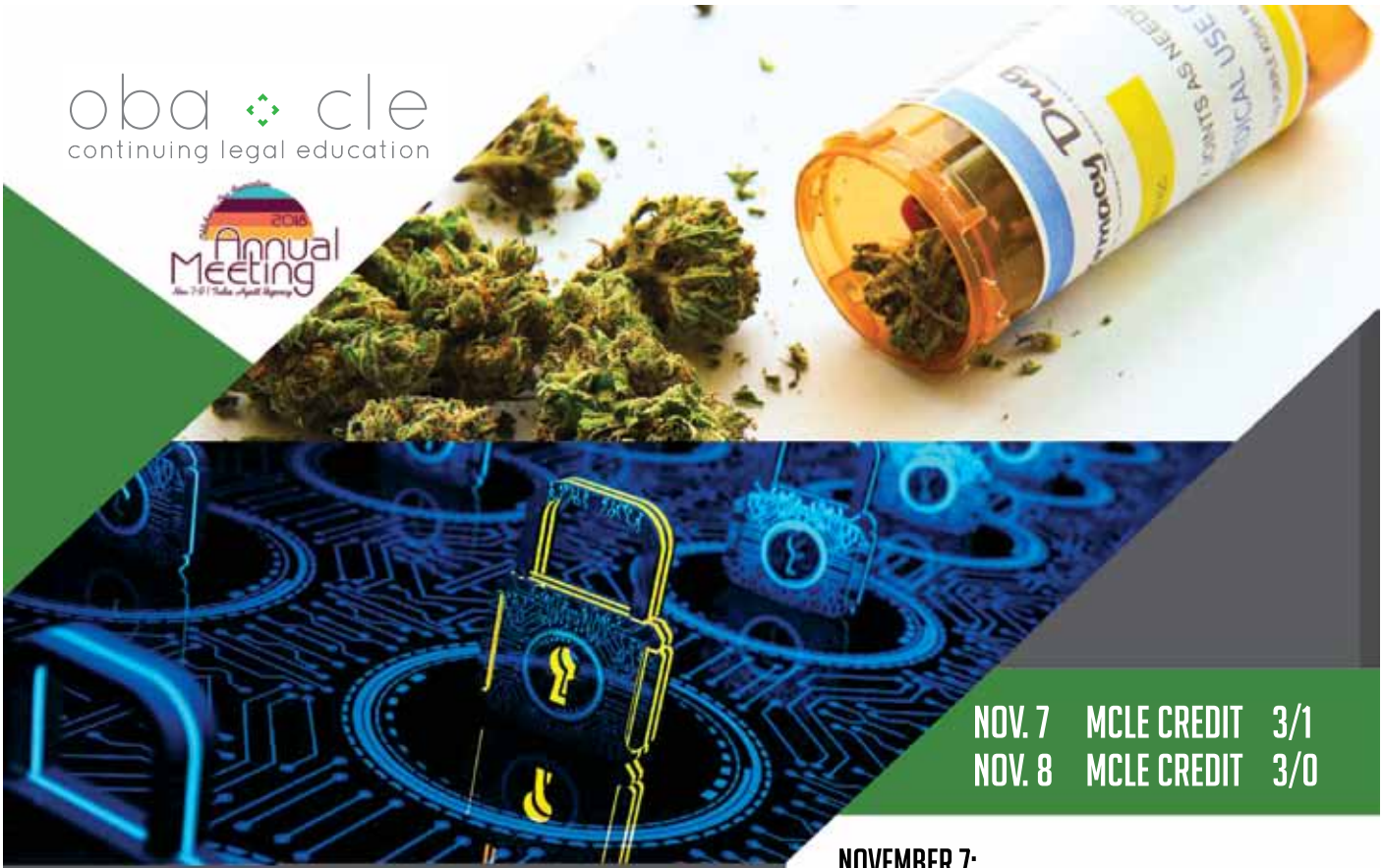
THE OKLAHOMA BAR
Journal
Volume 89 — No. 28 — 10/27/2018

Court Issue

oba cle
continuing legal education

2018 Annual Meeting



NOV. 7 MCLE CREDIT 3/1
NOV. 8 MCLE CREDIT 3/0

GETTING OUT OF THE WEEDS:

WHAT YOU NEED TO KNOW ABOUT THE NEW WORLD OF MARIJUANA REGULATION

NOVEMBER 7 2-5 P.M.

Downtown Hyatt, 100 East 2nd St., Tulsa, OK

THE INTERNET OF THINGS AND LEVERAGING DIGITAL EVIDENCE, CYBERSECURITY AWARENESS AND INVOLVEMENT AND WHY ALL THE COOL KIDS ARE DOING IT

NOVEMBER 8 9 - 11:50 A.M.

Downtown Hyatt, 100 East 2nd St., Tulsa, OK

TO REGISTER, GO TO WWW.OKBAR.ORG/ANNUALMEETING/REGISTRATION/

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NOVEMBER 7:

Featured Presenter: Lisa L. Pittman, Partner, Resnick & Louis, P.C., Admitted in Colorado and Texas

All traditional practice areas are implicated in the marijuana industry, and attorneys dealing with business formation, operation, litigation, family law, insurance coverage, and other practice areas will examine how the overlay of conflicting federal and local marijuana laws impact their practice and the handling of cases.

$50 with Annual Meeting registration or $75 without Annual Meeting registration if payment received by October 14th. A fee of $25 will be assessed for CLE registrations received October 15th – November 7th; $50 will be added for walk-ins.

NOVEMBER 8:

Featured Presenter: Mark Lanterman

In today's world, the Internet of Things has created an interconnected network of devices marked by an ever-expanding web of data. The average person now has vast amounts of data being created, collected, and stored about them every second. From laptops and appliances to our cars and especially the snitches we carry in our pockets – our smartphones - the legal community is faced with the task of processing this information and determining its value. There will also be a session on Cyber Security.

$50 with Annual Meeting registration or $75 without Annual Meeting registration if payment received by October 14th. A fee of $25 will be assessed for CLE registrations received October 15th – November 7th; $50 will be added for walk-ins.

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Journal

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Oklahoma Bar Association

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2018 OK 79

In Re: Rules of the Supreme Court for Mandatory Continuing Legal Education [Rule 1, Rule 6(e) and Rule 7 Regulation 4.1.9]

SCBD 3319. October 8, 2018

ORDER

This matter comes on before this Court upon an Application to Amend Rule 1, Rule 6(e) and Rule 7 Regulation 4.1.9 of the Rules of the Supreme Court for Mandatory Continuing Legal Education, 5 O.S. ch. 1, app. 1-B, as proposed and set out in Exhibit "A" attached hereto. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibits A, B & C attached hereto effective January 1, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 8th day of OCTOBER, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

EXHIBIT A

Rules for Mandatory Continuing Legal Education

Chapter 1, App. 1-B

RULE 1. Mandatory Continuing Legal Education Commission

(a) There is hereby established a Mandatory Continuing Legal Education Commission (MCLEC) consisting of eleven (11) members who are ~~**resident**~~ members of the Bar of this State of which one voting member may be a non-resident of the State of Oklahoma. The Executive Director of the Oklahoma Bar Association and the Director of Continuing Legal Education of the Oklahoma Bar Association shall be ex-officio members without vote. The remaining nine (9) members shall be appointed by the President of the Oklahoma Bar Association with the consent of the Board of Governors of the Oklahoma Bar Association

(b) The MCLEC shall have the following duties:

(1) To exercise general supervisory authority over the administration of these rules.

(2) To adopt regulations consistent with these rules with approval of the Board of Governors.

(3) Report annually on the activities and operations of the Mandatory Continuing Legal Education Commission to the Board of Governors of the Oklahoma Bar Association and the Oklahoma Supreme Court.

(c) Five (5) Commissioners shall constitute a quorum of the MCLEC.

(d) A member of the MCLEC who misses three (3) consecutive regular meetings of the MCLEC, for whatever reason, shall automatically vacate the office.

EXHIBIT B

Rules for Mandatory Continuing Legal Education

Chapter 1, App. 1-B

Rule 6. Noncompliance and Sanctions.

(a) As soon as practicable after February 15th of each year, the Commission on Mandatory Continuing Legal Education shall furnish to the Executive Director of the Oklahoma Bar Association (1) a list of those attorneys who have not reported for the calendar year ending the preceding December 31st as required by Rule 5, Rules for Mandatory Continuing Legal Education, and (2) a list of attorneys who have reported on or before February 15th indicating that they have not complied with the requirements of Rule 3, Rules of Mandatory Continuing Legal Education.

(b) For a member who fails to comply with the Rule 3 continuing legal education requirement by December 31st of each year, there shall be added an expense charge of $100.00. For a member who fails to comply with the Rule 5 annual report requirement by February 15th of each year, there shall be added an expense charge of $100.00. The Commission is authorized to, and may waive the expense charge for a late filing of the Rule 5 annual report upon a finding by the Commission that the late filing was attributable to extreme hardship. Attorneys seeking a waiver shall do so by written application submitted to the Commission. The Commission is authorized to adopt, from time to time, policies and procedures as may be deemed appropriate for continuity in the exercise of the foregoing discretionary authority.

(c) The Executive Director of the Oklahoma Bar Association shall then serve by certified mail each attorney who has not complied with the Rules for Mandatory Continuing Legal Education, with an order to show cause, within sixty (60) days, why the attorney's license should not be suspended at the expiration of the sixty (60) days. Cause may be shown by furnishing the Board of Governors of the Oklahoma Bar Association with an affidavit by the attorney and a certificate from the MCLEC (a) indicating that the attorney has complied with the requirement prior to the expiration of the sixty (60) days or (b) setting forth a valid reason for failure to comply with the requirement because of illness or other good cause.

(d) At the expiration of sixty (60) days from the date of the order to show cause, if good cause is not shown, the Board of Governors shall file application with the Supreme Court recommending suspension of the delinquent's membership. Upon order of the Court, the attorney shall be so suspended and shall not thereafter practice law in this state until reinstated as provided herein. At any time within one (1) year after the order of suspension, an attorney may file with the Executive Director an affidavit by the attorney and a certificate from the MCLEC indicating compliance with the Rules for Mandatory Continuing Legal Education, and payment of a reinstatement fee of $500.00 and if satisfactory to the Executive Director, the member will be restored to membership and the Executive Director will notify the Clerk and the Chief Justice of the Supreme Court and cause notice of reinstatement to be published in the Oklahoma Bar Journal.

(e) A suspended member who does not file an application for reinstatement within one (1) year from the date the member is suspended by the Supreme Court for noncompliance with the Rules for Mandatory Continuing Legal Education, shall cease automatically to be a member of the Association, and the Board of Governors shall file an application with the Supreme Court recommending the member be stricken from the membership rolls. Subsequent to the Order of the Court, if the attorney desires to become a member of the Association <u>within two years</u>, the attorney shall be required to file with the Professional Responsibility Commission an affidavit by the attorney and a certificate from the MCLEC indicating compliance with the Rules for Mandatory Continuing Legal Education <u>for the year suspended for noncompliance with MCLE</u>, including payment of all fees and charges, and the attorney must comply with Rule 11 of the Rules Governing Disciplinary Proceedings of the Oklahoma Bar Association, <u>unless otherwise ordered by the Supreme Court of Oklahoma. If the attorney desires to become a member of the Association after two years and a day, the attorney shall be required to file with the Professional Responsibility Commission an affidavit by the attorney and a certificate from the MCLEC indicating completion of 24 CLE credits, including 2 legal ethics credits, including payment of all fees and charges, and the attorney must comply with Rule 11 of the Rules Governing Disciplinary Proceedings of the Oklahoma Bar Association, unless otherwise ordered by the Supreme Court of Oklahoma.</u>

EXHIBIT C

Rules for Mandatory Continuing Legal Education

Chapter 1, App. 1-B

Rule 7. Regulations.

Regulation 4.

4.1.1. The following standards will govern the approval of continuing legal education programs by the Commission.

4.1.2. The program must have significant intellectual or practical content and its primary objective must be to increase the participant's professional competence as an attorney.

4.1.3. The program must deal primarily with matters related to the practice of law, professional responsibility or ethical obligations of attorneys. Programs that cross academic lines may be considered for approval.

4.1.4. The program must be offered by a sponsor having substantial, recent, experience in offering continuing legal education or demonstrated ability to organize and present effectively continuing legal education. Demonstrated ability arises partly from the extent to which individuals with legal training or educational experience are involved in the planning, instruction and supervision of the program.

4.1.5. The program itself must be conducted by an individual or group qualified by practical or academic experience. The program, including the named advertised participants, must be conducted substantially as planned, subject to emergency withdrawals and alterations.

4.1.6. Thorough, high quality, readable, and carefully prepared written materials must be made available to all participants at or before the time the course is presented, unless the absence of such materials is recognized as reasonable and approved by the MCLE Administrator. A mere outline without citations or explanatory notations will not be sufficient.

4.1.7. The program must be conducted in a comfortable physical setting, conducive to learning and equipped with suitable writing surfaces.

4.1.8. Approval may be given for programs where audiovisual recorded or reproduced material is used. Video programs shall qualify for CLE credit in the same manner as a live CLE program provided:

(a) the original CLE program was approved for CLE credit as provided in these regulations or the video program has been approved by the Commission under these rules, and

(b) each person attending the video program is provided written material as required in regulation 4.1.6 and

(c) each program is conducted in a location as required in regulation 4.1.7 and

(d) there are a minimum of five (5) persons enrolled and in attendance at the presentation of the video program unless viewed at the Oklahoma Bar Center or sponsored by a county bar association in Oklahoma.

4.1.9. Approval for credit may also be granted for the following types of electronic-based CLE programs:

a. Live interactive webcast seminars, webcast replay seminars live teleconferences, ~~and~~ teleconference replays, on-line, on-demand programs and downloadable podcasts. If approved, an attorney may earn credit for seminars provided by these various delivery methods without an annual limit.

~~b. Online, on-demand seminars and downloadable podcasts. If approved, an attorney may receive up to six approved credits per year for these types of electronic-based programs.~~

Such programs must also meet the criteria established in the Rules of the Oklahoma Supreme Court for Mandatory Continuing Legal Education, Rule7, Regulation 4, subject to standard course approval procedures and appropriate verification from the course sponsor.

1. The target audience must be attorneys.

2. The course shall provide high quality written instructional materials. These materials may be available to be downloaded or otherwise furnished so that the attorney will have the ability to refer to such materials during and subsequent to the seminars.

3. The provider must have procedures in place to independently verify an attorney's completion of a program. Verification procedures may vary by format and by provider. An attorney affidavit attesting to the completion of a program is not by itself sufficient.

4. If an online, on demand seminar is approved, it is approved only for twelve (12) months after the approval is granted. The sponsor may submit an application to have the course considered for approval in subsequent years.

2018 OK 81

Multiple Injury Trust Fund, Respondent on Certiorari, v. Neil Tweedy, Petitioner on Certiorari.

No. 116,224. October 23, 2018

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION IV, ON APPEAL FROM THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS, STATE OF OKLAHOMA

¶0 The Court of Civil Appeals vacated an award of permanent total disability that the Workers' Compensation Court of Existing Claims entered in favor of Claimant Neil Tweedy. Claimant filed a petition for certiorari, asking this Court to review the opinion of the Court of Civil Appeals. This Court has previously granted Claimant's petition. Upon review, we vacate the opinion of the Court of Civil Appeals and reinstate the award of permanent total disability.

OPINION OF THE COURT OF CIVIL APPEALS VACATED; AWARD SUSTAINED

Leah P. Keele, LATHAM, WAGNER, STEELE AND LEHMAN, Tulsa, Oklahoma for Respondent on Certiorari,

Michael R. Green, Tulsa, Oklahoma and Bob Burke, Oklahoma City, Oklahoma, for Petitioner on Certiorari

REIF, J.

¶1 This case concerns a claim by Neil Tweedy against the Multiple Injury Trust Fund for an award of permanent total disability. The parties agree that this claim is governed by 85 O.S.Supp.2005, §§ 171 and 172. They disagree over whether Mr. Tweedy can use a *Crumby* finding to establish the Fund's liability under these statutes for permanent total disability. The Workers' Compensation Court of Existing Claims considered the *Crumby* finding and entered an award in favor of Mr. Tweedy. On appeal, the Court of Civil Appeals read this Court's opinion in *Ball v. Multiple Injury Trust Fund*, 2015 OK 64, 360 P.3d 499, as precluding use of a *Crumby* finding for any purpose in determining the Fund's liability. This reading was error.

¶2 What this Court said in the *Ball* case is that a *Crumby* finding is not an adjudication of preexisting disability for the purpose of determining threshold eligibility to proceed against the Fund as a physically impaired person. This Court later clarified that if a claimant can otherwise meet one of the threshold requirements of a physically impaired person, then "a *Crumby* finding of preexisting disability may be combined with other impairments in determining whether an employee is permanently totally disabled and entitled to an award against the Fund." *Multiple Injury Trust Fund v. Sugg*, 2015 OK 78, ¶ 11, 362 P.3d 222, 226.

¶3 In the case at hand, Mr. Tweedy established his threshold eligibility by virtue of an obvious and apparent partial loss of use of a member (right hand) that preexisted his last job-related injury. An obvious and apparent impairment of this nature is one of the threshold requirements set forth in § 171.

¶4 In view of Mr. Tweedy's eligibility as a physically impaired person, the Workers' Compensation Court of Existing Claims properly combined the impairment set forth in the *Crumby* finding with the preexisting obvious and apparent impairment as well as the impairment from the last job-related injury. The Court of Civil Appeals erred in disturbing this award and, therefore, the Court of Civil Appeals' opinion is vacated. The award is reinstated and sustained.

OPINION OF THE COURT OF CIVIL APPEALS VACATED; AWARD SUSTAINED.

ALL JUSTICES CONCUR.

2018 OK 82

IN RE: MATTER OF THE REINSTATEMENT OF WILLIAM P. TUNELL, JR. TO THE ROLL OF ATTORNEYS OF THE STATE OF OKLAHOMA.

SCBD No. 6611. October 22, 2018

ORDER DENYING REINSTATEMENT

¶1 William P. Tunell, Jr. (Tunell or Petitioner) filed a petition on December 20, 2017, for reinstatement of his membership in the Oklahoma Bar Association (OBA). As required by Rule 11.3 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011 ch. 1, app. 1-A, the Professional Responsibility Tribunal (PRT) held a hearing on Tunell's application on April 17, 2018. The OBA opposed Tunell's application for reinstatement, but the PRT recommended that Tunell be reinstated.

¶2 Upon *de novo* review of the record, we find:

1. That Tunell has complied with the procedural requirements necessary for reinstatement, as set forth in Rule 11.1 of the RGDP, 5 O.S.2011 ch. 1, app. 1-A;
2. That Tunell has established by clear and convincing evidence that he has not engaged in the unauthorized practice of law in Oklahoma following his voluntary resignation, in compliance with Rule 11.5(b) of the RGDP, 5 O.S.2011 ch. 1, app. 1-A;
3. That Tunell has established by clear and convincing evidence that he possesses the competency and learning in the law required for reinstatement without re-examination, in compliance with Rule 11.5(c) of the RGDP, 5 O.S.2011 ch. 1, app. 1-A; but
4. That Tunell has not established by clear and convincing evidence that he possesses the good moral character and fitness necessary for reinstatement to the Oklahoma Bar Association.

¶3 At the reinstatement hearing, the OBA opposed reinstatement because it believes the "Petitioner's issues with anxiety, depression and alcoholism" are not being "appropriately treated."[1] Even now, the OBA hesitates to recommend reinstatement, submitting instead a request "that this Court closely scrutinize the record to ensure that Petitioner has appropriately handled his mental health and alcohol issues so that it [sic] does not interfere with his ability to practice law."[2]

¶4 This Court has the non-delegable, constitutional responsibility to regulate both the practice and the ethics, licensure, and discipline of Oklahoma practitioners of the law.[3] Our review of the record is made *de novo*, meaning we conduct a non-deferential, full-scale examination of all relevant facts.[4] The PRT's recommendations concerning these matters, while entitled to great weight, are merely advisory in character; and the ultimate decision — regarding facts, the evidence, and even the credibility of witnesses — rests with this Court.[5]

¶5 Reinstatement proceedings are governed by Rule 11 of the RGDP, 5 O.S.2011 ch. 1, app. 1-A. Rule 11.5 requires the PRT to make certain findings concerning an applicant's (1) good moral character, (2) competency in the law, and (3) participation in any unauthorized practice of law during the period of resignation. In addition to the reinstatement standards found in Rule 11.4, the Court also considers an applicant's (1) present moral fitness; (2) demonstrated consciousness of past wrongful conduct and the disrepute which it has brought upon the legal profession; (3) extent of rehabilitation; (4) past misconduct and its seriousness; (5) conduct subsequent to resignation; and (6) character, maturity, and experience at the time of resignation, as well as (7) the time which has elapsed since the applicant's resignation.[6]

¶6 Our review of the record and testimony reveals that Tunell was first diagnosed with depression and anxiety in 1987 and that he has struggled with alcoholism since 2011. Tunell testified that he began attending Alcoholics Anonymous (AA) in July of 2012, which he has allegedly attended ever since. He also claims to have attended three counseling sessions with Lawyers Helping Lawyers. Tunell further testified that, following a relapse in October of 2012, he attended 30 days of outpatient counseling for his alcoholism and mental health issues at the behest of his wife and his employer, the Holden Law Firm. Tunell testified that he had another relapse in late 2013 that resulted in the loss of his job with the Holden Law Firm. According to Tunell, he then had a good period of sobriety and signed on with the Abowitz Law Firm in early 2014. In late 2014 and early 2015, Tunell had a major relapse, which led to his dismissal from the Abowitz Law Firm. Shortly thereafter, Tunell and his wife separated. Tunell testified that this scared him into "a good period of sobriety," and he hung his own shingle. Tunell also testified, however, that he received 30 days of in-patient treatment at a facility near Dallas, Texas, during the summer of 2015. Eventually, his business dwindled — something he attributes partially to alcohol use and partially to depression

and anxiety. In the summer of 2016, Tunell sought treatment for his mental health issues at a facility in Oklahoma City; they initially admitted him and placed him on a suicide watch, but then quickly released him after he started medication and agreed to follow-up care. Tunell stopped his medication shortly thereafter due to his belief that the medication did not help him, but he attended counseling sessions through A Chance for Change from August of 2016 until February of 2017, when finances prevented him from participating further. While these counseling sessions were ongoing, Tunell had another relapse in October of 2016 that resulted in a DUI conviction. At some point after the DUI but before the imposition of his deferred sentence and probation terms in January of 2017, Tunell had another relapse.

¶7 In May of 2017, Tunell resigned from the OBA, claiming that his resignation was due to financial hardships. Upon review of the record, it appears Tunell may have voluntarily resigned in order to avoid proceedings under Rule 7 of the RGDP following his DUI conviction. Tunell was on probation through June of 2017. In December of 2017, Tunell sought reinstatement to the OBA.

¶8 Tunell purports that he has been sober since late 2016 or early 2017, although he cannot provide a specific sobriety date. Tunell testified that he currently attends at least one AA meeting per week, but tries to attend two, particularly if it is a bad week for him.[7] He also testified that he treats both his alcoholism and depression issues using prayer, meditation, and community involvement. Tunell's alcoholism is likely propagated by the depression and anxiety from which he suffers, yet he has not taken any medication for depression or anxiety since mid-2016 or had any professional counseling since early 2017. When the PRT asked him what assurances he could give that he won't relapse again, Tunell responded, "If I'm being honest, I cannot give you any complete assurance that I won't relapse. . . . So I can't give you any assurances, but I very much believe moving forward that if I get that back in my life [i.e., being a lawyer], it gives me a three-legged stool, rather than a two-legged stool, to rely on and move forward."[8]

¶9 As evidence of his current moral character, Tunell testified himself and presented correspondence obtained from his priest, his estranged wife, a friend, and four attorneys who formerly worked with him. All of the attorneys' correspondence discussed Tunell's legal abilities when they last worked with him, but they have had no contact with him for years. Thus, they provide no evidence of rehabilitation.[9] Tunell's wife, priest, and friend all mention that Tunell is very involved in church and is a good father; but those letters also reflect that the same has been true for years — even before the DUI and resignation. Consequently, his continued conduct as a good father and churchgoer is a poor indicator of any rehabilitation.[10] Regarding family responsibilities, Tunell's wife reports that he has not provided any child support during their 3-year separation and that, after agreeing to pay her auto insurance premiums, he failed to do so and failed to give her notice that she was uninsured.

¶10 Upon review of the relevant factors, this Court finds that Tunell has not presented clear and convincing evidence of appropriate treatment, rehabilitation, or good moral character at present. Furthermore, the problems he has with alcoholism, depression, and anxiety are serious — even if they have never resulted in a client complaint or disciplinary investigation. The lack of such complaints and investigations is a testament to the diligence of Tunell's employers and coworkers. Finally, the amount of time which has lapsed since Tunell's voluntary resignation is minimal, and Tunell lacks a long enough track-record of proven moral character.

¶11 This is not to say Tunell shouldn't be readmitted to the bar at some point in the future. But on the record before us today, Tunell has not presented clear and convincing evidence of treatment, rehabilitation, or good moral character.

¶12 The petition of William P. Tunell, Jr. for reinstatement to the Oklahoma Bar Association is therefore DENIED. Pursuant to Rule 11.1(e) of the RGDP, 5 O.S.2011 ch.1, app. 1-A, the Petitioner may seek reinstatement again within one year of this denial.

¶13 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 22ND DAY OF OCTOBER, 2018.

/s/ Douglas L. Combs

CHIEF JUSTICE

Combs, C.J., and Winchester, Reif, Wyrick, and Darby, JJ., concur.

Gurich, V.C.J., and Kauger (by separate writing), J., concur in result.

Edmondson and Colbert, JJ., dissent.

KAUGER, J., with whom Gurich, V.C.J., joins, concurring in result:

¶1 I concur that at this time the respondent has not shown that he is ready for reinstatement. This is not the first time a lawyer with a dependency problem has been before the Court for reinstatement, been denied reinstatement, and later was successfully reinstated. In State of Oklahoma *ex rel.* Oklahoma Bar Association v. Albert, 2007 OK 31, 163 P.3d 527, the attorney agreed to an interim suspension because he was incapable of practicing law. After he was released from a rehabilitation program, he sought reinstatement.

¶2 We denied the attorney's first attempt at reinstatement because the attorney failed to meet the burden of proof necessary for reinstatement.

¶3 In that case, the attorney had sought inpatient treatment, agreed and submitted to random drug tests, completed a six week relapse prevention program, attended Alcoholics Anonymous, and participated in Lawyers Helping Lawyers. At his initial reinstatement hearing he presented testimony from a trial judge, a defense lawyer, his drug counselor and a friend he met in treatment, all of whom agreed that he should be reinstated, but also agreed that he needed safeguards in place such as counseling, monitoring, random urinalysis, and attendance of counseling and Lawyers Helping Lawyers.

¶4 We applauded his efforts to seek treatment, get sober, remain clean, and overcome his problems of drug and alcohol abuse, but given the severity of his afflictions, the severity of his misconduct, the surrounding circumstances, and the short time frame in which he sought reinstatement, we denied reinstatement.

¶5 Nine months later, he again requested reinstatement. At the second reinstatement hearing, the attorney demonstrated every factor which we consider for reinstatement due to a personal incapacity: present moral fitness; consciousness of the wrongfulness and disrepute brought on the profession; extent of rehabilitation; seriousness of the original misconduct; conduct subsequent to discipline; time elapsed since the original discipline; petitioner's character, maturity, and experience; and present competence in legal skills. This time he was reinstated.

¶6 Here, the attorney provided little evidence of rehabilitation or of continuing treatment for alcoholism, depression and anxiety. He stopped taking his medicine in 2017 because he thought it was ineffective. This attorney must continue on his track of recovery and demonstrate his commitment to sobriety by making a showing that, over a significant amount of time, he has maintained sobriety and refrained from abusing drugs or alcohol. Once he accomplishes this, he should be reinstated.

1. Answer Br. of Resp't OBA at 4, *In re Reinstatement of Tunell*, No. SCBD-6611 (Okla. filed June 8, 2018).

2. *Id.* at 6-7.

3. *In re Reinstatement of Gill*, 2016 OK 61, ¶ 5, 376 P.3d 200, 202 (citing *In re Reinstatement of Kerr,* 2015 OK 9, ¶ 6, 345 P.3d 1118, 1121).

4. *Id.* (citing *State ex rel. Okla. Bar Ass'n v. Hulett*, 2008 OK 38, ¶ 4, 183 P.3d 1014, 1016); *In re Kerr,* 2015 OK 9, ¶ 6, 345 P.3d at 1121 (citing *In re Reinstatement of Otis*, 2007 OK 82, ¶ 7, 175 P.3d 357, 361; *Hulett,* 2008 OK 28, ¶ 4, 183 P.3d at 1016; *In re Reinstatement of Jones*, 2006 OK 33, ¶ 7, 142 P.3d 380, 381).

5. *In re Gill*, 2016 OK 61, ¶ 5, 376 P.3d at 202 (citing *In re Reinstatement of Pate*, 2008 OK 24, ¶ 3, 184 P.3d 528, 530; *In re Reinstatement of Floyd*, 1989 OK 83, ¶ 3, 775 P.2d 815, 816); *In re Kerr*, 2015 OK 9, ¶ 6, 345 P.3d at 1121 (citing Rule 6.15(a) of the RGDP, 5 O.S.2011 ch. 1, app. 1-A; *State ex rel. Okla. Bar Ass'n v. Besly,* 2006 OK 18, ¶ 2, 136 P.3d 590, 594; *In re Reinstatement of Rhoads*, 2005 OK 53, ¶ 2, 116 P.3d 187, 188; *In re Reinstatement of Holden*, 2003 OK 28, ¶ 5, 66 P.3d 416, 418; *In re Reinstatement of Kamin*s, 1988 OK 32, ¶ 18, 752 P.2d 1125, 1129; *State ex rel. Okla. Bar Ass'n v. Raskin*, 1982 OK 39, ¶ 11, 642 P.2d 262, 265-66).

6. *See In re Reinstatement of Christopher*, 2014 OK 73, ¶ 4, 330 P.3d 1221, 1223 (citing *In re Reinstatement of Swant*, 2003 OK 9, ¶ 5, 65 P.3d 275, 276; *In re Reinstatement of Pearson*, 2000 OK 61, ¶ 3, 9 P.3d 692, 694; *In re Reinstatement of Phillips*, 1996 OK 62, ¶ 4, 919 P.2d 419, 420); *In re Kamins,* 1988 OK 32, ¶¶ 20-21, 752 P.2d at 1130 (quoting *State v. Russo,* 630 P.2d 711, 714 (Kan. 1981)).

7. Tunell's testimony about AA involvement is not substantiated by other evidence, despite the OBA's prodding for such corroboration. He didn't submit any documentation showing his attendance at AA. *See* Tr. of Reinstatement Hr'g at 68:13-:19, 70:16-71:4, *In re Reinstatement of Tunell*, No. SCBD-6611 (PRT Apr. 17, 2018). He also didn't proffer any witness who could verify his attendance at AA. *See id.* at 68:19-70:15, 108:6-109:3.

8. *Id.* at 96:1-97:12, *In re Reinstatement of Tunell,* No. SCBD-6611 (PRT Apr. 17, 2018); *see* also *id.* at 18:15-:18 ("I cannot say I will not relapse again. I don't think any alcoholic can say that. But I will say that my handle on the situation is getting better.").

9. *See In re Reinstatement of Golden*, 2013 OK 96, ¶ 11, 315 P.3d 377, 381-82; *In re Reinstatement of Hanlon*, 1993 OK 159, ¶ 10, 865 P.2d 1228, 1231 ("[T]he majority of the witnesses had had very little contact with Mr. Hanlon since his disbarment and testified primarily as to his former legal abilities, not as to his rehabilitation or his personal conduct.").

10. *See In re Reinstatement of Hird*, 2001 OK 28, ¶ 18, 21 P.3d 1043, 1046 ("As evidence of his current moral character, Hird presented several witnesses that testified to Hird's involvement in his community and church and his trustworthiness. These are the same characteristics that Hird possessed before his conviction. Hird has failed to show that under pressures and circumstances similar to those which led to his past misconduct, he would now act differently. Hird has presented insufficient evidence to show a change in moral character since his resignation.").

2018 OK 83

IN RE: THE MARRIAGE OF: CAROL A. LAY, Petitioner/Appellee, v. WARREN H. ELLIS, JR., Respondent/Appellant.

No. 115,992. October 23, 2018

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY

Honorable Stephen W. Bonner, Trial Judge

¶0 The District Court of Cleveland County, Oklahoma, found the respondent/appellant, Warren H. Ellis, Jr., (Ellis) guilty of contempt related to his failure to follow the terms of a divorce decree and separation agreement. Ellis appealed in Case No. 113,068 when the trial court issued a certified interlocutory order for immediate appeal to this Court. The Court denied the respondent's petition for review. Subsequently, Ellis submitted a purge plan to the trial court to purge his contempt. Upon completion of the purge plan, the trial court issued a summary order purging the contempt. Ellis again appealed the finding of contempt, arguing that because the Court did not grant his previous petition to review the interlocutory order, he was unconstitutionally denied access to Court. He also argues that the trial court: 1) improperly applied res judicata to a previous bankruptcy court proceeding; 2) improperly interpreted the separation agreement; and 3) erred in finding him guilty of contempt. We hold that the respondent was not unconstitutionally denied access to Court. Additionally, the trial court did not err in its application of res judicata, in its interpretation of the separation agreement, or in finding the respondent in contempt. Consequently, we affirm the trial court.

APPEAL PREVIOUSLY RETAINED; TRIAL COURT AFFIRMED.

Jan Meadows, Norman, Oklahoma, for Petitioner/Appellee.

Barry K. Roberts, Evan Taylor, Norman, Oklahoma, for Respondent/Appellant.

KAUGER, J.:

¶1 This retained cause presents multiple issues, one of which is when it is appropriate to appeal an indirect contempt finding. Under the facts of this cause, the respondent argues that the Court has created the set of circumstances which put him in the position of first having to completely purge the contempt (in this case a three year process) before appealing, thus violating his constitutional right of access to the courts. The remaining issues are whether the trial court: 1) improperly applied res judicata to a previous bankruptcy court proceeding; 2) improperly interpreted a separation agreement; and 3) erred in finding the respondent guilty of contempt. We hold that the respondent was not denied access to the courts, nor did the trial court err in applying res judicata, in its interpretation of the separation agreement or in finding the respondent guilty of contempt.

FACTS AND PROCEDURAL HISTORY

¶2 The respondent/appellant, Warren H. Ellis, Jr. (Ellis/husband) and the petitioner/appellee, Carol Lay (wife) were married on January 7, 1978, in Washington, D.C. and had two children born October 8, 1983, and March 8, 1987. On November 25, 1992, the husband and wife entered into a deed of trust note in Madison, Virginia with the wife's aunt and uncle, Carlyn and Francis Lay (the Lays). The note amount was for $77,400.00 with an interest rate of 8% per year. The monthly installments were set at $567.93 and began on December 25, 1992. If paid out at the monthly amount, the final payment would be due November 25, 2022. The purpose of the note was to purchase a parcel of land.

¶3 On June 27, 2000, the husband and wife entered into a separation agreement, citing irreconcilable differences. The separation agreement required the husband to pay the wife $500.00 per month spousal support beginning October 1, 2000, and terminating on October 1, 2005. The couple shared joint legal and physical custody of the children with no child support paid by either party. Each parent agreed to take one child each as a deduction on tax returns. The agreement also divided personal property, and set forth requirements for maintaining the children's health insurance.

¶4 The agreement also contained a clause devoted to joint indebtedness and provided that each party's obligation to the other pursuant to this clause would not be considered to be dischargeable in bankruptcy.

The pertinent provision of the indebtedness clause provides that:

> . . .a. Husband shall be responsible for the following debts in every respect and shall hold Wife harmless thereon: Personal loan to [sic] Francis and Carlyn Lay in the approximate amount of $20,000.00. On the date that this debt is executed, Husband agrees to pay Wife the sum of Eight Thousand three hundred seventy and 00/100 ($8,370.00). This sum is intended to reimburse Wife for her previous payment of joint debts. . .

¶5 On April 28, 2005, the County of Maricopa Court of Arizona granted the wife a default

divorce. Apparently, on September 26, 2006, the wife filed a contempt action in the Arizona court as well because an order filed January 25, 2007, notes that the parties reached an agreement regarding the September 26, 2006, contempt and jointly ask for entry of a proposed order regarding the separation agreement that the parties entered into before the divorce. The agreed and stipulated order filed February 9, 2007, requires among other things, the husband to: 1) honor the terms of the separation agreement; 2) pay $500.00 a month for five years for spousal maintenance; and 3) reimburse the wife $8,370.00 for reimbursement of the husband's portion of joint debts previously paid by the wife.

¶6 The court granted the wife a judgment against the husband for $29,946.91 with 10% annual interest for spousal support until paid in full and a judgment of $11,245.00 with 10% interest for reimbursement to the wife for joint debt until paid in full. Payments towards both judgments were set in the amount of $500.00 a month. In 2008, the wife was awarded attorneys' fees and costs against the husband as well. Also in 2008, the husband filed Chapter 7 Bankruptcy in the United States Bankruptcy Court for the Western District of Virginia.

¶7 At issue in the bankruptcy case was the note to the Lays, and whether it would be discharged in bankruptcy. In the bankruptcy court, the husband argued that he only owed $20,000.00 towards the Lays' loan and that he had already paid $21,000.00 towards it, thus already extinguishing his obligations regarding it all together.

¶8 The $20,000.00 number came from language in the settlement agreement which specifically refers to a "[p]ersonal loan to Francis and Carlyn Lay in the approximate amount of $20,000.00," even though the note was for the amount of $77,400.00. In the bankruptcy proceeding the wife testified that there was never any discussions of each of them paying a portion of the note, but rather, the husband was to pay the entire note. She testified that "[t]he note was to be totally assumed by" the husband. The wife explained that her attorney indicated that there should be a dollar amount involved to be incorporated into the separation agreement, and that she asked her husband what the amount of the debt was and he said approximately $20,000.00. Apparently, the real amount they owed at that time, after they had made several payments while married, was closer to approximately $50,000.00.

¶9 The husband, on the other hand, argued that he only owed $20,000.00 pursuant to the express language of the separation agreement, but that he had already mistakenly paid $21,000.00. Thus, according to the husband he had already complied with the terms of the separation agreement. The bankruptcy court judgment entered on June 23, 2008, merely states that:

> It is ORDERED, ADJUDGED and DECREED that the obligation of the Defendant Warren H. Ellis to hold the Plaintiff Carol A. Lay harmless from liability on the debt that she owes Francis and Carlyn Lay by virtue of a note dated on or about November 5, 1992, is non-dischargeable, the order of discharge in the above-styled chapter 7 bankruptcy case notwithstanding.

¶10 On April 26, 2012, the wife filed an application for registration of foreign orders in the District Court of Cleveland County. The foreign orders included a copy of her April 28, 2005, default divorce decree entered in the Superior Court in Maricopa County, Arizona, against the husband. She also included a January 25, 2007, Stipulation and Joint Motion for Entry of Order re: Confirmation of Judgments and an attached order filed February 9, 2007, and a July 16, 2008, Judgment for Attorneys' Fees and Costs. On the same day, the wife also filed an application for indirect contempt citation also in the Cleveland County District Court, alleging that the husband owed:

> 1. A debt in the amount of $30,763.19 plus interest from May 30, 2008, to present at a rate of eight per cent (8%) which was the amount she alleges she paid to the Lay's to extinguish the 1992 note;
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> 2. A judgment for spousal support arrears in the amount of $29,946.91 plus interest at a rate of ten percent (10%) from April 28, 2005, which was to be paid in monthly payments of $500.00 and if the monthly payments were not made, then the entire judgment was immediately due and payable [which equates to $34,179.53 plus accruing interest since April 25, 2012];
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> 3. A judgment in the amount of $4,400.00 for attorney's fees and costs plus interest at the statutory rate. [Apparently, he had paid

$1,315.00 but has failed and refused to pay the balance plus interest.]

4. Any additional attorney's fees and costs which the husband should be required to pay for the wife having to pursue what he owed her.

¶11 On May 10, 2012, the Cleveland County District Court entered an indirect contempt citation and set an arraignment for June 12, 2012. The husband responded with an objection to the enforcement of the Arizona orders, and he requested a hearing and stay of the collection proceedings. On July 31, 2012, the husband also filed a motion to dismiss and demurrer in response to the application and citation for indirect contempt. On November 30, 2012, the wife filed a supplemental application for indirect contempt citation arguing that in May, June, and July of 2012 the husband received $41,429.00, $14,925.00 and $17,000.00 respectively from his parents' estate and thus had the ability to purge the contempt.

¶12 The trial court held a hearing on February 25, 2013, regarding the contempt. The court issued an order in which it determined that the husband owed the wife $26,313.03 as of the date of the hearing, and that his lawyer was to pay $15,499.44 to the wife and her attorney, and that the husband agreed to pay $10,813.59 today, thus purging the contempt as far as the support alimony goes. The trial court also reduced the amount which the wife alleged she had already paid towards the 1992 note of $38,042.44 to a judgment. He delayed sentencing until a purge plan was submitted, but set sentencing on May 2, 2013, and he required submission of the purge plan within 20 days. [For some unexplained reason, the order was not signed until February 11, 2014, and filed that same day.]

¶13 On March 25, 2013, the husband filed a his proposed purge plan. Under his plan, he would pay $500.00 a month to purge his contempt. The wife responded on August 2, 2013, with her proposal to the husband's purge plan. She suggested that the order for purge be increased so that he would pay off his debt to her in three years with interest; he provide business and personal records as to the status of his company and the debt it owes to him; and the husband surrender his passport as long as the purge is owed. On July 1, 2014, the trial court issued a certified interlocutory order reflecting what the February 11, 2014, order required, but certifying the matter for immediate appeal to this Court.[1]

¶14 The July 1, 2014, order is not in this record, but on July 25, 2014, the husband filed the appeal of it in this Court (case number 113,068). The husband filed it as a petition for certiorari, seeking review of the July 1, 2014, certified interlocutory order which found him in contempt for failing to pay a marital debt which the husband was ordered to assume, but which did not impose a sentence.[2] In 113,068, the husband alleged that the trial court erred: 1) in giving res judicata effect to an order of a Virginia bankruptcy court, and interpreting the bankruptcy court order in such a way that it was contrary to the clear intent of the parties when they entered into the separation agreement; and 2) in finding the amount of debt the husband owed.

¶15 The wife countered that the trial court's order was not appropriate for appeal as a certified interlocutory order and that the husband has an adequate remedy which is to request the trial court to issue a sentence so that he could appeal. The Court denied the husband's petition for certiorari to review the trial court's interlocutory order by order sheet. The husband made monthly payments to purge the contempt and on March 30, 2017, the trial court issued a summary order purging contempt and determining the purge plan to be completed.

¶16 On April 27, 2017, the husband filed a petition in error, seeking review of the finding and order of contempt which led to the purge plan. The petition in error sets forth four specific arguments regarding how trial court erred: 1) by finding that a previous adjudication by the U.S. Bankruptcy Court that the debt in issue was non-dischargeable and res judicata as to the issues raised in contempt; 2) by declining to consider evidence that the appellant had already fully discharged his obligations under the decree; 3) by declining to consider evidence of the intent of the parties when they entered the prior Settlement Agreement; and 4) by finding indirect contempt of court. The appellant, in the petition in error, also notes that other errors may become apparent upon a full examination of the record and he "reserves the right to present such errors in a timely-filed brief."

¶17 In his brief, the husband argues that because this Court did not review his certified interlocutory order in case no. 113,068, he had to wait until he completed his purge plan

before he got a final, appealable order which was three years after the trial court initially determined him guilty of contempt.[3] Consequently, the husband argues that he was unconstitutionally denied access to Court for having to wait so long to appeal.[4] On March 20, 2018, the husband filed a motion to retain the appeal in the Supreme Court and the Chief granted the motion to retain on April 20, 2018, and assigned the cause on April 23, 2018, after briefing was complete.

UNDER THE FACTS OF THIS CASE, THE RESPONDENT WAS NOT UNCONSTITUTIONALLY DENIED ACCESS TO THE COURT.

¶18 The husband argues that having to wait until he paid out his payment plan before getting a final sentence and appealable order, he was unconstitutionally denied access to Court.[5] He insists that he could not have filed a petition in error to appeal the adjudication of contempt for three years until his purge was complete. He argues that had he asked the trial court to immediately impose judgment and sentence in 2014, he did not have the means to satisfy the money judgment against him and therefore, he could have been thrown in jail.

¶19 The wife argues that after he was found guilty of contempt, he could have requested the court to enter judgment and sentence in this matter, thereby allowing immediate appeal. Instead, he asked the court to allow him to make payments which the court allowed. She insists he did have the money to pay what he owed her due, in part, to his inheritance from his parents' estate. She also argues that he cannot now complain that he was prejudiced because the court granted his request to make periodic payments to purge the contempt. She points out that in November of 2012, three months prior to the contempt trial, the trial court determined that the bankruptcy court's ruling that the husband still owed the wife could not be relitigated. The husband could have sought an immediate appeal of that decision, at that time, but did not.

¶20 In Oklahoma contempts are not governed by the common law, but by the Oklahoma Constitution and Statutes.[6] Contempt has been statutorily classified as either indirect or direct.[7] Direct contempt involves conduct in the presence of, or near, the court.[8] Indirect contempt includes the wilful disobedience of any process or order lawfully issued or made by a court.[9] Disobedience of an order to pay alimony in a divorce proceeding constitutes indirect contempt of court.[10]

¶21 This Court has jurisdiction of an appeal to review a sentence imposed for contempt of court occurring in a civil matter.[11] Ordinarily, an order in contempt proceedings is not appealable by right until the judgment and sentence become final.[12] In this cause, the appeal was brought after the trial court's judgment and sentence for contempt became final and the appellant completed his purge plan.[13]

¶22 However, this is not the only way the Court may review contempt proceedings. We may exercise discretion to review certain interlocutory trial court orders when certified by the trial court.[14] The order must affect a substantial part of the merits of controversy and be certified by the trial judge that an immediate appeal may materially advance the ultimate termination of the litigation.[15] This was the route the husband first took in the prior appeal in case no. 113,068, in which we denied review. Because the Court denied review, the husband argues that having to wait until he paid out his payment plan before getting a final sentence and appealable order, created an unconstitutional denial of access to Court. He also points out that our requirement that indirect contempt is not appealable until the judgment and sentence become final is not constitutional or statutory, but instead based on caselaw.

¶23 The Okla. Const. art. 2, §6 provides that:

> The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

In Flandermeyer v. Bonnor, 2006 OK 87, ¶10 , 152 P.3d 195, a case in which the trial court tried a divorce piecemeal over the course of two years, we held that the right to a speedy and certain remedy without delay in a civil proceeding, is one of the rights enjoyed by the citizens of the State.[16] While the access to courts issue might be implicated in this cause, access was neither denied, nor delayed under the facts presented.

¶24 When the Court denied review in 113,068, the husband could have sought a stay pending appeal of continued payments, in which case

he would not have had to make any payments,[17] or he could have posted bond and appealed.[18] The husband did not choose either of these options, but instead, made the payments and appealed after the payments were completed.[19] Under these facts, the delay was not a violation of the Oklahoma Constitution because it was predicated on how the husband chose to proceed.[20]

THE TRIAL COURT DID NOT ERR IN APPLYING RES JUDICATA TO PRIOR BANKRUPTCY COURT PROCEEDINGS.

¶25 The husband argues that the trial court erred by applying res judicata to the bankruptcy court judgment which, in turn, led to an erroneous interpretation of the language in the couple's separation agreement. The wife argues that the trial court correctly applied the doctrine of res judicata.

¶26 Res judicata is a Latin phrase that translates to "a thing adjudicated."[21] Res judicata, also known as claim preclusion, prevents the relitigation of previously adjudicated claims, or those claims which could have been raised, but were not, which have been subject to a final judgment on the merits.[22]

¶27 The bankruptcy proceeding occurred on April 21, 2008, and a transcript of the hearing is included in the record. The bankruptcy court heard evidence regarding the $20,000.00 provision in the separation agreement relating to the personal loan from the wife's aunt and uncle. The evidence concerned why the amount of $20,000.00 was used in the agreement when the actual, original amount of the promissory note was $77,400.00.23 The evidence also revealed that the husband had paid $21,000.00 towards the debt and why he thought he was absolved from paying any more.[24]

¶28 The June 23, 2008, bankruptcy court judgment provides:

> It is ORDERED, ADJUDGED and DECREED that the obligation of the Defendant Warren H. Ellis to hold the Plaintiff Carol A. Lay harmless from liability on the debt that she owes Francis and Carlyn Lay by virtue of a note dated on or about November 5, 1991, is non-dischargeable, the order of discharge in the above-styled chapter 7 bankruptcy case notwithstanding.[25]

¶29 The bankruptcy court only determined that the debt the husband owed the wife was non-dischargeable. It did not make any findings regarding what amount the husband previously or currently owed, what amount he may have already paid, or if by paying $21,000, he had already paid the debt in full. It merely found that the full amount of the debt the husband owed, whatever it was, was not dischargeable in bankruptcy.

¶30 In a handwritten order filed November 28, 2012, the trial court issued a special order which noted that the bankruptcy court had previously determined that the husband was to hold the wife harmless on the full amount remaining due, thus precluding re-litigation of this issue in the contempt proceeding. The trial court also noted that this did not resolve the issue of the wilful failure to pay on the contempt charge, and he set a date for the contempt hearing.

¶31 At the contempt hearing, the wife testified that as a result of the husband's failure to pay her aunt and uncle, she entered into a new promissory note with her aunt and uncle so that she could make the payments on the original note that the husband and wife jointly executed. She made payments under the new note, and kept a log until it was paid off. She paid a total of $38,542.44 in satisfaction of their joint debt. Because the husband had already paid one payment of $500.00 in 2008, a total of $38,042.44 was left that the wife paid on behalf of the joint debt.

¶32 When the husband's attorney sought to introduce evidence from the bankruptcy court proceeding regarding what the wife believed was owed on the note in October of 2000, the trial court excluded it on the basis that evidence was barred by res judicata. The husband made an offer of proof that her answer would have been "$46,000.00." Notwithstanding this exclusion, the husband later testified that he believed that he owed the entire debt. Also notwithstanding the trial court's prior res judicata ruling, a large portion of the hearing concerned how much was really owed to the Lays and had already been paid, and why the husband thought he had already paid the full amount he owed, etc.

¶33 Reviewing the entire transcript, it appears that the trial court: 1) precluded the bankruptcy court's ruling as conclusive in so far as it determined that the husband was responsible for all of the debt to the aunt and uncle (whatever that debt may be); 2) it did not

decide what he paid, what was owed, or what the wife actually paid on their behalf to extinguish the debt. Consequently, the husband's argument that the trial court erroneously applied res judicata to the bankruptcy court's ruling is unpersuasive. Res judicata was applicable and the trial court did not err in applying it.

THE TRIAL COURT DID NOT ERR IN ITS INTERPRETATION OF THE SEPARATION AGREEMENT

¶34 The husband argues that the trial court erred in holding him in contempt for not paying the required $38,042.44 (the amount remaining on the note to the Lays that the wife paid on the husband's behalf) when the plain language of the separation agreement only required him to pay approximately $20,000.00. Both parties agree that by the terms of the separation agreement, Virginia law applies. The wife argues that: 1) the separation agreement was negotiated by both parties; 2) the husband knew the amount of the original debt; 3) the husband was responsible for making the payments during the marriage and for several years after separation; 4) the husband received periodic letters from Francis Lay as to the amount due; and 5) when the entire separation agreement is read in whole, the "approximately $20,000.00" figure is obviously unclear.

¶35 The separation agreement requires the husband to assume all of the loan debt and hold the wife harmless for any of it. It also ordered him to pay the wife back $8370.00 she had previously paid towards joint debt. The agreement also acknowledges that the parties had fully disclosed to each other all the obligations or debts which they have incurred on or prior to the agreement. Both parties knew, or should have known, the amount of the original loan, how much they had paid towards it during the marriage, and what was left to pay upon their separation.

¶36 Clearly the use of the term "approximately" when coupled with the fact the number $20,000 was used, when the true amount remaining was more than double that (nearly $50,000.00), indicates that the parties either intentionally guessed at the amount owed or inadvertently created an ambiguity, because they both knew or at least should have known it was higher than $20,000. Virginia follows similar rules of construction of contractual language as Oklahoma.

¶37 Under Virginia law, settlement agreements are subject to the same rules of construction as any other contract.[26] Matters of contract interpretation are questions of law, and when a contract ambiguity exists, the court may look beyond the four corners of the contract to determine the intent of the parties.[27] When all the provisions of the separation agreement are read together, coupled with both parties' knowledge regarding the amount of debt when the agreement was drafted and how the approximately $20,000.00 number came about, we cannot say that the trial court erred when it sought to determine the actual amount owed on the debt and how much of it the wife had paid on behalf of the husband.

THE TRIAL COURT DID NOT ERR IN FINDING CONTEMPT

¶38 In an indirect contempt case such as this, the contemnor must be proven guilty of acts constituting contempt by clear and convincing evidence.[28] Furthermore, when the contemnor admits violation of a court order, the contemnor has the burden of excusing his or her acts.[29] The transcript and evidence of the hearing on contempt illustrates that the husband could have but did not make payments pursuant to the separation agreement and prior court orders. His excuse regarding the Lays' loan, that he thought he only owed $20,000.00 justified his refusal to pay his obligations is clearly controverted by the evidence in both the bankruptcy proceeding as well as the hearing on contempt. The only other explanation offered by the husband was a lack of funds which was also clearly controverted by the evidence. Trial court did not err in recognizing the husband's wilful conduct and thus holding the husband in contempt. Nevertheless, pursuant to the husband's purge plan, the debt has now been purged.

CONCLUSION

¶39 The husband was not denied access to the courts in his appeal of the contempt finding because he had avenues of review which he did not pursue. Nor did the trial court err in its interpretation of the separation agreement or in applying res judicata to a previous court ruling involving the same parties on the same issues. The evidence clearly and convincingly showed that the husband was in contempt and that the trial court did not err in making such a finding. Consequently, we affirm the trial court.

APPEAL PREVIOUSLY RETAINED; TRIAL COURT AFFIRMED.

GURICH, V.C.J., KAUGER, WINCHESTER, EDMONDSON, COLBERT, REIF, WYRICK, DARBY, JJ., concur.

COMBS, C.J., concurs in part, dissents in part.

KAUGER, J.:

1. 12 O.S. 2011 App. 1, Oklahoma Supreme Court Rules, Rule 1.50 provides:

> Any interlocutory order not appealable by right under the statutes, which order affects a substantial part of the merits of the controversy, may be brought for review to this Court in compliance with the rules in this Part when the trial judge or the judge's successor has certified that an immediate appeal from that order may materially advance the ultimate termination of the litigation. In the exercise of its statutory discretion this Court may refuse to review a certified interlocutory order. 12 O.S. § 952, Subdiv. (b)(3).
>
> No certified interlocutory order shall be considered if taken from an order overruling a motion for summary judgment. See Rule 1.40 for the application of other rules to review of a certified interlocutory order.

12 O.S. 2011 Ch. 15 §952(b)(3) provides:

> (b) The Supreme Court may reverse, vacate or modify any of the following orders of the district court, or a judge thereof:
>
> . . .3. Any other order, which affects a substantial part of the merits of the controversy when the trial judge certifies that an immediate appeal may materially advance the ultimate termination of the litigation; provided, however, that the Supreme Court, in its discretion, may refuse to hear the appeal. If the Supreme Court assumes jurisdiction of the appeal, it shall indicate in its order whether the action in the trial court shall be stayed or shall continue.
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> The failure of a party to appeal from an order that is appealable under either subdivision 2 or 3 of subsection (b) of this section shall not preclude him from asserting error in the order after the judgment or final order is rendered.

2. 12 O.S. 2011 App. 1, Oklahoma Supreme Court Rules, Rule 1.51 provides:

> (a) Commencement. Time for the commencement of a proceeding to review a certified interlocutory order shall begin to run from the date of the filing of the certification order wherein the trial court certifies in writing that an immediate review may materially advance the ultimate termination of the litigation. A proceeding to review a certified interlocutory order shall be commenced by filing a petition for certiorari within 30 days of the date the certification is filed in the trial court. This time limit cannot be extended either by the trial court or by this Court. A petition for certiorari to review a certified interlocutory order will be deemed filed when mailed in compliance with Rule 1.4. See Rule 1.4(e).
>
> (b) Motion for New Trial. The filing of a motion for new trial, reconsideration, re-examination, rehearing, or to vacate the interlocutory order shall not operate to extend the time to appeal from such order.
>
> (c) Petition, Entry of Appearance, and Costs. A proceeding for review of a certified interlocutory order shall be regarded as commenced when the petition is filed and costs are deposited as set out in Rule 1.23. The petitioner and respondent shall file entries of appearance in conformity with Rules 1.23 and 1.25.

3. The Court has held that when issues which speak to the merits of the action are raised for the first time in the briefs, but not at the trial court or petition in error, consideration of those issues on appeal is inappropriate. Nu-Pro, Inc., v. G.L. Bartlett & Company, Inc, 1977 OK 225, ¶7, 575 P.2d 618. However, under our current Rule 1.26 (b), Oklahoma Supreme Court Rules, 12 O.S. 2011 Ch. 15, App. 1, the petition in error is deemed amended to include errors set forth in the brief-in-chief. Title 12 O.S. 2011 Ch. 15, App., 1, Rule 1.26(b) provides:

> (b) Amendment Upon Filing of Brief-in-chief.
>
> The petition in error will be deemed amended to include errors set forth in the propositions in the brief-in-chief, provided that in no event may the appeal be broader in scope than allowed by Rule 1.26(a). Jackson v. Oklahoma Memorial Hospital, 1995 OK 112 ¶ 5, 909 P.2d 765, 768. Error may not be raised for the first time in any reply brief.

4. Art. 2 Okla. Const. §6 provides:

> The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation, and right and justice shall be administered without sale, denial, delay or prejudice.

5. Art 2 Okla. Const. §6, see note 4, supra.

6. Sommer v. Sommer, 1997 OK 123, ¶9, 947 P.2d 512; Watson v. State ex rel. Michael, 1989 OK 116, 777 P.2d 945. In Sommer v. Sommer, supra, we said, in footnote 2, that:

> A court also possesses inherent power to punish for contempt. Harber v. Shaffer, 1988 OK 45, 755 P.2d 640, 641. However a court's inherent power to define and punish contempts does not supersede or override any conflicting provision of the Oklahoma Constitution. See Seay v. Howell, 311 P.2d 207, 208 (Okla. 1957) where this Court explained that under our form and theory of government all governmental power is inherent in the people, the people possess the power to deprive the courts of their inherent powers to define contempts, and that power to define contempts has been specifically delegated by the people to the Legislature in accordance with Article 2 § 25 of the Oklahoma Constitution.

7. Sommer v. Sommer, see note 6, supra; Woodworth v. Woodworth, 1935 OK 585, ¶0, 48 P.2d 1052. 21 O.S. 2011 §565 provides:

> Contempts of court shall be divided into direct and indirect contempts. Direct contempts shall consist of disorderly or insolent behavior committed during the session of the court and in its immediate view, and presence, and of the unlawful and willful refusal of any person to be sworn as a witness, and the refusal to answer any legal or proper question; and any breach of the peace, noise or disturbance, so near to it as to interrupt its proceedings, shall be deemed direct contempt of court, and may be summarily punished as hereinafter provided for. Indirect contempts of court shall consist of willful disobedience of any process or order lawfully issued or made by court; resistance willfully offered by any person to the execution of a lawful order or process of a court.

8. 21 O.S. 2011 §565; Sommer v. Sommer, see note 6, supra; Ex Parte Plaistridge, 1918 OK 352, 173 P.2d 646, ¶4.

9. 21 O.S. 2011 §565; Sommer v. Sommer, see note 6, supra; Ex Parte Plaistridge, see note 8, supra.

10. Sommer v. Sommer, see note 6, supra; Ex Parte Bighorse, 1936 OK 686, ¶0 ,62 P.2d 487; Wells v. Wells, 1915 OK 211, ¶0 ,148 P.723.

11. Okla. Sup. Ct. R. 1.21 (e)(1) provides:

> (e) Contempt Appeals and Juvenile Delinquency Appeals.
>
> (1) An appeal or habeas corpus proceeding to review a sentence imposed for contempt of court occurring in a civil action or proceeding shall be brought in the Supreme Court; an appeal or habeas corpus proceeding to review a sentence imposed for contempt of court occurring in a criminal prosecution or a grand jury proceeding shall be brought in the Court of Criminal Appeals. If a contempt appeal or habeas corpus proceeding is not brought in the appellate court designated as proper by this rule, the case will be transferred to the proper court either on motion or sua sponte. Art. VII, 4, Okla.Const. A contempt appeal shall be considered timely brought for review, on transfer to either appellate court, if it was commenced in the Supreme Court within the time limit and in the manner prescribed by these Rules or in the Court of Criminal appeals within one hundred and twenty (120) days from the time judgment and sentence was imposed and in the manner prescribed by the rules of that court.

Sommer v. Sommer, see note 6 at ¶5; Fulreader v. State, 1965 OK 187, ¶3, 408 P.2d 775 [The law is well settled by prior decisions of this Court that proceedings for direct contempt are neither civil nor criminal in character but are sui generis and this Court has jurisdiction to review an order adjudiging one in contempt and imposing punishment therefor.].

12. Sommer v. Sommer, see note 6, supra; First Nat. Bank and Trust Co. of Ada v. Arles, 1991 OK 78, ¶5,816 P.2d 573; See also, Hampton v. Hampton, 1980 OK 46, ¶1, 609 P.2d 772.

13. A contempt proceeding to satisfy an award of support alimony is constitutionally permissible [under Okla. Const. Art. 2 §13 Imprisonment for Debt] even though the payments have been reduced to judgment. Sommer v. Sommer, see note 6, supra.

14. Sommer v. Sommer, see note 6, supra;

15. 12 O.S. 2011 §952(b)(3) provides:

> (b) The Supreme Court may reverse, vacate or modify any of the following orders of the district court, or a judge thereof:
>
> . . .3. Any other order, which affects a substantial part of the merits of the controversy when the trial judge certifies that an immediate appeal may materially advance the ultimate termination of the litigation; provided, however, that the Supreme Court,

in its discretion, may refuse to hear the appeal. If the Supreme Court assumes jurisdiction of the appeal, it shall indicate in its order whether the action in the trial court shall be stayed or shall continue.

The failure of a party to appeal from an order that is appealable under either subdivision 2 or 3 of subsection (b) of this section shall not preclude him from asserting error in the order after the judgment or final order is rendered.

Sommer v. Sommer, see note 6, supra. The term "merits" includes the real or substantial grounds of an action or defense, and excludes matters of practice, procedure, and evidence. Pierson v. Canupp, 1988 OK 47, 754 P.2d 548, 552 n.8; Ellison v. Ellison, 1996 OK 64, ¶ 5, 919 P.2d 1.

16. See also, State ex rel. Oklahoma Bar Association v. Mothershed, 2011 OK 84, ¶64, 264 P.3d 1197; State ex rel. Oklahoma Bar Association v. Maddox, 2006 OK 95, ¶16, 152 P.3d 204; State ex rel. Bar Association v. Lowe, 1982 OK 20, ¶7, 640 P.2d 1361; Civil Service Commission of City of Tulsa v. Gresham, 1982 OK 125, ¶40, 653 P.2d 920.

17. Title 22 O.S. 2011 §1076 provides:

The court shall at the time of entering judgment and sentence notify the defendant of his right to appeal. An appeal from a judgment of conviction stays the execution of the judgment in all cases where sentence of death is imposed, but does not stay the execution of the judgment in any other case unless the trial or appellate court shall so order.

18. Title 22 O.S. 2011 §1078 provides:

When bail is allowed, the court shall fix the amount of the appeal bond and the time in which the bond shall be given in order to stay the execution of the judgment pending the filing of the appeal in the appellate court, and until such bond is made shall hold the defendant in custody. If the bond be given in the time fixed by the court, the execution of the judgment shall be stayed during the time fixed by law for the filing of the appeal in the appellate court. If the appeal is filed within the time provided by law, then the bond shall stay the execution of the sentence during the pendency of the appeal, subject to the power of the court to require a new or additional bond when the same is by the court deemed necessary. If the bond is not given within the time fixed, or if given and the appeal not be filed in the appellate court within the time provided by law, the judgment of the court shall immediately be carried into execution

See, Gilchrist v. Lowry, 1945 OK 118, ¶3, 159 P.2d. 261 [Defendant cited for indirect contempt for delinquent child support posted bond to commence proceeding in the Supreme Court.]; State ex rel. Young v. Woodson, 1974 OK 54, ¶2, 522 P.2d 1035 [Wherein an attorney found in contempt of Court posted bond to appeal the finding of contempt.]; D.M. v. State, 1996 OK CR 53, ¶7, 927 P.2d 50 [Appellant held in direct contempt posted appeal bond and appealed sentencing.]; Zeigler v. State, 1991 OK CR 25, ¶5, 806 P.2d 1131 [Appellant held in contempt of court allowed to post appeal bond, which was later modified/reduced.]; League v. League, 1983 OK CIV APP 23, ¶5, 735 P.2d 583 [Trial court set appeal bond of $15,000.00 for father found guilty of indirect contempt which the Supreme Court reduced to $2000.00].

19. In First Nat. Bank and Trust Co. of Ada v. Arles, 1991 OK 78, ¶4, a case involving contempt, the Court said:

Before addressing the substance of this case, we first must inquire into our own jurisdiction to resolve the matter. Although the order complained of found that Arles was guilty of contempt, sentence was deferred for six months. A court minute in the record indicates that the parties were concerned about the appealability of such an order. The trial court offered to accelerate the deferred sentence to assure its finality. However, the record does not show such was done.

The Court ended up recasting the appeal as an original proceeding asking for a writ of prohibition, something we could have done in 113,068, but did not.

20. In State ex rel. Oklahoma Bar Association v. Mothershed, see note 16, supra, the Court looked at four factors to consider whether excessive delay has violated a litigant's rights. The factors include: 1) the length of the delay; 2) the reason for the delay; 3) the party's assertion of the right; and 4) the prejudice to the party occasioned by the delay. Flandermeyer v. Bonner, 2006 OK 87, ¶11, 152 P.3d 195; State ex rel. Oklahoma Bar Association v. Maddox, see note 16, supra; Civil Service Commission of City of Tulsa v. Gresham, see note 16, supra.

21. Bierman v. Aramark Refreshment Services, Inc, 2008 OK 29, ¶11, fn. 9, 198 P.3d 877.

22. Bierman v. Aramark Refreshment Services, Inc, see note 21, supra; Miller Dollarhide, P.C. v. Tal, 2006 OK 27, ¶8, fn 11, 174 P.3d 559.

23. In the bankruptcy proceeding, the wife explained why the number 20,000 was used. Bankruptcy Proceeding Transcript of April 21, 2008, pg 15, ln. 19 provides:

Well, when we were talking with my attorney when I was preparing the separation, with the knowledge of Mr. Ellis, with my attorney in Charlottesville, she indicated to me she felt that there should be a dollar amount involved. And that could I go ahead and furnish her with a dollar amount to incorporate into the separation agreement. I came home and asked Mr. Ellis what the amount of the debt he felt was, and he said approximately 20,000. I said would that be 20,000 exactly or 20,000 or above. He said oh, somewhere in the neighborhood of $20,000. Then I went back to my attorney, gave her that. And I need it to be very clear because I'n not exactly sure of the amount. He states approximately $20,000. That's the language that was incorporated into the separation agreement.

And at pg. 20, ln. 19:

Q Was there ever, in describing this note as having been approximately of $20,000, was there any source of the description between you and Mr. Ellis about how any portion of this debt would be settled?

A No. The note was to be totally assumed by Mr. Ellis.

24. Bankruptcy Proceeding Transcript of April 21, 2008, pg 31, ln 5:

A. That was the amount that we believed that we owed them.

Q Okay. And when you saw that amount, what was your impression?

A That it was a manageable amount.

Q And where did that amount come from?

A I can't really answer that. I mean I do know that we discussed it, I don't know if there was any conversations with the Lays or we looked at cancelled checks. But it was a figure that was discussed with Mr. Lay.

And pg 37, ln 13:

A Yeah. I've got the payment schedule. It's in some of papers being passed around here. I paid down the principal approximately $21,000.00.

Q And is there some particular reason that you paid more than $21,000 if you thought the debt was only $20,000?

A I didn't keep good accounting on it.

25. The order also states "for the reasons states in the accompanying memorandum," but the accompanying memorandum does not appear in the record.

26. Southerland v. Estate of Sourtherland, III, 249 Va. 584, 457 S.E.2d 375, 378 (Va. 1995); Bailey v. Bailey, 54 Va. App. 209, 677 S.E.2d 56, 59 (Va. App. 2009.

27. Eure v. Norfolk Shipbuilding & Drydock Corp., Inc., 263 Va. 624, 561 S.E. 2d 663, 667 (Va. 2002.); Tuomala v. Regent University, 252 Va. 368, 447 S.E.2d 501, 505 (Va. 1996).

28. Whillock v. Whillock, 1976 OK 51, ¶24, 550 P.2d 558; See also, Wells v. Wells, 1915 OK 211, ¶10-11, 148 P.723.

29. Whillock v. Whillock, see note 28, supra; Morgan v. National Bank of Commerce, Wells v. Wells, see note 28, supra.

2018 OK CR 33

BYRON JEROME BIVENS, Appellant, v. STATE OF OKLAHOMA Appellee.

Case No. F-2017-259. October 11, 2018

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

¶1 Appellant Byron Jerome Bivens was tried by jury and convicted of Trafficking in Illegal Drugs (Count I) (63 O.S.Supp.2014, § 2-415); Possession of a Controlled Dangerous Substance (Count II) (63 O.S.Supp.2012, § 2-402); Unlawful Possession of Drug Paraphernalia (Count III) (63 O.S.2011, § 2-405); and Possession of a Dangerous Drug Without a Prescription (Count IV) (59 O.S.2011 § 353.24(7), all counts After Former Conviction of Two or More Felonies, in the District Court of Blaine County, Case No. CF-2015-97. The jury recommended as punishment fifty (50) years in prison and a $500,000.00 fine in Count I, and one (1) year in prison and a $1,000.00 fine in each of Counts II, III and IV. The trial court sentenced accordingly, ordering the sentences to run concurrently. It is from this judgment and sentence that Appellant appeals.

¶2 Appellant raises the following propositions of error in support of his appeal:

I. The State's evidence in case No. CF-2015-97 was insufficient to convict Appellant of Counts I-IV.

II. Appellant's separate convictions for Possession of a Controlled Dangerous Substance in Counts I, II and IV violate his constitutional protection against Double Punishment and Double Jeopardy.

III. Appellant's Fourteenth Amendment due process rights pursuant to the United States Constitution were violated when the jury was erroneously instructed as to the range of punishment for Trafficking methamphetamine in excess of 200 grams.

IV. Prosecutorial misconduct deprived Appellant of a fair trial as guaranteed by the United States and Oklahoma Constitutions and caused the jury to render an excessive sentence.

V. The trial court committed fundamental error by failing to instruct the jury on the lesser-related offense of Possession of Controlled Drug with the Intent to Distribute, in violation of Appellant's right to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.

VI. The trial court committed fundamental error by not instructing the jury that Appellant would be ineligible for good time credits.

VII. The trial court failed to properly instruct the jury that Appellant would receive additional punishment of methamphetamine registration if found guilty.

VIII. Alternatively, reversal is required because any failure to adequately and completely preserve issues for review in this Court was the result of the ineffective assistance of counsel.

IX. Appellant's sentence is excessive.

X. The cumulative effect of all the errors addressed above deprived Appellant of a fair trial.

¶3 After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we find that under the law and the evidence no relief is warranted.

¶4 On July 19, 2015, Appellant was a passenger in a pickup detained for a traffic stop by an officer from the Watonga Police Department. The driver was unable to produce a driver's license or vehicle registration. A warrant check returned an outstanding warrant for the back seat passenger. As the traffic stop progressed, all four occupants of the pickup acted nervous but Appellant particularly so. Appellant was constantly on his phone, had an odor of alcohol about him, and was the only occupant to repeatedly get in and out of the truck. Appel-

lant appeared particularly upset when the officer advised the occupants that the driver was to be arrested and the pickup impounded. Appellant refused to leave the scene and remained by the driver's side door. During the ensuing inventory of the pickup, Appellant asked for a bag of tools lying on the front passenger floorboard. When asked if the bag of tools belonged to him, Appellant replied no. His request was refused. Appellant attempted to persuade the officers to allow him to move the pickup. This request was also refused. Appellant eventually complied with the officers' directives to leave the scene.

¶5 The inventory of the pickup yielded the tool bag, an orange power tool and a bottle of vodka in the front passenger floorboard. Underneath the front passenger seat was found a black nylon bag containing $280.00 cash, a silver spoon containing a crystal like residue, a digital scale with residue, and three clear baggies of a white, crystal-like substance which tested as methamphetamine in quantities of 205.01 grams, 13.13 grams and 2.91 grams. Also found inside the nylon bag were 3 baggies of a green leafy substance that tested as marijuana in the quantities of 4.25 grams, 0.43 grams, and 0.91 grams. A small jewelry bag was also found containing 10 tablets which tested to be Xanax. Three days later an arrest warrant was obtained for Appellant and he was taken into custody.

¶6 In Proposition I, Appellant challenges the sufficiency of the evidence to support his convictions arguing the State failed to prove he knowingly participated in the crimes. Appellant argues he was only one of four people in the truck and his mere proximity to the bag of drugs is insufficient to connect him to possession of the drugs.

¶7 We review Appellant's challenge to the sufficiency of the evidence supporting his convictions in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111. This Court will accept all reasonable inferences and credibility choices that tend to support the verdict. *Id.* It is the exclusive province of the trier of fact to weigh the evidence and determine the facts. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849.

¶8 Each of the offenses Appellant was convicted of committing contains an element of knowing and intentional possession. *See* 63 O.S. Supp.2014, § 2-415 (Trafficking); 63 O.S. Supp.2012, § 2-402 (Possession of a Controlled Dangerous Substance); 63 O.S.2011, § 2-405 (Unlawful Possession of Paraphernalia) and 59 O.S.2011 § 353.24(7) (Possession of a Dangerous Drug Without a Prescription). When an accused is not apprehended while in physical custody of contraband, proof of the knowledge and control necessary to justify an inference of possession (*i.e.*, constructive possession) can be and usually is circumstantial. *Johnson v. State*, 1988 OK CR 246, ¶ 6, 764 P.2d 530, 532.

¶9 Proof of knowing possession of drugs is often solely circumstantial, and thus requires that guilt be determined through a series of inferences. *Id.* Even in the absence of proof of possession and exclusive control, constructive possession may still be proven if "there are additional independent factors showing [the accused's] knowledge and control." *Id.* Such independent factors may consist of "incriminating conduct by the accused, ... or any other circumstance from which possession may be fairly inferred." *Id.* Possession may be individual or joint, actual or constructive. *White v. State*, 1995 OK CR 15, ¶ 6, 900 P.2d 982, 986. "[J]oint possession can be proven by circumstantial evidence of dominion and control over the thing possessed." *Id.* Possession need not be exclusive "as long as there is proof that the defendant knowingly and willfully shared the right to control the dangerous substance." *Id.*

¶10 Contrary to Appellant's claim, the evidence in this case shows much more than his mere proximity to the drugs. The evidence, taken as a whole, supports the inference that Appellant knew the bag of drugs was under the front passenger seat where he had been sitting, next to the very visible tool bag. His attempts to either get inside the truck to retrieve the bag or move the truck and retrieve the bag or merely create a diversion set him apart from the conduct of the other occupants of the truck. Reviewing the evidence in the light most favorable to the State, we find any rational trier of fact could have found beyond a reasonable doubt that Appellant knowingly and intentionally committed the charged crimes.

¶11 In Proposition II, we review for plain error Appellant's claims of double punishment and double jeopardy. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144. Under the plain error test set forth in *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, we determine whether

Appellant has shown an actual error, which is plain or obvious, and which affects his or her substantial rights. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id. See also Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121; *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395; *Hogan v. State,* 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

¶12 Appellant's convictions in Counts I, II and IV are not barred by the statutory prohibition against double punishment, 21 O.S.2011, § 11(A), or the constitutional prohibition against double jeopardy. *See Sanders v. State,* 2015 OK CR 11, ¶¶ 5-8, 358 P.3d 280, 283-284. Appellant was charged and convicted of violating three separate statutes - 63 O.S.Supp.2014, § 2-415; 63 O.S.Supp.2012, § 2-402, and 59 O.S.2011 § 353.24(7). Each offense contains different elements. As each offense required proof of a fact which the other did not, and given the differences between the statutes involved, we find no legislative intent to treat the offenses as parts of a single criminal transaction for punishment purposes.

¶13 Further, under a traditional double jeopardy analysis, Appellant's convictions were for three separate and distinct offenses requiring dissimilar proof. *See Logsdon v. State,* 2010 OK CR 7, ¶ 19, 231 P.3d 1156, 1165 (citing *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)). Therefore, any double jeopardy claim fails. Finding no error, we find no plain error.

¶14 In Proposition III, Appellant contends his due process rights were violated by the trial court incorrectly instructing the jury on the range of punishment and provisions for a fine in Count I, Trafficking, After Former Conviction of Two or More Felonies. Our review is for plain error under the standard set forth above as Appellant neither requested his own instructions nor objected to those given. *Watts v. State,* 2008 OK CR 27, ¶ 9, 194 P.3d 133, 136-137.

¶15 While Appellant had both drug related and non-drug related prior convictions, the record indicates the State relied on all six prior convictions to enhance his sentence under the provisions of the Habitual Offender Act, 21 O.S.2011, § 51.1. *See Jones v. State*, 1990 OK CR 17, ¶ 8, 789 P.2d 245, 247 ("where an appellant is charged with both drug and non-drug predicate offenses, it is permissible to provide for enhancement under either statute"). Therefore, the jury was correctly instructed that the range of prison time for a conviction of Trafficking, After Former Conviction of Two or More Felonies, is twelve (12) years to life. *See McIntosh v. State*, 2010 OK CR 17, ¶ 9, 237 P.3d 800, 803 ("[w]hen the two year sentence provided by § 2-401(B)(2) is doubled under section 2-415(D), as required for a trafficking offense, and then tripled under 21 O.S.Supp.2002, § 51.1(C) for McIntosh's three prior felony convictions, the correct minimum sentence in McIntosh's case should have been twelve years").

¶16 Appellant notes that the Habitual Offender Act does not include provisions for a fine, therefore the reference to a fine in the jury instruction was error. He is correct in that § 51.1 does not address fines. In *Coates v. State,* 2006 OK CR 24, ¶ 6, 137 P.3d 682, 685 this Court held that a sentence enhanced under § 51.1 may not include the additional imposition of any fine imposed in the substantive drug statute. The State argues we should not extend the holding in *Coates* to the present case to invalidate the fine as the underlying substantive penal statute, Trafficking in Illegal Substances, 63 O.S.2011, § 2-415(D) specifically provides for the imposition of a fine in addition to incarceration and as *Coates* is not a Trafficking case.

¶17 Statutory amendments enacted since *Coates* have rendered unworkable *Coates* and its predecessors holding that "[p]unishment may not be assessed by combining statutes, but must fall within the limitations of one statute only." *See Gaines v. State,* 1977 OK CR 259, ¶ 16, 568 P.2d 1290, 1294. Since we handed down Coates, the Legislature has amended 63 O.S. 2011, § 2-415(D), to provide that the term of imprisonment imposed for Trafficking shall be "in addition to any fines" specified by subsection 2-415(D). Sentencing Appellant as a habitual offender under § 51.1 does not render subsection 2-415(D) somehow inapplicable. There is no indication in § 51.1 that the absence of any language regarding fines is to be interpreted as a prohibition against the imposition of fines proscribed in other penal statutes.

¶18 Further, nothing in our constitution or other statutory provisions dictates the holding in *Coates* and *Gaines* that it is improper to combine two penal statutes to determine the imposition of a fine when a defendant is subject to the Habitual Offender Act or some other enhanced sentence of imprisonment. In fact, the

general rule is that when two different statutes regulate the same subject matter, both provisions are to be given effect, as long as such effect would not defeat the intent of the Legislature. *Livingston v. State*, 1990 OK CR 40, ¶ 10, 795 P.2d 1055, 1058. Clearly, the Legislature intended for those punished under the Habitual Offender Act to be punished more harshly than first time offenders. Eliminating the fine provision from those sentenced as Habitual Offenders (and requiring only incarceration) while leaving the fine provision intact, and in addition to incarceration, for first time offenders is surely not what the Legislature intended by enacting § 51.1.

¶19 The substantive drug statute in *Coates* (Distribution of Controlled Dangerous Substance within 2000 Feet of a School) and statutes in similar cases, neither impose a mandatory minimum fine nor state that the fine shall be imposed in addition to other punishment. However, the Trafficking statute, 63 O.S.2011, § 2-415, specifically allows for the imposition of a fine in addition to other punishment. We find no error in the trial court's instruction in this case on the imposition of a fine on a sentence enhanced under § 51.1 when the underlying substantive penal statute, 63 O.S.2011, § 2-415(D) specifically includes provisions for a fine and states the fine shall be imposed in addition to other punishment provided by law.[1] To the extent *Coates* and its predecessors prohibit the imposition of a statutorily authorized fine in the sentencing of a habitual offender under § 51.1, those cases are hereby overruled. We find no error and thus no plain error in the instruction given to the jury in this case.

¶20 In Proposition IV, we have reviewed Appellant's claims of prosecutorial misconduct for plain error under the standard set forth above as none of the alleged instances were met with contemporaneous objections. *Malone v. State*, 2013 OK CR 1, ¶ 40, 293 P.3d 198, 211.

¶21 We evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. *Sanders*, 2015 OK CR 11, ¶ 21, 358 P.3d at 286. We have long allowed counsel for the parties a wide range of discussion and illustration in closing argument. *Id.* We will reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant's rights. *Id.* Having thoroughly reviewed the challenged comments in this case, we find the prosecutor's conduct was not so improper or prejudicial so as to have infected the trial so that it was rendered fundamentally unfair.

¶22 Contrary to Appellant's claims, the prosecutor's comments did not shift the burden of proof or misstate the law of drug possession and drug trafficking. The prosecutor's comments did not constitute "societal alarm" as they did not refer to the crime rate in general, crimes committed by others, or deterring others from committing crimes. *See McElmurry v. State*, 2002 OK CR 40, ¶ 151, 60 P.3d 4, 34. The prosecutor's opinion as to punishment was permissible, *Bernay v. State,* 1999 OK CR 37, ¶ 65, 989 P.2d 998, 1014, and he appropriately refrained from giving an opinion as to guilt, *Bryson v. State,* 1994 OK CR 32, ¶ 45, 876 P.2d 240, 257; *Tart v. State*, 1981 OK CR 113, ¶¶ 5-6, 634 P.2d 750, 751. Generally the prosecutor's comments were proper statements of the law and based on the evidence before the jury. Any misstatements were minor and not sufficient to warrant relief. We find no error and no plain error.

¶23 In Proposition V, we review the trial court's failure to *sua sponte* instruct the jury on the lesser included/lesser related offense of Possession of Controlled Dangerous Substance with Intent to Distribute for plain error under the standard set forth above. *Daniels v. State,* 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383.

¶24 The proper test for determining whether instructions on a lesser related or lesser included offense are required involves a two part analysis which first requires courts to make a legal determination about whether a crime constitutes a lesser included offense of the charged crime. *Davis v. State*, 2011 OK CR 29, ¶ 101, 268 P.3d 86, 115, citing *Shrum v. State*, 1999 OK CR 41, ¶ 7, 991 P.2d 1032, 1035. The court then must determine whether *prima facie* evidence of the lesser offense has been presented. *Id.* Sufficient evidence to warrant a lesser included offense is evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater. *Id.* Here, Appellant fails to meet the first step of the analysis as the crime of Possession with Intent to Distribute is not a legally recognized lesser included or lesser related offense to the crime of Trafficking. *Dufries v. State*, 2006 OK CR 13, ¶ 20, 133 P.3d 887, 891 citing *Ott v. State*,

1998 OK CR 51, ¶ 13, 967 P.2d 472, 477. Therefore, we find no error and thus no plain error in the absence of the instruction.

¶25 In Proposition VI, we review for plain error the trial court's failure to *sua sponte* instruct the jury on institutional earned credits. *See Daniels*, 2016 OK CR 2, ¶ 3, 369 P.3d at 383. In *Watts,* 2008 OK CR 27, ¶ 9, 194 P.3d at 137 we found no plain error in the omission of an instruction on the defendant's ineligibility for some institutional earned credits to reduce his prison sentence as such an instruction would introduce highly speculative factors into jury sentencing decisions. Appellant's arguments to the contrary are not persuasive. We find no error and thus no plain error in the absence of the instruction.

¶26 In Proposition VII, Appellant contends the trial court erred by failing to instruct the jury *sua sponte* that if convicted, he would be subject to the Oklahoma Methamphetamine Registry Act. Appellant asserts this is additional punishment and the failure to make the jury aware of the additional punishment is a denial of his due process rights.

¶27 "[T]rial courts have a duty to instruct the jury on the salient features of the law raised by the evidence with or without a request." *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923. Here, our review is for plain error as no request was made for such an instruction nor was an objection raised to the absence of the instruction. *Daniels,* 2016 OK CR 2, ¶ 3, 369 P.3d at 383.

¶28 The Oklahoma Methamphetamine Registry Act, 63 O.S.Supp.2013, § 2-701, establishes a registry of persons convicted of various methamphetamine crimes, and applies to all persons convicted after November 1, 2010, and all persons on probation for any specified offense as of that date. *See Wolf v. State*, 2012 OK CR 16, ¶ 3, 292 P.3d 512, 514. Upon conviction, the district court clerk is required to send the name of the offender to the Oklahoma State Bureau of Narcotics and Dangerous Drugs (OSBNDD), which maintains the registry. A person subject to the registry is prohibited from buying pseudoephedrine. Every pharmacist or other person who sells, manufactures or distributes pseudoephedrine must check the registry at each purchase, and deny the sale to any person on the list. *Id.* Appellant has not cited to any authority where a uniform instruction on the Oklahoma Methamphetamine Registry Act has been created or required to be given to the jury.[2]

¶29 The State directs us to *Reed v. State*, 2016 OK CR 10, 373 P.3d 118 and argues the reasoning used there to find a jury instruction on the Sex Offender Registration Act is not required is applicable to an instruction on the Oklahoma Methamphetamine Registry Act. We agree and find the reasoning used in *Reed* applicable to the present case.

¶30 The requirements of the Oklahoma Methamphetamine Registry Act were not part of the range of punishment for Appellant's offense nor did any statutory provision permit a judge or a jury to impose, delay, alter, or suspend registration and no provision within the Oklahoma Methamphetamine Registry Act authorizes a sentencing judge or jury to require or preclude compliance with the Act. As we found with the Sex Offender Registration Act, the Oklahoma Methamphetamine Registry Act is a regulatory scheme that is entirely separate and distinct from the applicable punishment range. *See Reed*, 2016 OK CR 10, ¶ 17, 373 P.3d at 123.

¶31 Further, it is not analogous to the 85% Rule as registration pursuant to the Oklahoma Methamphetamine Registry Act has no bearing on the issue of guilt or the actual term of imprisonment or fine imposed. Thus, registration pursuant to Oklahoma Methamphetamine Registry Act is not a material consequence of sentencing and is a collateral matter outside the jury's purview. Registration pursuant to Oklahoma Methamphetamine Registry Act is not a salient feature of the law in drug cases upon which trial courts have a duty to instruct. Finding no error in the absence of a jury instruction on the Oklahoma Methamphetamine Registry Act, we find no error and thus no plain error.

¶32 In Proposition VIII, we review Appellant's claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984). In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Goode v. State*, 2010 OK CR 10, ¶ 81, 236 P.3d 671, 686 citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. *See also Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481. In *Strickland*, the Supreme Court said there is a strong presumption that counsel's conduct falls within the wide range

of reasonable professional conduct, *i.e.*, an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Goode*, 2010 OK CR 10, ¶ 81, 236 P.3d at 686. To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at ¶ 82, 236 P.3d at 686.

¶33 As addressed in this opinion, trial counsel failed to object to the allegations of error raised in Propositions II, III, IV, V, VI and VII. However, counsel's failures to raise objections did not prevent this Court from thoroughly reviewing the allegations of error under the plain error standard. In each instance none of the alleged errors were sufficient to warrant relief. Therefore, any trial objections raised by counsel would have been overruled. We have previously held that trial counsel will not be found ineffective for failing to raise objections which would have been overruled. *Eizember v. State*, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244. Further, as none of the allegations warrant relief on appeal, Appellant has failed to show how he was prejudiced by counsel's omissions. Appellant has failed to meet his burden of showing a reasonable probability that, but for any unprofessional errors by counsel, the result of the trial would have been different. Accordingly, we find that Appellant was not denied the effective assistance of counsel.

¶34 In Proposition IX, Appellant argues that his fifty (50) year sentence is excessive. The question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case. *Rackley v. State*, 1991 OK CR 70, ¶ 7, 814 P.2d 1048, 1050. Where the punishment is within the statutory limits the sentence will not be disturbed unless under all the facts and circumstances of the case it is so excessive as to shock the conscience of the Court. *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. Considering all the facts and circumstances of Appellant's case, his sentence is not so excessive as to shock the conscience of the Court.

¶35 In Proposition X, Appellant argues the accumulation of errors denied him a fair trial. This Court has held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Engles v. State*, 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315; *Lott v. State*, 2004 OK CR 27, ¶ 166, 98 P.3d 318, 357. As we have found no error in the allegations raised herein, we find no cumulative error.

DECISION

¶36 The **JUDGMENT** and **SENTENCE** is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF BLAINE COUNTY
THE HONORABLE PAUL K. WOODWARD,
DISTRICT JUDGE

APPEARANCES AT TRIAL

Silas R. Lyman, 1800 W. Memorial Rd., Ste. 106, Oklahoma City, OK 73131, Counsel for Defendant

Michael J. Fields, District Attorney, Barry Retherford, Asst. District Attorney, 212 N. Weigle, Watonga, OK 73772, Counsel for the State

APPEARANCES ON APPEAL

Katrina Conrad-Legler, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Sheri M. Johnson, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

Opinion by: Lumpkin, P.J.
Lewis, V.P.J.: concur
Hudson, J.: concur in result
Kuehn, J.: concur in result
Rowland, J.: concur

HUDSON, JUDGE: CONCUR IN RESULTS

¶1 I concur in the results of today's decision. However, I disagree with the manner in which the Court resolves Proposition V. The Majority utilizes a two-step approach that begins with the "elements" test to determine whether Possession with Intent to Distribute is a lesser related offense of Trafficking in this case. However, in *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032, this Court adopted the "evidence" test after carefully considering the advantages and disadvantages of both the "elements" and "evidence" tests. *Id.*, 1999 OK CR 41, ¶ 10, 991 P.2d at 1036. The Majority's approach erroneously alters this Court's binding legal precedent and confuses the issue for the bench, bar and public. Whether a lesser related offense instruction is

warranted is a fact dependent issue, and hence, must be decided on a case by case basis. *State v. Tubby*, 2016 OK CR 17, ¶ 1, 387 P.3d 918, 922 (Hudson, J., Specially Concurring). The pivotal question being whether evidence was presented that "would allow a jury rationally to find the accused guilty of the lesser offense and acquit him on the greater." *Tryon v. State*, 2018 OK CR 20, ¶ 66, 423 P.3d 617, 638 ("trial court should instruct on any lesser form of [offense] supported by the evidence").

¶2 Reviewing for plain error in this case, the Court should look to "whether the evidence might allow a jury to acquit the defendant of the greater offense and convict him of the lesser." *Harris v. State*, 2004 OK CR 1, ¶ 50, 84 P.3d 731, 750. Here, given the uncontroverted evidence that Appellant possessed in excess of 200 grams of methamphetamine, no rational trier of fact could have rejected this evidence and convicted him of the lesser related offense of Possession with Intent to Distribute. *Id.* Thus, no plain error occurred.

KUEHN, JUDGE, CONCURRING IN RESULT:

¶1 I agree that Appellant's conviction should be affirmed. However, I disagree with the analysis used in Proposition V regarding lesser related offenses. The Majority categorically rejects the idea that Possession with Intent to Distribute can ever be considered a lesser related option in a Trafficking prosecution. To the extent that our prior case law supports that suggestion, it is in conflict with *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032.[1] I certainly agree that Possession with Intent to Distribute is not "necessarily" included within the crime of Trafficking, because no intent to distribute is ever required for Trafficking. It is, however, a related offense.[2] The proper test for whether lesser related offense instructions are warranted is whether any rational juror could have rejected evidence that distinguishes the greater crime from the lesser. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. When, as here, no rational juror could have ignored uncontroverted evidence that the quantity of drugs exceeded the threshold for Trafficking, no instruction on Possession with Intent to Distribute is warranted.

LUMPKIN, PRESIDING JUDGE

1. This is not the first time we have declined to extend *Coates*. In *Land-Cooper v. State*, Case No. F-2015-1139, opinion not for publication (Feb. 28, 2017) we declined to extend the holding of *Coates* to invalidate a fine clearly authorized by the Legislature in 63 O.S.2011, § 2-415 where the defendant's sentence was enhanced under § 51.1.

2. Appellant's reliance on *Wolf* is misplaced as it did not address the jury instruction issue, rather the holding in *Wolf* found Subsections (B) and (H) of Section 2–701 unconstitutional as violating the defendant's due process rights to notice. 2012 OK CR 16, ¶ 18, 292 P.3d at 518.

KUEHN, JUDGE

1. The Majority relies on *Dufries v. State*, 2006 OK CR 13, ¶ 20, 133 P.3d 887, 891. However, *Dufries* itself is in conflict with *Shrum*. Although *Dufries* was decided well after *Shrum*, it relies on *Ott v. State*, 1998 OK CR 51, ¶ 13, 967 P.2d 472, 477. *Ott* was decided before *Shrum*, and thus used the strict elements test in effect at that time, which was explicitly rejected in *Shrum*. To the extent that *Dufries* conflicts with *Shrum* it should be overruled.

2. While the term "trafficking" usually connotes economic transactions, the crime Appellant was convicted of is merely an aggravated possession offense. Nevertheless, prosecutors in Trafficking cases routinely offer evidence that tends to show economic activity, such as digital scales, retail packaging, and transaction records. They also present evidence of the "street value" of the drugs that were seized. In fact, over defense objection, the prosecutor in this case elicited an officer's testimony about the street value of the methamphetamine on which the Trafficking charge was based. The State may not have to prove an intent to distribute to obtain a conviction for Trafficking, but I believe it is disingenuous to treat Trafficking and Possession with Intent to Distribute as if they were completely unrelated crimes.

2018 Annual Meeting

President's Reception

Wednesday | Nov. 7

Open to all Annual Meeting registrants

www.okbar.org/annualmeeting

2019 OBA BOARD OF GOVERNORS VACANCIES

The nominating petition deadline was 5 p.m. Friday, Sept. 7, 2018

OFFICERS

President-Elect
Current: Charles W. Chesnut, Miami
Mr. Chesnut automatically becomes OBA president Jan. 1, 2019
(One-year term: 2019)
Nominee: **Susan B. Shields, Oklahoma City**

Vice President
Current: Richard Stevens, Norman
(One-year term: 2019)
Nominee: **Lane R. Neal, Oklahoma City**

BOARD OF GOVERNORS

Supreme Court Judicial District Three
Current: John W. Coyle III, Oklahoma City
Oklahoma County
(Three-year term: 2019-2021)
Nominee: **David T. McKenzie, Oklahoma City**

Supreme Court Judicial District Four
Current: Kaleb K. Hennigh, Enid
Alfalfa, Beaver, Beckham, Blaine, Cimarron, Custer, Dewey, Ellis, Garfield, Harper, Kingfisher, Major, Roger Mills, Texas, Washita, Woods and Woodward counties
(Three-year term: 2019-2021)
Nominee: **Timothy E. DeClerck, Enid**

Supreme Court Judicial District Five
Current: James L. Kee, Duncan
Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties
(Three-year term: 2019-2021)
Nominee: **Andrew E. Hutter, Norman**

Member At Large
Current: Alissa Hutter, Norman
Statewide
(Three-year term: 2019-2021)
Nominee: **Miles T. Pringle, Oklahoma City**

NOTICE
Pursuant to Rule 3 Section 3 of the OBA Bylaws, the nominees for uncontested positions have been deemed elected due to no other person filing for the position. The election for the contested position will be held at the House of Delegates meeting Nov. 9, during the Nov. 7-9 OBA Annual Meeting.

Terms of the present OBA officers and governors will terminate Dec. 31, 2018.

OKLAHOMA BAR ASSOCIATION
NOMINATING PETITIONS

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

OFFICERS
President-Elect

Susan B. Shields, Oklahoma City

Nominating Petitions have been filed nominating Susan B. Shields for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019.

A total of 573 signatures appear on the petitions.

Vice President

Lane R. Neal, Oklahoma City

Nominating Petitions have been filed nominating Lane R. Neal for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2019.

A total of 126 signatures appear on the petitions.

BOARD OF GOVERNORS
Supreme Court Judicial District No. 3

David T. McKenzie, Oklahoma City

Nominating Petitions have been filed nominating David T. McKenzie for election of Supreme Court Judicial District No. 3 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

A total of 57 signatures appear on the petitions.

Supreme Court Judicial District No. 4

Timothy E. DeClerck, Enid

Nominating Petitions have been filed nominating Timothy E. DeClerck for election of Supreme Court Judicial District No. 4 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

A total of 46 signatures appear on the petitions.

A Nominating Resolution has been received from the following county: Garfield County

Supreme Court Judicial District No. 5

Andrew E. Hutter, Norman

Nominating Petitions have been filed nominating Andrew E. Hutter for election of Supreme Court Judicial District No. 5 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

A total of 31 signatures appear on the petitions.

Member at Large

Miles T. Pringle, Oklahoma City

Nominating Petitions have been filed nominating Miles T. Pringle, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2019.

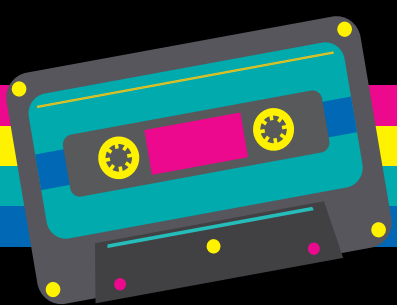
A total of 105 signatures appear on the petitions.

Kim & Alan's

HOUSE PARTY

Thursday, Nov. 8

Part of the 2018 Annual Meeting
Open to all - no registration required!



Co-hosted by

OKLAHOMA BAR ASSOCIATION

OKLAHOMA BAR FOUNDATION
LAW. EDUCATION. JUSTICE.

Sponsored by the OBA Sections

"A GOOD NIGHT'S SLEEP IS HARD TO FIND, OR IS IT?"

The Oklahoma Rules of Professional Conduct cover many topics with regard to the conduct for attorneys. This presentation will cover assorted ethical issues that confront attorneys in business and corporate matters regarding 1) the client-lawyer relationship, 2) an attorney's role as counselor, 3) an attorney's role as advocate, 4) transactions with persons other than clients, as well as 5) public service

presented by

BUFORD BOYD POLLETT, J.D.

Genave King Rogers Assistant Professor of Energy Law and Commerce
The University of Tulsa • Collins College of Business

sponsored by and in conjunction with the annual meeting of the
Business and Corporate Law Section of the Oklahoma Bar Association

WHEN: Thursday, Nov. 8, 2018 10:00 - 11:15 a.m.
announcements and presentation
11:125 - 11:30 a.m. business meeting

WHERE: Hyatt Regency Hotel • 100 E. 2nd St. • Tulsa, OK 74103
meeting room will be announced in Annual Meeting materials

This program has been approved by the OBA for 1 hour of MCLE Ethics Credit.
This seminar is free for members of the Business and Corporate Law Section of the OBA
All other attendees: $100

PLEASE RSVP to Sue Wagner - swagner@gablelaw.com • 918-595-4910

NOTICE OF MEETINGS

CREDENTIALS COMMITTEE

The Oklahoma Bar Association Credentials Committee will meet Thursday, Nov. 8, 2018, from 9-9:30 a.m. in Room 1 of Director's Row on the second floor of the Hyatt Regency Hotel, 100 E. Second Street, Tulsa, Oklahoma, in conjunction with the 114th Annual Meeting. The committee members are: Chairperson Luke Gaither, Henryetta; Kimberly K. Moore, Tulsa; Jennifer Castillo, Oklahoma City; and Jeffery D. Trevillion, Oklahoma City.

RULES & BYLAWS COMMITTEE

The Rules & Bylaws Committee of the Oklahoma Bar Association will meet Thursday, Nov. 8, 2018, from 10-10:30 a.m. in Room 1 of Director's Row on the second floor of the Hyatt Regency Hotel, 100 E. Second Street, Tulsa, Oklahoma, in conjunction with the 114th Annual Meeting. The committee members are: Chairperson Judge Richard A. Woolery, Sapulpa; Roy D. Tucker, Muskogee; Billy Coyle IV, Oklahoma City; Nathan Richter, Mustang; and Ron Gore, Tulsa.

RESOLUTIONS COMMITTEE

The Oklahoma Bar Association Resolutions Committee will meet Thursday, Nov. 8, 2018, from 10:45 - 11:45 a.m. in Room 1 of Director's Row on the second floor of the Hyatt Regency Hotel, 100 E. Second Street, Tulsa, Oklahoma, in conjunction with the 114th Annual Meeting. The committee members are: Chairperson Molly A. Aspan, Tulsa; Kendall A. Sykes, Oklahoma City; Cory B. Hicks, Guymon; Clayton Baker, Vinita; Courtney Briggs, Oklahoma City; and Mark E. Fields, McAlester.

EASIEST CATCH

Don't Be Another Fish in the Dark 'Net

Speaker: Mark Lanterman, founder, Computer Forensic Services

Annual Luncheon

Thursday, Nov. 8

Sponsored by the Family Law Section

Part of the 2018 Annual Meeting | www.okbar.org/annualmeeting

Criminal Law Section
ANNUAL LUNCHEON
Wednesday, November 7, 2018 - 11:50-1:15
Hyatt Hotel (OBA Annual Meeting)
100 E. 2nd St., Tulsa, OK

FANTASTIC KEYNOTE SPEAKERS

U.S. MAGISTRATE JUDGE SUZANNE MITCHELL, OKLAHOMA COUNTY DISTRICT COURT JUDGE KEN STONER, AND SUPERVISORY U.S. PROBATION OFFICER JEFF YOWELL will discuss the latest in specialty state court programs for criminal defendants. In addition, they will discuss the CARE reentry program that provides support systems for defendants with drug, alcohol and (in possibly in the future) gambling issues. *Register soon as seating is limited and the speakers are fantastic.*

PROFESSIONAL ADVOCATE OF THE YEAR AWARDS

The Criminal Law Section will recognize the **Defense Attorney of the Year and the Prosecutor of the Year** who (*as recognized by their peers*) exhibit superior advocacy skills before the court and consistently show professionalism, courtesy, and respect to opposing counsel in the spirit of the adversarial system. Prosecutors nominate defense attorneys, and defense attorneys nominate prosecutors. Send nominations to wilds@nsuok.edu or Trent.Baggett@dac.state.ok.us.

HONORABLE DONALD L. DEASON AWARD

The Criminal Law Section will award the **Honorable Donald L. Deason Judicial Award** to in Oklahoma or Tenth Circuit Judge who is known for character, dedication, and professional excellence.

BBQ BUFFET: Chopped Iceberg Lettuce, Tomatoes, Shredded Carrots, Cucumbers, Ranch Dressing Roasted Dill Potatoes, Sweet Baked Beans, Golden Corn, Sliced Smoked Brisket, BBQ Chicken Drumsticks, Pickles, Sliced Red Onion, Cherry Peppers, and Fantastic Fudge Brownies.

DOOR PRIZES: Everyone will receive a Criminal Law adhesive cell phone credit (or business) card holder. In addition, we will draw names for our **Thunder Tickets,** some Criminal Law polo shirts, and our famous Criminal Law sharks! *You must be present during the drawings to win the door prizes*.

Criminal Law Section Annual Luncheon

November 7, 2018 • Tulsa Hyatt Hotel (during the OBA Annual Meeting)

Last Name (print) _____ First Name _____

Address _____

City_____ State_____ Zip_____

Email _____ Phone _____ OBA # _____

❑ $20 - Criminal Law Section Member ❑ $15 - Judge ❑ $30 - Non-member ❑ $30 after Oct. 30 or at the door

❑ Check ❑ Visa ❑ Mastercard ❑ Card # _____

Signature (required if paying by credit card) _____

REMIT TO: CRIMINAL LAW SECTION OF THE OBA, ATTN: ROBERTA YARBROUGH

E-Mail: robertay@okbar.org
Fax: (405) 416-7001 (Attn: Roberta Yarbrough)

Mail: OBA Administration Department
PO Box 53036, Oklahoma City, OK. 73152

Oklahoma Bar Association 2018 Annual Meeting
Nov. 7-9 | Tulsa Hyatt Regency

REGISTRATION

Join us for great speakers, great events and good times with great friends at this year's Annual Meeting. See what's included with your Annual Meeting registation below. Plus, choose from optional CLE courses with nationally recognized speakers and add-on luncheons.

What's included in your Annual Meeting registration:

- Conference gift
- Wednesday President's Reception and Thursday Kim & Alan's House Party social events
- OBA hospitality refreshments daily
- 20% discount on registrants' Annual Luncheon tickets

HOW TO REGISTER

Online
Register online at www.okbar.org/annualmeeting

Mail
OBA Annual Meeting
P.O. Box 53036
Okla. City, OK 73152

Phone
Call Mark at
405-416-7026 or
800-522-8065

Fax/Email
Fax form to
405-416-7092 or email
to marks@okbar.org

DETAILS

Location

Most activities will take place at the Hyatt Regency Tulsa, 100 E 2nd St., Tulsa, 74103, unless otherwise specified.

CLE Materials

You will receive electronic CLE materials in advance of the seminar.

Hotel

Fees do not include hotel accommodations. For reservations at the Hyatt Regency Tulsa, call 888-591-1234 and reference the Oklahoma Bar Association, or go to www.okbar.org/annualmeeting. A discount rate of $115 per night is available on reservations made on or before Oct. 14.

Cancellation

Full refunds will be given through Oct. 31. No refunds will be issued after that date.

Special Needs

Please notify the OBA at least one week in advance if you have a special need and require accommodation.

Name _____

Email _____

Badge Name (*if different from roster*) _____ Bar No. _____

Address _____

City _____ State _____ Zip _____ Phone _____

Name of Nonattorney guest _____

Please change my OBA roster information to the information above: ☐ Yes ☐ No

Check all that apply: ☐ Judiciary ☐ Delegate ☐ Alternate

Meeting Registration

✓Check your choice
**New members sworn in this year*
***Early rate applies to registrations made on or before Oct. 14.*

**Early Rate	Standard Rate	*New Member Early Rate	*New Member Standard Rate
☐ $75	☐ $100	☐ $0	☐ $25

SUBTOTAL $ _____

CLE

Early rate valid on or before Oct. 14. ✓Check the box next to your choice.

	Early Rate With Meeting Registration	Standard Rate With Meeting Registration	Early Rate Without Meeting Registration	Standard Rate Without Meeting Registration
Wednesday *Getting Out of the Weeds: What You Need to Know about the New World of Marijuana Regulation*	☐ $50	☐ $100	☐ $75	☐ $125
Thursday *The Internet of Things and Leveraging Digital Evidence, Mark Lanterman, and Cybersecurity Panel, Eide Bailly LLP, Anglin PR and GableGotwals*	☐ $50	☐ $100	☐ $75	☐ $125

SUBTOTAL $ _____

LUNCHEONS AND EVENTS

Annual Meeting registration not required

Law School Luncheon ☐ OCU ☐ OU ☐ TU _____ # of tickets at $40 $ _____
Annual Luncheon with meeting registration _____ # of tickets at $40 $ _____
Annual Luncheon without meeting registration _____ # of tickets at $50 $ _____
Delegate Breakfast for nondelegates and alternates _____ # of tickets at $30 $ _____
Delegate Breakfast for delegates (*no charge*) ☐ (check if attending as a delegate)

SUBTOTAL $ _____

PAYMENT

☐ Check enclosed: Payable to Oklahoma Bar Association **TOTAL COST $** _____

Credit card: ☐ VISA ☐ Mastercard ☐ American Express ☐ Discover

Card # _____ CVV# Exp. _____ Date _____

Authorized Signature _____

Real Property Section Annual Meeting

November 8, 2018 • 2-4 p.m.

Location: Promenade Ballroom A, Hyatt Regency Hotel
Downtown Tulsa – 100 E 2nd St., Tulsa, OK 74103

Oklahoma Supreme Court Vice-Chief Justice Noma Gurich Kraettli Epperson, Scott McEachin and Dale Astle to discuss recent Oklahoma decisions involving real property matters

Pending 1 hour of CLE credit

NOTICE OF JUDICIAL VACANCY

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

Associate District Judge
First Judicial District
Cimarron County, Oklahoma

This vacancy is due to the retirement of the Honorable Ronald Kincannon effective December 31, 2018.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net by following the link to the Oklahoma Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 North Lincoln, Suite 3, Oklahoma City, OK 73105, (405) 556-9300, and should be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, November 16, 2018. If applications are mailed, they must be postmarked by midnight, November 16, 2018.**

Steve Turnbo, Chair
Oklahoma Judicial Nominating Commission

Calendar of Events

November

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 Legal Internship Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact H. Terrell Monks 405-733-8686

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

7-9 **OBA Annual Meeting;** Hyatt Regency Downtown, Tulsa

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

12 **OBA Closed** – Veterans Day

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

OBA Women in Law Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Melanie Christians 405-705-3600 or Brittany Byers 405-682-5800

14 **OBA Clients' Security Fund Committee meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Micheal Salem 405-366-1234

15 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-267-0672

OBA Professionalism Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda Scoggins 405-319-3510

19 **OBA Member Services Committee meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Peggy Stockwell 405-321-9414

20 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Rod Ring 405-325-3702

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

22-23 **OBA Closed** – Thanksgiving

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

28 **OBA Bar Center Facilities Committee meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Bryon J. Will 405-308-4272

December

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

6 **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

7 **OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

2018 OK CIV APP 61

IN THE MATTER OF: J.S., child under 18 years of age. STEPHEN SHAW and ROBYN DICKENS, Appellants, vs. STATE OF OKLAHOMA, Appellee.

Case No. 116,622. September 14, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DORIS L. FRANSEIN, TRIAL JUDGE

AFFIRMED

Timothy J. Gifford, LAW OFFICE OF TIMOTHY J. GIFFORD, Tulsa, Oklahoma, for Appellants

Stephen A. Kunzweiler, TULSA COUNTY DISTRICT ATTORNEY, Gregory A. Eberhard, ASSISTANT DISTRICT ATTORNEY, Tulsa, Oklahoma, for Appellee

Timothy R. Michaels-Johnson, TULSA LAWYERS FOR CHILDREN, Tulsa, Oklahoma, for Child

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Appellants Stephen Shaw and Robyn Dickens (collectively, Parents) appeal from the trial court's order terminating their parental rights to their minor child on the sole ground that the trial court committed fundamental error in terminating their rights pursuant to 10A O.S. Supp. 2014 § 1-4-904(B)(17) instead of 10A O.S. Supp. 2013 § 1-4-904(B)(15). We affirm.

BACKGROUND

¶2 The facts pertinent to this appeal are not in dispute. On June 11, 2014, the minor child was placed in emergency custody with the Department of Human Services (DHS). On June 20, 2014, Appellee State of Oklahoma filed a petition seeking leave to have the minor child adjudicated deprived as defined by 10A O.S. 2011 § 1-1-105(20)(a), (b), (d) and (e).[1] Parents stipulated to the petition and an adjudication order was filed on July 23, 2014, for the statutory basis of "neglect — nutritional and environmental" and "mental health and/or intellectual disability may have contributed to the neglect." The court ordered Individualized Service Plans for Parents on September 10, 2014. On December 16, 2015, State filed motions to terminate Parents' rights and the same grounds for termination were alleged as to each parent, as follows: (1) failure to correct conditions for the requisite statutory period, 10A O.S. Supp. 2013 & Supp. 2015 § 1-4-904(B)(5); (2) willful failure to contribute to the support of the minor child for the requisite statutory period, 10A O.S. Supp. 2011 & Supp. 2015 § 1-4-904(B)(7); and (3) minor "child has been placed in foster care by [DHS] for fifteen of the most recent twenty-two months preceding the filing of this motion/petition," 10A O.S. Supp. 2013 § 1-4-904(B)(15). State filed a second motion to terminate parental rights on September 7, 2016, again alleging against both parents grounds pursuant to 10A O.S. § 1-4-904(B)(5) and (7), and alleging that the minor child "was younger than four years of age at the time of placement in foster care by [DHS], has been in foster care for six of the most recent twelve months, and cannot safely be returned to the home of [Parents]" pursuant to 10A O.S. Supp. 2015 § 1-4-904(B)(17).[2]

¶3 Parents waived their rights to a jury trial and a non-jury trial was held on September 7 and 8, 2017. On September 27, 2017, the trial court entered its "Decision." Among the findings made by the trial court in its nine-page decision were the following

> Pursuant to statutory calculation, at the time the Motions to Terminate the Parental Rights of [Parents] were filed, [minor child] had been in foster care for almost twenty-six (26) months (*i.e.*, adjudication date, July 23, 2014, to September [7], 2016). At the time of the trial, [minor child] had been in foster care, as defined by law, for approximately thirty-seven (37) months (*i.e.*, July 23, 2014, to September 7, 2017).[3]

The court's legal conclusions set forth the requirements of 10A O.S. Supp. 2015 § 1-4-904(B)(17)[4] and concluded

> There are no issues regarding the adjudicatory status of the [minor child] or the length of time [minor child] has been in foster care prior to the filing of the Motion. [State] or the Court did not contribute to the period of time that [minor child]

> remained in foster care. And despite the continuances given to [Parents] at their request to employ the assistance of private counsel, they still failed to provide any indicia of evidence that obtaining custody of their child would be safe for [minor child].[5]

The trial court entered its order sustaining State's motion to terminate Parents' parental rights upon the statutory ground set forth in 10A O.S. § 1-4-904(B)(17) and ordering that such termination is in minor child's best interests. Parents appeal.[6]

STANDARD OF REVIEW

¶4 The only issue Parents raise on appeal is whether the trial court "committed fundamental error by applying 10A O.S. [Supp.] 2014 § 1-4-904(B)(17) retroactively to terminate [their] parental rights to the minor child."[7] "[A] fundamental error is one which 'has a substantial effect on the rights of one or more of the parties'" and is reviewable even if the error has been raised for the first time on appeal. *In re T.T.S.*, 2015 OK 36, ¶ 17, 373 P.3d 1022. "[I]t is within the purview of this Court to review the record for fundamental error." *Sullivan v. Forty-Second West Corp.*, 1998 OK 48, ¶ 6, 961 P.2d 801 (citation omitted). Questions of law, such as those raising fundamental error, are reviewed by a de novo standard without deference to the trial court's legal rulings. *In re L.M.*, 2012 OK CIV APP 41, ¶ 41, 276 P.3d 1088 (citation omitted).

ANALYSIS

¶5 Parents argue the 2014 "amendment to 10A O.S. § 1-4-904(B) created a whole new ground for terminating parental rights under [subpart] (B)(17)" which shortens the time during which a child must be in foster care before parental rights may be terminated. Thus, they argue, State's burden has been lessened from what it was required to prove under 10A O.S. Supp. 2013 § 1-4-904(B)(15), which was that the child was placed in foster care for fifteen of the most recent twenty-two months preceding the motion to terminate. Consequently, Parents argue, the 2014 amendment is not remedial or procedural; rather, it is substantive and, therefore, may only be applied prospectively absent a clear legislative intent otherwise. They argue the trial court committed reversible error when it terminated their rights under a statute — § 1-4-904(B)(17) — that was not in effect on June 20, 2014, the date State filed its petition for adjudication.

¶6 Though not specifically cited by Parents, the mandate of Article 5, section 54 of the Oklahoma Constitution appears to be at the heart of their argument that "State created this cause of action on June 20, 2014"; therefore, the statutory ground that should have been applied by the trial court for termination of parental rights was 10A O.S. Supp. 2013 § 1-4-904(B)(15), the statute in effect when the petition for adjudication was filed but which was repealed prior to State's December 2015 and September 2016 motions to terminate parental rights.

¶7 Article 5, section 54 provides, in part, as follows:

> § 54. **Repeal of statute - Effect**
>
> The repeal of a statute shall not . . . affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute.

In the present case, 10A O.S. Supp. 2013 § 1-4-904(B)(15) was in effect at the time of adjudication but was not reenacted in the amendments to § 1-4-904(B) that became effective November 1, 2014; instead, § 1-4-904(B)(16) and (17) were added. In December 2015, more than a year after the 2014 version of § 1-4-904(B)(17) became effective and more than a month after the 2015 version of that statute became effective, State moved for termination based on the statutory ground set forth in the 2013 version of § 1-4-904(B)(15). In September 2016, however, State filed its motion to terminate parental rights on, among other grounds, the 2015 version of § 1-4-904(B)(17). Parents appear to argue that because the present proceedings were begun under the 2013 version of § 1-4-904(B)(15), the repeal of § 1-4-904(B)(15) "shall not . . . affect . . . proceedings begun by virtue of [§ 1-4-904(B)(15)]"; thus, termination of their parental rights cannot be predicated on § 1-4-904(B)(17), either the 2014 or 2015 version of that statute.

¶8 State argues, however, that § 1-4-904(B)(17) did not "have any substantial and negative effect on [Parents'] rights, [and] in effect bestowed on [Parents] additional protections not afforded to them under the previous version of the statute." It further argues § 1-4-904(B)(17) was prospectively applied because the September 2016 motions to terminate were filed over six months after the effective date of the amended statute.

¶9 We agree with the decision reached by other divisions of this Court that Article 5, sec-

tion 54 of the Oklahoma Constitution controls the issue before us of whether the trial court committed fundamental error. *See e.g., In re L.M.*, 2012 OK CIV APP 41, ¶ 51, 276 P.3d 1088; *In re P.W.W.*, 2012 OK CIV APP 18, ¶ 11, 273 P.3d 83. The application of that constitutional safeguard to the facts of this case requires us to first determine whether the statutory ground for termination of parental rights created by § 1-4-904(B)(17) applies prospectively or retroactively. If it applies prospectively, we must then determine whether, in this case, proceedings begun for purposes of Article 5, section 54 was the date State filed its petition for adjudication or the date State filed its motions for termination of parental rights.

A. Prospective or Retroactive Application

¶10 We discern no legislative intent, express or necessarily implied, for retroactive application of § 1-4-904(B)(17).[8] "Under the general rule, operation of the amended statute would be prospective only, unless one of its exceptions applies"; that is, remedial or procedural statutes which do not create, enlarge, diminish, or destroy vested rights are generally held to operate retroactively. *In re L.M.*, 2012 OK CIV APP 41, ¶ 43, 276 P.3d 1088 (citations omitted). There the Court addressed a first impression issue of whether in parental termination cases "substantive rights are affected by an amended ground's changes to the prior version's elements." *Id.* ¶ 48. Finding instructive the reasoning applied by the Oklahoma Supreme Court in two workers compensation decisions,[9] the *In re L.M.* Court determined that the statutory ground with which it was concerned — § 1-4-904(B)(13) — added new elements to the former version of the statute and its application placed a lesser burden on the State and a higher burden on the parent in opposing termination thereby affecting the parent's substantive rights. "A substantive change which 'alters the rights or obligations of a party cannot be viewed as solely a remedial or procedural change and cannot be retrospectively applied.' *Sudbury v. Deterding*, 2001 OK 10, ¶ 19, 19 P.3d 856, 860. Therefore, as applied to this case, § 1-4-904(B)(13)'s operation is prospective only." *In re L.M.*, ¶ 50.

¶11 We are persuaded by the reasoning applied in *In re L.M.* and to the Court's conclusion that a determination of whether the amended statute comes within an exception to the general rule of prospective application, "requires a comparison of both versions to identify any changes to existing law, and if so, whether the changes are purely remedial or procedural, in which case the amended statute would operate retroactively." *Id.* ¶ 43 (citations omitted). "If the changes are substantive, its operation is prospective only." *Id.* (citation omitted).

¶12 As Parents assert, unlike former § 1-4-904(B)(15), pursuant to subpart (B)(17), State need only prove that the minor child was placed in foster care for six months of the twelve months preceding the filing of the motion or petition for termination, thus lessening State's burden of proof and diminishing the time during which a parent might secure the child's release from foster care placement. Although, as State contends, its burden is increased by subpart (B)(17)'s requirement that State must prove "the child cannot be safely returned to the home of the parent," that burden places upon a parent an additional defense and need to counter evidence produced by the State regarding the child's safety.[10]

¶13 We conclude this reduction of time for a parent to regain custody of a child placed in foster care and added defense are substantive changes that require prospective application of the statute.

B. Proceedings Begun

¶14 Although we conclude § 1-4-904(B)(17) applies prospectively, the question remains whether the trial court's reliance on that statutory ground for termination of Parents' parental rights was fundamental error. Relying on *In re L.M.*, Parents argue the prior version of the time-in-foster-care statute should have been the ground for termination because it was the statute in effect at the time the petition for adjudication was filed. As noted by State, other divisions of this Court have addressed the issue of whether the filing of a motion to terminate parental rights is the act which constitutes "proceedings begun" or whether the filing of the petition for adjudication is the act that constitutes "proceedings begun" in termination of parental rights cases.

¶15 "'Proceedings begun' under the meaning of [Article 5, section 54] 'refers to essential steps or measures to invoke, or establish or vindicate a right.'" *In re L.M.*, 2012 OK CIV APP 41, ¶ 51 (citing *Cole v. Silverado Foods, Inc.*, 2003 OK 81, ¶ 8, 78 P.3d 542). As noted by the *In re L.M.* Court, five published COCA cases had previously addressed "with varying

results" the effect of "[s]tatutory amendments to other termination grounds, prior to and after the State had moved to terminate parental rights[.]"[11] *Id.* ¶ 37. The Court acknowledged the facts before it differed from those other cases, as did the particular statutory ground alleged for termination of parental rights. However, the Court stated, and we agree, "[w]hether [the trial court's reliance on a particular version of a statute] constitutes fundamental error is dependent on the same issue addressed in all five cases — which version governed State's termination proceeding." *Id.* ¶ 41 (emphasis added). From our reading of those cases and their rationales and given the requisite elements for the time-in-foster-care ground for termination of parental rights, we conclude the critical date in this case was the filing of the termination motions.

¶16 Although the Court in *In re L.M.* ultimately determined the essential first step "under the facts of [the] case"[12] before it was the filing of the adjudication petition, the facts in that case are different from those presented here in one significant particular. In *In re L.M.* the petition for adjudication[13] and the adjudication order[14] brought into the deprived proceedings

> § 7006-1.1(A)(13)'s statutory protection for a special class of parents with mental illness or mental deficiency . . . . This "protected condition" triggered [the child's] removal from [the mother's] custody and his adjudication as a deprived child. [The mother's] mental illness remained the sole basis for the pending deprived action and was relied upon in State's application to terminate her parental rights. Because this statutory protection existed when the deprived action proceedings were begun, § 7006-1.1(A)(13)'s application is protected from extinguishment by the Legislature's 2009 amendments under Art. 5, § 54 of the Oklahoma Constitution. Accordingly, we find no fundamental error with the trial court's instruction based on § 7006-1.1(A)(13).[15]

¶17 In the present case, the petition for adjudication did not bring time in foster care into the deprived proceedings. Minor child was adjudged deprived on the statutory basis of "neglect — nutritional and environmental" and "mental health and/or intellectual disability may have contributed to the neglect." Indeed, time in foster care as a ground for termination under either the former or current version of the statute does not even arise until the requisite time in foster care has occurred after the child has been placed in foster care or adjudicated deprived and a petition or motion for termination is filed. The facts in this case, therefore, present circumstances more like those presented in *In re P.W.W.*, 2012 OK CIV APP 18, 273 P.3d 83, and other cases in which the critical date was held to be the filing of the petition or motion for termination.

¶18 In *In re P.W.W.*, as in the present case, the State filed its deprived child petition before repeal of the then-2009 version of § 7006-1.1(A)(15) and its motion to terminate parental rights after its repeal. Because the state had not filed its motion to terminate parental rights on the time-in-foster-care ground for termination before repeal, the Court held fundamental error occurred because the trial court instructed the jury on that ground. Even though the mother had not objected to the trial court's instruction on the time-in-foster-care ground for termination, the Court held the mother "could not, by waiver, impart such authority upon the trial court after the Legislature had withdrawn it." *Id.* ¶ 13. Consequently, the critical date was the filing of the motion to terminate and not the filing of the petition for adjudication.

¶19 As previously noted herein, in *In re M.C.*, the Court determined the Legislature expressly provided for the retroactive application of 10 O.S. § 7006-1.1(A)(15). 1999 OK CIV APP 128, ¶ 3, 993 P.2d 137. In that case, both the petition for adjudication and the first motion to terminate parental rights were filed prior to the effective date of the statute. The father stipulated to the petition that he failed to protect the children from the mother's neglect, and the motion to terminate alleged as the sole ground for termination that the father failed to comply with the standards set by the court to correct the deprived conditions. *Id.* ¶ 1. Neither, of course, contained any reference to the fifteen-month foster care placement as a statutory ground for termination of the father's parental rights. However, after the enactment of the statute, the State filed an amended motion to terminate in which § 7006-1.1(A)(15) and the failure to correct grounds were alleged. This motion was filed two weeks before the jury trial. Over the father's objection, the jury was instructed on § 7006-1.1(A)(15), the only ground for termination found by the jury.

¶20 While the Court acknowledged that § 7006-1.1(A)(15) retroactively applied as a

ground for termination against father, the Court further concluded that as applied in the case before it, the termination of his parental rights resulted from the unconstitutional *ex post facto* effect of the 1998 amendment. The Court stated:

> The 1998 amendment has a "punitive consequence" that did not exist either at the time the State initiated the deprived proceedings, or when it began its quest to terminate father's parental rights. The 1998 amendment also "change[ed] the obligation [of father] and impose[ed] . . . a liability which did not theretofore exist." It clearly has the type of *ex post facto* effect forbidden by the Oklahoma Constitution as applied to this case and any other case of a parent faced with termination for failure to correct deprived conditions whose exercise of their right to trial causes foster care to extend for the period specified in 10 O.S. Supp. 1998 § 7006-1.1(A)(15).

In re M.C., ¶ 8.

¶21 Although the *In re M.C.* Court did not specifically address the issue presented herein, the Court's holding rests, in part, on the date the State "began its quest to terminate father's parental rights." Likewise, as stated by the *In re P.W.W.* Court, application of the amended version of § 7006-1.1(A)(15) has been approved by the Court "in cases where it went into effect after the deprived child proceeding was filed but before the petition [or motion] to terminate was filed. *In re A.G.*, 2000 OK CIV APP 12, 996 P.2d 494, and *In re T.M.*, 2000 OK CIV APP 65, 6 P.3d 1087." 2012 OK CIV APP 18, ¶ 14.

¶22 In the present case, in December 2016, State first began its quest to terminate Parents' parental rights, but the statute upon which it relied for termination had been repealed and was no longer a statutory basis for termination.[16] Time in foster care, however, was still such a ground under the amended version of the statute, § 1-4-904(B)(17). In State's second motion to terminate, the amended version of the time-in-foster-care statute was a stated ground for termination.[17] Because § 1-4-904(B)(17) was the law in effect at the time State began its quest to terminate Parents' parental rights, we conclude the trial court did not commit fundamental error in relying on that statutory ground for its order terminating their parental rights.[18]

CONCLUSION

¶23 We conclude 10A O.S. Supp. 2015 § 1-4-904(B)(17), one of the statutes amending 10A O.S. Supp. 2013 § 1-4-904(B)(15), operates prospectively because its changes are substantive. We further conclude the trial court properly considered 10A O.S. Supp. 2015 § 1-4-904(B)(17) as a ground for termination of Parents' rights because it was the statute in effect at the time State began its quest to terminate their parental rights. Accordingly, we affirm.

¶24 **AFFIRMED**.

RAPP, J., and GOODMAN, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. The petition set out the following reasons for adjudication from § 1-1-105(20):
"Deprived child" means a child:
a. who is for any reason destitute, homeless, or abandoned,
b. who does not have the proper parental care or guardianship, . . .
d. whose home is an unfit place for the child by reason of depravity on the part of the parent or legal guardian of the child, or other person responsible for the health or welfare of the child,
e. who is a child in need of special care and treatment because of the child's physical or mental condition, and the child's parents, legal guardian, or other custodian is unable or willfully fails to provide such special care and treatment. . . .

2. State's motion did not contain the dates of the statutory provisions pursuant to which it sought termination of Parents' parental rights. As discussed later in this Opinion, Parents raise the issue of whether the 2014 or 2015 version of § 1-4-904(B)(17) is the statute pursuant to which their parental rights were terminated. In our review of the record, we conclude it is the 2015 version of § 1-4-904(B)(17) upon which State and the trial court acted.

3. R. at 421.

4. Section 1-4-904(B)(17) provides as follows:
A finding that a child younger than four (4) years of age at the time of placement has been placed in foster care by [DHS] for at least six (6) of the twelve (12) months preceding the filing of the petition or motion for termination of parental rights and the child cannot be safely returned to the home of the parent.
a. For purposes of this paragraph, a child shall be considered to have entered foster care on the earlier of:
(1) the adjudication date, or
(2) the date that is sixty (60) days after the date on which the child is removed from the home.
b. For purposes of this paragraph, the court may consider:
(1) circumstances of the failure of the parent to develop and maintain a parental bond with the child in a meaningful, supportive manner, and
(2) whether allowing the parent to have custody would likely cause the child actual serious psychological harm or harm in the near future as a result of the removal of the child from the substitute caregiver due to the existence of a strong, positive bond between the child and caregiver.

5. Although the record contains the pleadings, trial transcript, and other documents and instruments concerning the evidence upon which the trial court based its decision, Parents do not assert any arguments concerning the sufficiency of the evidence pertinent to the length of time minor child had been in DHS custody, to the State or the court being responsible for the length of time minor child had been in DHS custody, to the inability of minor child to be safely returned to Parents' home, and to termination of parental rights as being in minor child's best interests.

6. On appeal, minor child's motion to accept and incorporate State's Answer Brief and to waive additional briefing was granted by the Oklahoma Supreme Court.

7. As previously noted herein, see n.2, *supra*, Parents allege it is the 2014 version of § 1-4-904(B)(17) upon which their parental rights were

terminated; State argues its motion for termination was based on the 2015 version of the statute. The 2014 version of the statute states, in part,

> A finding that a child younger than four (4) years of age at the time of the filing of the petition or motion has been placed in foster care by [DHS]for at least six (6) of the twelve (12) months preceding the filing of the petition or motion for termination of parental rights and the child cannot be safely returned to the home of the parent.

The 2015 version states, in part, as above noted:

> A finding that a child younger than four (4) years of age at the time of placement has been placed in foster care by [DHS] for at least six (6) of the twelve (12) months preceding the filing of the petition or motion for termination of parental rights . . . .

(Emphasis added.) The 2015 version of the statute was in effect at the time the December 2015 and the September 2016 motions to terminate were filed and the trial court's decision appears to reference the 2015 version of the statute. In any event, we agree with State's observation that the change in the 2015 version from the 2014 version is inconsequential to Parents' argument on appeal.

8. This conclusion stands in contrast to the conclusion reached by another division of this Court in *In re M.C.*, 1999 OK CIV APP 128, 993 P.2d 137, concerning 10 O.S. Supp. 1998 § 7006-1.1(A)(15). The *In re M.C.* Court explained that

> 10 O.S. Supp. 1998 § 7006-1.1(A)(15) . . . allows termination where "[a] child has been placed in foster care by the Department of Human Services for fifteen (15) of the most recent twenty-two (22) months." The legislature also expressly provided for the retroactive application of this amendment to pending cases involving "adjudicated deprived children who have been in the Department's custody for fifteen (15) of the most recent twenty-two (22) months, and who were in out-of-home placement . . . as of November 17, 1997." 10 O.S. Supp. 1998 § 7006-1.6(A).

In re M.C., ¶ 3. Section 7006-1.1(A)(15) was not reenacted in 2009 when the Legislature amended 10 O.S. § 7006-1.1, 2009 Okla. Sess. Laws, ch. 233, § 76, and renumbered that section 10A § 1-4-904, 2009 Okla. Sess. Laws, ch. 233, § 263. It was subsequently added to 10A § 1-4-904 in 2013. 10A O.S. Supp. 2013 § 1-4-904(B)(15). Section 7006-1.6(A) was repealed effective May 21, 2009. 2009 Okla. Sess. Laws, ch. 233, § 189.

9. The Court reasoned:

> *In American Airlines Inc. v. Crabb*, 2009 OK 68, ¶¶ 14-16, 221 P.3d 1289, 1292-93, the Court found the addition of the phrase "major cause of the injury" in the amended statutory definition of "compensable injury" added a new element to the claim, intruded on substantive rights, and could not be applied retroactively. After-enacted legislation that "alters the elements of a claim or defense by imposition of new conditions affects the parties' substantive rights and liabilities." *King Manufacturing v. Meadows,* 2005 OK 78, ¶ 19, 127 P.3d 584, 590; *Welch* [*v. Armer,* 1989 OK 117, ¶¶ 27-28, 776 P.2d 847].
>
> The Court in *Cole v. Silverado Food Inc.*, 2003 OK 81, ¶ 13, 78 P.3d 542, 548, similarly held the retroactive application of an amended statute of limitations affected the substantive rights of both parties in two ways. First, it made the employer's defense "much more extensive than it stood at the time the claim was brought." Second it affected the merits or "grounds or elements" of the employee's claim, since she would have to confront a "different defense." *Id.* ¶ 14, n.27. Because the amended statute operated on "rights in existence," the Court in *Cole* held its terms are subject solely to prospective application." *Id.* Similar conclusions were reached about an amended adoption without consent statute in *Adoption of W.C.*, 938 N.E.2d 1052 (Ohio Ct. App. 12th 2010) and *Van Bremen v. Geer,* 931 N.E.2d 650 (Ohio Ct. App. 5th 2010).

In re L.M., ¶¶ 48-49 (footnote omitted).

10. Indeed, one of the findings made by the trial court in its Decision was that "despite the continuances given to [Parents] at their request to employ the assistance of private counsel, they still failed to provide any indicia of evidence that obtaining custody of [minor child] would be safe for [minor child]."

11. Another published opinion subsequently addressed this issue in *In re T.J.*, 2012 OK CIV APP 86, 286 P.3d 659.

12. *Id.* ¶ 53.

13. The petition alleging the child was deprived stated, among other things, "[t]hat the mother's paranoid erratic behaviors is also placing the child is (sic) at risk of harm." *Id.* ¶ 6.

14. The order of adjudication found the child was deprived because, among other reasons, "the mother's paranoid erratic behaviors had also placed him at risk of harm." *Id.* ¶ 8.

15. *Id.* ¶ 55. We note two divisions of this Court have reached different conclusions about whether the statutory version of "failure to correct" in effect when the deprived proceedings have begun — that is, when the petition for adjudication had been filed — or the version in effect when the petition or motion for termination had been filed governs the proceedings to terminate parental rights. In *In re J.C.*, 2010 OK CIV APP 138, ¶ 2 n.2, 244 P.3d 793, the Court rejected the parent's contention that the law in effect at the time of the deprived adjudication applied to the termination proceeding when the State filed its second amended motion to terminate after the effective date of the statutory amendment. However, in *In re T.J.*, 2012 OK CIV APP 86, 286 P.3d 659, the Court found fundamental error had not occurred when the trial court instructed the jury under the former failure to correct statute — § 7006-1.1(A)(5) — that was in effect at the time the petition for adjudication was filed although the state "moved to terminate parental rights after the effective date of Title 10A (May 21, 2009) based on the amended 'failure to correct' ground, § 1-4-904(B)(5)[.]" *Id.* ¶ 45. The Court reasoned that analogous to the circumstance in *In re L.M.*, the conditions that warranted adjudication in *In re T.J.* triggered the child's removal from the mother's custody and his adjudication as a deprived child. As in *In re L.M.*, the Court concluded, the mother's efforts in addressing the correction of those conditions (and others) in *In re T.J.* were the basis for the pending deprived action and were among the conditions upon which the State relied in its application to terminate her parental rights. These facts present a circumstance different from those in the present case.

16. It is also noted that at the time State filed the December 2016 motions, less than seventeen months, not twenty-two months, had elapsed from the July 2014 adjudication date; consequently, the former version of § 1-4-904(B)(15) had not yet been triggered.

17. That motion was filed about a year before trial. Notice and opportunity to defend are not issues in this case and no objection was raised by Parents below to the stated ground for termination.

18. Even if we were to conclude that the critical date was the date of the petition for adjudication such that the former version of the statute applies, the outcome in this case is the same given the unchallenged factual determinations made by the trial court. *See* n.3 and accompanying text, *supra*.

2018 OK CIV APP 62

SANDRA L. HOLD, individually and as the Personal Representative of the Estate of Gorman R. Hold, Deceased, Plaintiff/Appellant, vs. KYLA BENTLEY, Defendant, and GARY WAYNE HOLD, Defendant/Third Party Plaintiff/Appellee.

Case No. 116,464. April 13, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE MARY F. FITZGERALD, TRIAL JUDGE

AFFIRMED

Kenny Joe Smith, Trevor R. Henson. Evan M. McLemore, Gregory R. McKenna, Tulsa, Oklahoma and

Gary W. Crews, GARY W. CREWS, PLLC, Tulsa, Oklahoma, for Plaintiff/Appellant

Joseph C. Woltz, Robert N. Lawrence, PEZOLD BARKER & WOLTZ, Tulsa, Oklahoma, for Defendant/Third-Party Plaintiff/Appellee

P. THOMAS THORNBRUGH, CHIEF JUDGE:

¶1 Sandra Hold appeals a decision of the district court finding that a power of attorney given by Gorman Hold to his son-in-law, Stephen Carlile, was not effective at the time Carlile transferred property on Gorman Hold's

behalf. On review, we affirm the decision of the district court, but on a different rationale from that stated.

BACKGROUND

¶2 Gorman Hold and Sandra Hold were married but allegedly separated at the time of the events in this case. In June 2014, Gorman Hold purchased a property located in Tulsa at 8618 South 69th East Ave (the "8618 property"). The deed was titled in joint tenancy with one Kyla Bentley. After suffering, on July 10, 2015, what is described as a "brain bleed," Gorman Hold, on July 13, 2015, executed a durable power of attorney to his son-in-law, Stephen Carlile, pursuant to 58 O.S.2011 §§ 1071 through 1077. Four days later, Gorman executed a durable power of attorney to his son, Gary Hold, stating that it revoked the previous power of attorney. Carlile was informed of the revocation, but allegedly disputed its validity, because the second power of attorney identified only one witness on the signature page.

¶3 On October 9, 2015, Carlile, under the purported authority of the first power of attorney, filed a deed transferring Gorman Hold's interest in the 8618 property to himself, with the stated intention of severing the joint tenancy with Kyla Bentley and destroying the right of survivorship. Gorman Hold died five days later, on October 14, 2015. On August 31, 2016, Sandra Hold filed a petition for "quiet title and ejectment" against Bentley, alleging that Carlile's October 9, 2015 deed had severed the joint tenancy and that Kyla Bentley's claim of a right of survivorship created a cloud on the title of the 8618 property.[1]

¶4 Bentley filed an appearance but did not answer, and Sandra Hold moved for default judgment which the trial court denied. Gary Hold then filed a motion to be added as a defendant and third-party plaintiff, stating that he had obtained the rights of Kyla Bentley via a quitclaim deed, and that he was the real party in interest. The trial court allowed Hold to be added as a party. The matter then proceeded as a suit between Sandra Hold and Gary Hold. Both parties filed motions for summary judgment on the issue of the validity of Carlile's power of attorney. The district court ruled in Gary Hold's favor, holding that Gorman Hold was not competent at the time he executed either power of attorney. Sandra filed a motion to reconsider, which was denied. Sandra's motion, filed within ten days of the court's August 25, 2017, order of summary judgment, is the functional equivalent of a motion for new trial filed within ten days, as provided by 12 O.S. 2011 § 651.

¶5 As a postscript, in September 2017, after the court had ruled that Carlile's quitclaim deed to himself was void due to Gorman's lack of competence, and Sandra Hold filed her motion to reconsider, Kyla Bentley finally reappeared in the case and filed a "motion to vacate" alleging that she had been given no consideration for her quitclaim deed to Gary Hold, and that the deed was obtained by fraud. Bentley argued she was the true owner of the property. The court denied her motion to vacate, and there is no record of an appeal by Kyla Bentley from the latter decision.

STANDARD OF REVIEW

¶6 Our standard of review when a trial court denies a motion for new trial after granting summary judgment is set out in *Reeds v. Walker,* 2006 OK 43, ¶ 9, 157 P.3d 100 (footnotes omitted):

> Summary relief issues stand before us for *de novo* review. All facts and inferences must be viewed in the light most favorable to the non-movant. Appellate tribunals bear the same affirmative duty as is borne by nisi prius courts to test for legal sufficiency all evidentiary material received in summary process in support of the relief sought by the movant. Only if the court should conclude there is no material fact (or inference) in dispute and the law favors the movant's claim or liability-defeating defense is the moving party entitled to summary relief in its favor. A trial court's denial of a motion for new trial is reviewed for abuse of discretion.

See also Andrew v. Depani-Sparkes, 2017 OK 42, ¶ 27, 396 P.3d 210 (quoting *Reeds*).

ANALYSIS

I. STATUTORY POWERS OF ATTORNEY

¶7 The district court held that Gorman Hold was not competent at the time of making either power of attorney. We agree with Sandra Hold that there is no record evidence of incompetence until September 28, 2015, more than two months after the subject powers of attorney were made. This does not end the matter, however, as the outcome ordered by the district court is correct as a matter of law.

¶8 This case presents primarily a question of statutory interpretation. Title 58 O.S.2011 § 1072.2 provides a standard form for a durable power of attorney. The statute states, "The principal, or such other person, shall sign in the presence of **two witnesses**, each of whom shall sign his name in the presence of the principal and each other." § 1072.2(A)(1) (emphasis added). It is this provision on which Sandra Hold relies, arguing that the second power of attorney made by Gorman Hold to Gary Hold was invalid because it shows only one witness.

¶9 If § 1072.2 stated exclusive and mandatory requirements for a valid power of attorney, Sandra would be correct. Section 1072.2 contains, however, two curious caveats. The first is found in subsection A, and states that "failure to execute a power of attorney as prescribed in this section shall not be construed to diminish the effect or validity of an otherwise properly executed durable power of attorney." The second is found in subsection F, and states, "Nothing in this section shall be construed to affect powers of attorney established pursuant to common law."

¶10 The exact result of the first caveat is not immediately clear. The statutory language implies that there is another way to construct ("otherwise properly execute") a durable power of attorney, but it gives no further guidance. Oklahoma does have a second set of statutes dealing with powers of attorney, at 15 O.S.2011 §§ 1001 through 1020. Those provisions set out a slightly different statutory form at 15 O.S.2011 § 1003, which does not state a requirement of two witnesses.

¶11 Interpretation would be relatively simple if the Title 58 statute governed durable powers of attorney and the Title 15 statute governed non-durable powers. That is not the case, however. Title 15 O.S.2011 § 1004 states:

> A power of attorney legally sufficient under this act is durable to the extent that durable powers are permitted by other laws of this state and the power of attorney contains language, such as "This power of attorney will continue to be effective if I become disabled, incapacitated, or incompetent", showing the intent of the principal that the power granted may be exercised notwithstanding later disability, incapacity, or incompetency.

It appears that Oklahoma has two statutory sections allowing the valid construction of a durable power of attorney, and only one section states a requirement of two witnesses.

¶12 Beginning with the rule of interpretation that the Legislature is not presumed to perform a vain or useless act,[2] we must presume some substantive difference, besides the number of witnesses, between a durable power of attorney executed pursuant to 15 O.S. §§ 1001 through 1020 and one executed pursuant to 58 O.S. §§ 1071 through 1077. The difference appears to be a subtle one. Execution pursuant to § 1072.2 creates a presumption of competence and a presumption of justified reliance if a durable power is executed pursuant to its provisions:

> B. Execution of a durable power of attorney in substantially the form prescribed by this section shall create a presumption that the principal understands the nature and purpose of the power of attorney and has executed the same while being of sound mind, and of his free will. A person dealing with the attorney-in-fact shall not be required to inquire into the validity or adequacy of the execution of the power of attorney, nor shall any such person be required to inquire into the validity or propriety of any act of an attorney-in-fact apparently authorized by a power of attorney executed pursuant to this section.

¶13 This language is absent from 15 O.S. §§ 1001 through 1020. This difference becomes material if competency becomes an issue, or if third-party reliance becomes an issue. We find it clear, however, that a durable power of attorney may be executed in Oklahoma pursuant to the provisions of either 15 O.S. §§ 1001 through 1020 or 58 O.S. §§ 1071 through 1077. As such, we find the second power of attorney granted to Gary Hold is valid.

II. COMMON LAW POWERS OF ATTORNEY

¶14 Title 58 O.S.2011 § 1072.2 (F) also states that "nothing in this section shall be construed to affect powers of attorney established pursuant to common law." This implies three methods of creating a valid power of attorney: 15 O.S. §§ 1001 through 1020; 58 O.S. §§ 1071 through 1077, and previous common law. The statutory forms appear to have evolved, in part, because of the difficulty in making a common-law power durable. In *Cox v. Freeman*, 1951 OK 16, ¶ 37, 227 P.2d 670 (quoting *Filtsch v. Bishop*, 1926 OK 603, 247 P. 1110), the Court noted, "A power of attorney which, in effect, is a mere contract of agency is revocable at the

will of the principal." Because this power exists by the continuing approval of the principal, it would fail at common law if the principal became incompetent. The statutory durable power of attorney abrogates the common-law rule that the mental incapacity of the principal terminates the authority of the agent. *See* 58 O.S.2011 § 1073.

¶15 Even assuming (without agreeing) that the power of attorney given to Gary Hold was not validly executed pursuant to either statute, it was still effective as a common law power, at least until Gorman Hold became incompetent. Therefore, the power of attorney given to Stephen Carlile on July 13, 2015, was properly revoked on July 17.[3] Gary Hold testified that Carlile was informed of the revocation before Carlile transferred the subject property. Sandra Hold did not deny this notice.[4] Hence, any transfer made by Carlile on October 9, 2015, more than two months after his power of attorney was revoked, is void.

CONCLUSION

¶16 The power of attorney given to Gary Hold on July 17, 2015, was valid pursuant to Oklahoma law and properly revoked the power of attorney given to Stephen Carlile four days earlier. Hence, Carlile's transfer of the 8618 property to himself on October 9, 2015, had no legal effect. The decision of the district court is affirmed.

¶17 **AFFIRMED**.

FISCHER, J., concurs, and WISEMAN, P.J., concurs in result.

P. THOMAS THORNBRUGH, CHIEF JUDGE:

1. Curiously, the petition, while arguing that Carlile's October 9, 2015 deed to himself was valid, does not state that there was any subsequent transfer between Carlile and Gorman Hold's estate. If Carlile was still a co-tenant with Bentley, the estate would appear to have no interest in the property.

2. *See Curtis v. Bd. of Educ. of Sayre Pub. Sch.*, 1995 OK 119, ¶ 9, 914 P.2d 656.

3. Sandra Hold's arguments imply that a "hierarchy of revocation" exists between powers of attorney granted pursuant to 15 O.S. §§ 1001 through 1020, 58 O.S. §§ 1071 through 1077, and common law, *i.e.*, that powers executed pursuant to 58 O.S. §§ 1071 through 1077 cannot be revoked unless the new power of attorney uses the same statutory form. We find no authority for this theory.

4. Sandra Hold stated in summary judgment briefing that she denied that Carlile was informed that the power of attorney had been revoked. However, she did so on the basis that the revocation was legally invalid, not that Carlile was unaware of it.

2018 OK CIV APP 63

IN THE MATTER OF THE ESTATE OF CLIFFTON FRED WALKER, Deceased, BEVERLY WALKER, Appellant, vs. GENTNER F. DRUMMOND, Appellee.

Case No. 116,753. September 18, 2018

APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY, OKLAHOMA

HONORABLE SHAWN S. TAYLOR, TRIAL JUDGE

REVERSED

Brad E. Hilton, HILTON LAW OFFICE, Skiatook, Oklahoma, for Appellant

Harvey C. Grauberger, DRUMMOND LAW, PLLC, Tulsa, Oklahoma, for Appellee

JERRY L. GOODMAN, JUDGE:

¶1 Beverly Walker appeals a February 2, 2018, order denying her motion to dismiss and Objection to Petition for Probate of Will, Appointment of Personal Representative, Determination of Identity of Heirs, Devisees and Legatees and Termination of Joint Tenancy. Based on our review of the record and applicable law, we reverse.

BACKGROUND

¶2 Cliffton F. Walker (Decedent) died on November 6, 2011. Decedent was an Osage Indian who died testate, leaving a Last Will and Testament. Decedent left behind his surviving spouse, Beverly Walker (Spouse), as his sole devisee/legatee. Decedent owned a fractional Osage headright interest. At the time of his death, he was a resident of Mayes County, Oklahoma.

¶3 On March 30, 2012, Gentner F. Drummond (Drummond) filed a Petition for Probate of Will, Appointment of Personal Representative, Determination of Identity of Heirs, Devisees and Legatees, and Termination of Joint Tenancy in the District Court of Osage County, Oklahoma, Case No. PB-2012-43. Drummond was nominated in the Will to serve as Executor, and on April 26, 2012, was appointed Personal Representative in the Osage County probate case. On November 29, 2016, an Order Approving First and Final Account, Petition for Decree of Distribution; Approval of Attorneys' Fees, Costs, and Expenses; and Discharge of Personal Representative was entered. No appeal was filed and the order is now final.

¶4 On September 7, 2017, Drummond filed a petition to probate Decedent's estate in Mayes County District Court, Case No. PB-2017-55. Spouse filed an objection, asserting the Mayes court did not have jurisdiction as Decedent's

estate had previously been probated in Osage County. Spouse further filed a motion to dismiss for lack of jurisdiction, citing the finality of the Osage County order. Drummond filed a response, asserting the Osage County District Court lacked venue over Decedent's estate because it was not the county of which Decedent was a resident at the time of his death, citing 58 O.S.2011, § 5 and *Presbury v. County Court of Kay County, Oklahoma*, 1923 OK 127, 213 P. 311. Thus, its actions were void.

¶5 By order entered on February 2, 2018, the trial court denied Spouse's motion to dismiss and Objection to Petition for Probate of Will, Appointment of Personal Representative, Determination of Identity of Heirs, Devisees and Legatees and Termination of Joint Tenancy. Spouse appeals.

STANDARD OF REVIEW

¶6 We review *de novo* a district court's order on a motion to dismiss. *Miller v. Miller*, 1998 OK 24, ¶ 15, 956 P.2d 887, 894.

ANALYSIS

¶7 The issue on appeal is whether the Osage County District Court was a proper venue for probate of Decedent's estate. Drummond contends it was not, citing 58 O.S.2011, § 5 and *Presbury v. County Court of Kay County*, Oklahoma, 1923 OK 127, 213 P. 311.

¶8 The Oklahoma Supreme Court held in *Presbury*, 1923 OK 127, at ¶ 7, 213 P. at 312, that wills must be proved, and letters testamentary or of administration granted, first in the county of which the decedent was a resident at the time of his death. The Court relied on § 6193, Revised Laws 1910, which specifically provided:

> Wills must be proved, and letters testamentary or of administration granted:
>
> First. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died.
>
> Second. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the State. ...

Thus, the Legislature prioritized venue in which a probate action should be filed by its use of "First, Second, ...". The Legislature subsequently amended the statute, specifically removing the priority language. Title 58 O.S.2011, § 5 provides:

> Wills must be proved, and letters testamentary or of administration granted in the following applicable situations:
>
> 1. In the county of which the decedent was a resident at the time of his death, regardless where he died.
>
> 2. In the county in which the decedent died, leaving an estate therein, the deceased not being a resident of this state.
>
> 3. In the county in which any part of the estate of the deceased may be, where the decedent died out of this state, and the decedent was not a resident of this state at the time of his death.
>
> 4. In the county in which any part of the estate may be and the decedent was not a resident of this state, but died within it, and did not leave an estate in the county in which he died.
>
> 5. In all other cases, in the county where application for letters is first made.

¶9 Accordingly, a priority no longer exists in the statute and a probate action may be filed in any of the applicable situations listed in § 5. As a result, venue was proper in Osage County District Court in PB-2012-43, as it was the county where application for letters was first made. The November 29, 2016, Order Approving First and Final Account, Petition for Decree of Distribution; Approval of Attorneys' Fees, Costs, and Expenses; and Discharge of Personal Representative in PB-2012-43 is final.

¶10 Therefore, the District Court erred by denying Spouse's motion to dismiss. The February 2, 2018, order denying Spouse's motion to dismiss is reversed.

¶11 **REVERSED**.

BARNES, P.J., and RAPP, J., concur.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, October 4, 2018

F-2017-709 — On June 28, 2016, as part of a plea agreement, the Honorable Richard G. Van Dyck, District Judge, admitted Appellant, James Gabriel Sander, to the Grady County Drug Court program in Grady County District Court Case Nos. CM-2014-679, CF-2015-57, and CF-2016-164. On July 3, 2017, following an evidentiary hearing on applications by the State to terminate Appellant from Drug Court, the Honorable Kory Kirkland, District Judge, sustained the applications. In terminating Appellant from Drug Court, and in accordance with that agreement sentencing him to the Drug Court Program, Judge Kirkland imposed a sentence of twenty (20) years imprisonment in CF-2016-164 for Unauthorized Use of a Motor Vehicle, After Former Conviction of Two or More Felonies, revoked both of Appellant's suspended sentences of twenty (20) years each in CF-2015-57 for Possession of a Firearm after Felony Conviction, After Former Conviction of Two or More Felonies; and Possession of a Controlled Dangerous Substance (Methamphetamine and Marijuana), After Former Conviction of Two or More Felonies; and further revoked Appellant's suspended sentence in CM-2014-679 of one (1) year for Possession of Marijuana. All sentences were ordered to be served concurrently. Appellant appeals the final order terminating him from Drug Court. AFFIRMED. Opinion by: Lumpkin, P.J., Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

RE-2017-1264 — On August 26, 2005, Appellant Randall Brent Cook entered a plea of guilty in Pittsburg County District Court Case No. CF-2005-360 and was convicted and sentenced to ten years imprisonment, with all but the first seven years suspended for Count 1; and twenty years imprisonment, with all but the first seven years suspended each for Counts 2 and 3. On December 10, 2013, Appellant entered a plea of guilty in Pittsburg County District Court Case No. CF-2013-374 and was convicted and sentenced to ten years imprisonment, with all but the first three years suspended. On April 22, 2014, Appellant entered a plea of guilty in Pittsburg County District Court Case No. CF-2014-135 and was convicted and sentenced to ten years imprisonment, with all but the first three years suspended. On September 2, 2016, the State filed a motion to revoke Appellant's suspended sentences in all three cases. Following a hearing on the application, the Honorable Michael W. Hogan, Special Judge, revoked Appellant's suspended sentences in full. Appellant appeals. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

C-2017-1311 and F-2017-1304 — Heath Justin Wright, Appellant/Petitioner, entered, without counsel, negotiated plea of guilty to Second Degree Burglary (Count 1), Knowingly Concealing Stolen Property (Count 2) and Possession of a Controlled Substance (Count 3) in Case No. CF-2015-43 in the District Court of Pontotoc County. The Honorable Gregory D. Pollard accepted Wright's plea and, pursuant to the plea agreement, placed him in the Pontotoc County Drug Court. Wright failed to successfully complete the drug court program and the district court sentenced him to twenty-five years on each count to run concurrently. Wright filed a timely application to withdraw his plea that the district court denied after holding the prescribed hearing. Wright appeals the denial of his motion to withdraw his plea. The Petition for a Writ of Certiorari is GRANTED and the case is REMANDED to allow Wright to withdraw his plea and proceed to trial on all counts. Wright's appeal in Case No. F-2017-1304 is DENIED as MOOT. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-394 — Herbert Dale Haynes, Appellant, was tried by jury for the crime of Murder in the Second Degree, After Nine Prior Felony Convictions in Case No. CF-2014-47 in the District Court of Comanche County. The jury returned a verdict of guilty and set as punishment life imprisonment. The trial court sentenced accordingly and further imposed court

costs, assessments, and a restitution award of $7,286.21 for burial costs. From this judgment and sentence Herbert Dale Haynes has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-376 — Jason David Dang, Appellant, was tried by jury for the crime of Forcible Oral Sodomy in Case No. CF-2016-3213 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at five years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Jason David Dang has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs in results; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

F-2017-108 — In the District Court of Oklahoma County, Case No. CF-2012-4096, Bryant Jamal Nelson, Appellant, entered a plea of guilty to Possession of a Controlled Dangerous Substance (Cocaine), and on November 14, 2014, the Honorable Donald L. Deason, District Judge, deferred Appellant's sentencing for five (5) years conditioned on written rules of probation. On January 30, 2017, the Honorable Michele D. McElwee, District Judge, found Appellant violated probation. Judge McElwee thereupon accelerated sentencing, pronounced a judgment of guilt, and imposed a sentence of ten (10) years imprisonment. Appellant appeals the final order of acceleration. AFFIRMED. Opinion by: Lewis; V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

F-2017-135 — Timothy Shawn Cato, Appellant, was tried by jury for the crimes of Counts 1, 2, 4, 5, and 6, child sexual abuse, and Counts 7, 8, 10, 11, 12, and 13, sexual abuse of a child under twelve (12) years, in Case No. CF-2014-5212 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at thirty-five (35) years imprisonment in Count 1, fifteen (15) years imprisonment in Count 2, five (5) years imprisonment in each of Counts 4 through 6, and twenty-five (25) years imprisonment and a $500.00 fine in each of Counts 7, 8, 10, 11, 12, and 13. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Timothy Shawn Cato 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; Rowland, J., concurs.

RE-2017-107 — In the District Court of Jackson County, Case No. CF-2009-77, Appellant, Robert Kelly Fields, while represented by counsel, entered pleas of nolo contendere to one count of Causing/Aiding/Abetting Minor in Drug Crime and two counts of Lewd Molestation. On July 7, 2009, in accordance with a plea agreement, the Honorable Richard Darby, District Judge, sentenced Appellant to concurrent terms of twenty (20) years imprisonment for each count, with all but the first eight (8) years of those terms suspended under written rules of probation. On February 1, 2017, the Honorable Clark E. Huey, Associate District Judge, found Appellant had violated his probation, and he revoked the suspension order in full. Appellant appeals the final order of revocation. AFFIRMED. Opinion by Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J, Concurs.

F-2017-884 — Clifford Warner Hiler, Appellant, was tried by jury for the crime of Aggravated Assault and Battery, After Conviction of Two or More Felonies in Case No. CF-2016-2 in the District Court of Blaine County. The jury returned a verdict of guilty and recommended as punishment 20 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Clifford Warner Hiler has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-1072 — Michael Dean Smothermon, Appellant, was tried in a bench trial for the crimes of Count I - Trafficking in Illegal Drugs, after four felony convictions, and Count II - Unlawful Possession of Drug Paraphernalia in Case No. CF-2016-343 in the District Court of Canadian County. The trial court found Appellant guilty and sentenced him to 20 years imprisonment in Count I and one year incarceration in county jail and a $50.00 fine in Count II. From this judgment and sentence Michael Dean Smothermon has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur in result; Hudson, J., concur; Rowland, J., concur.

C-2018-612 — Michael Pearson, Petitioner, pled no contest to the crimes of Count I - Assault with a Dangerous Weapon and Count II - Malicious Injury to Property (Misdemeanor) in Case No. CF-2017-213 in the District Court

of Grady County. In accordance with a negotiated plea agreement, the Honorable Timothy A. Brauer sentenced Petitioner to 10 years imprisonment, all suspended, and a $500.00 fine in Count I and one year, suspended, and a $100.00 fine in Count II. Petitioner timely filed an application to withdraw his pleas. After a hearing, at which Petitioner was represented by new counsel, the trial court denied the motion. From this denial of his motion to withdraw plea, Michael Pearson has perfected his certiorari appeal. CERTIORARI DENIED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur in result; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-1161 — Rashad Samir Scott, Appellant, was tried by jury for the crimes of Count I - Robbery With a Firearm, Count II - Obstructing an Officer and Count III - Driving With License Cancelled/Suspended/Revoked in Case No. CF-2016-501 in the District Court of Washington County. The jury returned a verdict of guilty and recommended as punishment 15 years im-prisonment and a $5,000.00 fine in Count I, and a $100.00 fine for each of Counts II and III. The trial court sentenced accordingly. From this judgment and sentence Rashad Samir Scott has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concurR; Rowland, J., concur.

Thursday, October 11, 2018

F-2017-42 — Appellant, Ronnie Eugene Fuston, was tried by jury and convicted of First Degree Murder (Count 1) in the District Court of Garfield County Case Number CF-2013-94. The jury recommended as punishment imprisonment for life without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Ronnie Eugene Fuston has perfected his appeal. The Judgment and Sentence of the District Court is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

F-2017-805 — Appellant, Kevin Joe Sweat was tried in a non-jury trial before the Honorable Lawrence W. Parish, District Judge, in District Court of Okfuskee County Case Number CF-2016-17 and convicted of Assault and Battery with a Deadly Weapon. The Court sentenced Appellant to imprisonment for sixty (60) years and ordered the sentence to run consecutive to the sentences he received in District Court of Okfuskee County Case Numbers CF-2011-87 and CF-2011-126. It is from this judgment and sentence that Appellant appeals. From this judgment and sentence Kevin Joe Sweat has perfected his appeal. The Judgment and Sentence of the District Court is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, October 11, 2018

116,649 — Jodi Koch, Plaintiff/Appellant, v. State of Oklahoma, ex rel. Department of Public Safety, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honor able April Seibert, Judge. Plaintiff/Appellant, Jodi Koch, appeals from the trial court's order sustaining the revocation of her driver's license by Defendant/Appellee, State of Oklahoma ex rel. Department of Public Safety (DPS). Appellant was arrested on December 26, 2015, on suspicion of driving under the influence. She refused to submit to chemical testing and was notified her driver's license was being revoked for 180 days. She thereafter requested a DPS hearing. On the date of the hearing, December 19, 2016, neither Appellant nor her counsel participated in the hearing and DPS sustained her revocation. The district court reversed on appeal, holding Appellant was not at fault for missing the first hearing. Neither Appellant nor her attorney participated in the second hearing. The DPS hearing officer, once again, sustained the revocation of Appellant's driver's license. Appellant appealed the second DPS revocation order to the district court, asserting that her right to a speedy trial was violated. The trial court affirmed Appellant's revocation and she appeals. Under the facts of this case and pursuant to 47 O.S. 2011 §6-211(F), we conclude Appellant waived her right to assert a speedy trial violation because she failed to appear at her administrative hearing. AFFIRMED. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

116,972 — In Re the Matter of A.G. and B.G. alleged Deprived Children: Melisa Jean Greer, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Pittsburg County, Oklahoma. Honorable Mindy Beare, Judge. Appellant, Melisa Jean Greer (Mother), appeals from the trial court's order terminating her parental rights to her minor children, A.G. and B.G. (Children). Appellee, the State of Oklahoma (State), filed a petition to terminate

Mother's parental rights on the basis that she failed to correct the conditions for which the children were found to be deprived: Mother failed to correct the conditions of substance abuse and she failed to provide proper parental care or guardianship even though she was given at least three (3) months to correct the conditions. After reviewing the record, we find clear and convincing evidence supports the grounds for termination of Mother's parental rights pursuant to 10A O.S. Supp. 2015 §1-4-904(B)(5) for her failure to correct the condition of substance abuse and failure to provide proper parental care or guardianship even though she was given at least three (3) months to correct the conditions. However, the order is remanded to the trial court with instructions to specifically identify the statutory basis for the termination. AFFIRMED AND REMANDED FOR CORRECTIONS. Opinion by Bell, P.J.; Joplin, J., and Buettner, J., concur.

(Division No. 2)
Friday, October 5, 2018

116,299 — In the Matter of the Estate of Rhodena L. Thornton, Deceased, and In the Matter of the Estate of William H. Thornton, Deceased, Pamela Louise Brown, Appellant, vs. Teresa Annette Hand, Appellee. Appeal from an order of the District Court of Osage, County, Hon. B. David Gambill, Trial Judge, in which we seek to determine whether the trial court erred in awarding attorney fees and costs to Appellee Teresa Annette Hand. Appellant Brown argues the trial court erred in allowing Hand's counsel to recover attorney fees and expenses in the amount of $45,925 in this probate case that were actually incurred in civil case CJ-2013-269 ("surcharged attorney fees"). Brown further argues the trial court erred in awarding $11,449.82, an amount the attorney fee application did not specifically request, but did urge "[t]hat the balance of the legal fees and court costs should be equally shared between the heirs at law" and that "balance" could be found in an attached attorney time invoice ("non-surcharged attorney fees and costs"). Hand maintains in her appellate brief that these attorney fees "were incurred in the ordinary course of the joint administrations." We conclude the trial court erred as a matter of law in determining Teresa Hand was entitled to recover in the probate case the $45,925 of surcharged attorney fees and expenses actually incurred in the previous case, CJ-2013-269. We reverse the trial court's judgment and award on this issue. We also cannot determine from the appellate record whether the non-surcharged attorney fees and costs awarded in the probate case were "necessarily incurred in the administration of the estate" or "in the preservation and care of the estate" thereby justifying the award. The $11,449.82 amount representing "non-surcharged" fees and expenses is incorrect and without evidentiary support. The trial court's judgment and award are also reversed on this issue. We remand only this issue regarding the "non-surcharged" amount of $11,449.82 to the trial court with directions to determine whether Hand's counsel is entitled to attorney fees and expenses in accordance with this Opinion. REVERSED IN PART AND REVERSED AND REMANDED WITH DIRECTIONS IN PART. Opinion from the Court of Civil Appeals, Division II, by Wiseman P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Wednesday, October 10, 2018

116,238 — MAC Systems, Inc., Plaintiff/Appellee, vs. Brittani Carns, Defendant/Appellant. Proceeding to review a judgment of the District Court of Tulsa County, Hon. Caroline Wall, Trial Judge. Brittani Carns appeals the district court's decision granting a temporary injunction to MAC Systems, Inc. on the grounds of a non-compete agreement. On review, we find that the injunction was void because the mandatory bond requirement of 12 O.S.2011 § 1392 was not followed. In *Morse v. Earnest, Inc*., 1976 OK 31, 547 P.2d 955, the Supreme Court held a temporary injunction is subject to the bond requirement of § 1392. The rule of *Morse* is clear: "The judgment of the trial court must be reversed for failure to require an undertaking as required by § 1392." This rule applies regardless of what party may bear the blame for the failure to set a bond. *See Walbridge-Aldinger Co. v. City of Tulsa*, 1924 OK 1141, ¶ 7, 233 P. 171. The judgment of the trial court is reversed for failure to require a bond as required by 12 O.S. § 1392. REVERSED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

Wednesday, October 12, 2018

116,254 — Jesus Hidalgo, Petitioner, vs. Unit Drilling Company and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of The Workers' Compensation Commission, Hon. Patricia Sommer, Administrative Law Judge. Claimant seeks review

of an order of the Workers' Compensation Commission, which affirmed in part and modified in part the decision of an Administrative Law Judge (ALJ). The ALJ denied Claimant's constitutional challenges to the Administrative Workers' Compensation Act's (AWCA) maximum temporary total disability (TTD) wage rate set by 85A O.S. Supp. 2013 § 45(A)(1). Claimant argues that the statute's maximum TTD rate violates his due process rights granted by Okla. Const. art. 2, § 7, and the Fourteenth Amendment to the United States Constitution. Claimant also argues that section 45(A)(1) is unconstitutional as a denial of an adequate remedy guaranteed by Okla. Const. art. 2, § 6, and a related argument maintains that if section 45(A)(1) of the AWCA is a proper exercise of the legislature's police power, then section 5(C) of the AWCA, granting employers immunity from civil liability, is unconstitutional because employers "cannot have it both ways." Finally, Claimant argues that section 45(A)(1) is unconstitutional because it is a special law, prohibited by Okla. Const. art. 5, §§ 46 and 59, that creates disparate treatment of members of a class without a reasonable basis for doing so. Claimant has failed to meet the "heavy burden" required to demonstrate the unconstitutionality of 85A O.S. Supp. 2013 § 45(A)(1). *Graham v. D&K Oilfield Servs.*, 2017 OK 72, ¶ 36, 404 P.3d 863. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Thornbrugh, C.J., and Wiseman, P.J., concur.

(Division No. 3)
Thursday, October 4, 2018

116,518 — In the Matter of the Adoption of A.E.E. and M.R.E., Minor Children: Michael Joseph Lee, Petitioner/Appellant, vs. State of Oklahoma, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Susan K. Johnson, Judge. Petitioner/Appellant Michael Joseph Lee (Lee) appeals from an order of the trial court denying and dismissing his petition to adopt minor children A.E.E. and M.R.E., two children who were briefly placed in therapeutic foster care with Lee before being removed due to a Department of Human Services referral against him. The court found the children's best interest would not be served by allowing the adoption to proceed. We find this decision is not against the clear weight of the evidence or otherwise an abuse of discretion. Accordingly, we AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., concurs; Goree, V.C.J., concurs specially.

116,853 — (Comp. w/116,854) In the Matter of L.C., S.C., and R.C., Deprived Children: Robert Conn, Sr., Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Garfield County, Oklahoma. Honorable Tom L. Newby, Trial Judge. Father appeals the trial court decision terminating his parental rights based on his failure to correct conditions which led to Children's deprived status and based on the best interest of Children. Father argues that the Order Terminating Parental Rights violated his constitutional and statutory rights. Father received an ISP approved by the trial court which explained the conditions he was charged with correcting to regain custody of Children. He was on notice of the conditions to be corrected, and he did not challenge the deprived adjudication by appeal. The record does not demonstrate a denial of due process in the notice given Father of the conditions which led to the deprived adjudication and the steps required for him to show he had corrected those conditions. Father complains State did not clearly and convincingly prove that he failed to correct the conditions which led to deprived status. After a review of the evidence presented, we hold there is clear and convincing evidence that Father did not correct the conditions which led to Children's deprived status. There is clear and convincing evidence that Children have been in foster care for 15 out of the most recent 22 months since the filing of the petition, a period of a lack of permanency and stability for them. It is in Children's best interest to terminate Father's parental rights. State carried its burden clearly and convincingly. AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Joplin, J. (sitting by designation), concur.

116,854 — (Comp. w/116,853) In the Matter of C.C., Deprived Child: Robert Conn, Sr., Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Garfield County, Oklahoma. Honorable Tom L. Newby, Trial Judge. Father appeals the trial court decision terminating his parental rights based on his failure to correct conditions which led to Child's deprived status and based on the best interest of Child. Father argues that the Order Terminating Parental Rights violated his constitutional and statutory rights. Father received an ISP approved by the trial court which explained the conditions he was charged with correcting to regain custody of the Child. He was on notice of the conditions to be corrected, and he did not challenge the deprived adjudication by appeal. The record does not demon-

strate a denial of due process in the notice given Father of the conditions which led to the deprived adjudication and the steps required for him to show he had corrected those conditions. Father complains State did not clearly and convincingly prove that he failed to correct the conditions which led to deprived status. After a review of the evidence presented, we hold there is clear and convincing evidence that Father did not correct the conditions which led to the Child's deprived status. There is clear and convincing evidence that the Child has been in foster care for 15 out of the most recent 22 months since the filing of the petition, a period of a lack of permanency and stability for him. It is in the Child's best interest to terminate Father's parental rights. State carried its burden clearly and convincingly. AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Joplin, J. (sitting by designation), concur.

(Division No. 4)
Friday, September 28, 2018

116,958 — Seradge Investment Company, L.P., an Oklahoma limited partnership, Plaintiff/Appellant, v. Dr. Lee P. Frye, an individual, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Thomas E. Prince, Trial Judge, granting Dr. Lee P. Frye's (Tenant) Motion for Summary Judgment and denying Landlord's Motion for Summary Judgment. Landlord claimed Tenant had underpaid the rent for over 100 months, but sued to collect only the back rent owed from March 3, 2010, until August 31, 2014, and unpaid ad valorem taxes spanning multiple tax years. Tenant claimed no additional rent was due because Landlord was estopped from collecting the back rent, had waived the collection of the rent, or by its continued acceptance of the tendered rent, had engaged in a course of conduct that operated to modify the lease. The trial court granted summary judgment to Tenant. Based on the undisputed facts, we affirm the trial court's award of summary judgment to Tenant on the issue of collection of any taxes claimed to be due under Section 9.1 of the Lease. We hold that the equitable defenses of estoppel or waiver are not available to Tenant under these facts and the grant of summary judgment on those bases was erroneous and is reversed. We find disputed issues of material fact exist regarding whether the parties' acts towards each other constituted an oral agreement to modify the existing Lease. Summary judgment was also erroneous for that reason. The matter is remanded to the trial court with directions to present to the trier of fact the single issue of whether an oral modification of the amount of rent due during the Holding Over period of the existing Lease occurred as a result of the acts of the parties. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Monday, October 8, 2018

117,071 — Jacob Khorsandnia, Plaintiff/Appellant, vs. Ali Daemi, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Trevor S. Pemberton, Trial Judge, granting summary judgment to Defendant Ali Daemi on Plaintiff's claim for breach of contract. The trial court granted summary judgment because Plaintiff failed to comply with Rule 13 by not including responses to undisputed facts raised by Defendant. The record reflects that Plaintiff is attempting to enforce an oral contract involving the sale of real property, or an interest therein. This is an invalid contract pursuant to the Statute of Frauds. The record further reflects that, assuming arguendo the existence of a valid contract, and further assuming a breach of that contract could be proven under these facts, Plaintiff has failed to prove he suffered damages. He admits to having no out of pocket expenses. He admits that all of the efforts he made to bring together Defendant and the prior owner of the property were done before he brought the opportunity to Defendant's attention. Therefore, it follows that any monetary losses incurred by Plaintiff for research, negotiation, or other such activities were incurred in anticipation of presenting the matter to Defendant. Defendant, therefore, cannot be held responsible for any damages Plaintiff incurred before the alleged oral agreement was made. The requisite elements for enforcement of an oral agreement have not been met, as a matter of law. We agree with the trial court that summary judgment, under these undisputed facts and the law, is appropriate. The trial court's order is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

Tuesday, October 9, 2018

116,863 — Allan Wayne McLaurin, Plaintiff/Appellant, vs. State of Oklahoma, ex rel. Oklahoma Department of Corrections, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Lisa Tipping

Davis, Trial Judge, dismissing Allan Wayne McLaurin's (McLaurin) petition for writ of mandamus. McLaurin is an inmate in the custody of the Oklahoma Department of Corrections (DOC), and is incarcerated at the James Crabtree Correctional Center (JCCC) in Helena, Oklahoma. McLaurin filed a request to use $800.00 of his mandatory savings to send to his fiancée to purchase clothing and religious items. The JCCC declined his request, and McLaurin's grievance appeal was ultimately denied by the DOC. McLaurin filed an application for writ of mandamus asserting he had a constitutional property interest in the wages. DOC filed a motion to dismiss, asserting McLaurin has no constitutional interest in the 20% mandatory saving funds. The trial court granted the motion to dismiss. We conclude the order filed by the trial court must be reversed for failure to comply with the mandates of 12 O.S.2011, § 2012(G), and because the existence or non-existence of good cause cannot be determined from the record presented on appeal. Because the order under review fails to comply with the authorities set out above, we reverse it and remand the case to the trial court for further proceedings consistent with the opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

116,863 — Allan Wayne McLaurin, Plaintiff/Appellant, vs. State of Oklahoma, *ex rel.* Oklahoma Department of Corrections, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Lisa Tipping Davis, Trial Judge, dismissing Allan Wayne McLaurin's (McLaurin) petition for writ of mandamus. McLaurin is an inmate in the custody of the Oklahoma Department of Corrections (DOC), and is incarcerated at the James Crabtree Correctional Center (JCCC) in Helena, Oklahoma. McLaurin filed a request to use $800.00 of his mandatory savings to send to his fiancée to purchase clothing and religious items. The JCCC declined his request, and McLaurin's grievance appeal was ultimately denied by the DOC. McLaurin filed an application for writ of mandamus asserting he had a constitutional property interest in the wages. DOC filed a motion to dismiss, asserting McLaurin has no constitutional interest in the 20% mandatory saving funds. The trial court granted the motion to dismiss. We conclude the order filed by the trial court must be reversed for failure to comply with the mandates of 12 O.S.2011, § 2012(G), and because the existence or non-existence of good cause cannot be determined from the record presented on appeal. Because the order under review fails to comply with the authorities set out above, we reverse it and remand the case to the trial court for further proceedings consistent with the opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

116,800 — Sonny Lauren Harmon, Plaintiff/Appellant, v. Oklahoma Department of Corrections and David Tate, Chief of Security, NFCC, Defendants/appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. The plaintiff, Sonny L. Harmon (Harmon), appeals an Order dismissing his action against the defendants, Oklahoma Department of Corrections (DOC), and David Tate (Tate), Chief of Security. Here, the only written record consists of an unsealed copy of the summons and docket sheet entries showing issuance, a fee charged, and Harmon's responses that he provided the completed summons. This Record is consistent with only one conclusion. The conclusion is that the clerk at least initiated the procedure outlined in the response to the Supreme Court in which the clerk executes, seals, and then mails the summons and petition to the defendant. However, it cannot be concluded that the clerk took the next step and mailed the summons because there is no record of the mailing and it is not reasonable to infer that the defendants would have ignored the summons had it been mailed. Therefore, under the circumstances, this Court must reverse the trial court's Order dismissing the case and does so with instructions to the trial court. The trial court is directed to order the clerk to issue an alias summons to the defendants in this case and to mail such summons to each defendant by certified mail. In the event that service by certified mail cannot be obtained, the clerk will be directed to issue summons for service by the sheriff of the appropriate county. Upon receipt of proof of service, the clerk shall notify Harmon that the defendants have been served. Appellant's Motion for Summary Disposition is denied. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

Wednesday, October 10, 2018

116,151 — In the Matter of the Termination of The Orval E. Cowan Revocable Living Trust, In the Matter of the Termination of The Geraldine B. Cowan Family Trust a/k/a The Geraldine B. Cowan Revocable Living Trust, In the Matter of the Orval E. Cowan, Deceased, T. Craig Cowan and Marcella Cowan, Respondents/Appellants, v. Mark Cowan, Respondent/Appellee. Appeal from an Order of the District Court of Blaine County, Hon. Paul K. Woodward, Trial Judge. Craig Cowan (Craig) and his wife, Marcella Cowan (Marcella) appeal an Order relating to disposition of attorney fee claims arising from underlying litigation. This appeal involves that part of the Order which surcharged the share of Craig Cowan (Craig) in the Orval Trust sum of $100,000.00 for attorney fees for Mark Cowan (Mark). This case is an appeal of the trial court's attorney fee award to Mark Cowan against Craig Cowan. The award is expressed as a lump sum. The Trust Code, 60 O.S.2011, § 175.57(D), provides the trial court with discretionary authority to award costs and expenses and an attorney fee "in a judicial proceeding involving a trust." The authority is constrained by the statute's phrase "as justice and equity may require." The trial court must first decide whether justice and equity requires an attorney fee. Here, the facts and circumstances of the case support the conclusion of the trial court to award an attorney fee to Mark payable by Craig from his share of the Orval Trust. Therefore, the decision to award attorney fees is affirmed. The next decision involves a determination of how much the amount of the fee to be awarded. Moreover, the final calculation of the compensatory fee must bear some reasonable relationship to the amount in controversy as well as meet the "justice and equity" standard of the statute. Here the lump sum award fails to identify the *Burk* and *Atwood* factors and criteria utilized by the trial court to reach the amount awarded. Therefore, it is necessary to vacate the amount awarded, but the decision to award attorney fees is affirmed. The cause is remanded to the trial court specifically for the trial court to state in the record the basis and calculation for its determination that the amount of the fee awarded is reasonable. AFFIRMED IN PART AND VACATED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

116,148 — In the Matter of the Termination of The Orval E. Cowan Revocable Living Trust, In the Matter of the Termination of The Geraldine B. Cowan Family Trust a/k/a The Geraldine B. Cowan Revocable Living Trust, In the Matter of the Orval E. Cowan, Deceased, Rodney Cowan, Petitioner/Counterclaim Respondent/Appellant, and Carol Cowan, Third-Party Claim Respondent/Appellant, v. Mark Cowan, Respondent/Appellee, and Troy Cowan, Respondent/Appellee. Appeal from an Order of the District Court of Blaine County, Hon. Paul K. Woodward, Trial Judge. Rodney E. Cowan (Rodney), individually and as former trustee of the Orval E. Cowan Revocable Living Trust (Orval Trust) and Carol Cowan (Carol) appeal multiple Orders relating to disposition of attorney fee claims arising from underlying litigation. The trial court: (1) denied the claim of Rodney and Carol where they successfully prevailed in their claim for farming equipment; (2) reduced the amount of attorney fee that Rodney was authorized to pay from the Orval Trust for assistance in an Internal Revenue Service (IRS) audit; (3) ordered Rodney to disgorge all attorney fees paid from the Orval Trust in excess of $25,000.00 to one firm and in excess of $50,000.00 to a separate firm (excluding fees for the IRS audit); (4) surcharged Rodney's share of the Orval Trust the sum of $100,000.00 for attorney fees for Troy Cowan (Troy); and, (5) surcharged the share of Craig Cowan (Craig) in the Orval Trust sum of $100,000.00 for attorney fees for Mark Cowan (Mark). In the district court, three matters were consolidated. Two involved trusts and one a probate. The base case is a dispute among siblings involving their parents' trusts and the management of them by their father in his lifetime and son, Rodney, after both parents died. The trial court made several rulings during the course of the proceedings including denial of Rodney's invocation of the in terrorem clause and removal of Rodney as trustee. Ultimately, the trial court rescinded two sales of trust property made by the father during his lifetime. One sale was to Rodney and one to his brother Craig. In a separate appeal, the trial court's judgment has been affirmed by this Court. Rodney prevailed in the base litigation on his claim that farm equipment was gifted to him. He sought attorney fees. However, this case was part of the probate proceedings and there is no authority for an attorney fee award. Therefore, the trial court's denial of attorney fees claimed by Rodney is affirmed. The trial court reduced the amount allowed for attorney

fees for an IRS audit. It appears to be undisputed that the IRS audit attorney fee in the amount of $33,354.00, met all of the applicable "*Burk*" criteria except the fee hourly rate was higher than fee rate customarily charged in the locality for similar legal services. However, the evidence also showed, without dispute, that there was no similar locality fee because the locality did not have someone professionally equipped to deal with a complex estate or trust tax issue. It could not provide a basis to determine an attorney fee. Thus, this criterion did not justify reduction. That judgment is modified to allow the full amount claimed to be paid from the Orval Trust. The trial court decided to require Rodney to disgorge money paid to his attorneys when he was trustee and to surcharge him for Troy's attorney fee. Under the evidence, the trial court did not err by denying Rodney protection under the Business Judgment Rule. The decisions to compel disgorgement and to award attorney fees are affirmed. However, the amounts in each case are set out in lump sums without elaboration or determinations as to reasonableness, relation to outcome, relation to the reason for the decisions, and the *Burk* criteria. Therefore, the lump sum rulings for disgorgement and for award of attorney fees to Troy are vacated and the cause is remanded for determination of the amounts in accordance with this Opinion. AFFIRMED IN PART, MODIFIED IN PART AND AS TO THE PART MODIFIED, AFFIRMED, VACATED IN PART AND, AS TO THE PART VACATED, REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

Friday, October 12, 2018

116,922 — Salas Urban Cantina and Amtrust Insurance Company of Kansas, Inc., Petitioners, vs. Ofelia Morales Ramirez and The Workers' Compensation Commission, Respondents. Proceeding to review an order of a three-judge panel of the Workers' Compensation Commission, Hon. Michael T. Egan, Trial Judge, affirming the decision of an Administrative Law Judge (ALJ) which found Claimant Ofelia Morales Ramirez suffered a compensable work-related injury to her lumbar spine. The crux of Employer's appeal centers on the ALJ's finding that Claimant suffered a work-related accident that resulted in a diagnosis of spondylolisthesis. Employer argues that spondylolisthesis is not a compensable injury pursuant to the Administrative Workers' Compensation Act (AWCA). While a naturally occurring condition of spondylolisthesis is not a compensable injury, the occurrence of spondylolisthesis resulting from trauma or accident may be compensable if the trauma or accident is work-related. We conclude the ALJ's finding that Claimant sustained a work-related injury was not clearly erroneous in view of the reliable, material, probative, and substantial competent evidence presented. It follows the WCC's order affirming the ALJ's order was correct. We affirm the WCC's order. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

115,978 — In re the Marriage of: Rick Lanoy, Petitioner/Appellee, vs. Rhonda Lanoy, Respondent/Appellant. Appeal from an Order of the District Court of Murray County, Hon. Wallace Coppedge, Trial Judge. Rhonda Lanoy (Wife) appeals the decree of dissolution of marriage which divided the marital estate. Wife contends the trial court failed to assign a monetary value to the parties' business in establishing an equitable division of the property. We find the divorce decree entered by the trial court indeed did not identify the parties' marital property and determine a value for that property. The error in not identifying and setting a value for the marital property in the final decree must be considered an abuse of discretion because it is an error regarding a simple, unmixed question of law. Therefore, we reverse and remand the matter to the trial court to enter a corrected decree identifying the marital property, valuing it, and dividing it in a just and reasonable manner. The matter is remanded to the trial court for further proceedings consistent with the opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

ORDERS DENYING REHEARING

(Division No. 2)
Monday, October 15, 2018

116,600 — Amanda Cole, Plaintiff/Appellant, vs. Samantha Josey, Defendant/Appellee. Appellant's Amended Petition for Rehearing is hereby *DENIED*.

(Division No. 4)
Friday, October 12, 2018

116,691 — In the Matter of A.B. and A.B., Deprived Children, Randal Bivins, Appellant, vs. State of Oklahoma, Appellee. The petition for rehearing is *DENIED*.

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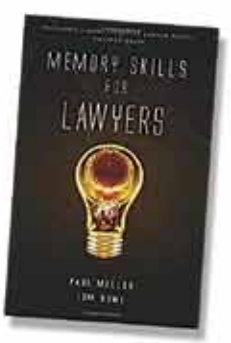

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