THE OKLAHOMA BAR
Journal
Volume 91 — No. 18 — 9/18/2020

Court Issue

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GUARDIANSHIPS: THE NEW NORMAL

THURSDAY,
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Overview of what Oklahoma Attorneys need to know about Guardianships and Resources available.

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- **Overview of Guardian Ad Litem process and handbook**
- **Overview of Guardianships handbook and forms**
- **Ethics of Guardianship – who is the client, duty**
- **Resources to help attorneys and the courts with wards with mental disorders**
- **Planning tools to avoid Guardianship**

WORKSHOP LEADERS:

Donna Jackson, ***JD, CPA,***
Donna J. Jackson & Associates, PLLC

A. Daniel Woska,
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THE OKLAHOMA BAR
Journal

Volume 91 – No. 18 – Sept. 18, 2020

The Oklahoma Bar Journal Court Issue is published twice monthly and delivered electronically by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105.

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2020 OK 67

MICHAEL ANTWAUN COLE, Plaintiff/Appellant, v. STATE OF OKLAHOMA, *ex rel.*, DEPARTMENT OF PUBLIC SAFETY, Defendant/Appellee

Case No. 117,424. September 15, 2020

ON CERTIORARI FROM THE COURT OF CIVIL APPEALS, DIVISION III

¶0 The Department of Public Safety revoked Michael Antwaun Cole's driver's license for one year for violating Oklahoma's implied consent law. Cole brought a due process challenge. The district court held DPS violated Cole's due process rights by not granting Cole a hearing and remanded the matter for an administrative hearing. The Court of Civil Appeals affirmed the due process violation but found the appropriate remedy was for the district court to set aside the revocation. This Court granted certiorari.

COURT OF CIVIL APPEALS' OPINION VACATED; DISTRICT COURT'S ORDER REVERSED; ORDER ENTERED BY THE DEPARTMENT OF PUBLIC SAFETY STANDS REINSTATED

Elliot Z. Smith, Tulsa, Oklahoma, for Plaintiff/Appellant.

Mark Edward Bright, Assistant General Counsel, Oklahoma Department of Public Safety, Oklahoma City, Oklahoma, for Defendant/Appellee.

Winchester, J.

¶1 Plaintiff/Appellant Michael Antwaun Cole appeals from a district court order remanding a driver's license revocation proceeding for hearing following his due process challenge. Cole violated Oklahoma's implied consent law after his arrest for suspicion of driving under the influence.[1] Cole attempted to contest the revocation of his driver's license by requesting an administrative hearing from Defendant/Appellee State of Oklahoma *ex rel*. Department of Public Safety (DPS). However, DPS determined that Cole's hearing request was insufficient and revoked Cole's license for one year.

¶2 The issue before the Court is whether DPS violated Cole's procedural due process rights in declining to hold a hearing when Cole failed to follow DPS's rule in submitting his hearing request. We hold DPS may designate how it receives hearing requests by administrative rule and DPS did not violate Cole's procedural due process rights when Cole failed to properly request an administrative hearing pursuant to Okla. Admin. Code § 595:1-3-7 (2017).

I. FACTS AND PROCEDURE

¶3 On February 18, 2018, the Oklahoma State University-Tulsa Police Department arrested Cole on suspicion of driving under the influence of alcohol. Cole refused to submit to a breath or blood alcohol concentration test to determine if he was intoxicated at the time of his arrest. The arresting officer served Cole with a notice of the revocation of his driver's license due to violating the implied consent law, which states that a driver gives consent to submit to a breath or blood alcohol concentration test when suspected of driving under the influence. On February 26, 2018, Cole, through his counsel, requested an administrative hearing by fax to DPS to contest the revocation. DPS deemed the request by fax insufficient under its rule regarding hearing requests, Okla. Admin. Code § 595:1-3-7. Within a week of receipt of this request, a DPS representative called Cole's counsel and advised him that DPS no longer accepted hearing requests made by fax. The DPS representative instructed Cole's counsel to submit the request by mail or in person.

¶4 On March 27, 2018, DPS sent a courtesy letter to Cole advising it received his faxed hearing request but that DPS deemed the request insufficient because DPS's rules had changed. The courtesy letter specifically stated that Cole should make the request by mail or in person and "faxed requests are no longer accepted." DPS instructed Cole to submit a corrected hearing request with the letter.[2] DPS was not required by law nor had any obligation to

make the courtesy call or send the courtesy letter. Cole, however, did not address the deficiency in his request. On March 31, 2018, DPS sent a letter to Cole stating it had revoked Cole's driver's license for one year. Cole appealed the matter to the District Court of Tulsa County.

¶5 The district court held Cole timely requested an administrative hearing and DPS deprived Cole of due process when DPS denied him a hearing. The district court remanded the case and ordered DPS to provide Cole with an administrative hearing. Cole appealed, contending the district court did not have the authority to remand the case for an administrative hearing. The Court of Civil Appeals affirmed the district court's determination that DPS violated Cole's due process by not granting him an administrative hearing. However, the Court of Civil Appeals reversed the district court's order directing DPS to provide Cole an administrative hearing and determined that the only appropriate remedy was for the district court to set aside the revocation. This Court granted certiorari.

II. STANDARD OF REVIEW

¶6 On appeal from orders of implied consent revocations, the appellate courts may not reverse or disturb the findings below unless the lower court's determinations are found to be erroneous as a matter of law or lacking sufficient evidentiary foundation. *Hollis v. State ex rel. Dep't of Pub. Safety*, 2008 OK 31, ¶ 10 n.4, 183 P.3d 996, 999 n.4. Questions of law – including whether an individual's due process rights have been violated – are reviewed *de novo*, meaning they are subject to an appellate court's plenary, independent, and nondeferential reexamination. *Jobe v. State ex rel. Dep't of Pub. Safety,* 2010 OK 50, ¶ 13, 243 P.3d 1171, 1175; *In re A.M. and R.W.*, 2000 OK 82, ¶ 6, 13 P.3d 484, 486-87. "[I]t is the duty of this court on appeal to apply the law to such facts as a court of first instance and direct judgment accordingly." *Rist v. Westhoma Oil Co.*, 1963 OK 126, ¶ 7, 385 P.2d 791, 793.

III. DISCUSSION

¶7 The issue before the Court is whether DPS violated Cole's due process rights in not granting him a hearing when Cole failed to follow DPS's rule in submitting his hearing request. We first address DPS's authority to promulgate rules as to how it receives administrative hearing requests.

¶8 Pursuant to the Administrative Procedures Act, 75 O.S.2011, §§ 250-323, the Legislature may delegate rulemaking authority to agencies, boards, and commissions to facilitate the administration of legislative policy. Administrative rules are valid expressions of lawmaking powers having the force and effect of law. *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 10, 184 P.3d 518, 523. Specifically, 75 O.S.2011, § 308.2 (C) states:

> Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise. Except as otherwise provided by law, rules shall be prima facie evidence of the proper interpretation of the matter to which they refer.

¶9 Administrative rules, like statutes, are to be given a sensible construction. *McClure v. ConocoPhillips Co.*, 2006 OK 42, ¶ 17, 142 P.3d 390, 396. Statutory construction by agencies charged with the law's enforcement is given persuasive effect especially when it is made shortly after the statute's enactment. *Id.* ¶ 19, 142 P.3d at 396. If the Legislature disagrees with an agency's interpretation, the Legislature can take certain actions according to 75 O.S.2011, § 250.2(B).[3]

¶10 The Legislature has delegated rulemaking authority to DPS. *See* 75 O.S.2011, §§ 250-323. The purpose of this delegation is to eliminate the necessity of establishing every administrative aspect of general public policy by legislation. *See* 27 O.S.2011, § 250.2(b). As part of its rulemaking authority, DPS can designate how it receives hearing requests. DPS's general rule regarding a request for an administrative hearing found in Okla. Admin. Code § 595:1-3-4(d) (2017) states:

> (d) Any person requesting a hearing must request the hearing in writing on a form prescribed by the Department of Public Safety and in compliance with this chapter. This form may be obtained from the Department's principal place of business at 3600 North Martin Luther King Avenue, Oklahoma City, OK or at www.ok.gov/DPS. A request that does not comply with these rules shall be rejected and shall not stay further action by the Department

¶11 On September 11, 2017, DPS amended its rule titled "Request for Hearing," which sets out the specific procedures to request a hearing:

> A request for a hearing must be in writing, on a form prescribed by the Department of Public Safety. This form is available at the Department's principal place of business at 3600 North Martin Luther King Avenue, Oklahoma City, OK or at www.ok.gov/DPS. The request shall be submitted to the Department of Public Safety. **Hearing requests may only be submitted in person at the Department's principal place of business, or by mail to the address below. Hearing requests submitted other than in person or by mail will not be accepted and a hearing will not be granted.** Hearing request forms mailed via the U.S. Postal Service shall be addressed to the Department of Public Safety, Legal Division, P.O. Box 11415, Oklahoma City, OK 73136.

Okla. Admin. Code § 595:1-3-7 (2017) (emphasis added).

¶12 Based on these rules, DPS determined that Cole's hearing request was insufficient because it was not submitted in person or by mail. DPS amended the rule setting forth the procedure to request a hearing over five months prior to Cole's arrest. The Legislature took no action concerning Okla. Admin. Code § 595:1-3-7; the Legislature's silence is evidence of its consent and adoption of DPS's construction.[4]

¶13 We hold it was within DPS's rulemaking authority to determine how it receives hearing requests. DPS, acting within its rulemaking authority, promulgated a rule disallowing hearing requests by fax, and Cole's faxed request was insufficient.[5] Cole failed to submit a proper hearing request and was, therefore, not granted a hearing. *See* 47 O.S.2005, § 754(D) (superseded Nov. 1, 2019).

¶14 We next address Cole's due process challenge. Relying on *Pierce v. State ex rel. Department of Public Safety,* 2014 OK 37, ¶ 8, 327 P.3d 530, 532, Cole urges that DPS denied him due process through no fault of his own, requiring his revocation be set aside. In *Pierce,* the sole issue was whether a delay of approximately twenty months in scheduling a revocation hearing was a violation of the constitutional right to a speedy trial. *Id.* ¶ 1, 327 P.3d at 531. The Court noted in *Pierce* that the driver acted in a timely fashion from the date of his arrest until the time of filing for certiorari to have this matter resolved at the first opportunity. *Id.* ¶ 14, 327 P.3d at 534. We do not find *Pierce* persuasive in this matter. The reason Cole did not receive a hearing from DPS was that Cole refused to properly submit a hearing request; it was not DPS's fault. *Id.* ¶ 15, 327 P.3d at 535.

¶15 The Due Process Clause does not, by itself, mandate any particular form of procedure. *See* U.S. Const. amends. V and XIV, § 1; *In re A.M. and R.W.,* 2000 OK 82, ¶ 9, 13 P.3d at 487. Instead, due process gives a person the opportunity to be heard in a meaningful time and manner. *Flandermeyer v. Bonner,* 2006 OK 87, ¶ 10, 152 P.3d 195, 198-99 (emphasis added). Due process is flexible, and a court must evaluate a challenge to due process based on the facts of a particular situation. *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976).

¶16 Here, DPS has a specific rule as to how a party can request an administrative hearing. Cole chose to ignore the rule and not avail himself of the opportunity to be heard, despite DPS giving Cole's counsel a courtesy telephone call and sending Cole a courtesy letter informing Cole of the proper way to submit his hearing request. DPS afforded Cole due process – an opportunity to be heard; Cole only had to comply with DPS's rule. *Grubb v. Johnson Oil Ref. Co*., 1947 OK 124, ¶ 17, 179 P.2d 688, 693 ("Due process of law is shown when opportunity is conferred to invoke the equal protection of the law. . . ."). Instead, Cole repeatedly refused DPS's admonitions to submit his hearing request by mail or in person. Cole was not deprived of due process when he failed to avail himself of the opportunity for a hearing.[6]

¶17 Since the Court does not find a due process violation, there is no basis for setting aside the revocation. Further, neither a trial *de novo* nor reinstatement of driving privileges is required where the licensee fails to properly contest the revocation and request a hearing. *In re Finley*, 1972 OK 155, ¶¶ 7-10, 503 P.2d 1273, 1275-76.

IV. CONCLUSION

¶18 The Legislature expressly delegated rulemaking authority to DPS. Once properly enacted, the rules promulgated by DPS have the force and effect of law. DPS specifically enacted a rule designating how it receives requests for hearings – in person or by mail. Cole requested an administrative hearing by fax, which the rule disallows, and DPS deemed this request insufficient. This Court defers to DPS's interpretation of its own rule – Cole's hearing request was insufficient pursuant to

DPS's rules. We further hold Cole was not deprived of due process when he failed to avail himself of the opportunity for a hearing.

¶19 Based upon our analysis, we reverse the district court's ruling that DPS violated Cole's due process rights by not granting him a hearing. The revocation entered by DPS stands reinstated.

COURT OF CIVIL APPEALS' OPINION VACATED; DISTRICT COURT'S ORDER REVERSED; ORDER ENTERED BY THE DEPARTMENT OF PUBLIC SAFETY STANDS REINSTATED

CONCUR: Darby, V.C.J., Winchester, Edmondson, Colbert, Combs, Kane, and Rowe, JJ.

DISSENT: Gurich, C.J. (by separate writing), and Kauger, J.

GURICH, C.J. with whom Kauger, J. joins, dissenting

¶1 I dissent to the majority opinion for two principal reasons. First, the majority opinion goes beyond the scope of issues raised on appeal and *sua sponte* reinstates Cole's license revocation. Second, DPS' failure to schedule a review after receiving Cole's written request for a review hearing was contrary to the express language contained in 47 O.S.2011 § 754 and fundamental principles of due process.[1] However, I do not agree with the COCA opinion, and I would remand the matter to DPS for an initial license revocation review hearing.

¶2 The Court's majority opinion has fashioned a remedy on appeal not properly before us.[2] The only real question before this Court is whether the trial court had authority to remand the case for an administrative hearing. ***DPS did not file a counter petition in error challenging the trial court's determination that DPS denied Cole due process by denying an administrative hearing.*** By failing to challenge this ruling, we are limited in our appellate review. In Bivins v. State ex rel. Okla. Mem'l Hosp., 1996 OK 5, ¶ 20, 917 P.2d 456, 465, we explained "[a] successful party below who did not bring an appeal, counter- or cross-appeal may, as appellee, argue only those errors which, if rectified, would support the correctness of the trial court's judgment." (Emphasis added). Thus, the only issue properly before us is whether the trial court had ***authority*** to remand the matter for an evidentiary hearing. ***The trial court's conclusions that the faxed hearing request was sufficient to mandate a review hearing was not challenged by DPS and our opinion should not address this issue.*** I would submit that the district court unquestionably had the power to remand the matter for a hearing. *See* 75 O.S.2011 § 322 (2) ("The reviewing court, also in the exercise of proper judicial discretion or authority, may remand the case to the agency for the taking and consideration of further evidence, if it is deemed essential to a proper disposition of the issue."). Therefore, I would affirm the trial court's order and direct the case remanded to conduct the license revocation review.

¶3 Notwithstanding, even if the issue of the sufficiency of Cole's faxed request for administrative review is properly before the Court, I believe Cole's attorney complied with 47 O.S. 2011 § 754.[3] On February 26, 2018, Cole's attorney timely requested a hearing concerning the revocation of Cole's license. The notice was submitted by facsimile. At the time, 47 O.S.2011 § 754 provided in relevant part:

> A. Any arrested person who is under twenty-one (21) years of age and has any measurable quantity of alcohol in the person's blood or breath, or any person twenty-one (21) years of age or older whose alcohol concentration is eight-hundredths (0.08) or more as shown by a breath test administered according to the provisions of this title, or any arrested person who has refused to submit to a breath or blood test, shall immediately surrender his or her driver license, permit or other evidence of driving privilege to the arresting law enforcement officer. The officer shall seize any driver license, permit, or other evidence of driving privilege surrendered by or found on the arrested person during a search.
>
> B. If the evidence of driving privilege surrendered to or seized by the officer has not expired and otherwise appears valid, the officer shall issue to the arrested person a dated receipt for that driver license, permit, or other evidence of driving privilege on a form prescribed by the Department of Public Safety. This receipt shall be recognized as a driver license and shall authorize the arrested person to operate a motor vehicle for a period not to exceed thirty (30) days. The receipt form shall contain and constitute a notice of revocation of driving privilege by the Department effective in thirty (30) days. The evidence of driving privilege and a copy of the receipt form issued to the arrested person shall be

attached to the sworn report of the officer and shall be submitted by mail or in person to the Department within seventy-two (72) hours of the issuance of the receipt. The failure of the officer to timely file this report shall not affect the authority of the Department to revoke the driving privilege of the arrested person.

C. Upon receipt of a written blood or breath test report reflecting that the arrested person, if under twenty-one (21) years of age, had any measurable quantity of alcohol in the person's blood or breath, or, if the arrested person is twenty-one (21) years of age or older, a blood or breath alcohol concentration of eight-hundredths (0.08) or more, accompanied by a sworn report from a law enforcement officer that the officer had reasonable grounds to believe the arrested person had been operating or was in actual physical control of a motor vehicle while under the influence of alcohol as prohibited by law, the Department shall revoke or deny the driving privilege of the arrested person for a period as provided by Section 6-205.1 of this title. Revocation or denial of the driving privilege of the arrested person shall become effective thirty (30) days after the arrested person is given written notice thereof by the officer as provided in this section or by the Department as provided in Section 2-116 of this title.

D. Upon the ***written request*** of a person whose driving privilege has been revoked or denied by notice given in accordance with this section or Section 2-116 of this title, the Department shall grant the person an opportunity to be heard if the request is received by the Department within ***fifteen (15) days after the notice***. The sworn report of the officer, together with the results of any test or tests, shall be deemed true, absent any facial deficiency, should the requesting person fail to appear at the scheduled hearing. A timely request shall stay the order of the Department until the disposition of the hearing unless the person is under cancellation, denial, suspension or revocation for some other reason. The Department may issue a temporary driving permit pending disposition of the hearing, if the person is otherwise eligible. If the hearing request is not timely filed, the revocation or denial shall be sustained. (emphasis added).

Section 754 imposes two requirements: (1) a request for review in writing; and (2) request for a hearing must be submitted within fifteen (15) days of notice of revocation from DPS. Nothing in the statute imposed restrictions on how the request was to be submitted to DPS; ***it merely had to be in writing.*** *See* Video Gaming Tech., Inc. v. Tulsa Cnty. Bd. of Tax Roll Corr, 2019 OK 84, ¶ 11, 455 P.3d 918, 921 (recognizing that statutes are interpreted using the text's "plain and ordinary meaning unless a contrary intention plainly appears.")

¶4 DPS rejected Cole's request for a review hearing, concluding he failed to properly submit his demand. Specifically, DPS determined that amendments to OAC § 595:1-3-7, approved in September 2017, prohibited submission of a request by facsimile.[4] The amended regulation reads:

> A request for a hearing must be in writing, on a form prescribed by the Department of Public Safety. This form is available at the Department's principal place of business at 3600 North Martin Luther King Avenue, Oklahoma City, OK or at www.ok.gov/DPS. The request shall be submitted to the Department of Public Safety. Hearing requests may only be submitted in person at the Department's principal place of business, or by mail to the address below. Hearing requests submitted other than in person or by mail will not be accepted and a hearing will not be granted. Hearing request forms mailed via the U.S. Postal Service shall be addressed to the Department of Public Safety, Legal Division, P.O. Box 11415, Oklahoma City, OK 73136. (emphasis added).

Yet, the prior version of OAC § 595:1-3-7 simply required the request to be submitted in writing – a draft which is entirely consistent with the wording of § 754. *See* 34 Okla. Reg. 1901 (eff. Sept. 1, 2017). Cole submitted his request for a hearing both in writing and in a timely manner. Submission of the review request by facsimile did not render it noncompliant; it fully complied with § 754. Cole absolutely complied with the statute and DPS undeniably received the notice. DPS rejected the notification solely because it was sent via facsimile and not by mail or in person.

¶5 I would submit that DPS rule § 595:1-3-7 sets forth additional requirements not contained

in § 754(D), and therefore the two conflict. Cornett v. Carr, 2013 OK 30, ¶ 6, 302 P.3d 769, 771; *see also* Cordillera Ranch, Ltd. v. Kendall County Appraisal Dist., 136 S.W.3d 249, 257 (noting "[a]dministrative agency rules cannot impose additional burdens, conditions, or restrictions exceeding or inconsistent with statutory provisions."). When a rule or regulation conflicts with a statutory enactment, the statute prevails. Ark. La. Gas Co. v. Travis, 1984 OK 33, ¶ 7, 682 P.2d 225, 227.

¶6 The facts in this case all weigh in favor of Appellant and against DPS. Appellant is entitled to an administrative hearing prior to the revocation of his license. I would vacate the decision of the COCA, reinstate the decision of the district court, and compel DPS to schedule an administrative review hearing with proper notice to the Appellant and his counsel.

Winchester, J.

1. *See* 47 O.S.2011, §§ 751, 753.

2. Title 47 O.S.2005, § 754(D) (superseded 2019) allowed Cole fifteen days to submit his hearing request after receiving notice of the revocation of his driver's license. By sending the courtesy letter a month after Cole received notice, DPS offered to consider a hearing request essentially out of time if Cole properly submitted it.

3. Section 250.2(B) states as follows:

> B. In creating agencies and designating their functions and purposes, the Legislature may delegate rulemaking authority to executive branch agencies to facilitate administration of legislative policy. The delegation of rulemaking authority is intended to eliminate the necessity of establishing every administrative aspect of general public policy by legislation. In so doing, however, the Legislature reserves to itself:
>
> 1. The right to retract any delegation of rulemaking authority unless otherwise precluded by the Oklahoma Constitution;
>
> 2. The right to establish any aspect of general policy by legislation, notwithstanding any delegation of rulemaking authority;
>
> 3. The right and responsibility to designate the method for rule promulgation, review and modification;
>
> 4. The right to approve or disapprove any adopted rule by joint resolution; and
>
> 5. The right to disapprove a proposed permanent, promulgated or emergency rule at any time if the Legislature determines such rule to be an imminent harm to the health, safety or welfare of the public or the state or if the Legislature determines that a rule is not consistent with legislative intent.

4. Cole relies on 47 O.S.2005, § 754(D) (superseded Nov. 1, 2019) to argue DPS does not have the authority to limit how it receives hearing requests. The relevant portion of the superseded statute cited by Cole states:

> D. Upon the written request of a person whose driving privilege has been revoked or denied by notice given in accordance with this section or Section 2-116 of this title, the Department shall grant the person an opportunity to be heard if the request is received by the Department within fifteen (15) days after the notice. . . . A timely request shall stay the order of the Department until the disposition of the hearing unless the person is under cancellation, denial, suspension or revocation for some other reason. . . . If the hearing request is not timely filed, the revocation or denial shall be sustained.

We reject Cole's argument that this statute limits the authority that DPS has to determine how it receives hearing requests. The superseded statute merely states the request must be in writing but does not address the method by which a person must submit a request. Further, we note that subsequent to the filing of Cole's appeal the Legislature removed the language from the statute relied upon by Cole. *See* 47 O.S. Supp. 2019, § 754. By removing the language, the Legislature gave additional discretion to DPS to determine how it receives administrative hearing requests.

The Court also notes that the Legislature attempted to amend 47 O.S.2005, § 754(D) with the Impaired Driving Elimination Act 2, SB No. 643, 56th Leg., 1st Sess. (Okla. 2017), which also removed the language relied upon by Cole. The Court declared the law unconstitutional – for other reasons – in *Hunsucker v. Fallin*, 2017 OK 100, 408 P.3d 599, and the law never took effect.

5. In *Osprey L.L.C. v. Kelly-Moore Paint Co. Inc.*, 1999 OK 50, 984 P.2d 194, the Court interpreted a contract provision, and it allowed a fax notice to stand in for hand delivery or mail. However, this case did not involve a question of contract interpretation but whether a government agency can create rules that are required to be followed when seeking to contest license suspensions. Further, the rule at issue here expressly excluded other methods of delivery, unlike the contract provision in the *Osprey L.L.C.* case. We need not devote any further explanation on how those two differ.

6. The Court further notes the requirement for DPS to hold a hearing within 60 days from receipt of the hearing request that this Court pronounced in *Nichols v. State ex rel. Department of Public Safety*, 2017 OK 20, ¶ 29, 392 P.3d 692, 698, was not triggered in this case because Cole failed to properly submit a hearing request.

GURICH, C.J. with whom Kauger, J. joins, dissenting

1. The procedural status of this case is not entirely clear. In May 2018, the district court concluded DPS' denial of a hearing was a violation of Cole's due process rights, and ordered the matter remanded to DPS for a review of Cole's license revocation. A journal entry memorializing this ruling was not filed until September 6, 2018. In the interim, DPS allegedly tried to comply with the district court's ruling, by scheduling a review hearing and sending notice to Cole and his attorney. DPS further alleges neither Cole nor his attorney appeared. Yet, there is nothing in the record to establish any of this actually took place; we have only been provided DPS' unsupported assertions.

2. While appellant did submit a proposition in his brief relating to the sufficiency of his faxed request for an administrative hearing, the issue was simply laying groundwork for the actual assignment of error before the Court – whether the trial court had authority to remedy the alleged due process violation created by DPS by remanding the case for a review hearing. *See* Appellant's Brief in Chief, p. 5 ("The trial court was correct the Appellant's original request was properly made and received, however, she was without authority of law in her decision to remand the matter for the Appellee to provide a hearing to the Appellant.")

3. *See generally*, Osprey L.L.C. v. Kelly-Moore Paint Co., 1999 OK 50, ¶ 15, 984 P.2d 194, 199-200 (recognizing that notice by facsimile served the same purpose of providing notice as the two methods set forth in lease).

4. This amendment was done ostensibly in connection with the enactment of S.B. 643, which provided a massive overhaul to Oklahoma's driving under the influence laws. Included in this legislation was an amendment to 47 O.S. § 754, which eliminated paragraph D – the procedure for seeking a revocation review hearing. Yet, our opinion in Hunsucker v. Fallin, 2017, OK 100, ¶ 2,408 P.3d 599,601, found S.B. 643 was unconstitutional, thereby restoring the version of § 754 in effect prior to the amendments. *See* Ethics Comm'n of State of Okla. v. Cullison, 1993 OK 37, ¶ 29, 850 P.2d 1069, 1078-79 (pronouncing the general rule "once the invalidly enacted statute has been declared a nullity, it leaves the law as it stood prior to the enactment.")

2020 OK 68

IN THE MATTER OF THE STRIKING OF NAMES OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONPAYMENT OF 2019 DUES

SCBD No. 6799. September 14, 2020

ORDER STRIKING NAMES

The Board of Governors of the Oklahoma Bar Association filed an Application for Order Striking Names of attorneys from the Oklaho-

ma Bar Association's membership rolls for failure to pay dues as members of the Oklahoma Bar Association for the year 2019.

Pursuant to the Rules Creating and Controlling the Oklahoma Bar Association (Rules), 5 O.S. 2011 ch. 1, app. 1, art. VIII §2, the Oklahoma Bar Association's members named on Exhibit A, attached hereto, were suspended from membership in the Oklahoma Bar Association and prohibited from practicing law in the State of Oklahoma by this Court's Order of June 10, 2019, for failure to pay their 2019 dues in accordance with Article VIII, Section 2 of the Rules. Based upon the application, this Court finds that the Board of Governors determined at its August 28, 2020, meeting that none of the Oklahoma Bar Association members named on Exhibit A, attached hereto, have applied for reinstatement, pursuant to Article VIII, Section 4 of the Rules, at the time of the filing of its application. The Board of Governors further requested that the members named on Exhibit A, attached hereto, shall cease to be members of the Oklahoma Bar Association and that their names should therefore be stricken from its membership rolls and the Roll of Attorneys pursuant to Article VIII, Section 5 of the Rules. This Court further finds that the actions of the Board of Governors of the Oklahoma Bar Association are in compliance with the Rules.

It is therefore ordered that the attorneys named as set forth on Exhibit A, attached hereto, are hereby stricken from the Roll of Attorneys for failure to pay their dues as members of the Association for the year 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 14th DAY OF SEPTEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

EXHIBIT A
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2020 OK 69

IN THE MATTER OF THE STRIKING OF NAMES OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONCOMPLIANCE WITH MANDATORY CONTINUING LEGAL EDUCATION REQUIREMENTS FOR THE YEAR 2018

SCBD No. 6800. September 14, 2020

ORDER STRIKING NAMES

The Board of Governors of the Oklahoma Bar Association filed an application for an Order Striking Names of attorneys from the Oklahoma Bar Association's membership rolls and from the practice of law in the State of Oklahoma for

failure to comply with the Rules for Mandatory Continuing Legal Education, 5 O.S. 2001, ch. 1, app. 1-B, for the year 2018.

Pursuant to Rule 6(d) of the Rules for Mandatory Continuing Legal Education, the Oklahoma Bar Association's members named on Exhibit A, attached hereto, were suspended from membership in the Association and the practice of law in the State of Oklahoma by Order of this Court on June 10, 2019, for noncompliance with Rules 3 and 5 of the Rules for Mandatory Continuing Legal Education for the year 2018. Based on its application, this Court finds that the Board of Governors determined at their August 28, 2020, meeting that none of the Oklahoma Bar Association's members named on Exhibit A, attached hereto, have applied for reinstatement within one year of the suspension order. Further the Board of Governors requested that the members named on Exhibit A, attached hereto, shall cease to be members of the Oklahoma Bar Association and their names should therefore be stricken from its membership rolls and the Roll of Attorneys. This Court finds that the actions of the Board of Governors of the Oklahoma Bar Association are in compliance with the Rules.

It is therefore ordered that the attorneys named on Exhibit A, attached hereto, are hereby stricken from the Roll of Attorneys for failure to comply with the Rules for Mandatory Continuing Legal Education for the year 2018.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 14th DAY OF SEPTEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

EXHIBIT A
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2020 OK 70

IN THE MATTER OF THE SUSPENSION OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONPAYMENT OF 2020 DUES

SCBD No. 6971. September 14, 2020

ORDER OF SUSPENSION FOR NONPAYMENT OF DUES

On August 28, 2020, the Board of Governors of the Oklahoma Bar Association filed an Application for the suspension of Oklahoma Bar Association members who failed to pay dues for the year 2020 as required by the Rules Creating and Controlling the Oklahoma Bar Association (Rules), 5 O.S. 2011, ch. 1, app. 1, art. VIII, §1 and in compliance with SCAD 2020-24 and SCAD 2020-29. The Board of Governors recommended that the members whose names appear on the Exhibit A attached to the Application be suspended from membership in the Oklahoma Bar Association and from the practice of law in the State of Oklahoma, as provided by the Rules, 5 O.S. 2011, ch. 1, app. 1, art. VIII, §2.

This Court finds that on or about April 1, 2020, the Executive Director of the Oklahoma Bar Association notified by certified mail all

members delinquent in the payment of dues and/or expense charges to the Oklahoma Bar Association for the year 2020. The Board of Governors have determined that the members set forth in Exhibit A, attached hereto, have not paid their dues and/or expense charges for the year as provided in the Rules.

This Court, having considered the Application of the Board of Governors of the Oklahoma Bar Association, finds that each of the Oklahoma Bar Association members named on Exhibit A, attached hereto, should be suspended from the Oklahoma Bar Association membership and shall not practice law in the State of Oklahoma until reinstated.

IT IS THEREFORE ORDERED that the attorneys named as set forth on Exhibit A, attached hereto, are hereby suspended from membership in the Association and prohibited from the practice of law in the State of Oklahoma for failure to pay membership dues for the year 2020 as required by the Rules Creating and Controlling the Oklahoma Bar Association.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 14TH DAY OF SEPTEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

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2020 OK 71

IN THE MATTER OF THE SUSPENSION OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONCOMPLIANCE WITH MANDATORY CONTINUING LEGAL EDUCATION REQUIREMENTS FOR THE YEAR 2019

SCBD No. 6972. September 14, 2020

ORDER OF SUSPENSION FOR FAILURE TO COMPLY WITH THE RULES FOR MANDATORY CONTINUING LEGAL EDUCATION

On August 28, 2020, the Board of Governors of the Oklahoma Bar Association filed an Application for the suspension of members who failed to comply with mandatory legal education requirements for the year 2019 as required by Rules 3 and 5 of the Rules for Mandatory Continuing Legal Education (MCLE Rules), 5 O.S. 2011, ch. 1, app. 1-B and in compliance with SCAD 2020-24 and SCAD 2020-29. The Board of Governors recommended the members, whose names appear on the Exhibit A attached to the Application, be suspended from membership in the Oklahoma Bar Association and prohibited from the practice of law in the State of Oklahoma, as provided by Rule 6 of the MCLE Rules.

This Court finds that on March 13, 2020, the Executive Director of the Oklahoma Bar Association mailed, by certified mail to all Oklahoma Bar Association members not in compliance with Rules 3 and 5 of the MCLE Rules, an Order to Show Cause within sixty days why the member's membership in the Oklahoma Bar Association should not be suspended. The Board of Governors determined that the Oklahoma Bar Association members named on Exhibit A of its Application have not shown good cause why the member's membership should not be suspended.

This Court, having considered the Application of the Board of Governors of the Oklahoma Bar Association, finds that each of the Oklahoma Bar Association members named on Exhibit A, attached hereto, should be suspended from Oklahoma Bar Association membership and shall not practice law in this state until reinstated.

IT IS THEREFORE ORDERED that the attorneys named on Exhibit A, attached hereto, are hereby suspended from membership in the Association and prohibited from the practice of law in the State of Oklahoma for failure to comply with the MCLE Rules for the year 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 14TH DAY OF SEPTEMBER, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

EXHIBIT A
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2020 OK 72

STATE OF OKLAHOMA ex rel., OKLAHOMA BAR ASSOCIATION, Complainant, v. DOUGLAS MARK GIERHART, Respondent.

SCBD No. 6848. September 15, 2020

BAR DISCIPLINARY PROCEEDING

¶0 Complainant, State of Oklahoma *ex rel.* Oklahoma Bar Association, charged Respondent, Douglas Mark Gierhart, with three counts of professional misconduct including failure to competently and diligently represent his clients, failure to communicate, collecting an unreasonable fee, mishandling client property, engaging in dishonest conduct, and commission of an act contrary to prescribed standards of conduct. The Trial Panel recommended Respondent be suspended for two years and one day. We hold there is clear and convincing evidence that the totality of Respondent's conduct warrants suspension for two years and one day. Respondent is ordered to pay the costs as herein provided within ninety days after this opinion becomes final.

RESPONDENT SUSPENDED TWO YEARS AND ONE DAY AND ORDERED TO PAY COSTS

Peter Haddock, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Timothy D. Beets, Midtown Attorneys, P.C., Oklahoma City, Oklahoma, for Respondent.

Rowe, J.:

¶1 Complainant, State of Oklahoma *ex rel.* Oklahoma Bar association began disciplinary proceedings pursuant to Rule 6, Rules Governing Disciplinary Proceedings ("RGDP"), 5 O.S. 2011 ch. 1, app. 1-A, alleging three counts of professional misconduct against Respondent, Douglas Mark Gierhart. Respondent is an active member of the Oklahoma Bar Association and is currently in good standing. Complainant's allegations arise in part from Respondent's mishandling of funds belonging to two clients. Complainant alleges Respondent's actions are in violation of the Oklahoma Rules of Professional Conduct ("ORPC"), 5 O.S.2011, ch. 1, app. 3-A, and the RGDP and are cause for professional discipline.

Procedural History

¶2 In April 2018, two grievances were filed with the Complainant against Respondent, one by a former employee of Respondent and one by a contractor with whom Respondent dealt during the probate of a client's estate. On April 25, 2018, Complainant opened a formal investigation into the allegations made by Respondent's former employee. After receiving Respondent's responses to both grievances, Complainant filed its formal Complaint on October 3, 2019, which contained three counts of alleged misconduct. Respondent filed an answer to the Complaint on October 23, 2019.

¶3 On November 19, 2019, the Professional Responsibility Tribunal ("Tribunal") held a hearing on the allegations contained in the Complaint, pursuant to Rule 6, RGDP. On January 6, 2020, the Tribunal filed its report wherein it found that Complainant had established by clear and convincing evidence that Respondent violated Rules 1.1, 1.3, 1.4, 1.5, 1.15(a), 1.15(d), 8.4(a), and 8.4(c), ORPC, and Rule 1.3, RGDP. The Tribunal unanimously recommended that Respondent be suspended from the practice of law for two years and one day. On January 8, 2020, the Tribunal issued a corrected report; the Tribunal's findings and recommendation were unchanged.

Standard of Review

¶4 This Court possesses exclusive jurisdiction in Bar disciplinary proceedings. *State ex rel. Oklahoma Bar Ass'n v. Holden,* 1995 OK 25, ¶ 10, 895 P.2d 707, 711. We review the evidence *de novo* to determine whether the Bar has proven its allegations of misconduct by clear and convincing evidence. Rule 6.12(c), RGDP; *State ex rel. Oklahoma Bar Ass'n v. Bolusky,* 2001 OK 26, ¶ 7, 23 P.3d 268, 272. Clear and convincing evidence is "that measure or degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *State ex rel. Oklahoma Bar Ass'n v. Green*, 1997 OK 39, ¶ 5, 936 P.3d 947, 949.

¶5 Our goals in disciplinary proceedings are to protect the interests of the public and to preserve the integrity of the courts and the legal profession, not to punish attorneys. *State ex rel. Oklahoma Bar Ass'n v. Kinsey,* 2009 OK 31, ¶ 15, 212 P.3d 1186, 1192. We consider the discipline previously imposed for similar professional misconduct to ensure that discipline is administered uniformly. *Id.* ¶ 16, 212 P.3d at 1192 (citing *State ex rel. Oklahoma Bar Ass'n v. Doris,* 1999 OK 94, ¶ 37, 991 P.2d 1015, 1025). Discipline, however, is decided on a case-by-case basis to account for differences in the offending conduct and mitigating circumstances. *Id.*

Background

I. Count I: Estate of Miriam Felty

¶6 Miriam Felty died intestate while residing in Oklahoma. Her daughter and sole heir, Wendy Reed, retained Respondent to probate the Felty estate. On September 15, 2015, Re-spondent filed a Petition for Probate, Determination of Heirs, and Issuance of Letters of Administration in Oklahoma County. That same day, at the suggestion of Respondent, Leslie Withee, a paralegal in Respondent's office, was nominated by Reed to serve as administratrix of the Felty estate.[1] On October 21, 2015, the court entered an Order Admitting the Estate to Probate and Issuance of Letters of Administration appointing Withee as administratrix.

¶7 The primary assets of the Felty estate included two residences, referred to in the parties' briefs as "63rd Street" and "Federal Court;" Tinker Federal Credit Union ("TFCU") accounts totaling $12,584.52; and life insurance proceeds in the amount of $10,000.00. After some necessary clean-up and repairs, both of the properties were sold with the 63rd Street property returning net proceeds of $21,469.78, and the Federal Court property returning net proceeds of $41,539.89. These funds, as well as those from the TFCU accounts and the life insurance policy, were deposited in Respondent's trust account.

¶8 In September 2016, Respondent instructed Withee, in her capacity as administratrix, to issue a check from his trust account in the amount of $2,725.00 made payable to herself and drawn against the Felty estate funds. He further instructed her to endorse the check and give it back to him. Respondent then endorsed the check and deposited it in one of his personal accounts at TFCU. Withee claimed that these funds were used by Respondent for a personal vacation.

¶9 In July 2017, Withee left her position in Respondent's law office and took a job with another firm. Despite the change in her employment, Withee remained in her position as administratrix of the Felty estate. However, because the estate funds were held in Respondent's trust account, Withee no longer had access to them. She also lost access to files relevant to the administration of the Felty estate. On January 10, 2018, Withee contacted Respondent's office and requested access to the Felty case files and the estate funds held in Respondent's trust account. Neither were produced by Respondent.

¶10 On January 25, 2018, Respondent filed a Final Account and Petition for Order Allowing Final Account, Determination of Heirship, Distribution, and Discharge, wherein he requested attorney's fees totaling $19,147.50. Respondent filed the Final Account without providing proper notice to Reed or Withee. On March 6,

2018, the court held a hearing on Respondent's proposed Final Account. Reed testified that, prior to the hearing, she received a call from Respondent's office indicating that she did not need to attend because the hearing would be continued. Neither Reed nor Withee attended the hearing. On March 9, 2018, the court entered an Order Allowing Final Account, Determining Heirs, and Final Decree of Distribution, wherein the court approved all of Respondent's requested fees. The Order Allowing Final Account was filed on March 14, 2018.

¶11 Withee learned of the Order Allowing Final Account on the day it was filed, and that same day, proceeding *pro se*, filed a Motion to Vacate Order Allowing Final Account. Withee then obtained new counsel, Sally Ketchum Edwards, who entered her appearance before the court on March 16, 2018. The Order Allowing Final Account was vacated by agreement on April 10, 2018. Throughout April and May 2018, Edwards wrote to Respondent on four occasions advising Respondent that she considered his fee excessive and requesting that he turn over the funds in his trust account belonging to the estate as well as any files relevant to the estate. Respondent provided some of the requested materials but failed to turn over the estate funds.

¶12 Based on the materials provided by Respondent, Withee filed an Interim Accounting on May 2, 2018. The Interim Accounting estimated that Respondent had $40,664.94 in estate funds remaining in his trust account. The Interim Accounting reflected certain errors in the Final Account filed by Respondent on January 25, 2018. Among them, the January 2018 Final Account indicated that certain administrative expenses owing to Kathy Upton (dba K&M Real Estate Investments) for work done on the 63rd Street and Federal Court properties had been paid when, in fact, they had not.

¶13 On June 7, 2018, Withee filed an Amended Interim Accounting, which indicated that Respondent should have $39,164.94 in estate assets remaining in his trust account. That same day, Withee filed a Motion to Compel Respondent to deliver those funds. On August 10, 2018, Respondent filed an objection to the Motion to Compel. Respondent included with his objection a revised Final Account showing that he had $18,451.79 in estate funds remaining in his trust account. In this revised Final Account, Respondent listed the $19,147.50 in fees he was previously awarded by the trial court as a disbursement. Taking the fees and remaining balance together, Respondent should have had $37,599.29 in estate funds remaining in his trust account.

¶14 The court held a hearing on the Motion to Compel on August 21, 2018. On the day of the hearing, Respondent filed an Application for Attorney Fees and Costs seeking $19,147.50, equal to the amount he had been awarded in the March 2018 Order Allowing Final Account. The court denied Respondent's requested fee and ordered him to turn over $37,000.00 belonging to the estate. Following the hearing, Respondent was only able to turn over $18,451.79. On September 24, 2018, Withee filed a Motion of Personal Representative for Contempt Citation to Issue to Douglas M. Gierhart because Respondent had still not paid the balance of the $37,000.00 he had been ordered to turn over by the court. Respondent eventually paid the remaining $18,548.21 on November 21, 2018. Respondent admitted during his testimony before the Tribunal that in order to pay the remaining balance, he borrowed money from family and used fees earned from unrelated cases.

II. Count II: Upton Grievance

¶15 Kathy Upton (dba K&M Real Estate Investments) was a contractor who was hired to prepare the two Felty estate properties for sale. In or around April 2018, Upton learned that Respondent had filed a Final Account with the court indicating that she had been paid for her services. On April 6, 2018, Upton filed a Claim for Administrative Expenses with the court, indicating that she was owed $4,153.98 for work done on the Federal Court property and $2,454.21 for work done on the 63rd Street property, for a total of $6,608.19. The Final Account filed by Respondent on January 25, 2018, indicated that $4,159.00 had been paid to Upton for her work on the Federal Court property and $2,454.21 had been paid to K&M Real Estate Investments for work done on the 63rd Street property. During his testimony before the Tribunal, Respondent admitted that the Final Account he originally submitted was wrong insofar that it indicated these expenses had been paid.

III. Count III: In re Madison Aelmore

¶16 In or around March 2008, Respondent filed a personal injury lawsuit in Oklahoma County on behalf of Anita Aelmore, individu-

ally and as parent and next friend of Madison Aelmore, a minor. The case was ultimately settled, and on May 1, 2008, the court entered an Order for Deposit of Settlement Proceeds. The Order approved the total settlement of $12,000.00 and authorized withdrawals of $2,207.25 to cover Madison's medical expenses and $3,625.58 to cover Respondent's attorney fee. The Order further provided that the balance, $6,167.17, would be deposited in a trust account for Madison's benefit at MidFirst Bank, and directed Respondent to provide MidFirst Bank with a copy of the Order when the deposit was made. The funds were to be held in the trust account until Madison turned eighteen.

¶17 Instead, in or around June 2008, Respondent opened a Certificate of Deposit ("CD") in his own name at Advantage Bank in the amount of $3,959.92. Respondent admitted during his testimony before the Tribunal that he did not provide Advantage Bank with a copy of the court's Order. He further admitted that he never attempted to contact Madison Aelmore or her Guardian ad litem, Anita Aelmore, when Madison turned eighteen.

¶18 The Oklahoma Bar Association ("OBA") learned of this incident in April 2018 when Withee submitted her grievance, in which she alleged that Respondent had disregarded a court order regarding the handling of settlement funds belonging to a minor and failed to deliver said funds when the minor turned eighteen. Thereafter, an OBA investigator located and contacted Madison Aelmore and suggested that she contact Respondent regarding her settlement funds. In July 2018, two months prior to Madison's twentieth birthday, Madison and her father, Bud Aelmore, met with Respondent. At this meeting, Respondent delivered a check, drawn from his trust account, to Madison Aelmore for $6,387.43, which represented Respondent's calculation of the amount she was owed. Respondent testified that the funds he placed in the CD at Advantage Bank still remain there. Respondent also admitted that he used the CD as collateral for a personal loan.

Discussion

I. Counts I and II: Mishandling of the Felty Estate

¶19 Because they both arise from Respondent's handling of the Felty estate, we will analyze the misconduct alleged under Counts I and II together. Complainant submits that Respondent's conduct with respect to Counts I and II amounts to violations of Rules 1.1, 1.3, 1.4, 1.5, 1.15(a), 1.15(d), 8.4(a), 8.4(c), ORPC, and Rule 1.3, RGDP.

¶20 Rule 1.1 requires that a lawyer provide competent representation to a client.[2] Respondent admits in his brief that he lacked sufficient understanding of the law regarding payment of attorney's fees in probate cases, which contributed to his mishandling of the funds in this case. While Respondent's deficiencies in concluding the probate proceedings, in particular his handling of the final account, appears to be an effort on his part to hide his misappropriation (discussed *infra*), the Complainant has not shown these deficiencies were the result of inadequate knowledge, skill, thoroughness, or preparation. Rule 1.3 requires that a lawyer act with reasonable diligence and promptness in representing a client.[3] Complainant has not shown that Respondent's shortcomings stem necessarily from a lack of diligence or promptness. Accordingly, we cannot find by clear and convincing evidence that Respondent violated either Rule 1.1 or Rule 1.3.

¶21 Rule 1.4 requires that a lawyer maintain communication with the client, including among other things keeping the client reasonably informed of the status of the matter and promptly complying with reasonable requests for information.[4] Respondent's failure to obtain Withee's approval of the Final Account, to provide Withee and Reed with proper notice that he had filed the Final Account, and to provide Withee and Reed proper notice of the hearing on the Final Account amounts to a violation of Rule 1.4.[5]

¶22 Rule 1.5(a) prohibits a lawyer from making an agreement for, charging, or collecting unreasonable fees.[6] In total, Respondent received $5,000.00 in exchange for services rendered in the probate of the Felty estate.[7] This included a $2,500.00 payment from Reed at the outset and a final award of $2,500.00 in attorney's fee, when the estate was settled. We do not find Respondent's fee in this matter to be unreasonable, nor is the evidence sufficient to prove Respondent's originally requested fee of $19,147.50, in itself, amounts to a violation of Rule 1.5(a).[8]

¶23 Rule 1.15 relates to a lawyer's duties in safekeeping client property.[9] Violations of Rule 1.15 can be sorted into three categories: (1) commingling, (2) simple conversion, and (3)

misappropriation. *State ex rel. Oklahoma Bar Ass'n v. Combs*, 2007 OK 65, ¶ 13, 175 P.3d 340, 346. The categories carry increasing levels of culpability, with misappropriation being the most serious. *Id.* Commingling occurs when client funds are combined with the lawyer's personal funds. *Id.* at ¶ 14, 175 P.3d at 346. Simple conversion occurs when an attorney applies a client's money to a purpose other than that for which it came to be entrusted to the lawyer. *Id.* at ¶ 15, 175 P.3d at 346. Misappropriation occurs when an attorney purposely deprives a client of money through deceit and fraud. *Id.* at ¶ 16, 175 P.3d at 346. A finding of misappropriation, regardless of exceptional mitigating factors, warrants the imposition of harsh discipline. *State ex rel. Oklahoma Bar Ass'n v. Mansfield*, 2015 OK 22, ¶ 18, 350 P.3d 108, 115.

¶24 In September 2016, Respondent directed Withee to issue a check for $2,725.00, drawn from the estate funds in his trust account and made payable to herself. He then directed her to endorse the check and give it back to him. Respondent deposited the check into one of his personal accounts at TFCU. This was done without court approval and well before Respondent filed his original Final Account in January 2018. Respondent's actions in this regard were clearly improper and evidence an intent to defraud. Thus, we find that Respondent misappropriated Felty estate funds in violation of Rule 1.15.

¶25 Complainant further contends that Respondent mishandled the $18,548.21 that he was unable to turn over following the hearing on the Motion to Compel. Specifically, Complainant posits that Respondent took these funds as a fee without approval of the court. However, pursuant to the March 2018 Order Allowing Final Account, Respondent received approval, at least for a brief time, to take a fee of $19,147.50. The problem with Respondent's conduct with respect to these funds is not so much a matter of whether he had approval to take them as a fee, but rather how he obtained that approval and how he handled the funds after the March 2018 Order Allowing Final Account was vacated by agreement.

¶26 Respondent filed the Petition for Order Allowing Final Account on January 25, 2018. However, he failed to obtain Withee's approval of the Final Account, to provide Withee and Reed with proper notice that he had filed the Final Account, and to provide Withee and Reed proper notice of the hearing on the Final Account. Despite these deficiencies, the Order Allowing Final Account was entered on March 9 and filed on March 14, 2018. Thus, to the extent Respondent received approval to take the funds in question as a fee, it was improperly obtained.

¶27 Furthermore, any approval Respondent had to take this fee was remarkably short-lived. Withee learned of the Order Allowing Final Account when it was filed on March 14, 2018, and filed a Motion to Vacate that same day. The Order Allowing Final Account was vacated by agreement on April 10, 2018. Although he agreed that the Order should be vacated based on the statutory and procedural deficiencies, Respondent did not re-deposit the $19,147.50 into his trust account. Several months later, when Withee filed a Motion to Compel Respondent to deliver the estate funds in his trust account, Respondent submitted, along with his objection to the Motion to Compel, a revised Final Account that listed the $19,147.50 as a disbursement. At no point after the Agreed Order to Vacate did Respondent advise either the court or the administratrix that he intended to retain the fee. Although he had already taken the fee, on the day of the hearing on the Motion to Compel, Respondent filed an Application for Attorney Fees and Costs seeking $19,147.50. The court ultimately declined to approve the fee, and when the court ordered Respondent to turn over $37,000.00 to the estate, he could not produce $18,548.21 of that amount. He later reimbursed the estate using borrowed money and earned fees from unrelated cases.[10]

¶28 Respondent's conduct in this regard amounts to misappropriation. Most notably, his attempt to obtain the Order Allowing Final Account without providing any notice to the client or administratrix is evidence of an intent to deprive the Felty estate of the funds in question through fraud and deceit. Based on the totality of the Respondent's behavior, we find that Respondent misappropriated the $18,548.21 in violation of Rule 1.15.

¶29 Additionally, Rule 1.15(d) specifically requires that a lawyer promptly deliver to a client any funds or other property that the client is entitled to receive. Respondent failed to promptly comply with numerous requests from Withee and Edwards to turn over the Felty estate files and funds, and in doing so, he violated Rule 1.15(d).

¶30 Rule 8.4(a) prohibits a lawyer from violating or attempting to violate the Rules of Professional conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another. [11] When Respondent directed Withee to issue a check for $2,725.00 unto herself, drawn from the Felty estate funds, and then endorse the check over to him, his conduct amounted to a violation of Rule 8.4(a).

¶31 Rule 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[12] For conduct to constitute a violation of Rule 8.4(c), it must be shown by clear and convincing evidence that the declarant engaged in misrepresentation, dishonesty, fraud and/or deceit, and that the declarant had an underlying motive, i.e., bad or evil intent. *State of Oklahoma ex rel. Oklahoma Bar Ass'n v. Siegrist*, 2020 OK 18, ¶ 11, 461 P.3d 213, 218. In directing Withee to make the $2,725.00 check payable to herself and then endorse it over to him, Respondent misrepresented the purpose for which these funds would be used and to whom they were being given. Furthermore, he did so with the requisite bad intent to use them for his own personal benefit.

¶32 Complainant further alleges that Respondent violated Rule 8.4(c) by misrepresenting to the court in the January 2018 Final Account that Kathy Upton had been paid for her services in preparing the Felty properties for sale. In this regard, the Upton Complaint was likely avoidable had Respondent not violated Rule 1.4, *supra*. Complainant has shown that Respondent indicated to the court that Kathy Upton had been paid when, in fact, she had not. However, Complainant has not shown by clear and convincing evidence that Respondent acted with the requisite bad intent to constitute a violation of Rule 8.4(c). Accordingly, we find that Respondent violated Rule 8.4(c) as to Count I, but not as to Count II.

¶33 Based on the foregoing, with respect to Counts I and II we find that Complainant has established by clear and convincing evidence the alleged that Respondent engaged in misconduct in violation of Rules 1.4, 1.15, and 8.4, ORPC. Furthermore, we find that Respondent has engaged in acts contrary to prescribed standards of conduct and which bring discredit upon the legal profession, in violation of Rule 1.3, RGDP.[13]

II. Count III: Aelmore Settlement

¶34 Complainant submits that Respondent's conduct with respect to Count III amounts to violations of Rules 1.3, 1.4, 1.15(a), 1.15(f), 8.4 (a), 8.4(c), ORPC and Rule 1.3, RGDP.

¶35 We find that Respondent violated Rules 1.3 and 1.4 in his handling of Madison Aelmore's settlement funds. Specifically, Respondent failed to comply with almost every material provision of the court's Order for Deposit of Settlement Proceeds. Respondent deposited an amount less than what was explicitly required by the Order. He deposited the funds at a different institution than the one required by the Order. He placed the funds in a CD under his name only, rather than a trust account for the benefit of Madison Aelmore. Respondent also failed to provide Advantage Bank with a copy of the court's Order, which would have put the bank on notice that the funds did not belong to him and might have prevented him from opening the CD altogether. Respondent's inability to comply with a court order demonstrates a lack of diligence in his representation. Respondent's subsequent failure to inform Madison or her guardian ad litem as to what he had done with the funds demonstrates a lack of communication.

¶36 Respondent's mishandling of Madison Aelmore's settlement funds also amounts to misappropriation in violation of Rule 1.15. It seems clear that if Withee had not brought Respondent's misconduct to the attention of the OBA, Madison Aelmore likely would never have received her settlement funds. Furthermore, Respondent's wholesale disregard for the court's Order demonstrates that he purposely sought to deprive Madison of her property through deceit and fraud. Respondent engaged in dishonesty toward the court, the client, and the bank.

¶37 Rule 1.15(f) in particular provides:

> Where funds or other items of property entrusted to a lawyer have been impressed with a specific purpose as to their use, they shall retain that specific character unless otherwise authorized by a client or third person or prohibited by law. Where funds are impressed with a specific purpose, a lawyer may not subject them to a counterclaim, set off for fees, or subject them to a lien.

Respondent violated Rule 1.15(f) by failing to observe the court's Order regarding the establishment of the minor's trust account and instead establishing a CD in his own name, which he then used as collateral for a personal loan.

¶38 Respondent's conduct also amounts to a violation of Rules 8.4(a) and (c). At the very least, Respondent made misrepresentations to Advantage Bank regarding the ownership of the funds when he failed to provide the bank with a copy of the court's Order and placed them in a CD in his name only.

¶39 Based on the foregoing, we find that Complainant has established by clear and convincing evidence the alleged misconduct in Count III and that Respondent's misconduct places him in violation of Rules 1.3, 1.4, 1.15, and 8.4, ORPC. Furthermore, we find Respondent acted in a manner contrary to prescribed standards of conduct and which brings discredit upon the legal profession, in violation of Rule 1.3, RGDP.

Mitigation

¶40 Respondent has practiced law for approximately 37 years and has not previously been the subject of any formal discipline. Respondent presented two character witnesses, Joel Hall and Trace Morgan, both of whom are attorneys in good standing and both of whom testified to Respondent's general honesty and professionalism. Furthermore, Respondent notes that all parties who were harmed by his misconduct were made whole or nearly whole. Although it took several months, Respondent ultimately delivered all $37,000.00 that he was ordered to turn over to the Felty estate. Kathy Upton was ultimately paid her outstanding fees out of the Felty estate funds. Additionally, Respondent attempted to calculate the amount Madison Aelmore would have been owed had her settlement funds been handled in accordance with the court's order, and he provided her a check in that amount from his trust account.

Discipline

¶41 Our goals in bar disciplinary matters are to protect the interests of the public and preserve the integrity of the legal profession, not to punish attorneys. *Kinsey*, 2009 OK 31, ¶ 15, 212 P.3d 1186, 1192. With these goals in mind, we must weigh all relevant factors including those that justify severe sanctions and those that would mitigate the severity of discipline. *State ex rel. Okla. Bar Ass'n v. Stewart*, 2003 OK 13, ¶ 19, 71 P.3d 1, 4. We must also weigh the deterrent effect of our discipline on the Respondent and the Oklahoma Bar as a whole. *State ex rel. Okla. Bar Ass'n v. Taylor*, 2003 OK 56, ¶ 22, 71 P.3d 18, 29.

¶42 We have recently considered a number of cases involving misappropriation of client funds. In *State ex rel. Okla. Bar Ass'n v. Siegrist*, 2020 OK 18, 461 P.3d 203, the respondent was found to have misappropriated $1,135,000.00 as the personal representative of his father's estate and failed to competently and diligently represent a client in a separate matter. After his misconduct was brought to the attention of the OBA, the respondent failed to cooperate with the investigation, respond to grievances submitted against him, file an answer to the formal Complaint, and appear at his own disciplinary hearing. 2020 OK 18, ¶ 19, 461 P.3d 213, 219. We found that the respondent's misconduct warranted disbarment. *Id.* at ¶ 21, 461 P.3d at 219.

¶43 In *State ex rel. Okla. Bar Ass'n v. Miller*, 2020 OK 4, 461 P.3d 187, the respondent was found to have misappropriated $4,600.00 in funds acquired during the sale of assets obtained in the settlement of a personal injury lawsuit. Additionally, the respondent failed to render competent and diligent representation and communicate with her clients. 2020 OK 4, ¶¶ 29-30, 461 P.3d 187, 200. When confronted with her misconduct, the respondent failed to cooperate with and provided misleading information to the OBA during its investigation. *Id.* at ¶ 37, 461 P.3d at 201. We found that the respondent's misconduct warranted disbarment. *Id.* at ¶ 40, 461 P.3d at 202.

¶44 In *State ex rel. Okla. Bar Ass'n v. Mayes*, 2003 OK 23, 66 P.3d 398, the respondent was found to have misappropriated approximately $20,000.00 in funds owing to two minor children from the settlement of a wrongful death action on behalf of their mother's estate. The respondent failed to cooperate with the OBA's investigation of his misconduct. 2003 OK 23, ¶¶ 12-13, 66 P.3d 398, 403. Prior to the complaint of misappropriation, he had received a six-month suspension of his law license for failing to adequately supervise a non-lawyer office manager and improperly taking in a portion of one of his client's personal injury settlement proceeds, which were converted or commingled by the office manager. *Id.* at ¶ 6, 66 P.3d at 402. The respondent ultimately made

partial restitution to the two minors, totaling approximately $14,000.00. *Id.* at ¶ 27, 66 P.3d at 408. We found that the respondent's misconduct warranted disbarment. *Id.* at ¶ 30, 66 P.3d at 408-09.

¶45 Cases that do not involve misappropriation but involve other forms of misconduct similar to Respondent's have yielded more disparate results. In *State ex rel. Okla. Bar Ass'n v. Whitebrook*, 2010 OK 72, 242 P.3d 517, the respondent failed to render competent and diligent representation, failed to communicate with his clients, and charged and collected unreasonable attorney's fees. The respondent also failed to participate in the disciplinary process at every step. 2010 OK 72, ¶¶ 10-14, 242 P.3d 517, 520. We found that his misconduct warranted a suspension of two years and one day. *Id.* at ¶ 26, 242 P.3d at 523. In *State ex rel. Okla. Bar Ass'n v. Benefield*, 2005 OK 75, 125 P.3d 1191, the respondent admitted that he had failed to competently and diligently represent his clients, failed to communicate, and charged and collected unreasonable fees. The respondent cooperated in the disciplinary proceedings and expressed remorse for his conduct, but he had a history of discipline related to client neglect. 2005 OK 75, ¶ 23, 125 P.3d 1191, 1195. We found that the respondent's misconduct warranted a one-year suspension.

¶46 Here, Complainant recommends that Respondent's license be suspended for two years and one day. We agree. A finding that an attorney misappropriated client funds warrants the imposition of harsh discipline, regardless of any mitigating factors. *Miller*, 2020 OK 4, ¶ 35, 461 P.3d at 201. Given the precedents above, disbarment would not be unwarranted. Respondent deprived both the Felty estate and Madison Aelmore of funds that rightfully belonged to them. His conduct demonstrated an intent to defraud, and in the case of the Aelmore settlement funds, a lack of regard for the court's orders. Respondent's misconduct, however, was not accompanied by many of the aggravating factors present in *Siegrist*, *Miller*, and *Mayes*. Respondent cooperated with the OBA's investigation and the disciplinary proceedings. Furthermore, he does not have a history of prior discipline, despite practicing for 37 years.

¶47 Our primary goals in disciplinary proceedings are to protect the interests of the public while preserving the integrity of the courts and the legal profession. *Kinsey*, 2009 OK 31, ¶ 15, 212 P.3d at 1192. We also aim to deter future misconduct by providing notice to attorneys that the conduct in question will not be tolerated. *State ex rel. Okla. Bar Ass'n v. Watkins*, 2019 OK 76, ¶ 37, 463 P.3d 174, 184. Accordingly, we find that a suspension of two years and one day is appropriate to accomplish our duty of protecting the public interest and preserving the integrity of the legal profession.

Assessment of Costs

¶48 On January 7, 2020, Complainant filed an application to assess the costs of the disciplinary proceedings in the amount of $4,460.06. Respondent did not file an objection to the application. Rule 6.16, RGDP, provides that in disciplinary proceedings where discipline actually results, "the cost of the investigation, the record, and disciplinary proceedings shall be surcharged against the disciplined lawyer unless remitted in whole or in part by the Supreme Court for good cause shown." Respondent is hereby ordered to pay costs in the amount of $4,460.06 within ninety days of the effective date of this opinion. Rule 6.16, RGDP.

RESPONDENT SUSPENDED TWO YEARS AND ONE DAY AND ORDERED TO PAY COSTS

Gurich, C.J, Darby, V.C.J., Winchester, Edmondson, Colbert, Kane, JJ., concur; Combs, J., recused.

Kauger, J., concurring in part, dissenting in part:

¶1 I concur that discipline should be imposed.

Rowe, J.:

1. Although these issues were not raised by Complainant, we note the impropriety of this arrangement and the inherent conflict of interest for Withee in her dual capacities as Respondent's employee and administratrix of the Felty estate. Withee testified before the Tribunal that her interest in maintaining her employment compelled her to take actions that were not consistent with the best interests of the Felty estate.

2. Rule 1.1, ORPC, provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

3. Rule 1.3, ORPC, provides, "A lawyer shall act with reasonable diligence and promptness in representing a client."

Evident in the comments, Rule 1.3 primarily imposes an obligation on an attorney to pursue matters on behalf of clients diligently and ultimately bring them to a timely conclusion. Comment 1 indicates that a client's interests should be pursued diligently in spite of opposition, obstruction, or inconvenience. Comment 2 states a lawyer should manage his or her work load appropriately to ensure that each matter is handled competently and in a timely manner. Comment 3 notes that procrastination is perhaps the most widely resented professional shortcoming.

The emphasis on timeliness in Rule 1.3 is further born out in our prior decisions. *See State ex rel. Okla. Bar Ass'n v. Miller*, 2020 OK 4, 461 P.3d 187 (finding a violation where the attorney failed to timely file

actions under the Oklahoma Governmental Tort Claims Act due to a leap year miscalculation); *State ex rel. Okla. Bar Ass'n*, 2013 OK 22, 299 P.3d 488 (finding a violation where attorney consistently missed deadlines and sought reconsideration); *State ex rel. Okla. Bar Ass'n v. Loeliger*, 2005 OK 79, 127 P.3d 591 (finding a violation where the attorney failed to timely file a products liability claim before the statute of limitations had run).

Therefore, in assessing potential Rule 1.3 violations, we look to see whether an attorney has failed to pursue his or her client's interests in a diligent and timely manner.

4. Rule 1.4, ORPC, provides:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant information on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

5. In addition to demonstrating a failure of communication, Respondent's conduct in this regard was inconsistent with statutory requirements regarding the probate procedure. At the final accounting for settlement of an estate, an administrator is required to render an exhibit under oath showing the amount of money received and expended by her; the amount of all claims presented against the estate, as well as the names of the claimants; and, all other matters necessary to show the condition of the estate's affairs. 58 O.S. § 541. The Final Account Respondent submitted on January 25, 2018, was not signed by Withee when submitted to the court.

6. Rule 1.5, ORPC, provides:

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

[...]

7. This amount does not include the $2,750.00 Respondent misappropriated, discussed *infra*.

8. Respondent did provide the trial court with a billing summary showing time entries billed at the rate of $250.00 per hour in support of his requested attorney fee.

9. Rule 1.15, ORPC, provides:

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

[...]

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

[....]

10. In late 2016 – more than a year prior to Respondent filing his first final account – when the Respondent should have had in excess of $51,000.00 in his trust account for the Felty estate alone, the balance of his trust account fell below $13,000.00.

11. Rule 8.4(a), ORPC, provides:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

[...]

12. Rule 8.4(c), ORPC, provides:

It is professional misconduct for a lawyer to:

[...]

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

[....]

13. Rule 1.3, RGDP, provides:

The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not a condition precedent to the imposition of discipline.

2021 OBA Board of Governors Vacancies

Nominating Petition Deadline was 5 p.m. Friday, Sept. 11, 2020

OFFICERS
President-Elect
Current: Michael C. Mordy, Ardmore
(One-year term: 2021)
Mr. Mordy automatically becomes OBA president Jan. 1, 2021
Nominee: **James R. Hicks, Tulsa**

Vice President
Current: Brandi N. Nowakowski, Shawnee
(One-year term: 2021)
Nominee: **Charles E. Geister III, Oklahoma City**

BOARD OF GOVERNORS
Supreme Court
Judicial District One
Current: Brian T. Hermanson, Newkirk
Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers, Washington counties
(Three-year term: 2021-2023)
Nominee: **Michael R. Vanderburg, Ponca City**

Supreme Court
Judicial District Six
Current: D. Kenyon Williams Jr., Tulsa
Tulsa County
(Three-year term: 2021-2023)
Nominee: **Richard D. White Jr., Tulsa**

Supreme Court
Judicial District Seven
Current: Matthew C. Beese, Muskogee
Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee, Wagoner counties
(Three-year term: 2021-2023)
Nominee: **Benjamin R. Hilfiger, Muskogee**

Member At Large
Current: Brian K. Morton, Oklahoma City
Statewide
(Three-year term: 2021-2023)
Nominees:
Cody J. Cooper, Oklahoma City
Elliott C. Crawford, Oklahoma City
April D. Kelso, Oklahoma City
Kara I. Smith, 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.

Terms of the present OBA officers and governors will terminate Dec. 31, 2020.

An election will be held for the Member At Large position. The Oklahoma Supreme Court has issued an order (SCBD 6938) allowing the OBA to conduct its Annual Meeting in an alternative method to an in-person meeting allowing delegates to vote by mail. Ballots for the election will be mailed Sept. 21 with a return deadline of Friday, Oct. 9. If needed, runoff ballots will be mailed Oct. 19 with a return date of Monday, Nov. 2.

Counties needing to certify Delegate and Alternate selections should send certifications TODAY to: OBA Executive Director John Morris Williams, c/o Debbie Brink, P.O. Box 53036, Oklahoma City, OK 73152-3036, fax: 405-416-7001 or email debbieb@okbar.org.

Oklahoma Bar Association Nominating Petitions

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

OFFICERS
President-Elect
James R. Hicks, Tulsa
Nominating Petitions have been filed nominating James R. Hicks, Tulsa for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2021.

A total of 175 signatures appear on the petitions.

Vice President
Charles E. Geister III, Oklahoma City
Nominating Petitions have been filed nominating Charles E. Geister III, Oklahoma City for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2021.

A total of 231 signatures appear on the petitions.

BOARD OF GOVERNORS
Supreme Court
Judicial District No. 1
Michael R. Vanderburg, Ponca City
A Nominating Resolution from Kay County has been filed nominating Michael R. Vanderburg for election of Supreme Court Judicial District No. 1 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021.

Supreme Court
Judicial District No. 6
Richard D. White Jr., Tulsa
Nominating Petitions have been filed nominating Richard D. White Jr. for election of Supreme Court Judicial District No. 6 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021.

A total of 32 signatures appear on the petitions.

Supreme Court
Judicial District No. 7
Benjamin R. Hilfiger, Muskogee
Nominating Petitions have been filed nominating Benjamin R. Hilfiger for election of Supreme Court Judicial District No. 7 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021.

A total of 25 signatures appear on the petitions.

Member at Large
Cody J. Cooper, Oklahoma City
Nominating Petitions have been filed nominating Cody J. Cooper, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021.

A total of 52 signatures appear on the petitions.

Elliott C. Crawford, Oklahoma City
Nominating Petitions have been filed nominating Elliott C. Crawford, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021.

A total of 53 signatures appear on the petitions.

April D. Kelso, Oklahoma City
Nominating Petitions have been filed nominating April D. Kelso, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021. Fifty of the names thereon are set forth below:
Cheryl Jackson, Lindsey Albers, Mary Gannaway, John Wagener, Sarah R. Brown, Bevan G. Stockdell, Shannon Panach, Sara K. Hawkins, Kellie Laughlin, Gerald Green, Hailey M. Hopper, Jessica Dark, Malinda Matlock, Mark Hardin, Dan Hoehner, Randall Wood, Bryan Stanton, Peter Wheeler, Elizabeth R. Sharrock, John Condren, Shannon Bickham, Jerrod Geiger, Katie Lee, Amy Bradley-Waters, Jake Pipinich, Jason Robertson, Amanda Naifeh, Jeffrey C. Hendrickson, Charlie Schreck, Fallon Elliott, Stacey S. Chubbuck, Cathleen McMahon, Braden Hoffmann, Leslie Jones, John Kim, Joseph Stall, Clark Bushyhead, Thomas Griesedieck, Jared Nelson, Lauren Marciano, Rebecca Newman, Denelda Richardson, Nicholas Foster, Theresa Hill, L. Hollis Nix, Randall Long, Rachel R. Shephard, Katie A. Wilmes, Dallas Coplin and Josh Ritchey.

A total of 56 signatures appear on the petitions.

Kara I. Smith, Oklahoma City
Nominating Petitions have been filed nominating Kara I. Smith, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021. Fifty of the names thereon are set forth below:
Cathy Christensen, Renée DeMoss, Chuck Chesnut, Jim Roth, Elaine Turner, Jimmy Goodman, Kindanne Jones, Jeff Trevillion, Gary W. Farabough, Tiece Dempsey, Naureen Hubbard, Dianna Berry, Ruseal Brewer, Trent Baggett, Lenora Burdine, Joanne Lafontant-Dooley, Erick Harris, Kimberly Steele, John Miley, Jeff Hubbard, Nathan Richter, Hilton Walters, Neel Natarajan, Micah Cartwright, Jan Preslar, Laura Chesnut, Amber Peckio Garrett, Monica Ybarra, Travis Weedn, Clint Ward, R. Matt Whalen, John M. (Jake) Krattiger, Z. Faye Martin Morton, Paul Kluver, Kevin McClure, Jeb Joseph, Larry D. Foster II, Linda Scoggins, Michael English, Warren E. Mouledoux III, Diane Worsham, Jennifer Miller, Melissa Blanton, Mykel Fry, L. Mark Walker, Scott A. Butcher, Keith A. Wilkes, John Kempf, W. David Pardue and Seth A. Day.

A total of 62 signatures appear on the petitions.

2020 OK CR 17

SKYLER FRANCIS, Appellant, v. STATE OF OKLAHOMA, Appellee.

Case No. F-2019-255. September 10, 2020

SUMMARY OPINION

HUDSON, JUDGE:

¶1 Appellant, Skyler Francis,[1] was tried and convicted in a nonjury trial in Texas County District Court, Case No. CF-2018-101, of two counts of embezzlement in violation of 21 O.S.Supp.2016, § 1451.[2] The Honorable Judge Jon K. Parsley, District Judge, presided at trial and sentenced Francis to two concurrent five-year suspended sentences. The court further ordered Francis pay $5,497.00 in restitution and various other costs and fees. By agreement of both parties, the trial court ordered the sentences stayed pending this appeal. Francis now appeals and raises the following proposition of error before this Court:

I. THE DISTRICT COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS PURSUANT TO 22 OKL. ST. ANN. § 130, AS THE PROSECUTION IN OKLAHOMA WAS BARRED DUE TO THE APPELLANT'S CONVICTION IN KANSAS FOR THE SAME CRIME.

¶2 After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's judgment and sentence is **AFFIRMED**.

¶3 On October 31, 2018, Appellant filed a motion to dismiss the present case arguing the State's prosecution was in violation of his constitutional and statutory rights against double jeopardy. The State filed a responsive pleading opposing the motion to dismiss and a hearing on the matter was held on February 13, 2019. At the conclusion of the hearing, the trial court denied Appellant's motion. In his sole proposition of error on appeal, Appellant contends the trial court erred in denying his motion to dismiss. Citing 22 O.S.2011, § 130 and the Oklahoma and Federal Double Jeopardy Clauses, Appellant argues that his prosecution and conviction in Kansas foreclosed the possibility that Oklahoma could subsequently prosecute him.

¶4 This Court reviews the denial of a motion to dismiss for an abuse of discretion. *Lozano v. State*, 2013 OK CR 17, ¶ 4, 313 P.3d 272, 273 (finding the trial court "did not abuse its discretion in determining that Appellant's retrial was not barred by former jeopardy"). "An abuse of discretion has been defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Vanderpool v. State*, 2018 OK CR 39, ¶ 32, 434 P.3d 318, 325 (citing *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170). Appellant fails to show the trial court abused its discretion in denying his motion to dismiss. As discussed below, the facts clearly show Appellant's Oklahoma prosecution was not for the same acts or offenses for which he was prosecuted in Kansas.

¶5 Viewing his criminal conduct in Kansas and Oklahoma as the "same act" – embezzlement from his employer in Kansas – Appellant asserts his Oklahoma prosecution in Texas County violated both 22 O.S.2011, § 130 and the state and federal protections against double jeopardy.[3] Section 130 provides:

> "When *an act* charged as a public offense is within the jurisdiction of another territory, county or state, as well as this state, a conviction or acquittal thereof in the former is a bar to a prosecution therefor in this state."

(emphasis added).[4]

¶6 Appellant argues Section 130 is "clear and unambiguous" and "does not allow for an interpretation [which] fabricate[s] exclusive jurisdiction" for a second prosecution for the "same act". Appellant's argument is flawed from the onset as the record shows his Kansas and Oklahoma convictions do not arise out of the "same act."

¶7 Section 130's protection against successive prosecutions for "an act" is analogous to Title 21, Section 11's prohibition against multiple punishments for a single criminal act.[5] Like 21 O.S.2011, § 11, Section 130's protection is confined to "an act." *Cf. Irwin v. State*, 2018 OK

CR 21, ¶ 5, 424 P.3d 675, 676 ("If two or more crimes truly arise out of one act, section 11 prohibits prosecution and punishment for more than one crime." (emphasis added)); *Barnard v. State*, 2012 OK CR 15, ¶ 27, 290 P.3d 759, 767 (same). "An act" therefore denotes a single criminal act. A Section 130 analysis is thus dependent on the particular facts presented. *Cf. Sanders v. State,* 2015 OK CR 11, ¶ 8, 358 P.3d 280, 284 (Section 11 analysis is "based on the particular facts presented").

¶8 The record in the present case shows Appellant committed multiple acts, resulting in multiple offenses, some of which occurred in Kansas and others that transpired in Oklahoma. Each act was chronologically separated in time.[6] His actions in Kansas were thus separate and distinct from his criminal conduct in Oklahoma. *Cf. Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1165 ("Where there is a series of separate and distinct crimes, . . . Section 11 is not violated." (citing *Davis v. State*, 1999 OK CR 48, ¶ 12, 993 P.2d 124, 126)). Moreover, contrary to Appellant's assertion on appeal, the fact each act involved the same victim is of no consequence. *Cf. Rousch v. State,* 2017 OK CR 7, ¶ 3, 394 P.3d 1281, 1282 ("Two distinct acts of the same offense, carried out against the same victim, will not violate double jeopardy where the acts are interrupted and separate in time."). Appellant's Oklahoma prosecution was thus not prohibited by Section 130.

¶9 Nor was Appellant's prosecution in Oklahoma violative of the state or federal Double Jeopardy Clauses.[7] Appellant claims, as he did below, his convictions in the present case are barred by the Double Jeopardy Clause because Section 130's prohibition against a successive prosecution for the same "act" demonstrates the dual sovereignty doctrine has no application in Oklahoma. We have recognized the applicability of the dual sovereignty doctrine in Oklahoma and apply the Supreme Court's pronouncements for it. *Mack v. State*, 2008 OK CR 23, ¶ 6, 188 P.3d 1284, 1287.[8] Nothing in Section 130 requires reconsideration of this approach, let alone suggests that dual sovereignty is the *sine qua non* of Appellant's prosecution for embezzlement in Oklahoma. Section 130 provides greater protections than the Double Jeopardy Clause, but the two provisions are complimentary and work in tandem. Section 130 prohibits a successive prosecution in Oklahoma for "an act" – i.e., the same conduct or actions – for which a defendant has been previously prosecuted in "another territory, county or state."

¶10 The Double Jeopardy Clause, by contrast, "protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct or actions[.]" Gamble v. United States*, __U.S.__, 139 S. Ct. 1960, 1965 (2019) (quoting *Grady v. Corbin*, 495 U.S. 508, 529 (1990) (emphasis in original)). A traditional double jeopardy analysis thus need only be conducted when Section 130 does not apply. *Cf. Irwin*, 2018 OK CR 21, ¶ 5, 424 P.3d at 676 ("Traditional double jeopardy analysis is conducted only if section 11 does not apply."). Viewed in the proper legal and factual context, it is clear Appellant's prosecution in Oklahoma violated neither 22 O.S.2011, § 130 nor the constitutional prohibitions against double jeopardy. *See Rousch*, 2017 OK CR 7, ¶ 3, 394 P.3d at 1282 (two distinct acts, carried out against the same victim, that are interrupted and separate in time do not violate double jeopardy). The record shows Appellant was not twice put in jeopardy either for the "same act" or the "same offense" for which he was prosecuted in Kansas. Appellant's sole proposition of error is denied.

DECISION

¶11 The Judgment and Sentence of the District Court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF TEXAS COUNTY
THE HONORABLE JON K. PARSLEY,
DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LEWIS, P.J.: CONCUR IN PART/DISSENT IN PART
KUEHN, V.P.J.:CONCUR IN PART/DISSENT IN PART
LUMPKIN, J.:CONCUR
ROWLAND, J.:CONCUR

LEWIS, PRESIDING JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

¶1 I concur in the Court's conclusions that prosecution of the Appellant for one or more criminal acts committed in Oklahoma is clearly not barred by a statute that prohibits prosecution for a separate act "charged as a public offense" in Kansas, and does not inflict double jeopardy for the same offense. This much of the opinion is a straightforward application of the rarely used language of 22 O.S.2011, § 130 and basic principles of double jeopardy.

¶2 The Court confuses matters with a passing reference to the doctrine of dual sovereignty, which has no application here; and with a tenuous analogy to Title 21, section 11, and its unusual state law relationship to double jeopardy. The Court's analogy to section 11 jurisprudence, with its supposedly significant distinction between an "act" and an "offense," only expands a logically problematic statutory interpretation into yet another domain. The same doubtful premise now appears here in the opinion's assertion that "Section 130's protection is confined to an 'act.'"

¶3 But what *is* an "offense," after all, but an "*act* or omission forbidden by law" and punishable upon conviction? 21 O.S.2011, § 3. Section 130 addresses itself to "an *act* charged as a *public offense*" when providing that "conviction or acquittal *thereof*" in another state bars the Oklahoma prosecution (emphasis added). The utility of section 11's strained distinctions here is anything but clear.

¶4 At the most basic level, Appellant was guilty of "acts" *and* "offenses" against the laws of Oklahoma and Kansas; but neither his "acts" nor his "offenses" were the "same" for purposes of section 130 or double jeopardy. It seems unnecessary to complicate our analysis beyond this rudimentary point. And relegating section 130 to a "complementary" or "tandem" role for double jeopardy law needlessly diminishes the statute's greater protective force, which the Court acknowledges. From this academic and ill-conceived exercise, I respectfully dissent.

¶5 I am authorized to state that Vice Presiding Judge Kuehn joins in this separate opinion concurring in part and dissenting in part.

HUDSON, JUDGE

1. Appellant's first name is listed in the appeal record as "Skylar" with an "a". However, this appears to be a scrivener's error. Appellant's first name is spelled two ways within the record provided from below – Skyler and Skylar. Throughout most of the record, Appellant's first name is spelled "Skyler" with an "e". Key documents spelling it this way include, *inter alia,* the original charging Information, the Amended Information, Appellant's Motion to Dismiss, and the Judgment and Sentence – Non-Jury Trial. Transcripts of the three hearings held in relation to this case also denote Appellant's name as "Skyler." It appears the switch to "Skylar" with an "a" occurred when counsel filed Appellant's Notice of Intent to Appeal.

2. The parties jointly asked that the trial court render its verdict based on the preliminary hearing record.

3. The Fifth Amendment provides in pertinent part "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...." U.S. Const. amend. V. The Oklahoma Constitution provides "[n]or shall any person be twice put in jeopardy of life or liberty for the same offense." Okla. Const. art. 2, § 21.

4. Notably, this Court has only peripherally discussed or referenced Section 130 in one case – *State ex rel. Cobb v. Mills,* 1945 OK CR 124, 163 P.2d 558, 562, 82 Okl.Cr. 155, 162.

5. 21 O.S.2011, § 11 provides in relevant part that "an act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions[;]" however, "in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law."

6. The record shows Appellant purportedly made a total of 102 separate unauthorized purchases with his company credit card, totaling $61,389.60, at two different Walmart stores located in Liberal, Kansas, between September 11, 2017, and March 8, 2018. On April 10, 2018, Appellant was charged in Seward County District Court, Case No. 2018-CR-168, with Theft (Count 1); Criminal Use of a Financial Card (Count 2); and Making False Information (Count 3). Notably, none of the Kansas charges encompassed Appellant's criminal conduct in Oklahoma. Neither the affidavit for arrest, the complaint, nor the journal entry of waiver and arraignment filed in Seward County mention Appellant's Oklahoma offenses. On June 25, 2018, Appellant entered a negotiated plea of no contest to Criminal Use of a Financial Card (Count 2). The remaining charges were dismissed with prejudice.

7. "[T]his Court construes and interprets Oklahoma's Double Jeopardy Clause as providing the same protections offered by the federal clause." *Kane v. State*, 1996 OK CR 14, ¶ 6 n.5, 915 P.2d 932, 934 n.5 (citing *Edwards v. State*, 1991 OK CR 71, ¶ 7, 815 P.2d 670, 672 (Oklahoma's "constitutional prohibition against double jeopardy is coextensive with that of the federal constitution")). "Double jeopardy protects against (a) a second prosecution for the same offense after acquittal; (b) a second prosecution for the same offense after conviction; and (c) multiple punishments for the *same offense." Mack v. State*, 2008 OK CR 23, ¶ 4, 188 P.3d 1284, 1287 (emphasis added); *see also United States v. Halper*, 490 U.S. 435, 440 (1989); *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Kane*, 1996 OK CR 14 ¶ 6, 915 P.2d at 934.

8. Appellant's claim is heavily reliant on *Cobb*, 1945 OK CR 124, 163 P.2d at 571, 82 Okl.Cr. at 182-83, wherein the Court determined the "question of double punishment" was governed by 21 O.S.1941, § 25, a statute that has since been repealed. *See* 21 O.S.1941, § 25, repealed by Laws 1986, c. 178, § 1. To the extent *Cobb* is inconsistent with *Mack* and today's ruling, it is expressly overruled.

2020 OK CR 18

THE STATE OF OKLAHOMA, Appellant, v. KATHRYN JUANITA GREEN, Appellee.

Case No. S-2019-308. September 10, 2020

OPINION

ROWLAND, JUDGE:

¶1 The State of Oklahoma charged Appellee Kathryn Juanita Green by third amended Information in the District Court of Garfield County, Case No. CF-2017-274, with, inter alia, Child Neglect (Count 1), in violation of 21 O.S.Supp. 2014, § 843.5(C).[1] The State alleged in Count 1 that Green willfully or maliciously neglected her unborn child through her own failure or omission to protect the fetus from exposure to the use and/or possession of illegal drugs and/or other illegal activities while the unborn child was under the age of 18 and Green was a person responsible for the child's well-being. The magistrate bound Green over on all charges, including Count 1. Green filed a motion to quash Count 1 on the legal ground that a fetus was not a "child" subject to protection under the child neglect statute. After various amendments to her motion and the filing of State responses, the Honorable Dennis Hladik, District Judge, held a hearing and granted Green's motion to quash Count 1.[2] The State announced its intent to appeal the ruling in open court and perfected the instant appeal. Judge Hladik filed a written minute order memorializing his ruling. The State of Oklahoma identifies three overlapping issues for review:

(1) whether Oklahoma criminal law extends its protection to a human fetus;

(2) whether an unborn human offspring is a "child" for purposes of Title 21; and

(3) whether the district court abused its discretion in granting Green's motion to quash Count 1.

¶2 We reverse the district court's order for the reasons discussed below.

FACTS

¶3 Green gave birth to a stillborn son sometime in the early spring of 2017.[3] Police found the deceased infant, on April 9, 2017, inside a wooden box that had been placed in a construction dumpster outside Green's home. The medical examiner performed an autopsy on the deceased infant, who was in the early stages of generalized postmortem decomposition, and found no signs of traumatic injury. Toxicology screening revealed the presence of methamphetamine in the infant's system. The medical examiner opined the cause of death was methamphetamine toxicity, and the manner of death was homicide.[4]

DISCUSSION

¶4 The State challenges the district court's order sustaining Green's motion to quash Count 1. We exercise jurisdiction under 22 O.S.2011, § 1053(4).[5] Generally in state appeals, we review a district court's ruling for an abuse of discretion.[6] *See State v. Haliburton*, 2018 OK CR 28, ¶ 12, 429 P.3d 997, 1000. This case, however, does not involve a question of fact, but instead presents a question of law, namely whether an unborn fetus constitutes a "child under eighteen (18) years of age" within the protection of the child neglect statute, and ultimately whether the State may prosecute Green for child neglect because of her alleged methamphetamine use during pregnancy. Because the claim involves statutory interpretation only, our review is *de novo. Truskolaski v. State*, 2019 OK CR 4, ¶ 4, 458 P.3d 620, 621.

¶5 "The fundamental rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute." *Soto v. State*, 2014 OK CR 2, ¶ 7, 326 P.3d 526, 527. We give statutory language its plain and ordinary meaning. *King v. State*, 2008 OK CR 13, ¶ 7, 182 P.3d 842, 844. In a minute order granting Green's motion to quash Count 1, the district court found the fact that the statute did not define the term "child" to explicitly include the unborn was dispositive:

> This statute defines a child as a person under the age of 18. It would have been easy for the legislature to include in the definition additional terms such as conception, fetus or trimester if it had been their intent to apply this statute to the gestation period. For this court to apply this statute to a fertilized egg, zygote, embryo, fetus, or any of the months or trimesters of pregnancy would require it to legislate from the bench which is prohibited.

¶6 In its ruling, the district court analyzed the interplay of three statutory provisions: Oklahoma's criminal child neglect statute in Title 21, the definition of "neglect" in Title 10A which is the Children's Code, and the definition of "child" also in Title 10A. The first of

these, 21 O.S.Supp.2014, § 843.5(C), reads as follows:

> C. Any parent or other person who shall willfully or maliciously engage in child neglect shall, upon conviction, be punished by imprisonment in the custody of the Department of Corrections not exceeding life imprisonment, or by imprisonment in a county jail not exceeding one (1) year, or by a fine of not less than Five Hundred Dollars ($500.00) nor more than Five Thousand Dollars ($5,000.00), or both such fine and imprisonment. **As used in this subsection, "child neglect" means the willful or malicious neglect, as defined by paragraph 47 of Section 1-1-105 of Title 10A of the Oklahoma Statutes, of a child under eighteen (18) years of age by another.**

(emphasis added).

Thus, the child neglect criminal provision incorporates the definition of "neglect" from our civil Children's Code. Title 10A O.S.Supp. 2016, § 1-1-105(47) reads:

> "Neglect" means:
>
> . . .
>
> b. the failure or omission to protect a child from exposure to any of the following:
>
> (1) the use, possession, sale, or manufacture of illegal drugs….

¶7 It is clear from the record that the district court also relied upon the definition of "child" found in this same section of the Children's Code, specifically Section 1-1-105(7), presumably because the definition of "neglect" makes reference to the term "child." This reasoning assumes, erroneously we think, that the Legislature intended to incorporate the Section 1-1-105(7) definition of "child" into Section 843.5 (C). Just as the Legislature specifically referenced the definition of "neglect," so too would it have specifically incorporated the definition of "child," had it intended that both these definitions inform the criminal neglect statute. Section 843.5(C) makes no attempt to define the specific acts or omissions constituting child neglect, but rather it incorporates them by reference from the Children's Code. Conversely, Section 843.5(C) very plainly enumerates the class of persons protected as any "child under eighteen (18) years of age," and understandably makes no incorporation by reference to the Children's Code to define that class. There is therefore no need to borrow or incorporate further definition of whom this statute protects, and to assume that the Legislature intended to supplement this "child under eighteen (18) years of age" language from Section 843.5(C) with Title 10A's definition of child as "any unmarried person under eighteen (18) years of age" is dubious at best and leads to further ambiguity. "[T]he rules of statutory construction are intended as an aid to resolve doubts and not to create them." *Ex parte Higgs*, 1953 OK CR 160, 97 Okl. Cr. 338, 341, 263 P.2d 752, 756. We find that the Legislature did not intend that 21 O.S.Supp.2014, § 843.5(C) incorporate the definition of "child" found in 10A O.S.Supp.2016, § 1-1-105(7).[7]

¶8 Green maintains "[t]here is simply no doubt that the term 'child' from the Children's Code is incorporated by explicit reference" into the child neglect provisions of Title 21. On the contrary and as noted above, this is not at all clear. The only term explicitly incorporated by reference is "neglect," and because Section 843.5 (C) explicitly refers to "a child under 18 years of age," grafting onto this the redundant language of the Children's Code definition of "child" results in superfluous language. "[R] ules of statutory interpretation require us to avoid any statutory construction which would render any part of a statute superfluous or useless." *State ex rel. Mashburn v. Stice,* 2012 OK CR 14, ¶ 11, 288 P.3d 247, 250 (quoting *State v. Doak*, 2007 OK CR 3, ¶ 7, 154 P.3d 84, 87).

¶9 In support of her position, Green directs us to *Burns v. Alcala*, 420 U.S. 575, 581 (1975), and its language that "the word 'child . . . refer[s] to an individual already born, with an existence separate from its mother." In *Burns,* the United States Supreme Court considered the definition of "dependent child" under the federal Aid to Families With Dependent Children (AFDC) statute. Plaintiffs were pregnant women who claimed their unborn children were "dependent" children under the statute and therefore they were entitled to welfare benefits based upon the child before its birth. Analyzing the history and purpose of the AFDC program, the Supreme Court concluded that "dependent child" within that statute contained no entitlement to welfare benefits for children not yet born. *Id.* at 577-87. Green also cites *Starks v. State*, 2001 OK 6, 18 P.3d 342 for the proposition that "child" under the Children's Code does not mean the same thing as fetus or unborn child. In that case, the Okla-

homa Supreme Court held that the State could not take emergency custody of an unborn child whose mother was alleged to be using methamphetamine. *Id.* 2001 OK 6, ¶¶ 18-19, 18 P.3d at 347-48. Neither *Burns* nor *Starks* is helpful to the question before us. These decisions that the unborn are not to be counted for purposes of calculating welfare benefits under federal law, or that the State cannot assume physical custody of a fetus prior to its birth, do nothing to inform whether Oklahoma's criminal law protects an unborn child from the specific acts of neglect at issue here.

¶10 We must then look elsewhere to determine whether the stillborn fetus in this case is a "child under eighteen (18) years" as referenced in and protected by Oklahoma's child neglect statute, 21 O.S.Supp.2014, § 843.5(C). "To determine legislative intent we may look to each part of the statute, similar statutes, the evils to be remedied, and the consequences of any particular interpretation." *King,* 2008 OK CR 13, ¶ 7, 182 P.3d at 844. A review of other Oklahoma statutes for use and definition of the terms "person," "child," "human being," and the like is not helpful to our resolution of this case. In the Definition and General Provisions section of our statutes, "[t]he word 'person,' except when used by way of contrast, includes not only human beings, but bodies politic or corporate." 25 O.S.2011, § 16. The term "children" is defined as "children by birth and by adoption." 25 O.S.2011, § 7. Another statute goes so far as to define "person" to include everything from individuals and corporations to the State and its political subdivisions. 25 O.S.Supp.2013, § 1451(A)(3). Simply put, it is clear these terms have no general or universal meaning within our statutes, and in fact it is not uncommon in the law for such general terms to mean various things in various statutes. "[T]here is no 'canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing.'" *Jennings v. Rodriguez,* 138 S.Ct. 830, 845-46 (2018) (quoting *Kirtsaeng v. John Wiley & Sons, Inc.,* 568 U.S. 519, 540 (2013)).

¶11 Where we do find guidance is in *Hughes v. State*, 1994 OK CR 3, 868 P.2d 730, wherein this Court abandoned the common law "born alive" rule and held that an unborn viable fetus is a "human being" for purposes of Oklahoma's homicide statutes. In that case, the appellant was convicted of manslaughter for causing the death of an unborn child approximately four days before the expected delivery. This Court, in abandoning the common law "born alive" rule, found that the unborn fetus was a human being as that term was defined in 21 O.S.1981, § 691. "We now abandon the common law approach and hold that whether or not it is ultimately born alive, an unborn fetus that was viable at the time of injury is a 'human being' which may be the subject of a homicide under 21 O.S.1981, § 691 ('Homicide is the killing of one human being by another')." *Hughes,* 1994 OK CR 3, ¶ 4, 868 P.2d at 731. In arriving at this conclusion, we looked first at the purpose of the statute itself.

> The purpose of Section 691 is, ultimately, to protect human life. **A viable human fetus is nothing less than human life. As stated by the court in *Cass*, "[a]n offspring of human parents cannot reasonably be considered to be other than a human being … first within, and then in normal course outside, the womb."** *Cass, supra*, 467 N.E.2d at 1325. Thus, the term "human being" in Section 691 – according to its plain and ordinary meaning – includes a viable human fetus.

Id. 1994 OK CR 3, ¶ 15, 868 P.2d at 734 (emphasis added).

¶12 Using similar reasoning, we find the purpose of Section 843.5 is ultimately to protect from abuse, neglect, or exploitation the most vulnerable among us: children. A child several weeks away from birth, as was the fetus in this case, is every bit as vulnerable to and in need of protection from neglect and its potential harm as a child one minute after birth. To interpret Section 843.5(C) to deny that protection to the unborn child in this case is to thwart the clear trajectory that Oklahoma law has been on for at least the past quarter century, which is to protect children, born and unborn, from potential harm because they cannot protect themselves. Just as the term human being, "according to its plain and ordinary meaning – includes a viable human fetus[,]" so too does the term "child" in the very statute intended to protect children from neglect.

¶13 Two additional points support this conclusion. First, in addition to holding that "an unborn fetus that was viable at the time of the injury" can be the victim of a homicide, *Hughes* also overruled *State v. Harbert*, 1988 OK CR 134, 758 P.2d 826, which had held that a fetus was

not a person who could be the victim of assault and battery with a deadly weapon. *Hughes,* 1994 OK CR 3, ¶ 15, 868 P.2d at 734. Thus, current Oklahoma law clearly protects unborn children from not only homicide but also from assault and battery. Second, twelve years after our holding in *Hughes* the Legislature amended the definition of "human being" in 21 O.S.Supp.2006, § 691, going even farther than *Hughes* and making clear that '"human being' includes an unborn child, as defined in Section 1-730 of Title 63 of the Oklahoma Statutes." Section 1-730(4) in turn defines "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus…[.]"

¶14 Green would have us limit these cases to the actions of a third party as opposed to the acts of the expectant mother herself, but neither *Hughes* nor *Harbert* contain any such limitation. Furthermore, in essentially codifying the *Hughes* holding, Oklahoma's Legislature made clear that the mother of an unborn child could be held responsible for fetal death when occasioned by her criminal action. "Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child." 21 O.S.2011, § 691(D). Interpreting the child neglect statute to allow others to be prosecuted for bringing harm to an unborn child while shielding from criminal liability those very same harmful acts when committed by the mother would frustrate the very purpose of the statute, which is to protect children who cannot protect themselves. "We have also held that when statutes are specifically designed by the Legislature to treat a given situation, that intent should be effectuated." *Lozoya v. State*, 1996 OK CR 55, ¶ 18, 932 P.2d 22, 29 (citing *Luster v. State,* 1987 OK CR 261, 746 P.2d 1159).

¶15 Green maintains that interpreting Oklahoma's child neglect statute to protect her unborn child from neglect would violate her constitutional rights in three ways. First, she maintains it would violate her due process rights because she did not have adequate notice that her conduct could subject her to criminal liability.

> Due process requires that a criminal statute give fair warning of the conduct which it prohibits. Specifically, the Supreme Court of the United States has held that: "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Hughes, 1994 OK CR 3, ¶ 20, 868 P.2d at 735 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). The *Hughes* court made its holding prospective only, noting that the defendant in that case may not have had fair warning that her conduct could subject her to criminal liability for the death of an unborn child. *Hughes,* 1994 OK CR 3, ¶ 22, 868 P.2d at 735-36. *Hughes* and *Harbert,* however, have now been the law in Oklahoma for over twenty-five years, during which time the Legislature expanded the definition of human being first recognized in *Hughes.* We cannot find that Green lacked adequate notice that her use of illegal drugs while thirty-three weeks pregnant could subject her to criminal liability for child neglect when she unquestionably would have faced prosecution had the very same conduct been shown to have caused her baby's death. It simply makes no sense to excuse one's criminal and lethal acts because the unborn child survived the neglect or, as here, where the State elects not to pursue a homicide charge but opts for a less serious offense based upon the same conduct. Applying *Hughes* and *Harbert* to the facts of this case does not violate Green's due process rights.

¶16 Green suggests that our holding today would subject "any woman who used any amount of alcohol, nicotine, or a controlled substance" to criminal prosecution, but there is nothing in the definition of neglect quoted above which criminalizes the exposure of children to alcohol or nicotine.[8] Furthermore, the fact that hypotheticals might be envisioned with less prosecutive merit than this case does not change the case before us, the evidence of which shows that a fetus was stillborn at about thirty-three weeks, and that the death was a homicide caused by a lethal amount of methamphetamine.

¶17 The second constitutional claim, that interpreting Section 843.5(C) to apply to her unborn child violates her right to privacy, requires little discussion. In support of this argument, she relies upon *Planned Parenthood of*

Se. Pennsylvania v. Casey, 505 U.S. 833 (1992), involving one's right to privacy in obtaining a lawful abortion, and upon *Carey v. Population Servs. Int'l,* 431 U.S. 678 (1977), regarding the sale of contraceptives. This is not a case about a woman's right to an abortion, or any person's right to secure contraceptives. Just as the right to privacy recognized in those cases does not prohibit prosecution of a mother whose unlawful acts cause the death of her unborn child, neither does this right prohibit prosecution for those same acts which harm but do not result in the child's death.

¶18 The third constitutional claim urged by Green is that "[p]rosecuting a woman for experiencing a miscarriage or a stillbirth violates her Constitutional right to equal protection under the law." She maintains that if Oklahoma's child neglect statute is interpreted to protect the unborn child in this case, "women who become pregnant and experience pregnancy loss would be subject to criminal prosecution, but men are not." We do not agree. Green has not been charged with experiencing a miscarriage or stillbirth, and nothing in Section 843.5 (C) or its incorporated definition of neglect would permit such a prosecution. The allegation here is that Green failed to protect her child from "the use, possession, sale, or manufacture of illegal drugs." 10A O.S.Supp.2016, § 1-1-105(47). Equal protection requires that similarly situated persons be treated similarly. *See Castillo v. State,* 1998 OK CR 9, ¶ 10, 954 P.2d 145, 147. Her objection is that this law treats females differently from males, but the fact that a statute may treat the genders differently does not constitute a *per se* equal protection violation as long as the differentiation is not invidious. *State v. Johnson,* 1988 OK CR 273, ¶ 13, 765 P.2d 1226, 1229 (holding criminal statute prohibiting a woman from concealing stillbirth or death of a child does not violate the Equal Protection Clause). Moreover, this statute creates no gender distinctions but applies to any person who fails to protect a child from exposure to illegal drug activity. How and when it might apply to a third party alleged to have exposed an unborn child to illegal drugs is not before us and must await another case and another day. Prosecuting Green for the acts alleged above does not implicate her rights to equal protection under the law.

¶19 In sum, we hold that just as a viable fetus may be the victim of a homicide or an assault with a dangerous weapon, so too may he or she be a victim of child neglect under the facts presented by this case. We offer no opinion as to how or whether other acts of neglect enumerated in 10A O.S.Supp.2016, § 1-1-105(47) might apply to unborn child victims and we decline the State's invitation to opine whether an unborn human offspring is a child for purposes of the entirety of Title 21. We grant relief as to the State's third issue because, as explained above, we find the district court abused its discretion in granting Green's motion to quash Count 1.

DECISION

¶20 The ruling of the district court sustaining Green's motion to quash Count 1 is **REVERSED.** Green's request for oral argument is **DENIED.** This case is **REMANDED** for further proceedings not inconsistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY, THE HONORABLE DENNIS HLADIK, DISTRICT JUDGE

APPEARANCES IN DISTRICT COURT

Tallena Hart, Sean Karl Hill, Asst. District Attorneys, 114 W. Broadway, Enid, OK 73701, Attorneys for State

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APPEARANCES ON APPEAL

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Hayley Horowitz, Kristina Saleh, Still She Rises, 567 E. 36th St. N., Tulsa, OK 74106

Grey Gardner, Drug Policy Alliance, 1330 Broadway, Ste. 1426, Attorneys for Amici Curiae

OPINION BY: ROWLAND, J.
LEWIS, P.J.:Specially Concur
KUEHN, V.P.J.:Specially Concur
LUMPKIN, J.:Concur
HUDSON, J.:Concur

LEWIS, P.J., SPECIALLY CONCURRING:

¶1 I concur in the Court's conclusion that acts of illegal drug exposure against an unborn human offspring may be prosecuted as child neglect under 21 O.S.Supp.2014, section 843.5 (C). The Legislature removed all reasonable doubt of the State's policy when it amended 21 O.S.2011, § 691(B) to define the phrase "human being" to include an "unborn child, as defined in Section 1-730 of Title 63 of the Oklahoma Statutes;" and likewise excepted from its definition of homicide a legal abortion. § 691(C)(1).

¶2 Contrary to Appellee's arguments grounded in her constitutional rights to privacy and equal protection, no person, including a pregnant mother, is privileged to commit acts of homicide, assault, or neglect against an unborn child according to our statutes and case law. Stated another way, the statutory obligation to refrain from such acts does not unduly burden the defendant's exercise of any constitutionally protected right to privacy or equal protection of the law.

KUEHN, V.P.J., SPECIALLY CONCURRING:

¶1 I join the Majority's well-reasoned interpretation of 21 O.S.Supp.2014, § 843.5(C).[1] However, when discussing the nearly identical deprived "child neglect" statute in 10A O.S. Supp.2014, § 1-1-105 with criminal Title 21 "child neglect," the Majority does not mention important differences between them. I specially concur to discuss these differences.

¶2 Title 21 is a criminal code, while Title 10A is a child welfare code. Criminal codes are not drafted to rehabilitate an offender or to protect a victim, but to punish an offender for criminal conduct. Ideally, the threat of punishment will deter crime and keep the community safer. When discussing the criminal code, the Majority holds that the purpose of Section 843.5 is ultimately to protect "the most vulnerable among us: children." I respectfully disagree. The purpose of Section 843.5 (or any criminal statute) is to punish the offender and protect society. My point is supported by the tragic circumstances in this case. Prosecuting the mother will not protect the stillborn victim in this case.[2]

¶3 Recognizing the differences between the criminal and children's codes, the Oklahoma Supreme Court has held that although a fetus may be a "human being" under the former, it is not a "child" under the latter. *In re Unborn Child of Starks,* 2001 OK 6, ¶ 14, 18 P.3d 342, 345. In so holding, the Court recognized that the *purpose* of the Children's Code was to protect a born child from harm by another.[3] This Court, too, can readily conclude that Section 843.5(C) applies to a fetus.

¶4 Another glaring difference between the two child-neglect statutes is that only the criminal version requires the State to prove the offender's conduct was "willful" or "malicious."[4] The Legislature, by adding those terms, elevated child abuse and neglect under Section 843.5, to punish criminally those who potentially harm or actually harm a child, including a fetus in a willful or malicious manner.

ROWLAND, JUDGE

1. The State also charged Green with Count 2 – Unlawful Removal of a Dead Body; Count 3 - Child Neglect; Count 4 – Possession of Controlled Dangerous Substance; Count 5 – Desecration of a Human Corpse; and Count 6 – Obstructing an Officer.

2. Green also sought to quash Counts 2, 4, 5, and 6. Judge Hladik denied Green's motion to quash those counts.

3. His gestational age was estimated at 33 to 34 weeks. One of the investigators noted in his report that the medical examiner said the infant suffered intrauterine demise, i.e., stillborn. The investigator conceded he had no medical reports either contradicting that statement or indicating that the infant had been born alive.

4. Prior to preliminary hearing, the State charged Green in Count 1 with Second Degree Murder. The prosecutor informed the magistrate that the State had amended Count 1 to child neglect "because medical science in this case could not exclude the reasonable possibility another medical condition or anomaly may have contributed to the death of Baby Boy Green."

5. Under Section 1053(4), the State may appeal "[u]pon judgment for the defendant on a motion to quash for insufficient evidence in a felony matter[.]"

6. We give deference to the district court's ruling and we will find an abuse of discretion only when a district court's decision is not supported by the facts or law concerning the matter. *See Hammick v. State,* 2019 OK CR 21, ¶ 15, 449 P.3d 1272, 1277 (defining abuse of discretion).

7. This view is supported by the corresponding uniform jury instruction on the elements of child neglect, which makes no reference to the "unmarried person" language in 10A O.S.Supp.2016, § 1-1-105(8), but rather refers only to "a child under the age of eighteen," taken from 21 O.S.Supp.2014, § 843.5(C). The instruction reads in relevant part:

First, a person responsible for the child's health, safety, or welfare;
Second, willfully/maliciously;
[Third, failed/omitted to protect;
Fourth, a child under the age of eighteen from exposure to;
Fifth, (the use/possession/sale/manufacture of illegal drugs)/(illegal activities)/(sexual acts or materials that are not age-appropriate).]

Instruction No. 4-37, OUJI-CR(2d) (Supp.2015).

8. The argument of Amici Curiae in this regard is more limited, urging that pregnant women under the legal age for buying alcohol or nicotine could be prosecuted, presumably under Title 10A O.S.Supp. 2016, 1-1-105(47)(b)(2), which covers failure to protect a child from illegal activities. We do not today address the applicability of other acts of neglect covered under this definition other than the one at issue here, Section 1-1-105(47)(b)(1).

KUEHN, V.P.J., SPECIALLY CONCURRING:

1. Under similar circumstances, this Court held in 2018 that a fetus is a child. "[T]he Legislature's intent is clear: a defendant may be prosecuted for the homicide of an unborn child, whether or not that child is viable. An unborn child is clearly a 'human being' for purposes of the homicide statutes." *Cyr v. State*, No. F-2016-1122 (unpub. September 20, 2018) (Kuehn, V.P.J, for the Majority), slip op. at 10.

2. In child-abuse and child-neglect prosecutions, the children have already been harmed and therefore, the purpose of the charge is to punish the offender. To protect children from harm, the State files a deprived-child action. *See e.g. State v. Vincent*, 2016 OK CR 7, 371 P.3d 1127 (defendant charged with child neglect for drunk driving with another person's child in the car; when stopped, the drunk driving had already occurred); *Ball v. State* 2007 OK CR 42, 173 P.3d 81 (defendant claimed he spilled boiling water on his three-year-old and did not take him to the hospital; expert said it seemed like the water had been poured deliberately and that it would have been apparent to anyone that immediate medical attention was necessary; child died and defendant was convicted of both murder and child neglect; child-neglect charge was purely to punish defendant because the child had already passed away); *State v. Haliburton* 2018 OK CR 28, 429 P.3d 997 (defendants charged with child neglect for selling drugs out of the home they shared with their minor children; again, the criminal act had already occurred at the time of prosecution).

3. "No fetus could be in need of mental health treatment, and no fetus could be placed through child placement services. These terms apply only to those who are born, living outside the womb of the mother. Similarly, the definitions pertaining to 'deprived child' under § 7001–1.3(14) could not apply to a fetus." *Starks*, 2001 OK 6, ¶¶ 16-17, 18 P.3d at 346–47.

4. "Willful" implies a purpose or willingness to commit the act or the omission referred to, but does not require any intent to violate the law or to acquire any advantage. 21 O.S.2011, § 92. "Malicious" imports "a wish to vex, annoy or injure another person." 21 O.S.2011, § 95.

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill a vacancy for the position of Judge for the Oklahoma Court of Civil Appeals, District 5, Office 1. This vacancy is created by the retirement of the Honorable Kenneth L. Buettner.

To be appointed to the office of Judge of the Court of Civil Appeals, one must be a legal resident of the respective district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years' experience in Oklahoma as a licensed practicing attorney, a judge of a court of record, or both.

Application forms can be obtained online at www.oscn.net (click on "Programs," then "Judicial Nominating Commission," then "Application") or by contacting Tammy Reaves at 405-556-9300. Applications must be submitted to the Chairman of the JNC no later than **5:00 p.m., Friday, October 9, 2020.** Applications may be mailed or delivered by third party commercial carrier. No hand delivery of applications is available at this time. If mailed, they must be postmarked **on or before October 9, 2020** to be deemed timely. Applications should be mailed/delivered to:

Jim Webb, Chairman
Oklahoma Judicial Nominating Commission
c/o Tammy Reaves
Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3
Oklahoma City, OK 73105

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, September 3, 2020

F-2019-481 — Jerome D. Stimson, Appellant, was tried by jury for the crime of Count 1, First Degree Manslaughter; Count 2, Driving a Motor Vehicle While Under the Influence of Drugs; and Count 3, Unlawful Possession of Drug Paraphernalia in Case No. CF-2016-401 in the District Court of Mayes County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment on Count 1, and one year imprisonment and payment of a $1000.00 fine on both Counts 2 & 3. The trial court sentenced accordingly. From this judgment and sentence Jerome D. Stimson has perfected his appeal. Judgement and Sentence is AFFIRMED and Mandate is Ordered. Opinion by: Lumpkin, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Hudson, J., Concurs; Rowland, J., Concurs.

F-2019-121 — Burnice D. Brown, Appellant, was tried by jury for the crime of First Degree Burglary in Case No. CF-2016-7055 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set as punishment ten years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Burnice D. Brown has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs in results; Hudson, J., concurs in results.

F-2019-404 — Ashley Dawn Pearson, Appellant, was tried by jury for the crime of child neglect in Case No. CF-2018-264 in the District Court of Carter County. The jury returned a verdict of guilty and recommended as punishment three years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Ashley Dawn Pearson has perfected her appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in result; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

Thursday, September 10, 2020

F-2019-397 — Appellant Mickey Toh was tried by jury for the crimes listed as Count A – Unlawful Possession of Marijuana with Intent to Distribute, Count B – Possession of a Firearm While in the Commission of a Felony, after no prior felony convictions, Count C – Possession of a Controlled Drug Without a Tax Stamp Affixed, after one prior felony conviction, Count D – Acquiring Proceeds from Drug Activity, after one prior felony conviction, Count E – Misdemeanor Possession of Drug Paraphernalia, and Count F – Possession of a Firearm After Former Conviction of a Felony, after one prior felony conviction, in Tulsa County District Court Case No. CF-2017-1393. In accordance with the jury's recommendation the trial court sentenced Appellant to 15 years imprisonment on each of Counts A and F; five years on each of Counts B and C; 14 years on Count D and one year on Count E. The sentences in Counts A and F were ordered to run consecutively. From this judgment and sentence Mickey Toh has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2019-605 — Jerome Matthew McConell, Appellant, was convicted at a bench trial of one count of Obtaining Merchandise by False Pretenses, in Case No. CF-2018-72, in the District Court of McCurtain County. The Honorable Gary Brock, Special Judge, sentenced McConell to thirty months imprisonment and ordered credit for time served and imposed court costs. From this judgment and sentence Jerome Matthew McConell has perfected his appeal. We AFFIRM the Judgment and Sentence of the District Court except the Rules and Conditions of Supervised Probation and the District Attorney Prosecution Reimbursement Fee imposed in this case which are both STRICKEN. This matter is REMANDED to the trial court with instructions to MODIFY the Judgment and Sentence document in accordance with this pronouncement. The District Court is FURTHER ORDERED to specify in the Judgment and Sentence a period of post-imprisonment supervision for Appellant. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs in Results;

Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

RE-2019-285 — Appellant Carl Edward Johnson entered a plea of guilty to Assault and Battery with a Dangerous Weapon, After Former Conviction of a Felony, in Oklahoma County Case No. CF-2014-8419 and was sentenced to five (5) years imprisonment with all but the first ninety (90) days suspended. On June 22, 2017, the State filed an application to revoke Johnson's suspended sentence. Amended revocation applications were filed on November 5, 2018, and February 22, 2019. At a hearing held April 16, 2019, the District Court of Oklahoma County, the Honorable Ray C. Elliott, District Judge, revoked Johnson's suspended sentence in full. Johnson appeals. The revocation of Johnson's suspended sentence is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J.; concurs in results; Rowland, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Wednesday, September 2, 2020

118,565 — In the Matter of D.M.B., M.S.W., B.N.W., D.D.W., and J.W., alleged deprived children: Heather Brown, Appellant, vs. State of Oklahoma and D.M.B., M.S.W., B.N.W., D.D.W., and J.W., alleged deprived children, Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Trial Judge. Heather Brown, Appellant, appeals an order terminating her parental rights to five of her children. The order is supported by clear and convincing evidence that Ms. Brown failed to correct the condition that led to their adjudication as deprived children – lack of proper parenting – and it was in their best interest. Furthermore, a new trial is not required even though one lawyer represented all five children and the oldest expressed an interest to return to his mother's care. Counsel independently represented children and adequately expressed the interests of the oldest child within the mandates of 10A O.S. §1-4-306(A). AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Thursday, September 3, 2020

116,967 — 1132 Aviation, L.L.C., Plaintiff/Appellee/Counter-Appellant, v. United States Aviation Co., Defendant/Appellant/Counter-Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Jefferson D. Sellers, Judge. Appellant/Counter-Appellee, United States Aviation Co. (USAC), seeks review of the April 12, 2018 Tulsa County District Court order awarding attorney fees, costs and expert witness fees and costs in the amount of $890,224.70 in favor of Appellee/Counter-Appellant, 1132 Aviation L.L.C. (1132 Aviation), based on the reasoning of *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). 1132 Aviation, as Counter-Appellant, seeks review of the April 12, 2018 Tulsa County District Court order with respect to the district court granting USAC's Third Motion to Reconsider, in which USAC argued the district court's March 31, 2016 sanctions order was improperly premised on the court's authority to grant attorney fees under the provisions of 12 O.S. 2011 §936. The district court agreed with the USAC motion that §936 did not apply in this case and instead awarded the $890,224.70 for USAC's violations of the discovery code under the rationale of *Chambers v. NASCO.* The April 12, 2018 order of the trial court is Affirmed in Part, Reversed in Part and Remanded for Further Proceedings. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by Bell, P.J.; Swinton, V.C.J., and Goree, J., concur.

Friday, September 4, 2020

118,170 — Aero Taxis Metropolitanos S.A. de C.V., Plaintiff/Appellant, v. International Aviation Services (VIP) Corp., Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Ogden, Judge. Plaintiff/Appellant Aero Taxis Metropolitanos, S.A. de C.V. (ATM) appeals the denial of its motion to reconsider an order compelling arbitration granted to Defendant/Appellee International Aviation Services (VIP) Corp. (International). This proceeding is the second lawsuit following a failed multi-party transaction for the sale and purchase of an airplane. In 2012, the Oklahoma escrow agent filed a motion to interplead the purchase deposit, which culminated in an award of half the deposit to ATM and half to another party, Bernstein Services, Inc. ATM then filed this suit against International, seeking equitable indemnity or subrogation for the half of the deposit awarded to Bernstein. The trial court agreed with International's assertion the contracts at issue included arbitration clauses covering ATM's claims here. On *de novo* review, we find International was entitled to compel arbitration. We find no abuse of discretion in the

denial of ATM's motion to reconsider. We affirm. Opinion by Buettner, J., Bell, P.J., and Goree, J., concur.

(Division No. 2)
Thursday, August 27, 2020

118,023 — Cortez Nathaniel Meadows, Petitioner/Appellant, vs. City of Oklahoma City and OSBI, Respondents/Appellees. Appeal from the District Court of Oklahoma County, Hon. Susan Stallings, Trial Judge. The plaintiff, Cortez Nathaniel Meadows (Meadows), appeals an Order denying his petition to expunge criminal case records. The captioned defendants are the State of Oklahoma (State), City of Oklahoma City (City), Oklahoma County Sheriff's Office, State of Oklahoma Department of Public Safety, and Oklahoma University Health & Science Center Police Department. The Record shows appearances by City and State. No other party named appeared and there is no Record indication of service on those parties. The Oklahoma County District Attorney appeared for State and did not object to Meadows' request for expungement. City appeared and objected. At the hearings, counsel for the Oklahoma State Bureau of Investigation (OSBI) appeared and joined City's objection. In the body of the amended petition, Meadows also requested expungement and sealing relief against OSBI. The appellees here are City and OSBI. Meadows petitioned for expungement of his criminal records. Included in the records listed are nine felonies that Meadows alleges are not his convictions but those of another person who used his name as an alias. The remainder are misdemeanors. Meadows has alleged a claim for relief and that the harm to him outweighs the public interest in retaining the records. The City and OSBI objected. Meadows filed an amended petition and the trial court conducted a hearing. With respect to the misdemeanors, Meadows sufficiently alleged a claim for relief. The City and OSBI had the burden to show that public interest outweighed harm to Meadows. The trial court denied relief with the finding that the public interest outweighed the harm to Meadows. There is no transcript of the hearing. The appellate court does not presume error from a silent record and the presumption is that the judgment conforms to the proof. Therefore, denial of relief as to all misdemeanor cases is affirmed. With respect to the felonies, the harm to Meadows is self-evident. City and OSBI have no interest in maintaining an inaccurate or incorrect record. The records are not the records of Meadows and expungement is not appropriate. Therefore, the denial of relief as to these nine felony cases is reversed and the case is remanded for entry in each case of an appropriate correction and clarification Order as prescribed herein. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Tuesday, September 1, 2020

106,979 (Companion to Case Nos. 109,478 and 110,818) — Jeffrey P. and Kathy L. Nees, Mark A. Camp, Trustee of the Mark A. Camp 2005 Trust, Camille L. Camp, Trustee of the Camille L. Camp 2005 Trust, Samuel Edward, II, and Jenny C. Dakil, et al., Plaintiffs/Appellees, vs. Ashton Grove, LC, W. Dow Hamm III Corporation, Ashton Grove Master Association, Inc., Ashton Grove Estates Section 1 Community Association, Inc., William Dow Hamm, III, William Dow Hamm, Jr., and Jonathan H. Brinsden, Defendants/Appellants, and City of Norman, Appellee. Appeal from the District Court of Cleveland County, Hon. Tom A. Lucas, Trial Judge. In a September 2019 order, the Oklahoma Supreme Court stayed Plaintiffs' petition for certiorari and remanded the case to this Court "to address the issue of whether directors of a homeowner[s'] association can be held personally liable based upon violations of a fiduciary duty to the homeowners[']association." In its order, the Supreme Court stated, "The Oklahoma Court of Civil Appeals did not answer the issues as to whether the Hamms owed a fiduciary duty in their capacity as principals of the Association, and whether the Hamms could be held individually liable as principals of the Master Association." The Hamms exercised complete control over the Master Association at the times implicated in this lawsuit. We agree that as the principals of the Master Association, they owed a fiduciary duty to Plaintiffs which, as the trial court found, they breached. After further review, we agree with the trial court's conclusion that the Hamms are subject to personal liability for the breach of their fiduciary duty to the Master Association. The trial court's judgment on this question is therefore affirmed. AFFIRMED. Supplemental Opinion from the Court of Civil Appeals, Division II, by Wiseman, J.; Barnes, V.C.J., and Hixon, J. (sitting by designation), concur.

117,837 — Pamela Ray, Plaintiff/Appellant, vs. Oklahoma Farm Bureau Mutual Insurance Company, Defendant/Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Timothy R. Henderson, Trial Judge. Plaintiff Pamela Ray appeals the district court's order granting summary judgment in favor of her automobile insurer, Defendant Oklahoma Farm Bureau Mutual Insurance Company (OFB), in her action alleging breach of the covenant of good faith and fair dealing. Plaintiff also appeals the order denying her motion to reconsider that ruling. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2013, ch. 15, app. 1, and the matter stands submitted without appellate briefing. In a previous arbitration proceeding, the arbitration panel found that OFB had defended Plaintiff's claim in good faith. That finding is binding. In addition, Plaintiff released OFB from any and all future liability when she accepted the arbitration award. For these reasons, OFB was entitled to summary judgment and we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Barnes, P.J. and Rapp, J., concur.

Thursday, September 3, 2020

109,478 (Companion to Case Nos. 106,979 and 110,818) — P. Mark Moore and Megan Moore (Lots 7 and 28), Plaintiffs/Appellees, vs. W. Dow Hamm, Jr.; W. Dow Hamm, III; Ashton Grove Master Association, Inc.; and Ashton Grove Estates, Section I Community Association, Inc., Defendant/Appellants, and V & H Development, Company, LLC, et al., Other Interested Parties. Appeal from an order of the District Court of Cleveland County, Hon. George W. Butner, Trial Judge. In a September 2019 order, the Supreme Court stayed the Plaintiffs' petition for certiorari, remanded this case, and ordered this Court "to address the issue whether the trial court correctly determined the Hamms were not, as a matter of law, entitled to indemnity because they could not meet contractually required preconditions to obtaining indemnity under the Declarations and the provisions of 18 O.S. §1031." The Supreme Court additionally directed us to "determine whether the indemnity provisions at issue are unconscionable as a matter of law." After review, we do not find the indemnity provisions to be unconscionable, but for the reasons discussed in our Opinion, we conclude the trial court correctly decided as a matter of law that the Hamms are not entitled to indemnity, and we affirm the trial court's decision. AFFIRMED. Supplemental Opinion from the Court of Civil Appeals, Division II, by Wiseman, J.; Barnes, V.C.J., and Hixon, J. (sitting by designation), concur.

(Division No. 3)
Thursday, September 3, 2020

117,611 — Urban Oil & Gas Partners B-1, LP and Urban Fund II, LP, Plaintiffs/Appellants, v. Cimarex Energy Co.; Magnum Hunter Productions, Inc.; Mallard Hunter, L.P.; and Teal Hunter, L.P., Defendants/Appellees. Appeal from the District Court of Kingfisher County, Oklahoma. Honorable Robert E. Davis, Judge. Plaintiffs/Appellants Urban Oil & Gas Partners B-1, LP and Urban Fund II, LP (Plaintiffs) appeal from an order granting summary judgment in favor of Defendants/Appellees Cimarex Energy Co. and Magnum Hunter Production, Inc. (collectively Defendants) in a quiet title action involving a 2006 transaction (the 2006 Transaction) concerning the divestiture of the multi-county and multi-state assets of two partnerships. Plaintiffs argued that the 2006 Transaction included a certain lease, which was disputed by Defendants. The trial court determined that the lease was excluded from the transaction. Plaintiffs also appeal the trial court's order awarding attorney fees to Defendants. We agree with the trial court that the 2006 Transaction did not include the Jung Lease. Based upon our review of the record and applicable law, the order granting summary judgment in favor of Defendants is affirmed. The order awarding attorney fees, costs, and expenses is also AFFIRMED. Opinion by Swinton, V.C.J., Mitchell, P.J., and Goree, J., concur.

(Division No. 4)
Thursday, August 27, 2020

117,752 — In the Estate of Guy Reynold Richardson, Jr., Deceased, Kimberly Lopez, individually and as Personal Representative of the Carolyn Richardson Estate, Appellant, vs. Christina Conway, individually and as Personal Representative of the Guy Richardson Estate, Appellee. Appeal from an order of the District Court of McClain County, Honorable Charles Gray, Trial Judge. Kimberly Lopez appeals a decision of the district court allowing a final distribution of the estate of Guy Richardson. Our review in this case is limited both by the record and the pendency of tort claims. We make no comment on the viability of these

claims. We find, however, no record sufficient to demonstrate error in the district court's decision. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

Tuesday, September 1, 2020

118,442 — GG&A Central Mall Partners, L.P., Plaintiff/Appellant, vs. Duro-Last, Inc., d/b/a Duro-Last Roofing, Inc., Defendant/Appellee. Appeal from an Order of the District Court of Comanche County, Oklahoma, Honorable Gerald Neuwirth, Trial Judge, granting summary judgment in favor of Duro-Last, Inc., interpreting the warranty on a roofing product as a matter of law. The warranty in this case is a contract that contains an ambiguity. We find the ambiguity cannot be resolved as a matter of law based on this record. We therefore reverse the grant of summary judgment. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

Wednesday, September 2, 2020

118,042 — C.A. Wolf, Petitioner/Appellee, vs. H.B. Wolf, Respondent/Appellant. Appeal from an Order of the District Court of Tulsa County, Hon. Julie Doss, Trial Judge. H.B. Wolf appeals the trial court's order entering a judgment of $13,390.04 for child support arrearage. We affirm the trial court's order determining the child support arrearage amount of $13,390.04 for the thirteen months between minor child's eighteenth birthday and high school graduation. However, the trial court erred by not holding a hearing to consider H.B. Wolf's alleged equitable defenses and whether he was entitled to receive credit against the arrearage for amounts allegedly spent for minor child's support during the thirteen months as equitable relief. Accordingly, we reverse this portion of the order to the trial court and remand for further proceedings consistent with this Opinion. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Thursday, September 3, 2020

117,582 — Vickie McBee, an individual, Plaintiff/Appellant, vs. Shawn Forth, an individual; Kathryn Walls, an individual; Richard Long, an individual; Shawn Forth, Inc., d/b/a Shawn Forth Custom Homes, an Oklahoma Corporation, Defendants/Appellees. Appeal from an order of the District Court of Oklahoma County, Hon. Thomas E. Prince, Trial Judge, granting motions to dismiss and to compel arbitration filed by Defendants. After review of the appellate record, we conclude the trial court properly rejected both Defendants' waiver argument and Plaintiff's fraud in the inducement claim and its decision on these points is affirmed. The remaining issues raised by Defendants' motion to compel arbitration and Plaintiff's objection are remanded to the trial court for further proceedings consistent with our Opinion. AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Friday, September 4, 2020

117,862 — Chrystal Behrend, Petitioner/Appellant, vs. John Behrend, Respondent/ Appellee. Appeal from an order of the District Court of Oklahoma County, Honorable Barry Hafar, Trial Judge. Mother appeals from decisions entered by the trial court following a three-day bench trial at which witnesses were called to testify; an *in camera* interview of the parties' minor child occurred; and various exhibits were introduced into evidence. Mother challenges the court's Order Modifying Joint Child Custody Plan and its entry of a new child support order and computation schedule that reduced the amount of monthly support to be paid by Father. Mother also appeals the court's judgment finding Mother guilty of indirect contempt for willfully withholding from Father two overnight visitations, subject to Mother's opportunity to purge the contempt by providing two additional overnights as specified by the court. Lastly, in consolidated Case No. 118,433, Mother appeals from the Journal Entry of Judgment granting attorney fees to Father and denying attorney fees to Mother. For the reasons set forth in our Opinion, we either reject, or are unable to review, Mother's challenges to the trial court's orders. We find the record presented by Mother lacks appellate force due to the absence of a complete evidentiary record on appeal, and therefore affirm the trial court decisions on each of these joined issues. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Tuesday, September 1, 2020

117,313 — Cody Craig, Plaintiff/Appellee, vs. Bob Mills Furniture Co., LLC, and James Sesock, Defendants/Appellants. Appellant's Petition for Rehearing, filed August 11, 2020, is *DENIED*.

(Division No. 2)
Wednesday, August 26, 2020

118,048 — PNC Bank National Association, Plaintiff/Appellant, vs. Unknown Successor Trustees of the Robert C. Keck Revocable Living Trust, dated February 25, 1998, if any, Defendant/Appellee, and John Doe, as Occupant of the Premises; and Jane Doe, Occupant of the Premises, Defendants. PNC has not provided grounds to grant rehearing. The petition of rehearing is *DENIED*.

(Division No. 3)
Wednesday, August 26, 2020

117,165 — Arvest Investments, Inc., d/b/a Arvest Wealth Management, an Arkansas corporation, Plaintiff in Interpleader, vs. Rita Rae Byfield, Defendant/Appellant, and Earl Nichols, Defendant/Appellee. Appellant's Petition for Rehearing, filed July 28, 2020, is *DENIED*.

Thursday, August 27, 2020

118,500 — Michael Dewayne Hutchins, Jr., an individual, Plaintiff/Appellant, vs. UPS Industrial Services, LLC, a foreign limited liability company, Defendant/Appellee, and Terra International (Oklahoma) LLC, a foreign limited liability company, Nicholas Beard, an individual, and Mandy Parker, an individual, Defendants. Appellee's Petition for Rehearing, filed July 30th, 2020, is *DENIED*.

(Division No. 4)
Thursday, September 3, 2020

118,311 — Airport Express, Inc., Petitioner/Appellee, vs. Oklahoma Tax Commission, Respondent/Appellant. Appellee's Petition for Rehearing is hereby *DENIED*.

118,414 — Three Jacks, LLC, Plaintiff/Appellant, vs. John and Karen Cherry, Trustees of the Cherry Living Trust, and American Eagle Title Group, LLC, Defendants/Appellees. Appellees' Petition for rehearing is hereby *DENIED*.

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9 A.M. - 2:50 P.M.

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TOPICS include but are not limited to the following:

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9 - NOON MORNING PROGRAM

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MCLE 3.5/0 MORNING PROGRAM

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FEATURED PRESENTER:

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