78 P.3d 93, 97 n.6 (citing Bradley, 1990 OK 73, 804 P.2d 425). In Bradley, this Court found that the injured employee's work, the "killing" of a well, was not necessary and integral to the hirer's work, the hirer being the operator of the oil and gas well. Accordingly, the hirer was not a principal employer, and thus, was not immune from civil liability.

For a discussion of the evolution of the law regarding principal employers before the decision in Bradley, see generally Newport v. Crane Serv. Inc., 1982 OK 86, 649 P.2d 765, and Murphy v. Chickasha Mobile Homes, Inc., 1980 OK 75, 611 P.2d 243.

11. See 85 O.S. 2011 § 314(1), which provides:

> 1. In order for another employer on the same job as the injured or deceased worker to qualify as an intermediate or principal employer, the work performed by the immediate employer *must be directly associated with the day to day activity* carried on by such other employer's trade, industry, or business, *or it must be the type of work that would customarily be done* in such other employer's trade, industry, or business.

85 O.S. 2011 § 314(1).

12. Section 302(H) of the 2011 Code provides:

> H. *For the purpose of extending the immunity of this section, any operator or owner of an oil or gas well or other operation for exploring for, drilling for, or producing oil or gas shall be deemed to be an intermediate or principal employer* for services performed at a drill site or location with respect to injured or deceased workers whose immediate employer was hired by such operator or owner at the time of such injury.

85 O.S. 2011 § 302(H) (emphasis added). The 2011 version has been challenged as unconstitutional and is pending before this Court. See Bendetti v. Cimarex Energy Co., Case No. 115,136 (Cert. Granted Apr. 10, 2017).

13. We express no view with regard to the use of the terms "prime contractor" or "primary contractor liability" in the OAWCA.

14. TXO Prod. Corp. v. Okla. Corp. Comm'n, 1992 OK 39, ¶ 10, 829 P.2d 964, 970.

15. Maxwell v. Sprint PCS, 2016 OK 41, ¶ 6, 369 P.3d 1079, 1085 (quoting Special Indem. Fund v. Figgins, 1992 OK 59, ¶ 8, 831 P.2d 1379, 1382).

16. Okla. Const. art. 5, § 59. Strickland initially challenged § 5(A) under Okla. Const. Art. 5, § 46 – an additional constitutional prohibition on special laws. The trial court made its ruling on § 46 grounds. Both provisions were discussed by the parties on appeal. This Court maintains discretion to uphold trial court rulings on any grounds. See Nichols v. Nichols, 2009 OK 43, ¶ 10, 222 P.3d 1049, 1054.

17. Again, because the term principal employer is undefined in the OAWCA, we must accord the identical construction placed upon that term by preexisting law, meaning that an employer who presents factual proof under the necessary and integral test of a statutory employment relationship is entitled to principal employer status and immune from suit in the district court.

18. Appellant's Brief in Chief at 16.

19. Fent v. Contingency Review Bd., 2007 OK 27, ¶ 18, 163 P.3d 512, 523.

20. Naifeh v. Okla. Tax Comm'n, 2017 OK 63, ¶ 50, 400 P.3d 759, 775 (quoting Fent, 2007 OK 27, ¶ 18, 163 P.3d at 523). Although the OAWCA contains a severability clause, "[t]he severability of a statutory enactment is not contingent on the presence of an express severability clause within the particular enactment's text." Fent, 2007 OK 27, ¶ 18, 163 P.3d at 523.

21. Section 5(A) of Title 85A will now read:

> The rights and remedies granted to an employee subject to the provisions of the Administrative Workers' Compensation Act shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone else claiming rights to recovery on behalf of the employee against the employer, or any principal, officer, director, employee, stockholder, partner, or prime contractor of the employer on account of injury, illness, or death. Negligent acts of a co-employee may not be imputed to the employer. No role, capacity, or persona of any employer, principal, officer, director, employee, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this act, and the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.

22. 2000 OK 41, 5 P.3d 594.

January

27 **OBA Legislative Reading Day;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Angela Ailles Bahm 405-475-9707

29 **OBA Appellate Practice Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Rob Ramana 405-524-9871

February

1 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

2 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

6 **OBA Legislative Monitoring Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Angela Ailles Bahm 405-475-9707

OBA Government and Administrative Law Section meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600

8 **OBA High School Mock Trial Committee meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Judy Spencer 405-755-1066

9 **OBA Law-Related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Amber Peckio Garrett 918-895-7216

16 **OBA Board of Governors meeting;** 8:30 a.m..; Oklahoma Bar Center; Oklahoma City; Contact John Morris Williams 405-416-7000

17 **OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nathan Richter 405-376-2212

19 **OBA Closed** – Presidents Day

20 **OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Rod Ring 405-325-3702

OBA Bench and Bar Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact David Swank 405-325-5254 or David B. Lewis 405-556-9611

21 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City, Contact Jeffrey H. Crites 580-242-4444

OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Valery Giebel 918-581-5500

22 **OBA High School Mock Trial Committee meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Judy Spencer 405-755-1066

March

1 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

2 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

5 **OBA Appellate Practice Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Rob Ramana 405-524-9871

6 **OBA Legislative Monitoring Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Angela Ailles Bahm 405-475-9707

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF JAMES PHILLIP ALBERT, SCBD #6612 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if James Phillip Albert should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Friday, March 9, 2018**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF SUTTON ALEKSANDRA SMITH MURRAY, SCBD #6613 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Sutton Aleksandra Smith Murray should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Thursday, March 8, 2018**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

2018 OK CIV APP 3

LACEE DAWN JONES, Petitioner/Appellee, vs. JODY ROBERT PACK, Respondent/ Appellant.

Case No. 115,433. December 4, 2017

APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY, OKLAHOMA

HONORABLE BARRY V. DENNEY, TRIAL JUDGE

REVERSED

Bobby C. Ramsey, DAVIS & THOMPSON, PLLC, Jay, Oklahoma, for Petitioner/Appellee

Winston H. Connor, II, Joshua W. Brewer, STOCKWELL & CONNOR, P.L.L.C., Jay, Oklahoma, for Respondent/Appellant

JANE P. WISEMAN, JUDGE:

¶1 We address Jody Robert Pack's appeal of a trial court order awarding attorney fees to Lacee Dawn Jones to determine whether the trial court erred in making the award. After review, we conclude the trial court erred in making the award and reverse its order.

BACKGROUND

¶2 Department of Human Services, Child Support Services (CSS), filed a "Petition/Notice of Paternity and Support Obligations" on June 14, 2010, alleging Jody Robert Pack is the father of JCA, born in August 2007. An agreed order was filed on October 1, 2010, finding he is the father of JCA based on genetic testing, setting monthly child support in the amount of $222.50, and ordering Father to pay $5,348 for reimbursement of child support expenses prior to the entry of the order. There was no provision for visitation in the agreed order.

¶3 On January 3, 2014, a "Notice to Review and Modify Support Order" was filed by CSS due to "[a] change in income of one or both parties." An order modifying Father's child support obligation was filed on April 1, 2014, to increase Father's monthly child support obligation to $311.11. Again, no provision was made for visitation.

¶4 On May 5, 2016, Father filed a "Petition to Establish Visitation and Application for Temporary Order." Father alleged Mother Lacee Dawn Jones had custody of JCA pursuant to the Oklahoma Uniform Parentage Act "until determined otherwise by the Court." Father further alleged Oklahoma has jurisdiction to hear the petition because it is the home state of JCA pursuant to the Oklahoma Uniform Child Custody Jurisdiction and Enforcement Act, Uniform Interstate Family Support Act, and the federal Parental Kidnapping Prevention Act. Father stated that to his "best knowledge and information," JCA has lived with Mother and/or Father for the past five years in Delaware County, Oklahoma.

¶5 Mother filed a "Special Appearance to Object to Jurisdiction" and "Motion to Dismiss or Transfer" in which she stated that she and JCA have lived in Rogers, Benton County, Arkansas, for approximately a year and a half, and in Springdale, Washington County, Arkansas, for two and a half years. She alleged, "The only contact the minor child has with the State of Oklahoma is through child support enforcement and [Father] lives in Delaware County, Oklahoma." Mother asked the trial court to dismiss Father's petition for lack of jurisdiction.

¶6 The trial court held a jurisdictional hearing on June 7, 2016, and granted Mother's request to dismiss due to lack of jurisdiction.

¶7 On June 27, 2016, Mother filed an application for attorney fees and costs, seeking $2,175 in attorney fees and $20 in costs. Mother included attorney time records in support of her application.

¶8 At the hearing on Mother's motion, she testified she makes $20 an hour and works thirty-three to thirty-five hours a week. Father's attorney told the court he was not contesting Mother's counsel's hourly rate of $250 or the hours he billed. Mother testified she is currently pregnant, she has paid in full the bill she received from her attorney, and she would like the court to award her attorney fees for the time spent on the motion to modify. Mother testified she has $4,000 in a joint savings account with her husband and $400 or $500 in a checking account. Mother stated that she and her husband can pay their monthly bills because they live within their means.

¶9 Father testified he was unemployed and had been unemployed for two and a half months due to a layoff for lack of work. He testified that he has been looking for work and that he does not have $4,000 or $5,000 in a checking or savings account. He testified that he has no other money than what is "needed to eat and keep a roof over [his] head and gas in [his] car."

¶10 On cross-examination, he testified the contact he has had with JCA has been through some phone conversations and Skype messages in April 2016. He stated that he receives $259 a week in unemployment compensation. His wife works and contributes to the household. His mortgage payment is $270 a month and his monthly utility bills total about $350. He has credit card payments of $90 a month, a car payment of $426 a month, and a motorcycle payment of $400 a month. He paid his attorney $4,000 from his savings account and now has no money left in the account. He admitted he knew Mother left Oklahoma when JCA was a year-old.

¶11 The trial court found Mother filed a petition for custody of JCA in September 2008 claiming Oklahoma was JCA's home state. She left Oklahoma shortly thereafter and neither she nor JCA has lived in Oklahoma since then. Mother never dismissed the petition, but she "struck the matter from the Court's domestic docket on March 19, 2009 and there have been no pleadings filed in the matter since." After the State of Oklahoma filed an action to establish paternity, the court in October 2010 entered an agreed order finding Father to be JCA's father and setting child support but not addressing custody or visitation. Father filed a "petition" in the child support action in May 2016 to establish visitation. The order provides:

> In a hearing on June 7, 2016, the Court found under 43 O.S. § 551-202 that since Oklahoma had never made a child custody decision and that the child had not resided in the State of Oklahoma since 2008, Oklahoma lacked jurisdiction and only Arkansas (where the mother and child had resided for approximately 5 years) has jurisdiction to hear [Father's] petition for visitation. The Court also determined even if it had jurisdiction, Arkansas was a more convenient forum.

¶12 Mother argued that she was entitled to attorney fees in part because Father's petition "should have been filed in Arkansas and resulted in her incurring unnecessary expenditures of attorney fees to get the matter dismissed." Father countered that Oklahoma did have jurisdiction because Mother's 2008 custody action had never been dismissed. The trial court rejected this argument finding "that the 'date of commencement of the proceeding' (See 43 O.S. § 551-201), is May 5, 2016, the date [Father] filed his Petition for Visitation." It further found that although Father was unemployed at the time of the hearing "he also acknowledged that he had been employed for most of the several preceding years with wages in the $12-$13/hr. range." Based on these findings, the trial court granted Mother's request for attorney fees and ordered Father to pay Mother $2,195 in monthly payments of $182.92 from September 2016 through September 2017.

¶13 Father appeals this attorney fee award.

STANDARD OF REVIEW

¶14 Father does not challenge the amount or reasonableness of the award but argues instead that Mother was not entitled to attorney fees. "This issue presents a question of law which we review *de novo." Finnell v. Seismic*, 2003 OK 35, ¶ 7, 67 P.3d 339; *see also Hollingshead v. Elias,* 2016 OK CIV APP 46, ¶ 12, 376 P.3d 936 ("The question of a party's entitlement to attorney fees is . . . a question of law, which we review *de novo*."). "The court has plenary, independent, and non-deferential authority to reexamine a trial court's legal rulings." *Finnell*, 2003 OK 35, ¶ 7.

ANALYSIS

¶15 The rule that "'each litigant bears the cost of his/her legal representation and our courts are without authority to assess and award attorney fees in the absence of a specific statute or a specific contract therefor between the parties'" is "'firmly established in this jurisdiction.'" *Boatman v. Boatman,* 2017 OK 27, ¶ 16, 404 P.3d 822 (quoting *Eagle Bluff, L.L.C. v. Taylor,* 2010 OK 47, ¶ 16, 237 P.3d 173). The trial court in the present order does not state the legal basis for its fee award. After review, we find no authority directly supporting the award of attorney fees.

¶16 In her motion to dismiss, Mother argued that "Oklahoma has no significant contacts with" JCA and all significant contacts pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) are in Arkansas.

The trial court dismissed Father's petition for lack of jurisdiction. The UCCJEA, found at 43 O.S.2011 §§ 551-101 through 551-402, contains two statutes allowing the award of attorney fees. Title 43 O.S.2011 § 551-208 states:

> A. Except as otherwise provided in Section 16 of this act or by another law of this state, *if a court of this state has jurisdiction under this act because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct,* the court shall decline to exercise its jurisdiction unless:
>
> 1. The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
>
> 2. A court of the state otherwise having jurisdiction under Sections 13 through 15 of this act determines that this state is a more appropriate forum under Section 19 of this act; or
>
> 3. No court of any other state would have jurisdiction under the criteria specified in Sections 13 through 15 of this act.
>
> B. If a court of this state declines to exercise its jurisdiction pursuant to subsection A of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Sections 13 through 15 of this act.
>
> C. *If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection A of this section, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney fees,* investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this act.

(Footnotes omitted.) The trial court did not dismiss the petition because Father had engaged in unjustifiable conduct, nor is such a finding in the record.[1] Simply filing the petition to establish visitation in the pre-existing paternity/child support case does not constitute unjustifiable conduct.

¶17 The second statute allowing an award of attorney fees pursuant to the UCCJEA is 43 O.S.2011 § 551-312, found in the section of the Act addressing enforcement, and provides:

> A. The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

The UCCJEA provides that an Oklahoma court must "recognize and enforce a child custody determination of a court of another state" where the court making the determination "exercised jurisdiction in substantial conformity with this act or the determination was made under factual circumstances meeting the jurisdictional standards of this act and the determination has not been modified in accordance with this act." 43 O.S.2011 § 551-303(A) (footnote omitted). No custody determination in another state was made that an Oklahoma court was required to recognize or enforce, and 43 O.S.2011 § 551-312's provision governing attorney fees is not applicable here.

¶18 The original filings in the case were brought to establish paternity – the Uniform Parentage Act, 10 O.S.2011 & Supp. 2016 §§ 7700-101 through 7800. Section 7800 provides, "Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction." 10 O.S.2011 § 7800. No court has determined that Mother does not have custody of JCA.

¶19 This Court has previously concluded that 43 O.S. § 110, the statute allowing attorney fees in dissolution of marriage cases, did not apply when the parents were never married. *See McKiddy v. Alarkon*, 2011 OK CIV APP 63, ¶ 15, 254 P.3d 141. Without some custody determination by a court, we conclude the Uniform Parentage Act also does not provide grounds for attorney fees in this case. Title 43 O.S. Supp. 2016 § 109.2 states:

> A. Except as otherwise provided by Section 7700-607 of Title 10 of the Oklahoma

> Statutes, in any action concerning the custody of a minor unmarried child or the determination of child support, the court may determine if the parties to the action are the parents of the children. In a paternity action, prior to genetic testing to establish paternity pursuant to the Uniform Parentage Act, the court may award custody to the presumed father if it would be in the best interests of the child. As used in this subsection, "presumed father" means a man who, by operation of law under Section 7700-204 of Title 10 of the Oklahoma Statutes, is recognized as the father of a child until that status is rebutted or confirmed in a judicial proceeding.
>
> B. If the parties to the action are the parents of the children, the court may determine which party should have custody of said children, may award child support to the parent to whom it awards custody, and may make an appropriate order for payment of costs and attorney fees.

(Footnote omitted.) In consideration of Father's petition to establish visitation, the trial court did not make any decisions as to JCA's custody or child support because it found it had no jurisdiction. And, the trial court determined that Father initiated the proceedings here on May 5, 2016. An attorney fee award would be improper under § 109.2 because no custody or child support decisions were made as a result of Father's petition to establish visitation.

¶20 Title 10 O.S.2011 § 7700-636 provides that in a proceeding to adjudicate whether a man is the parent of a child, pursuant to the Uniform Parentage Act, "the court may assess filing fees, reasonable attorney fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this Article." But the trial court was not then determining paternity (previously adjudicated), but was considering only Father's request for visitation. The fees incurred by Mother were not incurred to determine parentage and § 7700-636 does not apply.

¶21 In *Briggeman v. Hargrove*, 2014 OK CIV APP 13, 318 P.3d 1130, the mother filed an application for attorney fees citing 10 O.S.2011 § 7700-636 as the basis for the award. *Id*. ¶ 3. The father filed an application for emergency custody in Oklahoma while he was exercising visitation with the parties' minor child and refused to return the child to Ohio where the mother lived. *Id*. ¶ 2. The mother objected to the Tulsa County District Court's assumption of jurisdiction and asked the Oklahoma Supreme Court to assume jurisdiction after "[t]he emergency show cause hearing [was] continued over a period of many months without resolution." *Id*. The Supreme Court concluded the Tulsa County District Court did not have jurisdiction and ordered the child returned to the mother. *Id*. The Court found that the father "'came forward with no evidence to substantiate his claim of emergency, and at the most raised a question as to the relative merit of either himself or [the mother] as the primary custodial parent.'" *Id.* The Court concluded that the matter should be litigated before "'the home county and state of the child.'" *Id*.

¶22 The father filed a motion to dismiss mother's application for attorney fees, costs, and expenses. *Id.* ¶ 4. The trial court held that it lacked jurisdiction and granted father's motion to dismiss. *Id.* On appeal, this Court held that "notwithstanding the entry of the writ of prohibition, the trial court had the inherent equitable supervisory power to assess [the father] and award [the mother] attorney fees in the event it finds [the father's] conduct was oppressive or abusive." *Id.* ¶ 6.

¶23 Examining this case in the light of *Briggeman*, we see no indication that Father's conduct was oppressive or abusive.[2] The trial court determined it lacked jurisdiction after Father filed a petition for visitation. The "inherent equitable supervisory power to assess" attorney fees against Father is not implicated under these facts. And, even delving into the equitable considerations of this case, we could not require Father to pay Mother's attorney fees and costs when he was unemployed at the time of the fee hearing. Further, the travel distance between Rogers, Arkansas, and Jay, Oklahoma, is not so burdensome as to tip the equitable considerations in Mother's favor or to make Father's filing in Delaware County oppressive or abusive.

CONCLUSION

¶24 Finding no basis to invoke the "inherent equitable supervisory power" to award fees and no statutory basis for the fee award, we reverse the decision of the trial court.

¶25 **REVERSED**.

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

JANE P. WISEMAN, JUDGE:

1. Despite Mother's characterization of Father's conduct in her application for attorney fees as "capricious indifference to the welfare of the parties' child" causing this litigation, Father's quest to establish visitation seems both normal and appropriate.

2. See n. 1 above.

2018 OK CIV APP 4

GARY M. JOHNSON, Plaintiff/Appellee, vs. STATE OF OKLAHOMA, *ex. rel.*, OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, Defendant/Appellant.

Case No. 115,924. October 25, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE GEARY L. WALKE, JUDGE

AFFIRMED

Stephen G. Fabian, Jr., Oklahoma City, Oklahoma, for Plaintiff/Appellee,

Joanne Horne, OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, Oklahoma City, Oklahoma, for Defendant/Appellant.

Bay Mitchell, Presiding Judge:

¶1 Defendant/Appellant State of Oklahoma, *ex. rel.*, Oklahoma Department of Public Safety (DPS) appeals from an order awarding Plaintiff/Appellee Gary M. Johnson (Driver) $8,299.66 in attorney and expert witness fees. We find the trial court properly awarded fees pursuant to 12 O.S. 2011 §941(B) because DPS had no reasonable basis for revoking Driver's license; further, we find the amount awarded was not an abuse of discretion. We affirm.

¶2 Driver was arrested on November 16, 2014 for driving under the influence. On March 24, 2016, DPS issued an order revoking Driver's license. Pursuant to newly decided case law directly controlling Driver's case, DPS issued a new order setting aside the revocation on April 26, 2016. Despite the fact that Driver's license revocation had been set aside, DPS issued a notice to Driver on June 4, 2016, apparently due to a clerical error, titled "Confirmation Notice and Reinstatement Requirements" (the Notice). The Notice informed Driver that his license had been revoked for a period of 180 days beginning May 23, 2016 and that it was unlawful for him to drive during that period. The Notice also included a list of conditions to be completed and fees to be paid by Driver in order to reinstate his license after the 180-day period expired. Driver notified his attorney, who purchased a Motor Vehicle Report (MVR). The MVR indicated that Driver was indeed under revocation.

¶3 Driver filed an appeal in district court. When DPS learned of the proceeding, it sent Driver's attorney a letter stating, "This will acknowledge receipt of your appeal in the above captioned case. Our records have been updated to reflect the proper Implied Consent Order that sets side [sic] the revocation stemming from your client's 11/16/2014 stop." The letter was unsigned, and no set aside order was attached to the letter or sent separately to Driver or his attorney. Driver's attorney purchased another MVR, which confirmed that the revocation had been removed from Driver's record. The court held a hearing on Driver's appeal on July 11, 2016. After the hearing, the court sustained Driver's petition and, in an order dated July 20, 2016, the court set aside "the revocation of [Driver's] license dated June 4, 2016[.]" This order was not appealed by DPS.

¶4 Driver then filed an application for attorney fees and costs. Driver cited 12 O.S. 2011 §941(B) as authority for the award, which provides, in pertinent part, as follows:

> The respondent in any proceeding brought before any state administrative tribunal by any state agency, board, commission, department, authority or bureau authorized to make rules or formulate orders shall be entitled to recover against such state entity court costs, witness fees and reasonable attorney fees if the tribunal or a court of proper jurisdiction determines that the proceeding was brought without reasonable basis or is frivolous[.]

After a hearing, the court found that DPS revoked Driver's license without a reasonable basis and, accordingly, Driver was entitled to an award of attorney fees and costs under §941(B). The court awarded $6,799.66 in attorney fees and $1,500.00 in expert witness fees, for a total of $8,299.66. DPS appeals.

¶5 Statutory construction presents a question of law that we review *de novo. Humphries v. Lewis,* 2003 OK 12, ¶3, 67 P.3d 333, 335. Likewise, the question of whether a party is entitled to attorney fees is a legal question reviewed *de novo. State ex. rel. Dep't of Transp. v. Cedars Grp., L.L.C.,* 2017 OK 12, ¶10, 393 P.3d 1095, 1100. Under that standard, we claim plenary, independent and non-deferential authority to reexamine the trial court's legal rulings. *Kluver v.*

Weatherford Hosp. Auth., 1993 OK 85, ¶14, 859 P.2d 1081, 1084. However, we review the question of whether an attorney fee award is reasonable only to determine if the court abused its discretion. *Finnell v. Seismic*, 2003 OK 35, ¶8, 67 P.3d 339, 342.

¶6 DPS argues the court erred as a matter of law by expanding the "without reasonable basis" language in §941(B) to include clerical errors. We find *Miller v. State ex. rel. Dep't of Pub. Safety*, 1996 OK CIV APP 71, 926 P.2d 797, instructive. There, another division of this Court found that the trial court had evidence from which it could conclude that revocation proceedings were brought without a reasonable basis where DPS admitted it lacked authority to revoke an out-of-state motorist's license or have him disqualified in his home state. *Id.*, ¶8, 926 P.2d at 800. Here, DPS revoked Driver's license, even after case law directly controlling Driver's case directed the revocation to be set aside.[1] DPS did not dispute that its actions were unjustified. The determination of whether a particular action is "reasonable" is within the trial court's discretion. Here, the trial court found that DPS' clerical error was not a reasonable basis to revoke Driver's license; that finding will not be disturbed on appeal.

¶7 DPS also argues the case was mooted when it corrected Driver's record and there should have been no hearing on Driver's appeal. We disagree. "[V]oluntary cessation of challenged conduct does not deprive a tribunal of its power to conduct appellate review." *State ex. rel. Oklahoma Firefighters Pension and Retirement System v. City of Spencer,* 2009 OK 73, ¶5, 237 P.3d 125, 129. "A claim may be mooted where subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*, ¶5 n.16, 237 P.3d at 129 n.16 (citations omitted).

¶8 Here, DPS revoked Driver's license, despite its knowledge of controlling case law. The letter received by Driver's attorney from DPS claiming to have corrected the record was unsigned and included no official set-aside order. At the attorney fees hearing, Driver's attorney noted the difficulty he had experienced communicating with DPS and argued that he proceeded with the appeal so he could get an order from the court and "feel a little more secure from the standpoint of my client's welfare in the future." The court noted that, after DPS caught and corrected the mistake, nothing happened, "[e]xcept that you showed up and the two of you argued for two hours about what happened in the past and why you should or shouldn't be here instead of saying, 'Judge, we fess up. There should be an order so that this man isn't stopped wrongfully[.]'" Under these circumstances, Driver's appeal was not mooted by DPS' correction, and it was not error for the court to hear Driver's appeal.

¶9 Further, although Driver's attorney could have, as DPS suggests, called DPS directly in an attempt to resolve the matter, as noted above, the record shows that Driver's attorney had a difficult time resolving issues and communicating with DPS. It was not unreasonable for Driver's attorney to file a petition to correct DPS' actions. We also reject DPS' claim that the court should not have awarded fees because Driver was unharmed by the error. Section 941(B) does not require harm for an award under its provisions. Even if it did, the trial court could reasonably conclude that the uncertainty and stress created by the Notice was harmful in itself.

¶10 Finally, we reject DPS' claim that there was insufficient evidence to support the amount of the trial court's award. DPS agreed that the hourly rates submitted by Driver's attorney were reasonable. The record shows that the court awarded less than requested, excluding any time expended by Driver's attorney before receipt of the Notice, as well as time spent by Driver's attorney responding to DPS' application for attorney fees. DPS presents no argument or evidence to support its claim that the hours expended were unreasonable. Accordingly, we find the attorney fee award was not an abuse of discretion.

¶11 AFFIRMED.

BUETTNER, C.J., and SWINTON, J., concur.

Bay Mitchell, Presiding Judge:

1. We reject DPS' claim that the Notice sent to Driver was not an actual revocation: the MVR purchased by Driver's attorney showed that Driver's license had in fact been revoked.

2018 OK CIV APP 5

In the Matter of J.J.P. and J.L.P., Deprived Children: ERIKA PRUIETT, Appellant, vs. THE STATE OF OKLAHOMA, Appellee.

Case No. 115,944. December 1, 2017

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE LYDIA Y. GREEN, JUDGE

AFFIRMED

Bill Parker, Oklahoma City, Oklahoma, for Mother/Appellant,

Ambika Nagasandra, Assistant District Attorney, Oklahoma County, Oklahoma City, Oklahoma, for The State of Oklahoma/Appellee,

Jennifer Douglas, Assistant Public Defender, Oklahoma County, Oklahoma City, Oklahoma, for the Minor Children/Appellee.

Bay Mitchell, Presiding Judge:

¶1 Appellant Erika Pruiett ("Mother"), the natural mother of minor children J.J.P., d.o.b. 10/12/2011, and J.L.P., d.o.b. 11/13/2012, (collectively "the Minor Children" or "Children"), appeals the judgment terminating her parental rights following a multi-day jury trial. Because our review of the record demonstrated the State proved its termination case with clear and convincing evidence, we AFFIRM the judgment of the trial court.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 Both of the Minor Children were removed from Mother's home in December 2012 when J.L.P., then approximately one-month old, suffered severe injuries.[1] The investigation into these injuries did not reveal who injured the child, but Mother and officials from law enforcement and the Department of Human Services ("DHS") suspected it was Mother's boyfriend at the time. A referral had previously been made to DHS at the time of J.L.P.'s birth due to Mother's statements that she felt like she might harm the child. Mother was later diagnosed with postpartum depression. Following a jury trial, both Children were adjudicated deprived by order entered September 3, 2014. Specifically, the order provided the Children were adjudicated based upon the lack of proper parental care and guardianship, physical abuse, and Mother's mental health. The jury declined to terminate Mother's parental rights at that time.

¶3 Following the deprived adjudication, Mother entered into an Individualized Service Plan ("ISP") on October 10, 2014. Mother worked through her plan which included parenting classes and other skills building programs. Mother progressed from supervised visitation, to unsupervised visitation, including extended overnight visits, and eventually to trial reunification which started June 9, 2016. During trial reunification, Mother reported to the permanency planning caseworker, Shelley Hughes, that the Minor Children were jumping on one of their twin beds when the bed slats broke and J.L.P. fell through the slats and hit his face. The fall left a scratch on J.L.P.'s face. This incident occurred sometime in mid-July 2016. During this same period of time, Mother underwent a tonsillectomy. The State's case highlighted Mother's apparent inability to make appropriate plans for the Children during her recovery from surgery. DHS offered to put the Children in respite care with the foster parents they had been with prior to trial reunification, but Mother declined. She told DHS that her sister and father could help with childcare, but neither family member was able to take time off work to help. Testimony was disputed as to whether DHS made it known to Mother that other options to help with childcare may have been available to her during her recovery including daycare. Mother was not employed at this time, so she did not believe DHS subsidized daycare was available to her.

¶4 Shortly after the bed incident, Ms. Hughes took J.L.P. to an appointment with his physical therapist where the therapist reported to Ms. Hughes that J.L.P. disclosed that he got the scratch on his face because Mother hit him with her cell phone.[2] Following that disclosure, Ms. Hughes took J.L.P. to The Children's Hospital in Oklahoma City where a pediatric child abuse specialist, Dr. Ryan Brown, examined him. When Dr. Brown asked J.L.P. how he got the scratch, J.L.P. again disclosed that Mother hit him with her cell phone and used Dr. Brown's cell phone to demonstrate. Dr. Brown's physical examination of J.L.P. also revealed that J.L.P. had bruising on the fleshiest part of his buttocks which Dr. Brown testified was consistent with the child being spanked beyond normal discipline. Following his examination, Dr. Brown drafted a memo to DHS which stated he thought the scratch on J.L.P.'s face and bruising to his buttocks were the results of child abuse. J.L.P. was returned to Mother's home, and both of the Minor Children remained in Mother's care at that time.

¶5 In response to Dr. Brown's referral, DHS sent a Child Protective Services ("CPS") caseworker, Jasmine Small, to check on both Children. Ms. Small testified at trial that her initial interaction with the family did not reveal any concerns or show that the Minor Children were

threatened with immediate harm. DHS did not remove the Children at that time but scheduled forensic interviews. At that point, Mallory Hulsey took over the investigation. Ms. Hulsey was of the opinion that J.L.P's injuries could not have been caused by falling through the bed slats. Ms. Hulsey testified that J.L.P. revealed during his forensic interview that Mother used a brown belt to hit the siblings. She also testified that J.L.P. used profanity not normally used by such young children to describe Mother's disciplinary actions against the siblings. J.L.P. made consistent disclosures to the children's therapist and Ms. Hughes using the same profanity. During his forensic interview, the older sibling, J.J.P., also made similar disclosures using the same profane language and specifically mentioned the brown belt. Following the disclosures by the Children, DHS changed its goal for the family from reunification to termination. On September 20, 2016, the State filed its Third Amended Petition where it sought to terminate Mother's parental rights to both Children based on 10A O.S. Supp. 2015 §§ 1-4-904(B)(5) (failure to correct conditions) and (B)(10) (subsequent abuse). Specifically, the State alleged Mother failed to correct the conditions of lack of appropriate parental care and guardianship, physical abuse, and Mother's mental health.

¶6 In addition to the evidence and testimony discussed above, the Children's therapist, Shar'dae Lewis, also testified that both Minor Children made consistent disclosures of physical abuse at the hands of Mother or her father (their grandfather) and also expressed that they were afraid of Mother. Ms. Lewis testified that J.L.P. cried when he made his disclosures and that J.J.P. described being spanked repeatedly. J.J.P. would throw objects and pound his fists while he made these disclosures to Ms. Lewis.

¶7 During the course of this case, the trial court also appointed two *guardians ad litem* ("GAL") to represent the best interests of the Minor Children. At trial one GAL, LeAnne Burnett, testified about her interactions with the Children. Based upon her interactions with the Children and her understanding of their extreme reluctance to continue visitations with Mother after the bed incident and the disclosures of abuse by Mother, Ms. Burnett filed a motion with the trial court to suspend Mother's supervised visitations until a decision was reached on Mother's parental rights. She specifically recounted one instance where she went to visit the Children at the foster parents' home. Previously, all of her visitations with the Minor Children had been at Mother's house. When she arrived at the foster parents' home, J.L.P. greeted her with a statement that he did not want to go to Mother's house. While acknowledging the progress Mother had made on her ISP, Ms. Burnett testified that she thought it was in the Children's best interests if Mother's parental rights were terminated.

¶8 For her part, Mother denied ever physically disciplining the Minor Children but did admit to threatening them with "whoopings." She testified that the scratch on J.L.P.'s face and the bruise on his buttocks came from the fall through the bed slats. She also denied that she knew of or allowed her father to spank the Children. Mother testified to all the progress she had made on her ISP and her desire to have her children returned to her. Mother also recounted her history with mental illness. Specifically, Mother stated she had been diagnosed with depression as a teenager and began receiving Social Security disability benefits. Both she and her therapist testified that she consistently attended her therapy sessions and that she was continuing to make progress on dealing with the daily stress of life. Mother also testified that she saw a nurse practitioner at Planned Parenthood after the Children were removed from trial reunification. The nurse prescribed an anti-depressant to help her deal with that situation, but, with the approval of the nurse, Mother stopped taking the medication because of the side effects. Mother's sister also testified on Mother's behalf and stated that she thought Mother did a good job with the Children but also admitted that she lived in north Texas and was not around them daily.

¶9 Following the submission of all the evidence to the jury, the jury terminated Mother's rights based on 10A O.S. Supp. 2015 §§ 1-4-904(B)(5) (failure to correct conditions) and (B)(10) (subsequent abuse). Specifically, the jury found Mother failed to correct the conditions of lack of appropriate parental care and guardianship, physical abuse, and Mother's mental health. Mother appeals the jury's verdict arguing that the State failed to prove its case by clear and convincing evidence.

STANDARD OF REVIEW

¶10 In parental termination cases, the State must show by clear and convincing evidence

that the child's best interest is served by the termination of parental rights. *In the Matter of C.G.,* 1981 OK 131, ¶17, 637 P.2d 66, 70-71. "Clear and convincing evidence" is the measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established. *In the Matter of the Adoption of L.D.S.*, 2006 OK 80, ¶11, 155 P.3d 1, 4 (quoting *In re C.G.*, 1981 OK 131, n. 12). This standard of proof "balances the parents' fundamental freedom from family disruption with the state's duty to protect children within its borders." *Id.* In like manner, our review on appeal must find the presence of clear and convincing evidence to support the trial court's decision. *In the Matter of S.B.C.*, 2002 OK 83, ¶7, 64 P.3d 1080, 1082. Appellate courts must canvass the record to determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that the grounds for termination were proven. *Id.* at ¶6.

¶11 The joint brief submitted by the State and the Minor Children points out that Mother's attorney did not challenge the sufficiency of the State's evidence at trial and contends Mother has thus failed to preserve that issue for appellate review. *Drouillard v. Jensen Const. Co. of Okla., Inc*., 1979 OK 126, ¶5, 601 P.2d 92, 93 (stating the general rule that, in a jury trial, appellate review is secured by moving for a directed verdict at the close of all the evidence and before the issues are submitted to the jury). That general rule will not apply here because of the fundamental and constitutionally protected parental rights of which the State seeks to deprive Mother.[3] We will not be limited in our review of the evidence by Mother's failure to challenge the sufficiency of that evidence at trial. Further, given our Supreme Court's unequivocal instructions to apply the clear and convincing standard of review, Mother's procedural lapse will not overcome Mother's request for meaningful appellate review. *In re S.B.C.,* 2002 OK 83, ¶7 ("[A]ppellate review of a parental-bond severance must be conducted by searching for the presence of clear-and-convincing proof.").

ANALYSIS

¶12 Mother's sole argument on appeal is that the State failed to prove by clear and convincing evidence that the statutory grounds for termination were met. Specifically, as to the allegations that Mother failed to correct conditions of lack of appropriate parental care and guardianship and physical abuse, 10A O.S. Supp. 2015 § 1-4-904 (B)(5), Mother argues that the State relied solely on the disclosures by the Minor Children to support termination and that such statements were not sufficient. Similarly, because the State's case that the Children suffered subsequent abuse, *id*. at § 1-4-904(B)(10), was supported by the same evidence, Mother argues the State did not meet its burden. As to the allegation Mother failed to correct the condition of her mental health, *id.* at § 1-4-904(B)(5), she argued the State never put forth any evidence about her mental health diagnosis or that she was not complying with the treatment thereof.

¶13 We agree with Mother that the State failed to prove with clear and convincing evidence that she failed to correct the condition related to the treatment of her mental health. The State did not provide any evidence of Mother's diagnosis or that she was not complying with the treatment protocols or otherwise not complying with the ISP. Both Mother and her therapist testified that she was consistent in going to therapy. The only testimony related to prescription treatment for Mother's mental health was that Mother sought out treatment after the trial reunification ended and that she stopped taking the drugs, with the nurse's approval, because of the side effects. Such evidence is insufficient to terminate Mother's parental rights for failure to correct the condition of her mental health.

¶14 However, we disagree with Mother's description of the majority of the State's case as being solely supported by the unreliable statements of young children. While the Minor Children in this case made the initial disclosures of abuse, the State presented testimony from multiple sources substantiating the Children's claims, including but not limited to the pediatric child abuse specialist, Dr. Brown, the DHS permanency worker, Ms. Hughes, the DHS investigator who investigated the Children's claims, Ms. Hulsey, along with the Children's therapist, Ms. Lewis, who testified to the continuing, consistent disclosures made by the Children. The Children's GAL, Ms. Burnett, also testified about her interactions with the Children and her belief that termination was in their best interests. While Mother denied the allegations of abuse, no explanation was ever given as to how the Children could have given consistent, continuing disclosures which used similar profane language and described the

same type of abuse. Evidence presented by the State overwhelmed any explanation or evidence presented by Mother.

¶15 Because we find the State proved with clear and convincing evidence that Mother failed to correct the condition of lack of proper parental care and guardianship and physical abuse and that the Minor Children suffered subsequent abuse, the judgment of the trial court terminating Mother's parental rights is AFFIRMED.

BUETTNER, C.J., and SWINTON, J., concur.

Bay Mitchell, Presiding Judge:

1. The jury for the termination proceeding was not made aware of the details of J.L.P.'s injuries, but the record showed the child was admitted to the hospital with two subdural hematomas, an occipital skull fracture, retinal hemorrhaging, three separate fractures to his legs, and brain injuries consistent with being choked. These injuries had lasting effects on J.L.P.'s health. He was diagnosed with cerebral palsy and required occupational and physical therapy.

2. J.L.P. actually stated that "Erika" hit him with the phone. Testimony was consistent at trial that both Minor Children referred to Mother as "Erika" instead of "mom" or other similar title.

3. The termination of a right so fundamental dictates an application of the full array of procedural safeguards. *Matter of Chad S.*, 1978 OK 94, ¶12, 580 P.2d 983, 985; *Matter of A.M. and R.W.*, 2000 OK 82, ¶8, 13 P.3d 484, 487. Because of the fundamental right which parents have in the custody of their children and the gravity of the sanction imposed by termination, there is no substitute to fully complying with all procedural safeguards.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, January 4, 2018

F-2016-1015 — Appellant Derreck Ryan Gray was tried by jury and convicted of Unlawful Possession of a Controlled Dangerous Substance (Methamphetamine) With Intent to Distribute, After Former Conviction of a Felony (Count I) (63 O.S.Supp.2012, § 2-401(B)(2)) and Obstructing an Officer, After Former Conviction of Two or More Felonies (Count II (21 O.S.2011, § 540) in the District Court of Payne County, Case No. CF-2015-380. The jury recommended as punishment imprisonment for twenty (24) years in Count I and one year and a five hundred dollar ($500.00) fine in in Count II. The trial court sentenced accordingly, except the fine in Count II was reduced to one hundred dollars ($100.00). The sentences were ordered to be served concurrent with each other. From this judgment and sentence Derreck Ryan Gray has perfected his appeal. The Judgment and Sentence are AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

Thursday, January 11, 2018

F-2016-52 — On April 16, 2015, Appellant Teresa Jean Hausle, represented by counsel, entered a guilty plea to Count One, Possession of a Controlled Dangerous Substance (Methamphetamine) after former conviction of a drug crime and Count 2, Possession of Drug Paraphernalia (misdemeanor) in Seminole County Case No. CF-2014-303. Sentencing was deferred pending Hausle's completion of the Seminole County Drug Court program. On August 25, 2015, the State filed an Application to Terminate Hausle from Drug Court. On January 7, 2016, the Honorable George Butner, District Judge, terminated Hausle's Drug Court participation and sentenced her as specified in her plea agreement. From this judgment and sentence Hausle appeals. Hausle's termination from Drug Court is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J.: Concur; Lewis, V.P.J.: Concur; Hudson, J.: Concur; Kuehn, J.: Concur.

F-2016-1093 — James Richard Irwin, Appellant, was tried by jury for the crimes of unlawful possession of a controlled dangerous substance (methamphetamine) (Count 1); possession of a firearm in the commission of a felony (Count 2), and unlawful possession of drug paraphernalia (Count 4) in Case No. CF-2016-21 in the District Court of Comanche County. The jury returned a verdict of guilty and set punishment at five years imprisonment and a $2,500.00 fine in Count 1, ten years imprisonment in Count 2, and thirty days imprisonment and a $500.00 fine in Count 4. The trial court sentenced accordingly and ordered the sentences in Counts 1 and 2 served consecutively, and Count 4 served concurrently with Count 1. From this judgment and sentence James Richard Irwin has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2016-994 — Phillip Eric Winbush, III, Appellant, was tried by jury in Case No. CF-2016-994, in the District Court of Comanche County, for the crime of Possession of Controlled Dangerous Substance (Methamphetamine), After Former Conviction of Two Felonies. The jury returned a verdict of guilty and recommended as punishment eight years imprisonment. The Honorable Mark R. Smith, District Judge, sentenced Winbush in accordance with the jury's verdict, ordered payment of various costs and ordered credit for time served. Judge Smith also ordered the sentence to run consecutive to the sentence imposed in Comanche County Case No. CF-2015-92. From this judgment and sentence Phillip Eric Winbush, III has perfected his appeal. The Judgment and Sentence of the district court is AFFIRMED except the indigent defense fee imposed is MODIFIED to $1,000.00. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs in Results; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2016-925 — Douglas Omagene Gilbert, Appellant, was tried by jury for the crime of felonious possession of a firearm, after former conviction of two or more felony offenses in Case No. CF-2016-158 in the District Court of

McCurtain County. The jury returned a verdict of guilty and set punishment at ten years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Douglas Omagene Gilbert has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs in results; Kuehn, J., dissents; Rowland, J., concurs in results.

C-2016-966 — Erlin Arteaga, Petitioner, was charged with Rape – First Degree, in Tulsa County District Court Case No. CF-2016-621. Petitioner entered a blind plea of guilty to this charge before the Honorable Sharon Holmes, District Judge. Judge Holmes accepted Petitioner's plea, postponed sentencing and ordered a presentence investigation and report. Petitioner was then sentenced to life imprisonment and was also ordered to pay various fines, fees, and costs. Petitioner filed a motion to withdraw his plea. Conflict counsel was subsequently appointed and a hearing on Petitioner's motion was held. After the hearing, Judge Holmes denied the motion. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

F-2016-710 — Devin Rogers, Appellant, was tried by jury for the crimes of kidnapping for extortion (Count 1); feloniously pointing a firearm (Count 3); possession of a firearm in the commission of a felony (Count 4); and reckless conduct with a firearm, a misdemeanor (Count 6), in Case No. CF-2014-2027 in the District Court of Cleveland County. The jury returned a verdict of guilty and recommended as punishment thirteen years imprisonment and a $5,000.00 fine in Count 1, ten years imprisonment and a $5,000.00 fine in Count 3, three years imprisonment and a $1,000.00 fine in Count 4, and six months in jail and a $500.00 fine in Count 6. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Devin Rogers has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs in results; Hudson, J., concurs; Kuehn, J., concurs in results; Rowland, J., concurs.

F-2017-0031 — Appellant, Heath Saxon Ford, was charged in the District Court of McCurtain County, Case No. CF-2014-085, on March 31, 2014, with Count 1 – Driving a Motor Vehicle While Under the Influence of Alcohol, a felony; Count 2 – Unauthorized Use of a Vehicle, a felony; Count 3 – Transporting Open Bottle or Container of Liquor, a misdemeanor; Count 4 – Transporting Opened Container of Beer, a misdemeanor; Count 5 – Threaten to Perform Act of Violence, a misdemeanor; and Count 6 – Driving with License Cancelled/Suspended/Revoked, a misdemeanor. These were charged after former conviction of two felonies. Appellant entered a plea of guilty to Counts 1 and 2; the remaining counts were dismissed. Appellant entered the McCurtain County Special Courts (Drug Court) Program. He agreed that if he failed, he would be sentenced to twelve years in the Department of Corrections; but if he succeeded, the remaining charges would be dismissed. The State filed an application to terminate Appellant from Drug Court on June 1, 2016. Following a hearing on the State's application on October 13, 2016, the Honorable Walter Hamilton, Special Judge, found by a preponderance of the evidence that Appellant violated the terms of his performance contract as alleged by the State. Appellant was sentenced to twelve years imprisonment, with credit for time served. Appellant appeals from his termination from Drug Court. Appellant's termination from Drug Court is REVERSED and REMANDED to the District Court for reinstatement into a Drug Court program. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs in Results; Lewis, V.P.J., Concurs in Results; Kuehn, J., Concurs; Rowland, J., Concurs.

RE-2016-768 — On October 16, 2008, Appellant Bycari J. Chatman, represented by counsel, entered a guilty plea to 2nd and Subsequent Possession of a Controlled Substance (Marijuana) after for-mer conviction of two felonies in Muskogee County Case No. CF-2006-805. Chatman was sentenced to twenty (20) years, all suspended, subject to terms and conditions of probation. On March 1, 2016, the State filed its fourth Application to Revoke Chatman's suspended sentence alleging he violated the terms and conditions of his probation by committing ad-ditional felony offenses. On August 2, 2016, the District Court of Muskogee County, the Honorable Mike Norman, District Judge, revoked the remainder of Chatman's suspended sentence in full. The revocation of Chatman's suspended sentence is AFFIRMED.Opinion by:

Hudson, J.; Lumpkin, P.J., Concurs in Results; Lewis, V.P.J. Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

COURT OF CIVIL APPEALS
(Division No. 2)
Friday, January 5, 2018

113,758 — Scott Sawyer, Plaintiff/Appellant, vs. Glenn D. Sawyer, Kenneth L. Sawyer and Joy Wise aka Sawyer, jointly and severally, Defendants/Appellees, Kenneth L. Sawyer and Joy Wise, individually and as Co-Powers of Attorney for their mother Janice Sawyer; Glenn D. Sawyer, Gladys Sawyer Box, Don R. Sawyer, Diana Sawyer Hash and Roger L. Sawyer, all individuals, Counterclaim Plaintiffs, vs. Scott Sawyer, Counterclaim Defendant. Appeal from Order of the District Court of Tulsa County, Hon. Carlos J. Chappelle, Trial Judge. This is the second appeal and counter-appeal in this case involving conflicting claims between the children of Argle and Janice Sawyer. Scott Sawyer appeals the judgment in favor of his older siblings Glenn D. Sawyer, Kenneth L. Sawyer and Joy Wise regarding Scott's claim to one-half of the funds deposited in six separate accounts and on which he was listed as a co-owner. Glenn, Kenneth and Joy, together with their other siblings, Gladys Sawyer Box, Don R. Sawyer, Diana Sawyer Hash and Roger L. Sawyer also appeal the judgment in favor of Scott on their counterclaim alleging that Scott misappropriated funds from their parents. The language in account documents that Scott relied on to establish that he was a joint tenant regarding the five certificates of deposit does not expressly create a joint tenancy. Further, the extrinsic evidence shows that the party purchasing those certificates did not intend to create joint ownership with right of survivorship regarding those certificates. Consequently, we affirm the judgment in favor of Kenneth and Glenn Sawyer and Joy Wise as to Scott's claim to the certificates of deposit. The checking account documents clearly state that the account is a joint tenant account with right of survivorship. Pursuant to *In re Estate of Metz,* 2011 OK 26, 256 P.3d 45, no further evidence can be considered regarding the ownership of that account. The district court's judgment with respect to that account is reversed. On remand, the district court shall enter judgment in favor of Scott for $10,000. The district court's judgment regarding the siblings' counterclaim is also reversed and that aspect of this case is remanded for disposition of the counterclaim consistent with this Opinion. AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS AND FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Goodman, J., and Wiseman, J. (sitting by designation), concur.

Thursday, January 11, 2018

114,715 — Bank of America, N.A., Plaintiff/Appellee, vs. Virginia Morgan, Defendant/Appellant, and Charles W. Morgan, Defendant. Appeal from Order of the District Court of Muskogee County, Hon. Norman Thygesen, Trial Judge. Virginia Morgan appeals the district court's order confirming the sheriff's sale of her real property in this mortgage foreclosure action. Bank of America, N.A., purchased Morgan's property at the sale and then filed a motion to confirm the sale. Although the Bank assigned beneficial ownership of the 2014 judgment, it retained legal title to that judgment and was the proper party to request confirmation of the sheriff's sale. Therefore, the district court did not abuse its discretion when it confirmed that sale. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

114,223 — The Bank Of New York Mellon Trust Company, N.A., F/K/A The Bank of New York Trust Company, N.A., as Successor-in-Interest to JPMorgan Chase Bank, N.A., F/K/A JPMorgan Chase Bank, As Successor-in-Interest to Bank One, N.A., as Trustee for Master Alternative Loan Trust 2002-3, Mortgage Pass Through Certificates, Series 2002-3, Plaintiff/Appellee, vs. Bonnie S. Masterson, Defendant/Appellant, and John F. Masterson; John Doe, as Occupant of the Premises; Jane Doe, as Occupant of the Premises; Alisa D. Dougless; Spouse of Alisa D. Dougless, if married; Monogram Credit Card Bank, Georgia; CAVC of Colorado, LLC; Scott Lowry Law Office, P.C.; Unifund CCR Partners; Capital One Bank (USA), N.A.; LVNV Funding, LLC; Carolyn Rhodes; and Head, Johnson & Kachigian, P.C., Defendants. Appeal from an order of the District Court of Tulsa County, Hon. Jefferson D. Sellers, Trial Judge, relating to an action to foreclose a note and mortgage. This is the second attempt to foreclose Defendant's real property. The first attempt began in 2003, after Defendant defaulted on her note. The case proceeded for years before The Bank of New York Mellon Trust Company, N.A. (BONY) was substituted as plaintiff in 2011. The 2003 case

was subsequently dismissed in 2012 for failure to prosecute, and without final judgment being entered by the trial court. Within one year of the dismissal of the 2003 action, BONY filed an action to collect on the note and foreclose the security interest thereon. It later sought summary judgment, which was granted and memorialized in a journal entry of judgment. That judgment granted an *in personam* judgment against Defendant Bonnie S. Masterson for the balance due on the note, recognized various liens on the property, foreclosed the mortgage and lien held by Plaintiff, and ordered the property be sold at a Sheriff's sale. Defendant filed a motion to vacate the journal entry. The motion to vacate was denied. Plaintiff's request to confirm the Sheriff's sale, and Defendant Masterson's oral request for a stay were granted in an order filed August 18, 2015. Defendant filed her petition in error and attached three orders: the Journal Entry of Judgment, the order denying her motion to vacate; and the order confirming the Sheriff's sale and granting Masterson a conditional stay. We find the only order properly before us is the trial court's denial of the motion to vacate. We conclude the trial court's decision to grant summary judgment to Plaintiff BONY was correct, and it therefore follows that its order denying Defendant's motion to vacate is correct and therefore, it is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Rapp, J., concurs, and Fischer, P.J., concurs except as to Part V. Concur in Part V on the basis of stare decisis.

114,463 — Charles Davis, Plaintiff/Appellant, v. Martin Marietta Materials, Inc., Meridian Aggregates Company, Venture Drilling Company and Buckley Powder Company, Defendants/Appellees. Appeal from an order of the District Court of Choctaw County, Hon. Michael D. DeBerry, Trial Judge, dismissing Plaintiff's claim, which was governed by the Asbestos and Silica Claims Priorities Act, 76 O.S.Supp. 2013, §§ 90.1 through 90.12 (ASCPA 2013). Reviewing the trial court's order, it both dismissed the claim and placed it on "inactive" status. The former portion of the order was legal error. The trial court correctly declined to place the matter on the active trial docket pursuant to the ASCPA of 2013, but erred when it then dismissed the claim. We therefore reverse that portion of the trial court's order dismissing the claim. Because we find legal error occurred which necessitates reversal, we need not address the Plaintiff's claim that the ASCPA of 2013 is unconstitutional at this time. The trial court's order dismissing the claim is reversed and the matter is remanded to the trial court for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Goodman, J.; Rapp, J., concurs, and Fischer, P.J., concurs in part and dissents in part.

Friday, January 12, 2018

115,258 — Nicholas David Deangelis, Petitioner/Appellee, v. Alicia Marie Ryherd, Respondent/Appellant. Appeal from an Order of the District Court of Tulsa County, Hon. Tammy Bruce, Trial Judge. The trial court petitioner, Alicia Ryherd (Mother), appeals the trial court's decision overruling her amended motion for new trial, reconsideration and to vacate the decision that denied her application to relocate her and the respondent's, Nicholas David Deangelis' (Father), children to Saudi Arabia. This is a case where Mother seeks to relocate the parties' children to another country where her husband has employment. The trial court determined that Mother made her application in good faith and the burden to oppose the motion shifted to Father. This ruling is not challenged in this appeal and the ruling is final. The trial court set out in extensive detail the evidence, the trial court's reasoning, and its decision. This Court summarily affirms the decision of the trial court overruling Mother's motion for new trial, reconsideration and to vacate the underlying decision denying her motion to relocate the parties' children to Saudi Arabia. The trial court is affirmed under Okla. Sup.Ct. Rule 1.202(b) (findings of fact of the trial court are supported by sufficient competent evidence); 1.202(d) (the opinion and findings of fact and conclusions of law of the trial court adequately explain the decision); and Rule 1.202(e) (the trial court did not abuse its discretion). Okla.Sup.Ct. Rule 1.202, 12 O.S.2011, ch, 15 app.1. On May 18, 2017, Father filed a Motion for Appeal related Attorney Fees. The appellate Record does not contain any response from Mother. Father's Motion conforms to the requirements of Okla.Sup.Ct. Rule 1.14(B), 12 O.S.2011, ch, 15 app.1. Therefore, the motion is granted and the cause is remanded to the trial court for a hearing to determine the amount of a reasonable appeal-related attorney fee on accord with *Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659. AFFIRMED AND REMANDED FOR FURTHER PROCEED-

INGS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Fischer, P.J., and Goodman, J., concur.

(Division No. 3)
Friday, January 5, 2018

115,785 — (Comp. w/115,541) Charles B. and Kathleen J. Wheeler Trust; Geraldine T. Brownlee Trust; Judy Coburn; Laurence Coburn; Mary Jane Tontz Carey and Michael Carey, Plaintiffs/Appellees, vs. Slawson Exploration Company, Inc., and Stephens Production Company, Defendants/Appellants. Appeal from the District Court of Logan County, Oklahoma. Honorable Louis A. Duel, Trial Judge. Defendants/Appellants Slawson Exploration, Inc. and Stephens Production Company appeal from the trial court's award of attorney fees and costs to Plaintiffs/Appellees Charles B. and Kathleen J. Wheeler Trust, Geraldine T. Brownlee Trust, Judy Coburn, Laurence Coburn, Mary Jane Tontz Carey and Michael Carey (Plaintiffs) in a breach of contract action related to minerals located in Logan County, Oklahoma. In a companion case (case number 115,541), this Court affirmed the trial court's order granting summary judgment in favor of Plaintiffs. Thereafter, the trial court entered an order awarding Plaintiffs attorney fees in the amount of $20,400.00. The contract does not provide for attorney fees, and we do not find any applicable statutory authority warranting an award of fees. The trial court's award of attorney fees was not supported by law. We therefore REVERSE the trial court's January 27, 2017 order. Opinion by Swinton, Acting P.J.; Buettner, J., and Bell, J. (sitting by designation), concur.

(Division No. 4)
Thursday, January 4, 2018

115,337 — Brian Lee Deibler, Petitioner/Appellee, v. Myra Dalke Deibler, Respondent/Appellant. Appeal from the District Court of Kay County, Hon. Jennifer Brock, Trial Judge. In this post-divorce proceeding, Respondent (Mother) appeals from the trial court's order granting Petitioner's (Father) motion to modify the parties' divorce decree with regard to the care, custody and control of their minor child (Child). We conclude the trial court's determination that the parties are unable to cooperate with each other and engage in joint discussions and joint decision-making regarding the best interests of Child is not clearly contrary to the weight of the evidence. Thus, the trial court did not err in terminating joint custody. In addition, we conclude the trial court's decision awarding custody to Father is not clearly against the weight of the evidence. Consequently, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Thornbrugh, V.C.J., and Wiseman, J., concur.

116,046 — In the Matter of: D.W., H.W. and N.W., Deprived Children, Brittany Wallace, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Rogers County, Hon. Lara M. Russell, Trial Judge. In this termination of parental rights case to which the Indian Child Welfare Act applies, Brittany Wallace (Mother) appeals on various grounds from an Order of the trial court terminating her parental rights to her three minor children upon the State of Oklahoma's petition to immediately terminate her parental rights. We conclude Mother was provided with effective assistance of trial counsel and conclude the trial court properly determined that active efforts had been made to keep the Indian family together. Further, based on our review of the record, we conclude State presented clear and convincing evidence that Mother's parental rights should be terminated for the statutory grounds set forth in §10A O.S. Supp. 2015 § 1-4-904(B)(9), (10) & (14), and presented proof beyond a reasonable doubt that Mother's continued custody of the children would likely result in serious emotional or physical damage to the children. Consequently, the trial court did not err in terminating Mother's parental rights and, therefore, we affirm the court's Order. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Thornbrush, V.C.J., and Wiseman, J., concur.

116,109 — Sequel Youth & Family Services LLC and Travelers Indemnity Co. of America, Petitioners, v. Marcella Aysisi and The Workers' Compensation Commission, Respondents. Proceeding to review an Order of the Workers' Compensation Commission En Banc, Michael T. Egan, Administrative Law Judge. Title 85A O.S. Supp. 2014 § 2(9)(b)(5) of the Administrative Workers' Compensation Act (AWCA), when compared to corresponding subsections in the Workers' Compensation Code (Code) and Workers' Compensation Act (WCA), no longer contains any mention of the "major cause" test used, in past cases, to differentiate those degenerative conditions which are not compensable because they are the natural result of aging from those which are compen-

sable because they are the result of the employment. However, the language of § 2(9)(b)(5) of the AWCA is substantially similar to the language found in the corresponding provisions of the Code and WCA. Moreover, the language of the major cause subsection of § 2 of the AWCA states, among other things, that "[a] finding of major cause shall be established by a preponderance of the evidence," and dictates that the exclusive remedy provisions apply even where a finding is made "that the workplace was not a major cause of the injury, disease or illness[.]" 85A O.S. Supp. 2014 § 2(27). We conclude the mere legislative silence as to the major cause test in § 2(9)(b)(5) does not suffice to signal the abrogation of that test. Thus, we conclude it is the legislative intent that, in this case, Respondent's osteoarthritis, if resulting from the natural results of aging, is not compensable unless it is found that the employment is the major cause of the deterioration or degeneration and such a finding is supported by objective medical evidence. This same test applies to both of Respondent's knees. Any other interpretation would result in absurd consequences and vain and useless provisions, and would fail to effectuate the legislative intent. Consequently, we vacate the Commission's order affirming the order of the Administrative Law Judge, and we remand this case to the Administrative Law Judge for further proceedings consistent with this Court's Opinion. VACATED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Thornbrugh, V.C.J., and Wiseman, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Thursday, December 7, 2017

114,693 — (Comp. w/115,143) Carl Jordan, Plaintiff/Appellant, vs. Jeff Heckenkemper, an individual; Performance Real Estate Services, Inc., an Oklahoma corporation, d/b/a Jeff Heckenkemper Renovations, Defendants/Appellees, Jeff Heckenkemper, an individual; Performance Real Estate Services, Inc., an Oklahoma corporation, d/b/a Jeff Heckenkemper Renovations, Third-Party Plaintiff, vs. 1st Call Electric, L.L.C., an Oklahoma corporation; Steve Moore, an individual; Snowden Engineering, Inc., an Oklahoma corporation; Alberto Chinchilla, an individual, and d/b/a Transformations by Alberto, L.L.C., an Oklahoma corporation; Matt Shope, an individual, d/b/a Matt Shope Plumbing & Drain; Persi Perez, an individual; Daniel Reyes, an individual; Gregory Patton, an individual; and Saul Bravo, an individual, Third-Party Defendants. Plaintiff/Appellant's Petition for Rehearing filed November 2, 2017 is *DENIED*.

Thursday, December 7, 2017

115,143 — (Comp. w/114,693) Carl Jordan, Plaintiff/Appellant, vs. Jeff Heckenkemper, an individual; Performance Real Estate Services, Inc., an Oklahoma corporation, d/b/a Jeff Heckenkemper Renovations, Defendants/Appellees, Jeff Heckenkemper, an individual; Performance Real Estate Services, Inc., an Oklahoma corporation, d/b/a Jeff Heckenkemper Renovations, Third-Party Plaintiff, vs. 1st Call Electric, L.L.C., an Oklahoma corporation; Steve Moore, an individual; Snowden Engineering, Inc., an Oklahoma corporation; Alberto Chinchilla, an individual, and d/b/a Transformations by Alberto, L.L.C., an Oklahoma corporation; Matt Shope, an individual, d/b/a Matt Shope Plumbing & Drain; Persi Perez, an individual; Daniel Reyes, an individual; Gregory Patton, an individual; and Saul Bravo, an individual, Third-Party Defendants. Plaintiff/Appellant's Petition for Rehearing filed November 2, 2017 is *DENIED*.

Tuesday, January 2, 2018

114,901 — Everett E. Cook, Plaintiff, vs. Robert G. Boeckman, Harry V. Willson, Eva Willson, Harry Willson, Jr., Charles D. Willson, Earl L. Willson, L.P. Stadler, Faye Stadler, Thelma Jewell Abney, Investors Royalty Company, Inc., Daniel W. Hogan, John S. Alter, Joe E. Alter, Merle J. Housel, and Clark U. Cornell; Faye A. Alter, Gertrude Stewart, Orlen May Ryan, Charles A. Anderson, and Dorothy Ann Zumbrun, if living, or if deceased, their known successors, Defendants, Charles D. Willson and Jean Willson, Trustees of the Charles D. Willson and Jean Willson Family Trust dated September 9, 20113; Garry Willson, as Trustee of the Mandjo Willson Revocable Trust; and Dorothy Willson, Petitioners/Appellants, vs. Bart Boeckman, Respondent/Appellee. Appellee/Respondent Bart Boeckman's Petition for Rehearing filed October 5, 2017 is *DENIED*.

Tuesday, January 9, 2018

115,389 — In the Matter of the Estate of John Payne, Deceased: Brian Alan Robinson and Brandon Dale Robinson, Appellants, vs. Sonja Payne, Jeremiah Payne and Jason Payne,

Appellees. Appellants' Petition for Rehearing, filed January 3, 2018, is *DENIED*.

(Division No. 2)
Friday, December 15, 2017

114,863 — In Re the Marriage of: Terri Gayle Buck, a/k/a Terry Buck, Petitioner/Appellee, vs. Marvin Randolph Buck, Respondent/Appellant. Appellant's Petition for Rehearing is *DENIED*.

Thursday, December 21, 2017

116,049 (Consolidated with Case No. 116,050) — Rosa Elena Alvarado, Individually and as General Guardian of the Person and Estate of Javier Macias Ramirez, an Incapacitated Person, Plaintiff/Appellant, vs. LRC Construction Services, LLC, an Oklahoma Limited Liability Company; Land Run Commercial Real Estate Advisors, LLC, an Oklahoma Limited Liability Company, Defendants/Appellees, and Terry Building Company, an Oklahoma Limited Liability Company, Defendant. Appellant's Petition for Rehearing is hereby *DENIED*.

(Division No. 2)
Tuesday, January 9, 2018

115,380 — State of Oklahoma, ex rel.; Jaycee Calan; Lucille Calan; Kace Calan; John E. Kendall, Jr.; Jacquelyne Kendall; David F. Hiebert, Jr.; Edwina C. Hiebert; Kathryn Weatherby; Jamie Mills; and Travis Mills, Plaintiffs/Appellants, vs. Kemp Stone, Inc., Defendant/Appellee, and City of Miami, Rudolph Schultz, Scott Trussler, Terry Atkinson, John Dalgarn, Brent Brassfield, Denny Crete, LLC, Scurlock Industries of Miami, Inc., Tri-State Asphalt, Inc., Neece Concrete Construction, Teeter's Paving, LLC, Bell Contracting, Inc., APAC-Central, Inc., Anderson Engineering, Inc., Service Solutions, Inc., Collins Construction Co. of Miami, Inc., Blevins Asphalt Construction Co., Inc., T-G Excavating, Inc., Vance Brothers, Inc., John Does 1-20, other persons and/or entities who were awarded bids pursuant to the street project in excess of $50,000.00, Defendants. Appellant's Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Wednesday, November 29, 2017

115,401 — Seaboard Foods LLC and American Zurich Insurance Co., Petitioners, vs. Armando Valdez and The Workers' Compensation Court of Existing Claims, Respondents. Respondents' Request for Review of Appellate Order Reversing Trial Court and Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims, filed November 1, 2017, is *DENIED*.

(Division No. 4)
Thursday, December 7, 2017

114,871 — (Consolidated with Case No. 114,875). One Bank and Trust Company, Plaintiff, vs. Julia Kwok and William R. Satterfield, Defendants/Appellants, vs. Mingo Energy, LLC, Intervenor/Appellee. Appellant Julia Kwok's Petition for Rehearing is hereby *DENIED*.

Tuesday, December 12, 2017

114,871 — (Consolidated with Case No. 114,875). One Bank and Trust Company, Plaintiff, vs. Julia Kwok and William R. Satterfield, Defendants/Appellants, vs. Mingo Energy, LLC, Intervenor/Appellee. Appellant William R. Satterfield's Petition for Rehearing is hereby *DENIED*.

Wednesday, December 20, 2017

114,777 — H. Michael Krimbill, Plaintiff/Appellee, vs. Louis C. Talarico, III, an individual; and LCT Capital LLC, a Delaware Limited Liability Company, Defendants/Appellants. Appellants' Petition for Rehearing is hereby *DENIED*.

Thursday, December 21, 2017

114,976 — Lamont Williams, Administrator of the Estate of Zahir Jeremiah Giles, Deceased, Plaintiff/Appellant, vs. Bill Higdon, d/b/a Bill Higdon Plumbing; Locke Supply Co.; Wehrle Organization, Inc. d/b/a Coyote Ridge Apartments; David E. Wehrle, Individually; Western Property Management; Bradford-White Corporation and Honeywell International Inc., Defendants/Appellees. Appellee Wehrle Organization, Inc. d/b/a Coyote Ridge Apartments' Petition for Rehearing is hereby *DENIED*.

Wednesday, December 27, 2017

115,331 — In re the marriage of: Jennifer Lynn Green, Petitioner/Appellee, vs. Nathan Travis Green, Respondent/Appellant. Appellant's Petition for Rehearing is hereby *DENIED*.

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TWO HALF-DAY PROGRAMS
Friday Afternoon and Saturday Morning

FEBRUARY 2, 2018 (FRIDAY 1 P.M. TO 5 P,M,) 4.5 HOURS MCLE

1 - 2 P.M.	PLENARY: Intro & Legal Tech Tips, Tricks, Apps (Paul Unger, Barron Henley)
2:05 - 3 p.m.	TRACK ONE: iPractice on the iPad! (Paul Unger)
2:05 - 3 p.m.	TRACK TWO: It's Time For a Change: Superior Methods for Complex Legal Documents (Barron Henley)
3:05 - 4 p.m.	TRACK ONE: PowerPoint for Litigators and Client Presentations (Paul Unger)
3:05 - 4 p,m,	TRACK TWO: Microsoft Word Power Tips (Barron Henley)
4:10 - 5 p.m.	PLENARY: 10 Steps to Reducing Dependence on Paper (Paul Unger & Barron Henley)
5 p.m.	RECEPTION IMMEDIATELY FOLLOWING

FEBRUARY 3, 2018 (SATURDAY 9 A.M. TO 1 P.M.) 4.5 HOURS MCLE INCL. 2 ETHICS

7:30-8:30 a.m.	Continental Breakfast
8:30 - 10 a.m.	The Rules Have Changed: Legal Tech Security Measures Every Lawyer Must Take - *Ethics* (Barron Henley)
10:15 - 11:15	Track One: Outlook Power Hour (Barron Henley)
10:15 - 11:15	Track Two: PDFing for Legal Professionals: Nuance PowerPDF v. Adobe Acrobat! (Paul Unger)
11:20 - 12:30	PLENARY: Tame the Digital Chaos! Essentials of Time, Task & Email Management (Paul Unger)

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Stay up-to-date and follow us on

YOU MAY EARN UNLIMITED HOURS FOR WEBCAST ENCORES

Monday, Jan. 29 @ 9 a.m.
How Federal Immigration Law Affects Your Practice
(7 total credit/including 1 hour of ethics)

Tuesday, Jan. 30 @ 9 a.m.
Practicalities of Family Law Advocacy
(6 total credit/including 1 hours of ethics)

Wednesday, Jan. 31 @ 9 a.m.
Advanced Estate Planning
(6 total credit/including 1 hour of ethics)

Thursday, Feb. 1 @ 9 a.m.
Practicing Elder Law
(6 total credit/including 2 hours of ethics)

Friday, Feb. 2 @ 9 a.m.
2017 Labor and Employment Law Update
(6 total credit/including 1 hour of ethics)

Monday, Feb. 5 @ 9 a.m.
Medicine and What Matters in the End
(6 total credit/which includes 1 ethic credit)

Tuesday, Feb. 6 @ 9 a.m.
Advanced DUI
(6 total credit/including 1 hour of ethics)

Wednesday, Feb. 7 @ 9 a.m.
2017 Banking and Commercial Law Update
(6 total credit/including 2 hours of ethics)

Thursday, Feb. 8 @ 9 a.m.
32nd Annual Advanced Bankruptcy Seminar: Day One
(6 total credit/including 1 hour of ethics)

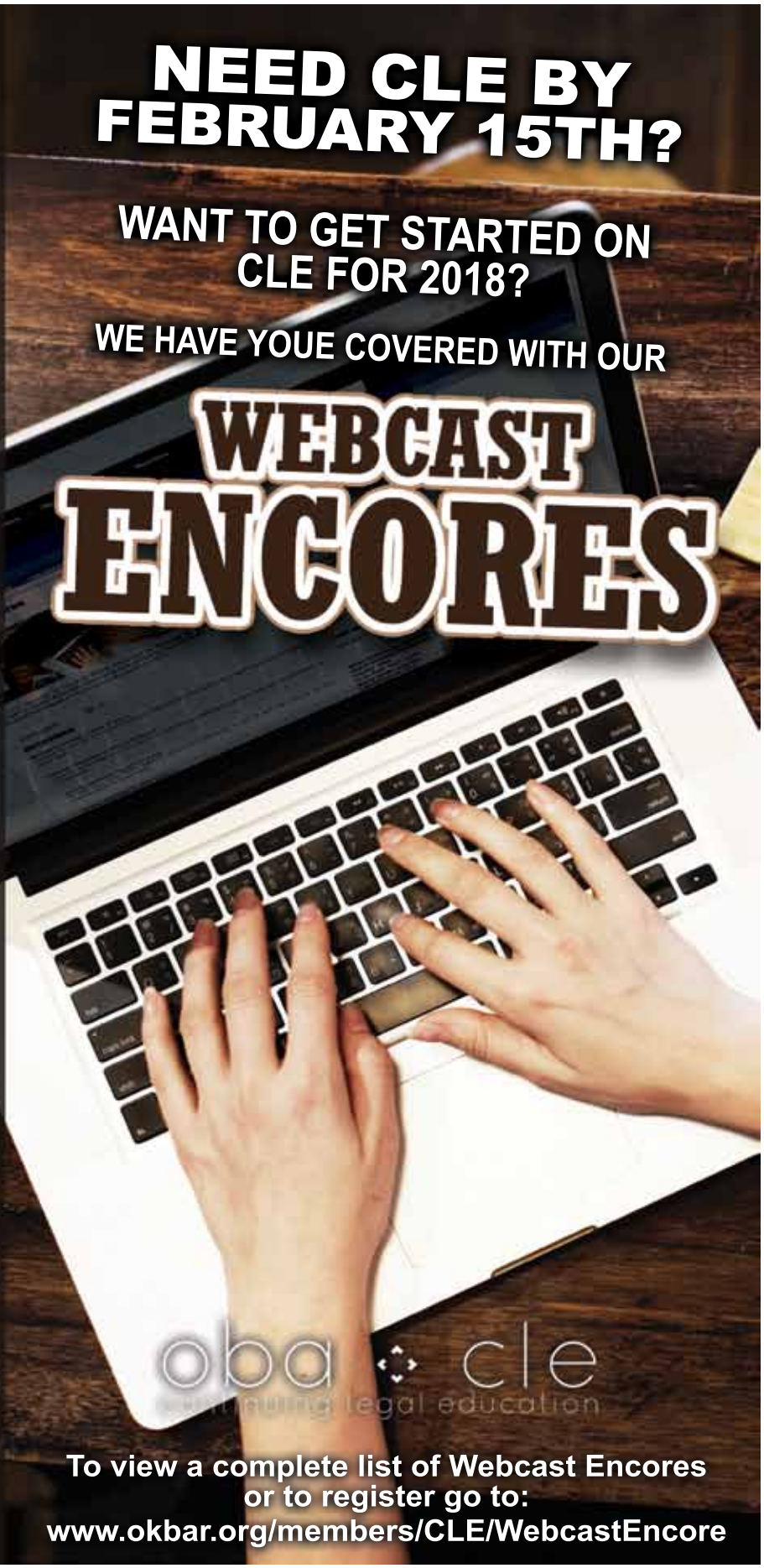
Friday, Feb. 9 @ 9 a.m.
32nd Annual Advanced Bankruptcy Seminar: Day Two
(6 total credit/including 0 hours of ethics)

NEED CLE BY FEBRUARY 15TH?

WANT TO GET STARTED ON CLE FOR 2018?

WE HAVE YOUE COVERED WITH OUR

WEBCAST ENCORES



To view a complete list of Webcast Encores or to register go to:
www.okbar.org/members/CLE/WebcastEncore