

Court Issue



Oba : Cle

FRIDAY, OCTOBER 23, 2020 9 A.M. - 4 P.M.



MCLE 7/1

FEATURED PRESENTER:

Jim Jesse, CEO/Founder, Rock N Roll Law

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THE ESSENTIALS OF MUSIC COPYRIGHT LAW

LEARNING OBJECTIVES:

- The origins of copyright law and what is a copyright.
- The two copyright in every song.
- How to register your copyrights and why it's important to do so.
- What is music publishing and what publishers do.
- All the exclusive right s you get with a copyright.
- All the revenue streams that songs can generate.
- The burden of proof and defenses to music copyright infringement cases.

ETHICS PORTION:

- The band/group is the client, not the individual members, unless there is informed consent.
- Who in the band do you go to? Is there a hierarchy of leadership? Can you go to manager or record label?
- This goes back to the importance of the operating agreement. Who are the leaders?
- And much, much more!

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OKLAHOMA BAR ASSOCIATION

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2020 OK 78

In Re: Amendment of Rule Two of the Rules Governing Admission to the Practice of Law, 5 O.S. 2011, Ch. 1, app. 5

SCBD 6961. September 28, 2020

ORDER

This matter comes on before this Court upon an Application to Amend Rule Two, Sections 1 and 5 of the Rules Governing Admission to the Practice of Law, 5 O.S. 2011, Ch. 1, app 5. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto, effective immediately.

DONE BY THE SUPREME COURT IN CONFERENCE this 28th day of September, 2020.

/s/ Douglas L. Combs ACTING CHIEF JUSTICE

ALL JUSTICES CONCUR

EXHIBIT A

Rules Governing Admission to the Practice of Law in the State of Oklahoma Chapter 1, App. 5 Rule 2. Admission Upon Motion Without Examination.

(1) For purposes of this Rule, the term "reciprocal state" shall mean a state which grants Oklahoma judges and lawyers the right of admission on motion, without the requirement of taking an examination and whose requirements for admission are similar to Oklahoma's admission upon motion without examination standards. Reciprocal state includes the District of Columbia, territories, districts, and commonwealths or possessions of the United States.

The following persons, when found by the Board of Bar Examiners to be qualified under Section I and 2 of Rule One, may be admitted by the Supreme Court to the practice of law in the State of Oklahoma upon the recommendation and motion of the Board, without examination:

Section 1. Persons who are graduates of an American Bar Association approved law school, have been lawfully admitted to practice and are in good standing on active status in by a reciprocal state, and have engaged in the actual and continuous practice of law <u>under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court in a reciprocal state for at least five of the seven years immediately preceding application for admission under this Rule. The years of practice earned <u>under the supervision and subject to the disciplinary requirements of in multiple reciprocal states may be combined.</u></u>

For the purposes of this section, "practice of law" shall mean:

- (a) Private practice as a sole practitioner or for a law firm, legal services office, legal clinic or similar entity, provided such practice was subsequent to being admitted to the practice of law in the reciprocal state in which that practice occurred;
- (b) Practice as an attorney for a corporation, partnership, trust, individual or other entity, provided such practice was subsequent to being admitted to the practice of law in the reciprocal state in which the practice occurred and involved the primary duties of furnishing legal counsel, drafting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying or presenting cases before courts, executive departments, administrative bureaus, or agencies;
- (c) Practice as an attorney for the federal, state, local government (including a territory, district, commonwealth or possession of the United States), branch of the armed services, or sovereign Indian nation with the same primary duties as described in Section I (b) above;
- (d) Employment as a judge, magistrate, referee, law clerk, or similar official for the federal, state or local government (including a territory, district, commonwealth or possession of the United States); provided that such employment is available only to attorneys;

(e) Full time employment as a teacher of law at a law school approved by the American Bar Association; or

(f) Any combination of the above.

The period of the "practice of law" as defined above in subparagraphs 1(a) through 1(f) shall have occurred outside the State of Oklahoma under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court in a reciprocal state. Applicants for admission without examination shall furnish such proof of practice and licensing as may be required by the Board. No applicant for admission without examination under this rule will be admitted if the applicant has taken and failed an Oklahoma bar examination without having later passed such examination.

An attorney practicing in Oklahoma under a Special Temporary Permit cannot later gain admission via Admission Upon Motion if five of the past seven years of actual and continuous practice experience were acquired in Oklahoma.

Section 2. Applicant shall provide at his or her own expense a report by the National Conference of Bar Examiners.

Section 3. Applications must be upon forms prescribed by the Board of Bar Examiners.

Section 4. It is the purpose of this rule to grant reciprocity to qualified judges and lawyers from other reciprocal states and to secure for Oklahoma judges and lawyers like privileges. If the former state of the applicant does not grant to Oklahoma judges and lawyers the right of admission on motion, then this Rule shall not apply and the applicant must, before being admitted to practice in Oklahoma, comply with the provisions of Rule Four. If the former state of the applicant permits the admission of Oklahoma judges and lawyers upon motion but the Rules are more stringent and exacting and contain other limitations, restrictions or conditions of admission and the fees required to be paid are higher, the admission of applicant shall be governed by the same Rules and shall pay the same fees which would apply to an applicant from Oklahoma seeking admission to the bar in the applicant's former state. If the applicant's actual and continuous practice for the past five of seven years is from a nonreciprocal state that does not grant Oklahoma judges and lawyers the right of admission on motion, the professional experience from the

former state will not be considered, and any professional experience from a nonreciprocal state cannot be combined with the professional experience from a reciprocal state to meet the requisite five of seven years of actual and continuous practice.

Section 5. Any person who is admitted to the practice of law in a reciprocal state and who remains under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court who becomes a resident of Oklahoma to accept or continue employment by a person, firm, association or corporation engaged in business in Oklahoma other than the practice of law, whose full time job is, or will be, devoted to the business of such employer, and who receives, or will receive, his or her entire compensation from such employer for applicant's legal services, may be granted a Special Temporary Permit to practice law in Oklahoma, without examination, if the applicant would be fully qualified to take the bar examination in Oklahoma under the rules of the Supreme Court, and so long as such person remains in the employ of, and devotes his or her full time to the business of, and receives compensation for legal services from no other source than applicant's said employer. Upon the termination of such employment or transfer outside the State of Oklahoma, the right of such person to practice law in Oklahoma shall terminate immediately without further action from the Bar Association or the Supreme Court of Oklahoma unless such person shall have been admitted to practice law in this state pursuant to some other rule.

The application must comply with Section 2 of Rule Two and be accompanied by a certificate from the clerk of the highest appellate court of the state in which the applicant last practiced, showing that applicant has been admitted, and is a member in good standing of the bar of that state; and a certificate from the employer of such applicant showing applicant's employment by such employer and that applicant's full time employment will be by such employer in Oklahoma. The Special Temporary Permit shall recite that it is issued under this Rule, and shall briefly contain the contents thereof. Such Special Temporary Permit shall be subject to Rule Ten of these Rules. An attorney practicing in Oklahoma under a Special Temporary Permit cannot gain admission via Rule Two, Section 2, Admission Upon Motion, if any of the five of the seven years immediately preceding of actual and continuous practice experience were acquired in Oklahoma under a Special Temporary Permit.

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- (b) Practice as an attorney for a corporation, partnership, trust, individual or other entity, provided such practice was subsequent to being admitted to the practice of law in the reciprocal state in which the practice occurred and involved the primary duties of furnishing legal counsel, drafting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying or presenting cases before courts, executive departments, administrative bureaus, or agencies;
- (c) Practice as an attorney for the federal, state, local government (including a territory, district, commonwealth or possession of the United States), branch of the armed services, or sovereign Indian nation with the same primary duties as described in Section I (b) above;
- (d) Employment as a judge, magistrate, referee, law clerk, or similar official for the federal, state or local government (including a territory, district, commonwealth or possession of the United States); provided that such employment is available only to attorneys;
- (e) Full time employment as a teacher of law at a law school approved by the American Bar Association; or
 - (f) Any combination of the above.

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Section 5. Any person who is admitted to the practice of law in a reciprocal state and who remains under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court who becomes a resident of Oklahoma to accept or continue employment by a person, firm, association or corporation engaged in business in Oklahoma other than the practice of law, whose full time job is, or will be, devoted to the business of such employer, and who receives, or will receive, his or her entire compensation from such employer for applicant's legal services, may be granted a Special Temporary Permit to practice law in Oklahoma, without examination, if the applicant would be fully qualified to take the bar examination in Oklahoma under the rules of the Supreme Court, and so long as such person remains in the employ of, and devotes his or her full time to the business of, and receives compensation for legal services from no other source than applicant's said employer. Upon the termination of such employment or transfer outside the State of Oklahoma, the right of such person to practice law in Oklahoma shall terminate immediately without further action from the Bar Association or the Supreme Court of Oklahoma unless such person shall have been admitted to practice law in this state pursuant to some other rule.

The application must comply with Section 2 of Rule Two and be accompanied by a certificate from the clerk of the highest appellate court of the state in which the applicant last practiced, showing that applicant has been admitted, and is a member in good standing of the bar of that state; and a certificate from the employer of such applicant showing applicant's employment by such employer and that applicant's full time employment will be by such employer in Oklahoma. The Special Temporary Permit shall recite that it is issued under this Rule, and shall briefly contain the contents thereof. Such Special Temporary Permit shall be subject to Rule Ten of these Rules. An attorney practicing in Oklahoma under a Special Temporary Permit cannot gain admission via Rule Two, Section 2, Admission Upon Motion, if any of the five of the seven years immediately preceding of actual and continuous practice experience were acquired in Oklahoma under a Special Temporary Permit.

2020 OK 80

In re: EDDIE JOE ADAMS, Debtor.

No. 118,735. September 29, 2020

CERTIFIED QUESTION FROM THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

¶0 The United States Bankruptcy Court for the Western District of Oklahoma certified a question of state law to this Court pursuant to the Revised Uniform Certification of Questions of Law Act, 20 O.S.2011, §§ 1601-1611.

CERTIFIED OUESTION ANSWERED

Michael J. Rose, Michael J. Rose PC, Oklahoma City, Oklahoma, for Debtor Eddie Adams.

Susan Manchester, Oklahoma City, Oklahoma, for Appellee Susan Manchester.

WINCHESTER, J.

¶1 The United States Bankruptcy Court for the Western District of Oklahoma certified to this Court the following question of law:

Is compensation exempt under 31 O.S.2011, § 1(A)(20) when the compensation was structured to meet the requirements for tax deferred treatment provided by Internal Revenue Code Section 409A (26 U.S.C. § 409A (2018))?¹

¶2 We answer no and hold the deferred compensation bonus at issue is not a "retirement plan or arrangement qualified for tax exemption or deferment purposes" as required to be exempt under 31 O.S.2011, § 1(A)(20).

CERTIFIED FACTS AND PROCEDURAL HISTORY

¶3 The bankruptcy court's certification order sets out the underlying facts of this case. When answering a certified question, this Court will not presume facts outside those presented by the certification order itself. *Gov't Emps. Ins. Co. v. Quine*, 2011 OK 88, ¶ 14, 264 P.3d 1245, 1249. That is, "our examination is confined to resolving legal issues." *Id.* We remain free, however, to "consider uncontested facts supported by the record." *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 2017 OK 14, ¶ 2, 392 P.3d 262, 263.

¶4 Boardman, LLC, a custom heavy metal fabricator, employed Debtor Eddie Joe Adams (Adams) as a sales representative for approximately 33 years. Adams and his employer entered into an Employment Agreement on January 1, 2013 (Original Agreement). The Original Agreement covered a period of ten years (until January 1, 2023) and compensated Adams through regular salary, bonuses, and severance. On January 1, 2014, Adams and his employer entered into the First Amendment to the Original Agreement (First Amendment) that included an additional performance incentive in the form of a "Deferred Bonus."²

¶5 On June 16, 2017, Adams and his employer executed an Amended and Restated Employment Agreement (Restated Agreement), which had a term until January 1, 2020. The preamble to the Restated Agreement provided:

(b) The parties desire to enter into this Agreement in order to: (i) modify the terms

of Adams' ordinary, non-deferred compensation subsequent to the Effective Date; (ii) make certain corrections under Internal Revenue Service Notice 2010-6, sections IV, VII.C and VII.D to the deferred compensation provided for in the Prior Employment Agreement to ensure that all of such deferred compensation complies with (or remains exempt from) section 409A of the Code; (iii) to further modify the Deferred Bonus by freezing it and eliminating future Annual Value Increases; and (iv) for the avoidance of doubt; to clarify that (x) the phantom unit referenced in the Original Employment Agreement was never adopted by the Company, and Adams never became a participant of or otherwise entitled to payment under any such plan; and (y) the amount of Annual Value Increase for any fiscal year of the Company in which the Company experienced a net loss was, and was originally intended to be, zero (\$0.00).

¶6 The pertinent bonus provisions of the Restated Agreement (the Deferred Bonus) were as follows:

3.3 Deferred Bonus.

(a) <u>Deferred Bonus Described</u>. Pursuant to the Prior Employment Agreement, Adams had the opportunity to earn a deferred bonus from the Company initially equal, on January 1, 2014, to \$100,000.00 (the "Initial Value") vesting at a rate of twenty percent (20%) per year over a five year vesting period (the "Deferred Bonus"). The vesting schedule provided by the Prior Employment Agreement was as follows (the "Vesting Schedule"):

Vesting Date	Current Vesting Percentage	Total Vested
January 1, 2015	20%	20%
January 1, 2016	20%	40%
January 1, 2017	20%	60%
January 1, 2018	20%	80%
January 1, 2019	20%	100%

¶7 The Restated Agreement modified the Deferred Bonus as follows:

(c) <u>Modification of Deferred Bonus</u>. As of the Effective Date, the Company and Adams hereby agree that Adams remains entitled to earn and be paid the Deferred Bonus as provided for in the Prior Employment Agreement, subject to the modifications thereof set forth in this Agreement. Such modifications are intended to ensure that the Deferred Bonus complies with section 409A of the Code. The Deferred Bonus shall vest as set forth in Section 3.3(a) above; in other words, on the same Vesting Schedule as was provided for in the Prior Employment Agreement. The Company and Adams acknowledge and agree that, as of the Effective Date, Adams has vested in sixty percent (60%) of the Deferred Bonus and forty percent (40%) of the Deferred Bonus remains unvested. The Company and Adams acknowledge and agree that: (i) as adjusted for Annual Value Increases through the end of 2016, the amount of the Deferred Bonus is One Hundred Eighty-One Thousand Eight Hundred Twenty-Five Dollars and No Cents (\$181,825.00); and (ii) no further Annual Value Increases shall be calculated or added to the Deferred Bonus.

. . .

(e) Time and Form of Payment of Deferred Bonus. Subject to Section 3.3(d)(i) hereof, that portion of the Deferred Bonus which has vested and which remains unforfeited as of the Distribution Commencement Date shall be paid to Adams (or his estate) in the form of five equal annual installments, together with interest at the Applicable Federal Rate on the entire unpaid vested portion of the Deferred Bonus calculated from January 1, 2019 through each payment date. The initial such payment shall be made on January 1, 2020 (the "Payment Commencement Date"), with the remaining payments made on January 1, 2021, January 1, 2022, January 1, 2023 and January 1, 2024.

¶8 On January 1, 2019, the Deferred Bonus fully vested, and on October 31, 2019, Adams filed his voluntary chapter 7 bankruptcy petition. Boardman, LLC did not renew the Restated Agreement, and it expired on January 1, 2020. Adams received his first payment of \$41,634.14, less withholding tax, under the Deferred Bonus on January 2, 2020.³

¶9 In his bankruptcy filings, Adams claimed the Deferred Bonus in the amount of \$197,623.78 (payable over 5 years) exempt under 31 O.S.

2011, § 1(A)(20).⁴ Trustee Susan Manchester (Trustee) objected to the exemption claimed by Adams. The question certified to this Court by the United States Bankruptcy Court for the Western District of Oklahoma is whether the Deferred Bonus is exempt under 31 O.S.2011, § 1(A)(20) (hereafter Subsection 20). This is a question of first impression in a matter that offers "no controlling Oklahoma precedent." *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 6 n.6, 432 P.3d 233, 236 n.6.

ANALYSIS

¶10 Under the Bankruptcy Code, a debtor must include in the bankruptcy estate virtually all property that a debtor has a legal or equitable interest in at the commencement of the case. See 11 U.S.C. § 541 (2019). However, a debtor may claim certain property exempt from the estate. Id. The Code allows states to establish separate exemption lists. A debtor may choose either the federal exemption provisions or the state provisions unless a debtor resides in a state that has "opted out" of the federal exemption list. See 11 U.S.C. § 522(b)(1) (2019). In states that have "opted out," debtors are limited to the state exemption list. Oklahoma has "opted out." See 31 O.S.2011, § 1(B). Therefore, Oklahoma bankruptcy debtors are limited to the Oklahoma exemptions. See 31 O.S.2011, § 1(A).

¶11 We must then examine Oklahoma's exemption statute to decide whether the Deferred Bonus structured to meet the requirements for tax deferred treatment provided by Internal Revenue Code (I.R.C.) Section 409A is exempt. When the Court examines a statute, our primary goal is to determine legislative intent through the "plain and ordinary meaning" of the statutory language. *In re Initiative Petition No.* 397, 2014 OK 23, ¶ 9, 326 P.3d 496, 501. Because the Legislature expresses its purpose by words, the plain meaning of a statute is deemed to express legislative authorial intent in the absence of any ambiguous or conflicting language. *Id*.

¶12 Oklahoma's exemption statute states in pertinent part:

A. Except as otherwise provided in this title and notwithstanding subsection B of this section, the following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale

for the payment of debts, except as herein provided:

. . .

20. Subject to the Uniform Fraudulent Transfer Act, Section 112 et seq. of Title 24 of the Oklahoma Statutes, any interest in a retirement plan or arrangement qualified for tax exemption or deferment purposes under present or future Acts of Congress; provided, any transfer or rollover contribution between retirement plans or arrangements which avoids current federal income taxation shall not be deemed a transfer which is fraudulent as to a creditor under the Uniform Fraudulent Transfer Act. "Retirement plan or arrangement qualified for tax exemption purposes" shall include without limitation, trusts, custodial accounts, insurance, annuity contracts and other properties and rights constituting a part thereof. By way of example and not by limitation, retirement plans or arrangements qualified for tax exemption or deferment purposes permitted under present Acts of Congress include defined contribution plans and defined benefit plans as defined under the Internal Revenue Code ("IRC"), individual retirement accounts, individual retirement annuities, simplified employee pension plans, Keogh plans, IRC. Section 403(a) annuity plans, IRC Section 403(b) annuities, Roth individual retirement accounts created pursuant to IRC Section 408A, educational individual retirement accounts created pursuant to IRC Section 530 and eligible state deferred compensation plans governed under IRC Section 457. This provision shall be in addition to and not a limitation of any other provision of the Oklahoma Statutes which grants an exemption from attachment or execution and every other species of forced sale for the payment of debts. This provision shall be effective for retirement plans and arrangements in existence on, or created after April 16, 1987[.]

31 O.S.2011, § 1(A)(20) (emphasis added).

¶13 Oklahoma's exemption statute seeks "to prevent improvident debtors from becoming subjects of charity" by excluding "classified property" like a home or other life "necessities." Sec. Bldg. & Loan Ass'n v. Ward, 1935 OK 996, ¶ 32, 50 P.2d 651, 657. Generally, Oklahoma case law has construed and applied the

exemptions in a reasonably limited matter. See *In re McKaskle*, 117 B.R. 671, 674 (Bankr. N.D. Okla. 1990).

¶14 In determining whether the Deferred Bonus is exempt under Subsection 20, we must resolve whether the Deferred Bonus is (1) a retirement plan or arrangement and (2) qualified for tax exemption or deferment purposes. We address each in turn.

A. Retirement Plan or Arrangement.

¶15 Subsection 20 specifically exempts any interest in a "retirement plan or arrangement." The term "retirement" consistently modifies the phrase "plan or arrangement" each of the three times the Legislature used the phrase in Subsection 20. The logical conclusion based on the plain language of the statute is that every interest exempt under Subsection 20 must be a plan or arrangement designated for retirement purposes. The Tenth Circuit Court of Appeals previously supported this conclusion when it held Subsection 20 represents a rational policy choice in favor of debtor retirement funds. See In re Walker, 959 F.2d 894, 900 (10th Cir. 1992). The United States Bankruptcy Court for the Northern District of Oklahoma also concluded the intent of the Legislature in exempting retirement accounts is to allow debtors to preserve assets that they have earmarked for retirement in the ordinary course of the debtor's affairs. In re Sims, 241 B.R. 467, 471 (Bankr. N.D. Okla. 1999). The reasoning of these federal courts tracks our holding in Security Building & Loan Association v. Ward, 1935 OK 996, ¶ 32, 50 P.2d 651, 657.

¶16 Similarly, the United States Bankruptcy Court for the Northern District of Oklahoma in *In re Gee*, 124 B.R. 581 (Bankr. N.D. Okla. 1991), addressed whether an annuity from the debtor's employer as a result of a sales bonus was exempt pursuant to 31 O.S.1987, § 1(A)(20) (superseded 1998). *Id.* at 582-83. The bankruptcy court held that the annuity was not a "retirement plan" as contemplated under Subsection 20. Specifically, the bankruptcy court reasoned:

But this annuity is not a "retirement plan" any more than it is "wages." Debtor has a right to receive the payments even though he has *not* yet retired; he enjoys the right whether he retires or not; and the right was never offered to employees at large for purposes of retirement, but to a select few employees as a reward for salesmanship.

Id. at 586; see also In re Cella, 128 B.R. 574, 578 (Bankr. W.D. Okla. 1991) (holding Subsection 20 is intended to apply only to retirement funds). In accordance with these persuasive federal court opinions and *Security Building & Loan Association v. Ward*, 1935 OK 996, ¶ 32, 50 P.2d 651, 657, we conclude for Subsection 20 to apply, the plan or arrangement must be for retirement.⁵

¶17 The next question becomes whether the Deferred Bonus is a "retirement plan or arrangement." Subsection 20 lists "by way of example and not by limitation" several retirement plans or arrangements that are exempt. An I.R.C. Section 409A plan, like the Deferred Bonus, is not listed. The stated examples are particularly helpful in determining the legislative intent as to what plans or arrangements are exempt. The majority of the retirement vehicles listed in Subsection 20 involve a trade-off: individuals invest their money with certain advantageous tax benefits in the future but must forfeit access to the money until retirement or face significant penalties for withdrawals or surrenders.6 These plans or arrangements protect funds that a plan participant will rely upon for retirement.

¶18 The Section 409A Deferred Bonus does not share these characteristics. Section 409A applies to "nonqualified deferred compensation," which it defines very broadly, and includes a present legally enforceable right to taxable compensation for services that will be paid in a later year. See 26 U.S.C. § 409A (2018).7 The Deferred Bonus vested five years after the execution of the original Employment Agreement. The Restated Agreement specified that Adams would receive payments on January 1st of the subsequent five years (2020, 2021, 2022, 2023, and 2024). Payment of the deferred bonus was not designated for retirement purposes, and once received, the Deferred Bonus could be used for any purpose. The Deferred Bonus is more akin to the annuity in *In re Gee*: a short term investment vehicle that Adams used to increase his earnings not offered to employees at large for purposes of retirement. See In re Gee, 124 B.R. at 586. Holding such a plan or arrangement exempt does not fulfill the legislative intent of Oklahoma's exemption statute - to provide a debtor with the "necessities" of life. Sec. Bldg. & Loan Ass'n, 1935 OK 996, ¶ 32, 50 P.2d at 657.

¶19 Further, a Section 409A Deferred Bonus does not enjoy the same kind of fiduciary rela-

tionship between the employer and employee as other retirement plans. The whole structure of the Section 409A Deferred Bonus is that of a debtor-creditor, giving rise to contractual claims in the event of a breach, not that of a fiduciary and its beneficiary. *See supra* Restated Agreement, Section 3.3.8

¶20 We, therefore, hold that Subsection 20 exempts only those plans or arrangements designated for retirement, and the Section 409A Deferred Bonus does not meet the characteristics of a retirement plan or arrangement.

B. Qualified for Tax Exemption or Deferment Purposes.

¶21 A retirement plan or arrangement must also be "qualified for tax exemption or deferment purposes" for it to be exempt under Subsection 20. Even if this Court held the Deferred Bonus is a retirement plan or arrangement, it would not be exempt because a Section 409A plan is not a "qualified employer plan" for tax deferral purposes.

¶22 In the context of employer retirement plans and arrangements, "qualified" has a specific meaning. For a plan to "qualify" under the provisions of the I.R.C., it must comply with the provisions of I.R.C. Section 401. See e.g., 26 U.S.C. § 401(a) (2020) ("Requirements for qualification"); 26 U.S.C. § 401(k)(2) (2020) ("Qualified cash or deferred arrangement"). Section 409A deferred compensation plans, like the Deferred Bonus, are eligible for tax deferral until the deferred compensation is paid, but they are distinct from "qualified employer plans." The I.R.C. designates Section 409A plans as "nonqualified deferred compensation plans," meaning they encompass any plan that provides for the deferral of compensation other than a "qualified employer plan." 26 U.S.C. § 409A(d)(1)(A) (2018). Section 409A defines "qualified employer plans" as follows:

- (i) A plan described in section 401(a) which includes a trust exempt from tax under section 501(a),
- (ii) An annuity plan described in section 403(a),
- (iii) A plan established for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing,
- (iv) An annuity contract described in section 403(b),

- (v) A simplified employee pension (within the meaning of section 408(k)),
- (vi) Any simple retirement account (within the meaning of section 408(p)),
- (vii) Any eligible deferred compensation plan (within the meaning of section 457(b)), or
- (viii) Any plan described in section 415(m). 26 U.S.C. § 409A(d)(2) (2018).9

¶23 The list of "qualified employer plans" in I.R.C. Section 409A(d) is nearly identical to those plans and arrangements listed in Subsection 20 of Oklahoma's exemption statute. Subsection 20 cites specifically to some qualified employer plans and arrangements by their I.R.C. sections: Sections 403(a) & (b), and 457. Others are more generically described: "defined contribution plans" and "defined benefit plans" governed by I.R.C. Section 401(a), and "individual retirement accounts" and "simplified employee pension plans" governed by I.R.C. Section 408. See 31 O.S.2011, § 1(A)(20). From the use of the word "qualified" and the qualified employer plans listed in Subsection 20, we conclude Subsection 20 exempts those employer retirement plans or arrangements that are "qualified" as defined by the I.R.C.

¶24 In this matter, Adams and his employer entered into the Restated Agreement to ensure the Deferred Bonus complied with Section 409A. The Section 409A Deferred Bonus is not qualified under the I.R.C. The Deferred Bonus is, therefore, "nonqualified" and not exempt under Subsection 20.

CONCLUSION

¶25 To be exempt under 31 O.S.2011, § 1(A) (20), the bankruptcy property must be an interest in a "retirement plan or arrangement qualified for tax exemption or deferment purposes." The Section 409A Deferred Bonus is bonus compensation that vested five years after executing an employment agreement and paid over the subsequent five years. The employer offered the Deferred Bonus to Adams as a performance incentive and not for retirement purposes. It does not meet the characteristics of a retirement plan or arrangement. Further, the Section 409A Deferred Bonus is not "qualified" under the I.R.C. as required by Subsection 20. We hold the Section 409A Deferred Bonus is not exempt under 31 O.S.2011, § 1(A)(20).

CERTIFIED QUESTION ANSWERED

CONCUR: Gurich, C.J., Kauger, Winchester, Edmondson, Colbert, Combs, Kane, and Rowe, II.

NO VOTE: Darby, V.C.J.

WINCHESTER, J.

- 1. The Court has not substantively reformulated the question of law, although it is within our discretion to do so. See 20 O.S.2011, § 1602.1. We have altered the question only to conform to this Court's own citation conventions.
- 2. The "Deferred Bonus" section of the First Amendment stated as follows:
 - 2. $\underline{\text{Deferred Bonus}}.$ The following new Section 3.4 shall be inserted in Article III:
 - 3.4 <u>Deferred Bonus</u>. Adams shall be entitled to a deferred bonus subject to the following ("Deferred Bonus"):
 - (a) <u>Initial Value</u>. As of the Effective Date, the value of the Deferred Bonus shall be One Hundred Thousand and No/100 Dollars (\$100,000.00) ("Initial Value"), subject to the vesting provisions in (b) below.
 - (b) <u>Vesting.</u> The Initial Value shall vest over the five-year period following the Effective Date, at a rate of 20% per year, commencing on January 1, 2015 and on the same day each year until becoming fully vested on January 1, 2019 ("Vesting Date").
 - (c) <u>Annual Value Increase</u>. The Initial Value of the Deferred Bonus shall be adjusted each year, commencing as of the close of business on December 31, 2014 and on the same day of each year until the final adjustment as of the close of business on December 31, 2019, by an amount equal to the product of Company's net income for that year, as shown on the applicable audited income statement, multiplied by .01665 ("Annual Value Increase"). The Annual Value Increase for each calendar year shall be calculated and added to the Initial Value within thirty (30) days of receipt by Company of the applicable audited income statement and at such time, the Board shall notify Adams, in writing, of the amount of the adjustment to the Deferred Bonus. *See* example attached hereto as Exhibit A.
 - (d) Option to Receive Deferred Bonus. After the fifth anniversary of this Amendment, Adams may request payment (the date of such request to be the "Payment Date") of the Deferred Bonus (including the Initial Value and all Annual Value Increases) and if Company consents to such request, Company shall pay to Adams the Deferred Bonus either, in Company's discretion, in one lump sum or in five equal installments (Deferred Bonus divided by five) plus interest on the outstanding balance at the mid-term Applicable Federal Rate as of the Payment Date, commencing on the one year anniversary of the Payment Date and on the same day of each year thereafter until five installments have been paid, plus interest.
- 3. The Restated Agreement called for payment on January 1st of each year. However, Boardman, LLC will make payments the first business day following January 1.
- 4. Adams originally claimed his Deferred Bonus exempt under 60 O.S.2011, §§ 327-328. Trustee objected to this exemption. Adams then amended his claim of exemption and claimed his Deferred Bonus exempt under 31 O.S.2011, § 1(A)(20). Adams has a Boardman, LLC 401(k) retirement plan with a value of over \$350,000.00 that he also claimed exempt under 31 O.S.2011, § 1(A)(20). Trustee conceded that the 401(k) retirement account is exempt.
- 5. The Court notes the term "arrangement" is not defined in the I.R.C. It is, however, a term commonly used to describe an individual retirement account or annuity and to distinguish them from other forms of retirement savings vehicles. *See e.g.*, 26 C.F.R. § 1.408-6 (1980) ("Disclosure statements for individual retirement arrangements").
- 6. Subsection 20 has one caveat to this analysis in that it lists educational individual retirement accounts (Educational IRAs). These accounts are primarily used to fund education needs. However, an Educational IRA is similar to a Roth IRA. The Legislature amended 31 O.S.2011, § 1(A)(20) in 2005 to move Educational IRAs from a separate exemption in subsection 24 and Roth IRAs from a separate exemption in subsection 23 to Subsection 20. *See* 31 O.S.2003, §§ 1(A)(23) & (24) (superseded 2005). The Legislature kept a similar exemption regarding

any interest in an Oklahoma College Savings Plan account as a separate exemption under a separate subsection. See 31 O.S.2011, §§ 1(A) (24). If the Legislature intended all savings plans or arrangements (and not just retirement plans or arrangements) to be included in the Subparagraph 20, the Legislature would have also included the exemption for any interest in an Oklahoma College Savings Plan account. Instead, the Legislature amended the statute to include only retirement accounts (including an Educational IRA due to its name including "retirement account") in Subsection 20. We reject the argument that the 2005 amendment changed the scope of Subsection 20.

7. Section 409A can apply to elective deferrals of compensation, severance and separation options, equity incentive programs, reim-

bursements, and a variety of other items.

8. See also In re Jokiel, 453 B.R. 743 (Bankr. N.D. Ill. 2011) (concluding that a Section 409A plan did not qualify for exemption under Illinois law); In re Gnadt, No. 11-10378-BFK, 2015 WL 2194475, at *9 (Bankr. E.D. Va. May 7, 2015) (concluding that a Section 409A plan did not qualify for exemption under Virginia law).

9. Section 1.409A-1(a)(2) of the Treasury Regulations defines a

9. Section 1.409A-1(a)(2) of the Treasury Regulations defines a "nonqualified deferred compensation plan" as one that does not include a qualified employer plan. It further defines a qualified

employer plan as any of the following plans:

- (i) Any plan described in section 401(a) and a trust exempt from tax under section 501(a) or that is described in section 402(d).
- (ii) Any annuity plan described in section 403(a).
- (iii) Any annuity contract described in section 403(b).
- (iv) Any simplified employee pension (within the meaning of section 408(k)).
- (v) Any simple retirement account (within the meaning of section 408(p)).
- (vi) Any plan under which an active participant makes deductible contributions to a trust described in section 501(c)(18).
- (vii) Any eligible deferred compensation plan (within the meaning of section 457(b)).
- (viii) Any plan described in section 415(m).
- (ix) Any plan described in § 1022(i)(2) of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829, 942) (Sept. 2, 1974) (ERISA).

See 26 C.F.R. § 1.409(A)-1(a)(2) (2007).

Further, I.R.C. Section 3121 defines terms for the Federal Insurance Contributions Act and specifically defines a "nonqualified deferred compensation plan" to mean "any plan or other arrangement for deferral of compensation other than a plan described in subsection (a) (5)." See 26 U.S.C. § 3121(v)(2)(C) (2019). In turn, Section 3121(a)(5) provides that wages do not include payments made to retirement plans qualified under I.R.C. Section 401(a), other similar plans under I.R.C. Sections 403(a) & (b), Section 408, Section 457, or cafeteria plans under I.R.C. Section 125. See 26 U.S.C. § 3121(a)(5) (2019).

Finally, the Federal Bankruptcy Code contains an exemption for retirement plans that is similar to Oklahoma's exemption and does not include Section 409A nonqualified deferred compensation plans. See 11 U.S.C. § 522(d)(12) ("Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.").

10. The Court notes that Subsection 20 does not refer generically to deferred compensation plans. Instead, it specifically exempts State deferred compensation plans under I.R.C. Section 457, which are qualified plans, without making mention of any other deferred compensation plans. *See* 31 O.S.2011, § 1(A)(20).

2020 OK 81

TOCH, LLC, an Oklahoma Limited Liability Company Plaintiff/Appellee, v. CITY OF TULSA, an Incorporated Municipality, Defendant/Appellant, and TULSA HOTEL PARTNERS, LLC, an Oklahoma Limited Liability Company, Intervenor/Appellant.

No. 118,682. September 29, 2020

As Corrected: September 30, 2020

ON APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY HONORABLE LINDA G. MORRISSEY, DISTRICT JUDGE

¶0 Plaintiff requested a declaratory judgment that Tulsa Tourism Improvement District No. 1 was improperly created. All parties sought summary judgment. The district court granted summary judgment in Plaintiff's favor. We retained Defendant's and Intervenor's appeal.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

John M. Thetford, Evan M. McLemore, and Grant B. Thetford, Levinson, Smith & Huffman, P.C., Tulsa, OK, for Plaintiff/Appellee, Toch, LLC.

Gerald M. Bender, T. Michelle McGrew, and R. Lawson Vaughn, Tulsa, OK, for Defendant/Appellant, City of Tulsa.

Frederic Dorwart, Jared M. Burden, and J. Kyden Creekpaum, Frederic Dorwart, Lawyers PLLC, Tulsa, OK, for Intervenor/Appellant, Tulsa Hotel Partners, LLC.

OPINION

DARBY, V.C.J.,

¶1 The City of Tulsa (City), Defendant, passed an ordinance creating a tourism improvement district that encompassed all properties within City which had hotels or motels with 110 or more rooms available for occupancy. Toch, LLC, Plaintiff/Appellee, owns Aloft Downtown Tulsa (Aloft) with 180 rooms. Toch filed a petition in Tulsa County District Court requesting a declaratory judgment that the ordinance is invalid for a variety of reasons, including that the district does not include all hotels with at least 50 rooms available. The court granted summary judgment to Toch based on its determination that City exceeded the authority granted in title 11, section 39-103.1. The question before this Court is whether section 39-103.1 grants authority to municipalities to limit a tourism improvement district to a minimum room-count of a number larger than 50. We answer in the affirmative.

I. BACKGROUND

¶2 In October 2018, City proposed an ordinance to create Tulsa Tourism Improvement District No. 1 (TID). City limited the prospective district to "those properties within the

geographical area of the City of Tulsa on which a hotel or motel, which in either case has one-hundred ten (110) or more rooms available for occupancy, is located." The proffered assessment-area map outlined the Tulsa corporate limits with bullet points noting the location of each hotel. The attached estimated-assessment roll listed thirty-three hotels and motels and contained hotel names, property owners, and legal descriptions for each property. Pet. Ex. A. The resolution stated that the "list of each Property on the assessment plat shall be updated as of each April 1 when the annual assessment roll is prepared." *Id.*

¶3 On November 5, 2018, Trevor Henson filed a letter with City which stated in relevant part:

I have been hired by multiple hotel owners to file an official objection to any creation of a Second Improvement District Assessment¹ in Tulsa applying to hotels in excess of 110 Rooms within the City of Tulsa and in the proposed improvement district. The parties joining in this objection are the owners and operators of the hotels listed as follows:

. . .

Aloft Downtown Tulsa [Footnote: Lee Levinson is the owner of the Aloft Downtown Tulsa hotel.]

Pet. Ex. B. On November 7, 2018, Henson filed a second opposition letter with City. Later that day at the City Council hearing, Henson, John Snyder, Lee Levinson, and three other individuals all made public comments in opposition to the creation of the TID. Joint Mot. for Summ. J. Ex. 3. Also at the hearing, Henson presented City Council with a copy of both previously filed objection letters before it voted unanimously in favor of the TID.

II. PROCEDURAL HISTORY

¶4 On December 6, 2018, Toch filed a petition in Tulsa County District Court requesting invalidation of the TID for a plethora of reasons, including that the creation and boundaries of the assessment roll were arbitrary, creation of the TID was outside of the authorities granted to City under title 11, section 14-101,² and the size of the TID was arbitrary because it would not reasonably benefit its members but would benefit properties that were not included.³ The petition stated that Toch's "primary business is owning

and operating the Aloft Hotel located in Downtown Tulsa." Pet. 1. The petition noted that "[i]n order to simplify proceedings [Toch] is the only named Plaintiff and is acting as a representative on behalf of the parties that have collectively objected to the assessment and creation of the TID." Pet. 1 n. 1.

¶5 Over the next nine months, Toch filed a motion for summary judgment, Tulsa Hotel Partners (Intervenor) filed a motion to intervene, and City and Intervenor (together "Appellants") filed a joint-motion for summary judgment. Prior to the hearing on summary judgment, Toch argued that the TID violated both article V, section 59 of the Oklahoma Constitution as a special law, and the Equal Protection Clause of the United States Constitution, when it did not seek to also assess hotels with 50 through 109 rooms. Appellants argued that City was authorized to create the TID under title 11, sections 14-101 and 39-103.1 and the creation of the TID was a valid exercise of municipal power. In a footnote to their argument that the TID is not a special law, Appellants asserted that Toch's argument that the statute does not allow City to limit the TID "to hotels with 110 rooms or more is both immaterial to an analysis of special laws and incorrect" as the statute clearly permitted City "to choose the size of hotels it assesses, so long as the hotels have at least 50 rooms." Reply in Supp. of Joint Mot. for Summ. J. 3 n. 5, Oct. 2, 2019.

¶6 At the hearing on the motions for summary judgment, Toch argued that City did not have the authority to require 110 rooms, instead of 50, as a basis for inclusion in the TID and City had no legislative purpose to set the higher floor except attempting to garner enough support for passage. When questioned by the court about the statute potentially requiring inclusion of all hotels with 50 or more rooms, Appellants asserted that the legislature's use of the disjunctive or expressed a choice and the legislature would have written "at least 50" if it intended municipalities to include all hotels with 50 or more rooms. Appellants argued that the legislature intended to provide flexibility so municipalities could determine their own special needs and draw appropriate distinctions. Further, Appellants argued that if the statute was ambiguous, the city council "makes the call on how to apply it."

¶7 In February 2020, the district court granted in part and denied in part Toch's motion for summary judgment and denied Appellants'

motion for summary judgment. The journal entry incorporated the court's twenty-one page order, wherein the court summarized Toch's arguments on summary judgment down to three points, but only granted the motion based on the first: "the TID was improperly created because the City did not use the 50 room threshold as authorized by 11 O.S. § 39-103.1 but rather arbitrarily established a threshold of 110 rooms." Order 5, Jan. 15, 2020.4

¶8 The district court determined that, "any citizen of Tulsa and certainly any hotel in the TID could at any time bring an action for determination of whether [City] has followed the law in creating the TID." Order 20-21. The court ultimately ruled:

The Legislature did not grant to [City] the authority to legislate the number of rooms a hotel must have in order to be subject to the TID. The level set by the legislature, "50 or more rooms" is "perfectly clear" and unambiguous.... A number of questions raised by [Toch] are not reached in the determination of this matter because the enabling statute simply does not grant authority to [City] to set a threshold for creation of a TID. The threshold created by the legislature is 50 or more rooms.

Order 20-21 (emphasis added). In performing a partial analysis of the TID as a special law under article V, section 59 of the Oklahoma Constitution, the court noted, but failed to address, Appellants' argument that the language of title 11, section 39-103.1 permits City to choose the size of hotels it assesses. Order 18. Instead, the court continued on with its special law analysis of the TID and then granted summary judgment based on the undiscussed, yet dispositive, issue.

¶9 Appellants timely filed a petition in error and now argue in relevant part that the district court erred in granting summary judgment when it (1) held that any citizen of Tulsa and certainly any hotel in the TID could bring an action to challenge the City's proper creation of the TID at any time, and (2) found *sua sponte* that municipalities can create a TID under section 39-103.1 *only* if all hotels with at least 50 rooms are included.⁵ Appellants requested that we retain the appeal and grant leave to submit additional briefing because the district court ruled based on a theory they had not been allowed to dispute. We did both.

¶10 In their Brief in Chief, Appellants allege that title 11, section 39-103.1 sets a floor for the minimum size of hotels which may be included.⁶ Appellants claim that the district court ignored all but the words "50 or more" in order to find a statutory requirement for municipalities to include all hotels with at least 50 rooms. Appellants note that the plain meaning of the disjunctive *or* is an alternative between one or more choices; accordingly, Appellants argue that the statute grants municipalities discretion to tailor districts to their unique socio-economic circumstances so long as each hotel has a minimum of 50 rooms.

¶11 Appellants argue that within the context of the tourism statute, the language "50 or more" can only be interpreted as a floor because sections 39-103.1 and 39-1047 provide broad discretion to the municipality. Appellants contend that the district court's "rigidity flies in the face of the general purpose of the Act" and does not provide the flexibility needed for both large and small cities. Appellants submit arguendo that even if the Court finds the statute created a level,8 the TID is still proper because, "[h]ere, the 'geographical area' of the [TID] is not synonymous with the city limits of Tulsa, but rather consists of the non-contiguous properties" described on the attached assessment roll "with hotels that have 110 or more rooms." Appellants' Br. in Chief 11.

¶12 Appellants further argue that the district court erred in allowing Toch to challenge the TID. Appellants note that section 39-108(D) specifically mandates that challenges to creation of a tourism improvement district are only allowed if a person previously filed a written protest *during the hearing*. Appellants aver that the objection here was filed at the hearing in the name of the hotel, not the name of the property owner, therefore Toch cannot object before the district court.

¶13 In response, Toch claims that Appellants failed to apply the correct standard of review, Toch has standing, and the district court properly held that section 39-103.1 mandates that if the municipality wishes to enact an improvement district for marketing hotels it must contain all hotels with at least 50 rooms. Toch states that this Court must presume that the district court was correct and review the district court's order under a clearly erroneous standard. Toch asserts that the district court properly found it had standing based on the court's findings.9 Finally, Toch notes that the

only issue decided below is whether City exceeded its authority under section 39-103.1 by choosing its own threshold for inclusion in the TID. Toch asserts that the legislature knows how to set a floor, and instead chose here to set a level – indicated by the legislature not using language identical to that of other statutory floors. Toch argues that the district court properly found section 39-103.1 mandates a "level of rooms (a) that must be included in any TID and (b) without which, the City may not create an Improvement District." Appellee's Resp. 10.

¶14 In reply, Appellants maintain that Toch considers key statutory language out of context and ignores the portion of the statute which allows municipalities unfettered discretion to define the geographical area of improvement districts. Appellants explain that "rather than mandating what properties **must** be included in such an improvement district, [the phrase '50 or more rooms'] sets a floor regarding what properties **may** be included in an improvement district." Reply 5 (emphasis original). Appellants further note that standing is a legal issue that appellate courts review *de novo*.

III. STANDARD OF REVIEW

¶15 Summary judgment settles only questions of law, therefore, we review de novo the grant thereof. Am. Biomedical Grp. v. Techtrol, Inc., 2016 OK 55, ¶ 2, 374 P.3d 820, 822. "Summary judgment will be affirmed only if the appellate court determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." Horton v. Hamilton, 2015 OK 6, ¶ 8, 345 P.3d 357, 360; see also 12 O.S.2011, § 2056(C). If a party is not entitled to judgment as a matter of law, then summary judgment will be reversed. Horton, 2015 OK 6, ¶ 8, 345 P.3d at 360. Questions of statutory interpretation are reviewed de novo. Signature Leasing, LLC v. Buyer's Group, LLC, 2020 OK 50, ¶ 2, 466 P.3d 544, 545.

IV. ANALYSIS

¶16 The issue before this Court is whether City exceeded its legislative authority in enacting the TID. Because the "mandatory scope of a legally cognizable cause of action may present a jurisdictional question," we must first address whether title 11, section 39-108(D) was complied with here. See Indep. Sch. Dist. No. 52 of Okla. Cty. v. Hofmeister, 2020 OK 56, ¶ 53, --- P.3d ---.

A. Title 11, Section 39-108(D)

¶17 Section 39-108(D) mandates:

Within thirty (30) days after the governing body has concluded the hearing; determined the advisability of constructing the improvement and the type and character of the improvement; and created the improvement district, any person who, during the hearing, filed a written protest with the governing body protesting the construction of the improvement may commence an action in district court to correct or set aside the determination of the governing body. After the lapse of thirty (30) days succeeding the determination of the governing body, any action attacking the validity of the proceedings and the amount of benefit to be derived from the improvement is perpetually barred.

11 O.S.2011, § 39-108(D) (emphasis added). This section creates a condition precedent in order to bring an action attacking the validity of a tourism improvement district: objecting to the creation of the district at the hearing creating it. The district court was therefore incorrect in its statement that "any citizen of Tulsa and certainly any hotel in the TID could at any time" challenge whether City "followed the law in creating the TID." Order 20-21 (emphasis added). But, in this case, Toch timely and properly brought the challenge on behalf of Aloft through an agency relationship.

¶18 "An agency relationship generally exists if two parties agree one is to act for the other." Sur. Bail Bondsmen of Okla., Inc. v. Ins. Comm'r, 2010 OK 73, ¶ 23, 243 P.3d 1177, 1185 (quoting McGee v. Alexander, 2001 OK 78, ¶ 29, 37 P.3d 800, 807). "[A] principal cannot do an act through an agent which the principal could not do directly." Sur. Bail Bondsmen of Okla., 2010 OK 73, ¶ 24, 243 P.3d at 1185. Here, the petition stated that Toch brought the action on behalf of the parties that objected to the creation of the TID and noted that Toch owns and operates Aloft. Toch did not appear and object at the hearing, but at least one party appeared at the hearing and filed a written objection on behalf of Aloft. Because Toch filed the petition in this matter as owner, operator, and on behalf of Aloft, we find Toch met the statutory prerequisite and properly brought this action.

B. Title 11, Section 39-103.1

¶19 Municipalities possess and can exercise only those powers expressly or impliedly

granted by the state. *City of Hartshorne v. Marathon Oil Co.*, 1979 OK 48, ¶ 4, 593 P.2d 97, 99; *Ex parte Holmes*, 1933 OK 62, ¶ 11, 18 P.2d 1053, 1054; *see In re De-Annexation of Certain Real Prop. from City of Seminole*, 2004 OK 60, ¶ 10, 102 P.3d 120, 125-26. A city has no power to enact an ordinance that includes persons or principles not clearly within the terms of the delegated powers. *Ex parte Holmes*, 1933 OK 62, ¶ 11, 18 P.2d at 1054. "[W]hen any fairly reasonable doubt exists as to the grant of the power, such doubt is resolved by the courts against the corporation, and the existence of the power is denied." *Id.*

¶20 Under title 11, section 39-103.1, municipalities are authorized to create tourism improvement districts for the sole purpose of providing marketing services for private or public events reasonably calculated to increase occupancy and room rates for such properties as a class. 11 O.S. Supp. 2016, § 39-103.1(A). If the municipality desires to create such a district, it "may be comprised of a designated geographical area within the municipality and limited to only those properties within such geographical area on which a hotel or motel having 50 or more rooms available for occupancy is located." *Id.* The district court granted summary judgment solely based on its determination that City exceeded its authority in the enabling statute when it created the TID with a threshold of 110 rooms instead of 50. Therefore the question before us is whether City exceeded the authority granted to it within section 39-103.1.

¶21 In 1978, the Oklahoma Legislature created the Oklahoma Improvement District Act (Act), 11 O.S.2011, §§ 39-101-39-121. The enabling statute here states in part:

In addition to those purposes set out in Section 39-103 of this title, the governing body of any municipality having a population of more than one thousand five hundred (1,500) may create one or more districts and levy assessments for the purpose of providing or causing to be provided any maintenance, cleaning, security, shuttle service, upkeep, marketing, management or other services which confer special benefits upon property within the district by preserving, enhancing or extending the value or usefulness of any improvement described in Section 39-103 of this title, whether or not the improvement was financed or constructed pursuant to this

act and such governing body may exclude or modify such assessments according to benefits received on properties which are exempt from ad valorem taxation, except those assessments provided for by Section 39-103 of this title. Without limiting or expanding the preceding sentence or any other provision of this act, such a district may be comprised of a designated geographical area within the municipality and limited to only those properties within such geographical area on which a hotel or motel having 50 or more rooms available for occupancy is located, if the *sole purpose of the district is to provide market*ing services for private or public events reasonably calculated to increase occupancy and room rates for such properties as a class.

11 O.S. Supp. 2016, § 39-103.1(A) (emphasis added). In 2016, the legislature amended section 39-103.1(A) to add the disputed sentence in this case, which is italicized above. Whether the words "50 or more" are meant as a level or floor is a question of statutory interpretation and as such our primary goal is to ascertain and follow the intent of the Oklahoma Legislature. See Signature Leasing, 2020 OK 50, ¶ 18, 466 P.3d at 549.

¶22 "Such intent must be gleaned from the statute in view of its general purpose and object." Grimes v. City of Okla. City, 2002 OK 47, ¶ 6, 49 P.3d 719, 723. In seeking intent, the court may look at each part of the statute, other statutes on the same subject, and the consequences of any particular interpretation. Okla. Ass'n of Broadcasters, Inc. v. City of Norman, 2016 OK 119, ¶ 16, 390 P.3d 689, 694. We presume that the legislature "expressed its intent and that it intended what it expressed." Heath v. Guardian Interlock Network, Inc., 2016 OK 18, ¶ 14, 369 P.3d 374, 379. In the absence of ambiguity or conflict with another enactment, we simply apply the statute according to the plain meaning. Video Gaming Techs., Inc. v. Tulsa Cty. Bd. of Tax Roll Corrs., 2019 OK 84, ¶ 11, 455 P.3d 918, 921. Words will be given their ordinary meaning unless a contrary legislative intent plainly appears. 25 O.S.2011, § 1; Video Gaming Techs., 2019 OK 84, ¶ 11, 455 P.3d at 921.

¶23 We first ask whether the statute mandates particular language a municipality must use to describe a proposed district. It clearly does not. By use of the word *may*, the statutory language permits, or allows, districts comprised of areas within the municipality and

further limited to only properties on which a hotel with 50 or more rooms is located.

¶24 Toch argues the disputed clause creates a level – meaning City is only allowed to create a district for marketing hotels if it includes all hotels with 50 or more rooms. But that interpretation is not consistent with the common meaning and usage of *or*. "If you are offered coffee or tea, you may pick either (or, in this case, neither), or you may for whatever reason order both. This is the ordinary sense of the word, understood by everyone and universally accommodated by the simple *or*." *And/or*, *Garner's Modern American Usage* 45(3d ed. 2009) (emphasis original).

¶25 On a deeper grammatical level, or is a "disjunctive particle used to express an alternative or give a choice of one among two or more things." Or, Black's Law Dictionary 987 (5th ed. 1979); State ex rel. Wise v. Whistler, 1977 OK 61, ¶ 8, 562 P.2d 860, 862. We have stated numerous times that the Legislature's use of the word *or* shows intent to treat the terms on either side of it as separate and distinct, or give a choice among options.¹⁰ The United States Supreme Court has noted that "[w]hile [or] can sometimes introduce an appositive – a word or phrase that is synonymous with what precedes it ('Vienna or Wien, 'Batman or the Caped Crusader') - its ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings." *United States v. Woods*, 571 U.S. 31, 45-46, 134 S. Ct. 557, 567, 187 L. Ed. 2d 472 (2013) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)). Further, "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." Reiter, 442 U.S. at 339, 99 S. Ct. at 2331.

¶26 Appellants argue that the context of the phrase "50 or more" within the tourism statute and Act clearly shows the legislature intended for municipalities to have flexibility in creating districts appropriate to their own needs and is a floor for which hotels may be included, not a level or threshold. We agree. The disputed provision preemptively explains that it is not meant to limit or expand any of the other provisions in the statute or Act. 11 O.S. Supp. 2016, § 39-103.1(A). Section 39-103.1 and section 39-104 both provide flexibility to municipalities in creating improvement districts that are customized to their needs and clearly allow

municipalities to create improvement districts solely by geographic description.

¶27 While Toch argues that the legislature knows how to create a floor using the words, "more than," the legislature is not restricted to only one method of sentence construction to create a floor. Further, a *one-size-fits-all* hotel improvement district would not make sense for both large municipalities, like Tulsa or Oklahoma City, and smaller municipalities across the state. Municipalities have different needs, and assessments must be tailored to specifically help the people assessed. *See City of Lawton v. Akers*, 1958 OK 292, ¶¶ 18-23, 333 P.2d 520, 525-26.

¶28 The legislature's use of the word *limited* also indicates this provision's permissive nature, which is consistent with the tenor of the entire act. *Black's Law Dictionary* defines *limited*: "Restricted; bounded; prescribed. Confined within positive bounds; restricted in duration, extent, or scope." *Limited, Black's Law Dictionary* 836 (5th ed. 1979). The limitation in section 39-103.1(A) provides a range, or scope, of ho-tels eligible for inclusion in a hotel improvement district.

¶29 The district court improperly strained its interpretation of the language describing which hotels may be included to instead describe which hotels must be included. Had this been the legislature's intent, instead of "limited to only," the wording would be, "and include all" properties within the areas on which a hotel with 50 or more rooms is located. Courts should not interpret statutes to mean something the legislature did not intend or express, especially where the resulting interpretation is absurd in light of the Act as a whole. See Ledbetter v. Okla. Alcoholic Beverage Laws Enf't Comm'n, 1988 OK 117, ¶ 7, 764 P.2d 172, 179 ("Statutory construction that would lead to an absurdity must be avoided and a rational construction should be given to a statute if the language fairly permits.").

¶30 The legislature intended to ensure that districts formed under section 39-103(A) do not create assessments for smaller hotels unlikely to benefit from the stated sole purpose of the district, which is to provide marketing services for events calculated to increase occupancy and room rates for such hotel properties as a class. Municipalities require flexibility regarding the number of hotel rooms included in improvement districts in order to reasonably

ensure that the assessment is only enacted against the hotels or properties benefitting from it. The statute thus protects hotels with less than 50 rooms, but does not force municipalities to include all hotels with more than 50 rooms.

¶31 Nothing in the statute prevents a municipality from proposing a district limited to only properties on which hotels with 50 or more *or even* 500 or more rooms are located. The TID falls within the permitted description because the designated areas are within the municipality and are limited to only properties therein on which hotels having 50 or more rooms are located. City did not exceed the authority granted in title 11, section 39-103.1 by limiting the TID to hotels with 110 or more rooms.

V. CONCLUSION

¶32 Title 11, section 39-103.1(A) provides municipalities the authority and discretion to create hotel advertising tourism improvement districts for any size hotel the municipality deems appropriate, so long as they have at least 50 rooms. City did not exceed the authority granted to it when it chose to limit the TID to hotels with 110 or more rooms. The district court erred in granting summary judgment to Toch. The district court's order is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Darby, V.C.J., Winchester, Edmondson, Colbert, and Combs, JJ., concur;

Gurich, C.J., Kauger, Kane, and Rowe (by separate writing), JJ., dissent.

Kane, J., dissenting:

I believe the trial court construed the statute correctly.

Rowe, J., dissenting, with whom Gurich, C.J. and Kauger, J., join:

¶1 The fundamental rule of statutory construction is to ascertain and give effect to the legislative intent, which is first sought in the language of a statute. *Fanning v. Brown*, 2004 OK 7, ¶ 10, 85 P.3d 841. When the language is plain and unambiguous, no occasion exists for application of rules of construction, and the statute will be accorded meaning as expressed by the language employed. *City of Durant v. Cicio*, 2002 OK 52, ¶ 13, 50 P.3d 218. In the interpretation of statutes, we do not limit our con-

sideration to a single word or phrase. Instead, we construe together the various provisions of relevant enactments, in light of their underlying general purpose and objective, to ascertain legislative intent. *World Publishing Co. v. Miller*, 2001 OK 49, ¶ 7, 32 P.3d 829, 832; *McNeill v. City of Tulsa*, 1998 OK 2, ¶ 11, 953 P.2d 329.

¶2 The majority's interpretation of 11 O.S. Supp. 2016 § 39-103.1 erroneously focuses solely on the phrase "50 or more," without giving proper consideration to the qualifying language in the remainder of the sentence:

Without limiting or expanding the preceding sentence or any other provision of this act, such a district may be comprised of a designated geographical area within the municipality and limited to only those properties within such geographical area on which a hotel or motel having 50 or more rooms available for occupancy is located, if the sole purpose of the district is to provide marketing services for private or public events reasonably calculated to increase occupancy and room rates for such properties as a class. (Emphasis added.)

¶3 The phrase "for such properties as a class" clearly expresses the Legislature's intent that "50 rooms or more" was meant to be something other than a floor; it was meant to be the level from which all improvements districts must be created. Additional rules of construction employed by the majority are unnecessary. The statute as a whole clearly and unambiguously defines the class of properties for an improvement district that a municipality having a population of more than 1,500 may create if the sole purpose of the district is to provide marketing services to benefit the entire class.¹

¶4 The Legislature has designated one *class* for the subject improvement district which as an entire class may be burdened with the special assessment (*i.e.*, properties on which a hotel or motel having 50 or more rooms available for occupancy is located).

¶5 City of Tulsa arbitrarily created a special class of hotels or motels – those with greater than 110 rooms – which are subject to an assessment of 3% of the gross proceeds per room. This special class was arbitrarily chosen because City of Tulsa could not get a majority vote for the subject improvement district for hotels or motels with 50 or more, 75 or more, or 100 or more rooms.² City of Tulsa exceeded its legislative authority when it impermissibly

modified the statute to create a subclass for the improvement district other than that designated by the statute.

¶6 Additionally, Okla. Const. art. 5, § 46 prohibits the Legislature from passing special laws on certain subjects, including, as relevant here, "[r]egulating the affairs of counties, cities, town, wards, or school districts." Special laws are those which single out less than an entire class of similarly affected persons or things for different treatment. EOG Resources Marketing v. Oklahoma State Board of Equalization, 2008 OK 95, ¶ 20, 196 P.3d 511.

¶7 I agree with the trial court that § 39-103.1 is altogether an impermissible special law violative of Okla. Const. art. 5, §§ 46 and 59. "A classification is not a prohibited, special law if it establishes a reasonable classification of persons, entities or things, sharing the same circumstances." City of Bethany v. Public Employees Relations Bd., 1995 OK 99, ¶ 36, 904 P.2d 604; State v. Goforth, 1989 OK 37, ¶ 10, 772 P.2d 911. As written, the statute is permissive in character. However, similarly situated hotels and motels with less than 50 rooms within the improvement district will receive the benefits of the assessed class of hotels or motels, yet pay no assessment.

¶8 Accordingly, I respectfully dissent.

DARBY, V.C.J.,

- 1. While Plaintiff refers to the proposed TID as the "Second Improvement District Assessment" in this letter, the objection was filed in reference to the Tulsa Tourism Improvement District No.1, formed under title 11, section 39-103.1.
 - 2. The municipal governing body may enact ordinances, rules and regulations not inconsistent with the Constitution and laws of Oklahoma for any purpose mentioned in Title 11 of the Oklahoma Statutes or for carrying out their municipal functions. Municipal ordinances, rules or regulations may be repealed, altered or amended as the governing body ordains.
- 11 O.S.2011, §14-101
- 3. The full list of arguments for invalidation of the TID in the peti-
 - [1]. The assessment [was] not reasonably tethered to a direct benefit to be equitably distributed to all of the parties to be assessed in violation of 11 O.S. §§ 39-103, 39-104, 39-110.
 - [2]. The creation of the assessment roll [was] arbitrary in violation of 11 O.S. §§ 39-103, 39-104, 39-110.
 - [3]. The boundaries of the assessment area [were] arbitrary in violation of 11 O.S. §§ 39-103, 39-104, 39-110.
 - [4]. The assessment [was] improper because the benefit to each party [was] not equal to the amount of the assessment in violation of 11 O.S. §§ 39-103, 39-104, 39-110.
 - [5]. The assessment [was] unconstitutional on its face because the statute upon which it [was] based [was] unconstitutional because it violate[d] of [sic] Article 2 Section 7 of the Oklahoma Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.
 - [6]. The statutes allowing for the creation of the TID violate[d] Article 2 Sec[tion] 7 of the Oklahoma Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

- [7]. The assessment is [sic] violate[d] the Fourteenth Amendment of the United States Constitution because [it] seeks only to assess the 3% tax liability on hotels with 110 rooms or more.
- [8]. The amount of assessment [was] inequitably apportioned because certain parties within the assessment district stand to receive a greater benefit than other parties within the same assessment district. The parties subject to the assessment do not stand to collectively benefit as a class in direct violation of 11 O.S. § 39-103.1.
- [9]. The creation of the TID [was] outside of the authorities granted to municipalities under 11 O.S. § 14-101. [10]. Creation of this Assessment confer[red] no special benefit
- upon the properties within the TID in direct violation of 11 O.S. §§ 39-103, 39-104, 39-110.
- [11]. The basis for the creation of this assessment [was] unclear and therefore [was] improper of [sic] 11 O.S. § 39-111.
- [12]. The creation of this assessment district [was] in no way necessary to preserve peace or health and safety of the public and therefore [was] improper as an emergency ordinance. The creation of the assessment district under an emergency basis is [sic] violate[d] of [sic] 11 O.S. § 39-107.
- [13]. The assessment itself [was] arbitrary because it [was] impossible to determine the specific benefits that benefit each member of the assessment district. 11 O.S. § 39-107.
- [14]. The size of the assessment district [was] arbitrary because it create[d] an improvement district that will not reasonably benefit its members but will likely benefit properties that are not a part of the district. 11 O.S. § 39-111.
- [15]. There ha[d] been no proper notice nor a proper hearing for the creation of an improvement district pursuant to 11 O.S. § 39-107
- [16]. There ha[d] been no specific description of what improvement will occur nor a hearing thereof, to discuss the benefits conferred to the parties as required by 11 O.S. § 39-107. [17]. There ha[d] been no description of the benefit to be con-
- ferred by the assessment to the specific parties in violation of 11 O.S. § 39-107.
- [18]. The method of management of the monies is improper and in direct violation of 11 O.S. § 39-113.
- [19]. Any monies derived through the creation of the TID cannot be conveyed to VisitTulsa to be managed.
- [20]. The creation of the TID ha[d] been objected to in writing by over 50% of the hotels subject to the assessment and the creation of the TID [was] improper pursuant to 11 O.S. § 39-108(D). . . . [21]. Pursuant to 11 O.S. § 39-108(D) it was improper for the City
- Council to proceed to a vote on the creation of the TID.
- Pet. 3-6. 4. The other two arguments on summary judgment were that "more than 50% of the parties subject to the TID objected pursuant to 11 O.S. § 39-108(D)," and the TID and statute are unconstitutional. Order 5.
- 5. Appellants also dispute that the district court erred when it (1) held the TID was a special law under article V, section 46, (2) performed a partial special law analysis of the enacting statute, and (3) found the 110-room threshold was arbitrary. We find that the limited grant of summary judgment against City was not based on any of the above arguments. Further, to any extent they were addressed by the district court, Toch has abandoned such arguments on appeal. See Fent v. Contingency Review Bd., 2007 OK 27, ¶ 22 n. 58, 163 P.3d 512, 525 n. 58 ("Claims to error for which there is no support in argument and authority are deemed abandoned.").
- 6. "The lower limit; e.g. minimum wages; lowest price stock will be permitted to fall before selling." Floor, Black's Law Dictionary 577 (5th ed. 1979).
 - 7. Any district may include one or more streets or areas which need not be contiguous and may include two (2) or more types of improvements. Such improvements may be included in one (1) proceeding and constructed and financed as one improvement. The district shall include, for the purpose of assessment, all the property which the governing body determines is benefited by the improvement or improvements . . .
- 11 O.S.2011, § 39-104.
- 8. The district court and the parties use the terms level and threshold synonymously to refer to a value above which inclusion is mandatory.
- 9. Toch proposes that Appellants' focus on title 11, section 39-108(D)'s requirements would allow unconstitutional laws to exist unfettered if not protested within thirty days. Toch also alleges that section 39-108(D) raises substantial due process concerns regarding who may object to the TID creation and who is affected by it. The constitutionality of title 11, section 39-108(D) was not questioned in any way below, therefore we do not address it now. See Lee v. Bruno,

2016 OK 97, ¶37 n. 7, 381 P.3d 736, 749 n.7; see also Stonecipher v. Dist. Ct. of Pittsburg Cty., 1998 OK 122, ¶ 11, 970 P.2d 182, 186.

10. See Cline v. Okla. Coal. for Reprod. Just., 2013 OK 93, ¶ 15, 313 P.3d 253, 259; see also In re J.L.M., 2005 OK 15, ¶ 7, 109 P.3d 336, 339; see also State ex rel. Dep't of Pub. Safety v. 1985 GMC Pickup, 1995 OK 75, 898 P.2d 1280, 1285; see also Corp. Comm'n v. Union Oil Co., 1979 OK 30, ¶ 8, 591 P.2d 711, 715; see also Whistler, 1977 OK 61, ¶ 8, 562 P.2d at 862.

Rowe, J., dissenting, with whom Gurich, C.J. and Kauger, J., join:

- City of Tulsa admits that the Tourism District challenged here is "[to] provid[e] marketing services reasonably calculated to increase occupancy and room rates for these hotels and motels." See Brief in Chief. p. 3.
 - 2. Transcript of Proceedings, April 25, 2019, p. 16, ln. 2-10.

2020 OK 82

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant. Tuan Anh Khuu, Respondent.

No. SCBD 6946. October 5, 2020

<u>ORDER</u>

¶1 The State of Oklahoma, ex rel. Oklahoma Bar Association (Complainant) by and through its First Assistant General Counsel Loraine Dillinder Farabow, has presented this Court with an application to approve the resignation of Tuan Anh Khuu (Respondent), OBA No. 17307, from membership in the Oklahoma Bar Association. Respondent seeks to resign pending disciplinary proceedings and investigation into his alleged misconduct, as provided in Rule 8, Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, ch. 1, app. 1-A which provides in Rule 8.2:

Upon receipt of the required affidavit, the Commission shall file it with the Clerk of the Supreme Court and the Supreme Court may enter an order approving the resignation pending disciplinary proceedings.

Upon consideration of the Complainant's Application for Order Approving Resignation Pending Disciplinary Proceedings (Application) and Respondent's Affidavit of Resignation Pending Disciplinary Proceedings (Affidavit) in support of resignation, we find:

- 1) On July 9, 2020, following the Complainant's investigation of multiple professional misconduct allegations, Respondent submitted his written Affidavit of Resignation from membership in the Oklahoma Bar Association pending investigation of a disciplinary proceeding.
- 2) Respondent's Affidavit of resignation reflects that:

- i) the affidavit was freely and voluntarily rendered:
- ii) he was not subjected to coercion or duress; and
- iii) he was fully aware of the consequences of submitting the resignation.
- 3) Respondent states that although he is aware that the resignation is subject to the approval of the Oklahoma Supreme Court, he will treat it as effective on the date of filing his resignation. Respondent outlines the grievances which are under investigation by the General Counsel of the Oklahoma Bar Association as follows:
 - (a) DC 19-147: Grievance by Joseph Dingal: alleging that I solicited Mr. Dingal to marry a woman in Vietnam so that she could become a United States Citizen through an Introduction Service located in Vietnam. Mr. Dingal alleges I promised to pay him \$25,000.00 if he married the woman and she applied for United States Citizenship. Mr. Dingal alleges he was paid to fly to Vietnam and that once he met his intended wife, they fell in love and married. Mr. Dingal further alleges I made numerous misrepresentations and bilked his wife for thousands of dollars.
 - (b) DC 19-158: Grievance by Wilson Ho: alleging that I was hired in January of 2017 to represent Mr. Ho and his family in a personal injury case and that, despite the case settling in April of 2018, Mr. Ho and his family have not received their portion of any settlement funds. Ho also alleges I failed to promptly communicate with him and that I failed to diligently conclude his legal matter.
 - (c) DC 19-218: Grievance by J. Cruz Godinez: alleging that I neglected to diligently handle a case involving the deaths of Mr. Godinez's two nephews who died in a motor vehicle accident. Said grievance alleges that I failed to promptly distribute the \$60,000.00 settlement funds in each case. The Office of the General Counsel alleges that during its investigation of grievances filed against me, I failed to provide my IOLTA bank statements as requested and that when I finally provided those records, my trust account records indicated that the funds from this settlement were not maintained and safekept as required by Rule

- 1.15, ORPC. The Office of the General Counsel also alleges that on June 15, 2020, check #2037, written from my client trust account in the amount of \$12,016.00, failed to clear. The Office of the General Counsel further alleges it learned that a second check was issued by my office to Mr. Godinez which did clear.
- (d) DC 19-193: Grievance by David Tran: alleging that I neglected to diligently disburse settlement funds from Mr. Tran's personal injury case despite him having signed a release and satisfaction over a year ago. Said grievance also alleges I failed to communicate with my client. The Office of the General Counsel further alleges I failed to timely respond to Mr. Tran's grievance and that I misrepresented that I had mailed Mr. Tran a settlement check in the amount of \$1,159.00 on April 15, 2020, by certified mail.
- (e) DC 20-103: Grievance by Geraldine Steil: alleging that I failed to properly respond to requests for information from Ms. Steil regarding distribution of approximately \$30,000.00 in settlement funds following a mediation in December of 2019. The Office of the General Counsel alleges that during its investigation of grievances filed against me, I failed to provide my IOLTA bank statements as requested and that when I finally provided those records, my trust account records indicate that the funds from this settlement had not been maintained and safekept as required by Rule 1.15, ORPC.
- (f) DC 20-107: Grievance by Benito Rodriguez: alleging that I failed to repeatedly and promptly communicate with Ms. Rodriguez despite multiple requests for information as to the distribution of approximately \$50,000.00 in settlement funds. The Office of the General Counsel alleges that during its investigation of this grievance, I failed to provide my IOLTA bank statements as requested and that when I finally provided those records, my trust account records indicate that the funds from this settlement had not been maintained and safekept as required by Rule 1.15, ORPC.
- **(g)** DC 20-110: Grievance by General Counsel: alleging that the Office of the General Counsel received a letter from Chase Bank indicating that my IOLTA trust

- account was overdrawn by \$150.00 on March 16, 2020. The Office of the General Counsel alleges that I misrepresented that my trust account overdraft was caused by an error resulting from my law firm changing its name and opening a new IOLTA account and that I failed to timely provide my trust account records despite multiple requests to do so. The Office of the General Counsel further alleges that once I provided a portion of my trust account records on June 15, 2020, my IOLTA bank statements show that on June 10, 2020, an online transfer for \$155,000.00 from a personal checking account (ending in 5820) was made to my trust account.
- (h) DC 20-110: Grievance Teresa Boye: alleging that my office neglected Ms. Boye's personal injury case and failed to timely communicate, despite repeated requests by Ms. Boye for information as to the status of her case.
- (i) DC 20-112: Grievance by Thuan Tran: alleging that I neglected to promptly provide settlement funds of approximately \$3,520.64 to my client despite Mr. Tran having approved and signed a settlement schedule several months earlier. Said grievance also alleges I failed to promptly communicate with my client's requests for information as to the status of his case. The Office of the General Counsel further alleges that during its investigation of this matter, I misrepresented that I had mailed a settlement check to my client and that the matter was resolved with Mr. Tran.
- (j) DC 20-113: Grievance by Vanna Nguyen: alleging that I failed to promptly communicate with Ms. Nguyen about the status of her personal injury settlement. Said grievance also alleges that I failed to pay Ms. Nguyen and a medical provider their share of settlement proceeds for several months.
- (k) DC 20-114: Grievance by Jerry Ellis: alleging that I failed to promptly communicate with Mr. Ellis and disburse settlement funds in his case. The Office of the General Counsel alleges that, during its investigation of this grievance, I made misrepresentations regarding the status of Mr. Ellis' case and settlement.
- (l) DC 20-118: Grievance by Neuyet Ha: alleging that I failed to promptly communicate with Ms. Ha's requests for informa-

tion as to the status of approximately \$3,966.66 in settlement funds she was to receive from her personal injury settlement. The Office of the General Counsel alleges that in its investigation of this grievance, I made misrepresentations regarding efforts to meet with and provide Ms. Ha her settlement funds.

- 4) Respondent is aware that, if proven, the allegations concerning his conduct as set forth in the above-stated grievances, would constitute violations of Rule 1.3 and 5.2 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, ch. 1, app. 1-A and Rules 1.15 and 8.1(a), (b), (c), and (d) of the Oklahoma Rules of Professional Conduct (ORPC), 5 O.S. 2011, ch.1, app. 3-A, and his oath as an attorney.
- **5)** Respondent is aware that the burden of proof regarding the allegations set forth in paragraph 3 (a)-(l) <u>supra</u> rests with Complainant but, Respondent waives any and all rights to contest the allegations.
- **6)** An attorney, who is the subject of an investigation into, or a pending proceedings involving allegations of misconduct, may resign membership in the Oklahoma Bar Association by complying with the prerequisites for resignation set forth in Rule 8.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A. In response, the Supreme Court may enter an order approving the resignation or, in the alternative, may refuse to approve the resignation and allow the Professional Responsibility Commission to proceed.
- 7) Respondent's resignation pending disciplinary proceedings is in compliance with all of the requirements set forth in Rule 8.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A, and it should be approved.
- 8) The official roster address of Respondent as shown by the Oklahoma Bar Association records is: 6508 NW 127th Street, Oklahoma City, Oklahoma 73142.
- 9) Respondent is unable to locate his Oklahoma Bar Association membership card, but offers to immediately destroy if it is located.
- 10) Respondent acknowledges that Complainant has incurred costs in the investigative pursuit of this matter in the amount of \$6.90 and agrees to reimburse said costs within 30 days from the date of this order.
 - 11) Respondent acknowledges that:

- a) his actions may result in claims against the Client Security Fund and he agrees to reimburse the Fund for any disbursements made because of his actions prior to the filing of any application for reinstatement; and
- b) he has familiarized himself with Rule 9.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A with which he agrees to comply within twenty (20) days following the date of his resignation.
- ¶2 IT IS THEREFORE ORDERED, AD-JUDGED, AND DECREED that the resignation of TUAN ANH KHUU, pending disciplinary proceedings, be approved with costs imposed in the amount of \$6.90 which will be paid within 30 days.

¶3 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT the name of Tuan Anh Khuu be stricken from the roll of attorneys. Because resignation pending disciplinary proceedings is tantamount to disbarment, the Respondent may not make application for reinstatement prior to the expiration of five (5) years from the date of this order. Pursuant to Rule 9.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A, the Respondent shall notify all of his clients having legal business pending with him within twenty (20) days, by certified mail, of his inability to represent them and of the necessity for promptly retaining new counsel. Repayment to the Client Security Fund for any monies expended because of the malfeasance or nonfeasance of the Respondent shall be a condition of reinstatement. No additional costs are imposed.

¶ 4 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 5th DAY OF October, 2020.

/s/ Noma D. Gurich CHIEF JUSTICE

ALL JUSTICES CONCUR

2020 OK 83

BETTY SUE ADAMS PURCELL; GILBERT LYNN PURCELL, JR.; SUSAN DENISE PURCELL PERINE; TWILA JUNE ADAMS MILLER; and BECKY LYNN MILLER CONTI, Petitioners/Appellants, vs. TODD A. PARKER, and JESSICA D. PARKER, husband and wife; STATE OF OKLAHOMA, ex rel. OKLAHOMA WATER RESOURCES BOARD, CASILLAS OPERATING, LLC.;

and SELECT ENERGY SERVICES, LLC. Respondents/Appellees.

No. 118,328. October 6, 2020

APPEAL FROM THE MCCLAIN COUNTY DISTRICT COURT

Honorable Charles Grey, Trial Judge

¶0 The petitioners and respondents own real property in McClain County, Oklahoma, containing and abutting Colbert Lake (the Lake). The petitioners also own real property containing Colbert Creek, which is the sole source of water that feeds the Lake. The respondents sought a permit from the Oklahoma Water Resources Board (OWRB), to sell water from the Lake to oil companies for use in fracking operations. The only notice that the OWRB provided to the petitioners of the respondents' permit application was by publication in newspapers. The permits were issued, and the petitioners subsequently sought relief in the District Court of McClain County, arguing that they were not given proper and sufficient notice of the permit proceedings. The District Court dismissed the lawsuit in a certified interlocutory order, and the petitioners appealed. We granted certiorari to address the proper, constitutionally required notice to landowners in such proceedings. We hold that the notice given was inadequate, and the cause is reversed and remanded for further proceedings consistent with our holding.

CERTIORARI PREVIOUSLY GRANTED; MOTION FOR ORAL ARGUMENT DENIED; TRIAL COURT REVERSED AND CAUSE REMANDED.

Phillip O. Watts, Beverly Q. Watts, Edmond, Oklahoma, for Petitioners Miller and Conti.

Travis A. Pickens, Oklahoma City, Oklahoma, for Petitioners, the Purcells.

Jonathan Allen, Sara Gibson, Oklahoma City, Oklahoma, for Respondents, OWRB.

Kaylee P. Davis-Maddy, Oklahoma City, Oklahoma, for Respondents, the Parkers.

KAUGER, J.:

¶1 We granted review of the certified interlocutory order to address whether the notice by publication provisions of 82 O.S. 2011 §105.11¹ which relate to stream water permits are constitutionally adequate when applied to an affected landowner whose name and address are known or easily discoverable. We hold that the notice by publication provisions are constitutionally inadequate when applied to a known or easily discoverable landowner.

ALLEGED FACTS/PROCEDURAL POSTURE

¶2 The petitioners/appellants, Susan Purcell, Susan Pernine, Gilbert Purcell, June Miller, and Becky Conti (collectively petitioners/landowners/Purcells), and the respondents/appellees, Todd A. Parker and Jessica D. Parker (respondents/Parkers), own interests in real property in McClain County, Oklahoma. In the 1950's, the landowners, and the Parkers, and/or their predecessors, granted land to the United States National Resources Conservation Service to create Colbert Lake (the Lake).

¶3 Both the petitioners' and respondents' real property currently contains and/or abuts the Lake. The Lake provides a water source for fire fighting, drinking water for livestock, and recreational pleasure for area residents. The approximately 270 acre farm owned by the petitioners' also contains Colbert Creek, the sole water source feeding the Lake.

¶4 On May 10, 2017, the Parkers entered into a "Right of Entry and Purchase Access" agreement (the Agreement) with Select Energy Services (Select), allowing Select, or their appointed representatives, the right of entry and the right of access to their real property for the purpose of water transfer from the Lake for Select's drilling/fracking operations. The use of the water was to commence on June 12, 2017.

¶5 Subsequently, Select applied for a provisional temporary permit (temporary permit)² from the Oklahoma Water Resources Board (the OWRB) to divert water from the Lake. On May 15, 2017, the OWRB issued a provisional temporary permit to Select without actual notice to the petitioners. The permit, in the amount of 81 Acre-Feet, allowed the diversion of 3200 gallons per minute from a Diversion Point located on the Lake for the purpose of oil, and gas drilling, and mining.

¶6 Subsequently, the Parkers applied for a long-term surface and stream water permit (Stream permit) to withdraw water from the Lake.³ Although the petitioners' family had lived in the area for decades and were known by the Parkers, the Parkers provided the land-

owners notice by publication as required by 82 O.S. 2011 §105.11.⁴ Because the petitioners did not timely protest, the OWRB did not hold a hearing/individual proceeding regarding the Parkers' permit application.⁵

¶7 On June 20, 2017, the OWRB issued to the Parkers the stream water permit authorizing the taking and use of 109 Acre-Feet of water per calendar year, at a rate not to exceed 3,360 gallons per minute. Although the petitioners did not receive actual notice of the permit applications, the stream water permit was issued after an OWRB meeting in which the petitioners apparently discovered and were given five minutes to comment.

¶8 On July 20, 2017, the petitioners filed a petition in the District Court of McClain County. The first claim of relief the petitioners sought was a declaratory judgment determining the stream use permit invalid based upon publication notice and insufficient actual notice to the petitioners. The second claim for relief was a declaratory judgment to nullify the temporary permit for lack of notice to the petitioners. The third and forth claims for relief were for judicial review of the stream permit and an accounting. On October 16, 2017, the petitioners added claims for conversion and unjust enrichment.

¶9 On December 14, 2018, the trial court entered a summary order denying judicial review of the OSWB proceedings, and also denying the constitutional challenges to the petitioners' notice pursuant to 82 O.S. 2011 §105.11.6 On September 17, 2019, the trial court certified its summary order for interlocutory appeal. On February 10, 2020, we granted the landowners' petition for certiorari to review the certified interlocutory order to address the notice issue. The briefing cycle was completed on June 23, 2020. On June 30, 2020, the petitioners requested oral argument before the Court, which we hereby deny.

¶10 THE NOTICE BY PUBLICATION PROVISIONS OF 82 O.S.2011 §105.11 WHICH RELATE TO STREAM WATER PERMITS ARE CONSTITUTIONALLY INADEQUATE WHEN THE AFFECTED LANDOWNERS ARE KNOWN OR READILY DISCOVERABLE.

¶11 The petitioners challenge the notice by publication process as it relates to the issuance of stream water permits. The respondents argue that the petitioners have no right to judicial review because no final agency order⁷ was ever entered, and even if the petitioners had a right to review, the permit process is free from any prejudicial error.

A

The Permit Process Involved In This Cause.

¶12 This cause concerns the question of sufficiency of the notice constitutionally required for permit applications for the appropriation and use of stream water. The term "stream water" includes lakes and reservoirs. Appropriation of stream water is governed by the process set forth in 82 O.S. 2011 §§105 et. seq. The Oklahoma Administrative Code (OAC), Title 785, Chapter 20, sets forth the guidelines for stream water permits to allow appropriation and use. The statute and Administrative Code work together to govern the stream water permit process and proceedings.

¶13 The OAC states that notice of the filing of an application for the appropriation and use of stream water "shall be provided by the applicant as required by law and Board instructions." Title 82 O.S. 2011 §105.11 requires notice by publication in a newspaper in the county in which the land is located and adjacent downstream counties, regardless of whether landowners or interested parties are actually known or easily discoverable. It states:

A. Except as otherwise provided by Section 105.13 of this title for limited quantity stream water permits, upon the acceptance of an application which complies with the provisions of Chapter 1 of this title, and the rules promulgated by the Oklahoma Water Resources Board pursuant thereto, the Board shall instruct the applicant to publish, within the time required by the Board, a notice thereof, at the applicant's expense, in a form prescribed by the Board in a newspaper of general circulation in the county of the point of diversion, and in a newspaper of general circulation published within the adjacent downstream county and any other counties designated by the Board once a week for two (2) consecutive weeks. Such notice shall give all the essential facts as to the proposed appropriation, among them being the places of appropriation and of use, amount of water, the purpose for which it is to be used, name and address of applicant, the hearing date, time and place if a hearing is scheduled by the Board before instructions to publish notice are given, and a thirty-day protest period as well as the manner in which a protest to the application may be made. At the time the Board provides the notice of application to the applicant, the Board shall publish on its website the applications and instructions for public notice, including the draft public notice prepared by the Board. The website publishing is in addition to, and not in lieu of, the requirement for applicants to publish notice in the newspaper. The time to protest shall run from the date of the first newspaper publication.

It required the OWRB to publish notice on their website in addition to publication in newspapers, it also gave any interested party the right to protest any application and appear and present evidence and testimony in support of such protest at the hearing thereon.¹²

¶14 Our decision today is limited to the issue of notice. This is not an administrative appeal of an individual proceeding,¹³ nor an appeal from an administrative agency's final order.¹⁴ Nor do we address the merits of the petitioner's protest, as it relates to whether the OWRB's decision regarding the granting of the permit was within its authority, and/or appropriate. Rather, this is a declaratory judgment action to address whether 82 O.S. 2011 §105.11,¹⁵ and the rules of the OWRB in conjunction therewith, are constitutionally sufficient.¹⁶ The issue is whether the notice by publication permit process was free from prejudicial error. If it is not, the permits granted thereunder are invalidated.

В.

Inadequacy Of Notice By Publication When Landowners Are Known Or Easily Discoverable.

¶15 Title 82 O.S. 2011 §105.11 requires notice by publication in a newspaper in the county in which the land is located and adjacent downstream counties.¹¹ Undisputedly, the statutory procedure was followed in this cause. However, in Cate v. Archon Oil Co., Inc., 1985 OK 15, 695 P.2S 1352, we addressed the constitutionality afforded pre-procedural due process required when an oil and gas lease of real property is being sold at a sheriff's sale. The dispositive issue was not whether the statutory procedure was properly followed, but rather whether the procedure accorded with fundamental notions of due process.

¶16 The statute at issue in <u>Cate</u>, supra, was much like the statute at issue in this cause. It only required notice by publication. There, we recognized that notice by publication postings are designed primarily to attract prospective purchasers, and are unlikely to reach those who have an interest in the property. If the actual whereabouts of the parties are known, failure to afford personal notice to those who have an interest or estate in real property sought to be sold in satisfaction of a judgment, results in an unconstitutional exercise of jurisdiction insofar as the interest of the owner is affected.¹⁸

¶17 With regard to notice by publication we said:

¶8 Theoretically, publication may be available for all the world to see, but it is presumptuous to suppose that anyone could read all that is published to see if something may be reported which affects his/ her property interest. Exclusive reliance on an inefficacious means of notification cannot be permitted . . . neither necessity nor efficiency can abrogate the rule that, within the limits of practicability, notice must be reasonably calculated to reach the interested parties. If the names of those affected by a proceeding are available, the reasons disappear for resorting to means less likely than the mails to apprise them of the pending sale. Mail service can be utilized as an inexpensive and efficient mechanism to enhance the reliability of the otherwise unreliable procedure of notice by publication. . . .

¶10 Notice is a jurisdictional requirement as well as a fundamental element of due process. Due process requires adequate notice, a realistic opportunity to appear at a hearing or judicial sale, and the right to participate in a meaningful manner before one's rights are irretrievably altered. The right to be heard is of little value unless adequate notice is given. Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an action, and lack of notice constitutes a jurisdictional infirmity. (Citations omitted)

¶18 In <u>Dulaney v. Okla. State Dept. of Health</u>, 1993 OK 113, 868 P.2d 676, we addressed notice and the opportunity for an individual proceeding in the context of a landfill permit. <u>Dulaney</u>

involved an applicant for a landfill permit from the Oklahoma State Department of Health. Landowners who owned real property and mineral interests adjacent to the application site, requested an evidentiary hearing which the Health Department denied before issuing the permit. The Landowners filed a lawsuit challenging the applicable administrative rules and statutes.

¶19 The permit applicant and Health Department argued that the Landowners had no statutory or constitutional right to notice or an opportunity to be heard. We held that minimum standards of due process require that administrative proceedings, which may directly and adversely affect legally protected interests, be preceded by notice calculated to provide knowledge of the exercise of adjudicative power and an opportunity to be heard. We also stated that:

¶18 Even if we were not convinced that adjacent landowners had constitutional rights sufficient to require the application of due process, we would be constrained to hold that, under the facts presented, these landowners are entitled to notice and an opportunity to be heard. Water rights are property which are an important part of the landowners' "bundle of sticks." The use and control of fresh water is a matter of publici juris, and of immediate local, national, and international concern. No commodity affects and concerns the citizens of Oklahoma more than fresh groundwater. Here, evidence was presented that drilling operations, which the mineral interest owners are entitled to engage in on the landfill site, could potentially contaminate the ground water supply the same supply underlying the adjacent landowners' property and which they use for drinking purposes. It is a problem which must be explained. These landowners' water-related property interest alone requires that they be given notice and an opportunity to participate in a hearing whose outcome could affect their constitutionally protected rights. It would be incongruous to protect oil and gas interests and to ignore the protection of fresh water. If we continue to do so, the price of a barrel of water will exceed the price of a barrel of oil. [This has happened before. See R. Kerr, Land, Wood & Water, Ch. 3, p. 44 (Fleet Publishing Co. 1960).]

While the appropriation and use of water in this cause may or may not involve potentially contaminating the ground water supply, the same principles still apply and the same "bundle of sticks" exists as to the petitioners in this cause. Accordingly, notice must be reasonably calculated to provide knowledge of the existence of an adjudicative power and an opportunity to be heard.

¶20 To meet the statutory requirements for notice by publication of 82 O.S. 2011 §105.11, the newspaper must qualify as a legal publication. Apparently, the notice by publication was given by publication in the *Purcell Register*. It has a circulation of 2,900. McClain County, in which the petitioners reside, has a population of 39,985. That means that there was a 7% chance that it might provide notice to interested parties in McClain County.

¶21 Section 105.11 also requires that publication be made in adjacent downstream counties. Assuming that was Garvin County, the population of Garvin County is 27,811.22 There are four legal newspapers in Garvin County, The Wynnewood Gazette, the Pauls Valley Democrat, the Garvin County News Star, and the Lindsey *News*.²³ The newspapers have a total estimated circulation of 8800.24 That means that there was a 31.64% chance that notice would be provided to all interested parties if they read all four newspapers. Regardless of the best possible scenario, i.e., combining the circulation to all the possible newspapers, the chances of an affected party receiving notice is less than 40%. With a less than 40% chance of seeing the notice in the newspaper, what would that chance be that a landowner would see the notice published on the OWRB's website? How would the landowner even know to check the website for such notice?

¶22 In Harvey R. Carlile Trust v. Cotton Petroleum, 1986 OK 16, 732 P.2d 432, a case involving standards of adequate notice in spacing proceedings before the Corporation Commission, we said, concerning notice by publication, that:

¶13 Publication notice is not reasonably calculated to provide actual knowledge of instituted proceedings. It is hence inadequate as a method to inform those who could be notified by more effective means such as personal service or mailed notice. Mail service is an inexpensive and far more efficient mechanism to enhance the reliability of notice than either publication or posting. When a party's name and address are reasonably ascertainable from sources avail-

able at hand, communication by mail or other means certain to insure actual notice is deemed to be a constitutional prerequisite in every proceeding which affects either a person's liberty or property interests.

¶14 Because resort to publication service is constitutionally permissible only when all other means of giving notice are unavailable, we hold today that the face of an administrative proceeding must affirmatively show a diligent but unsuccessful effort to reach the affected party by better process. In short, courts may not presume publication service alone to be constitutionally valid when the judgment roll or record of an administrative proceeding fails to show that the means of imparting better notice were diligently pursued but proved unavailable. (Citations omitted), (Emphasis added)

¶23 Since <u>Cate</u>, <u>Dulaney</u>, and <u>Carlile</u>, supra, were promulgated, notice by publication has become even less effective. In Oklahoma, statewide daily newspaper circulation dramatically declined in 2019 when *The Oklahoman*, citing economic realities, further dropped delivery of 7000 subscribers and 3500 retail outlets, narrowing its previously confined 150 mile radius from Oklahoma City.²⁵ Even with the decline in newspaper circulation, if a landowner does not see the notice in the newspaper they are expected to know to regularly check the OWRB website in case their property is involved in the permit process.

CONCLUSION

¶24 Pursuant to <u>Cate</u>, <u>Dulaney</u>, and <u>Carlile</u>, supra, if the affected landowners are known, or reasonably discoverable, notice provided by publication results in an unconstitutional exercise of jurisdiction and a denial of due process. There is no excuse for failing to give personal notice of something that directly affects landowners when such landowners are known or easily discoverable.²⁶ Instead, 82 O.S. 2011 §105.11²⁷ ignores the precedents of this Court and the United States Supreme Court and clings to archaic procedures which have been invalidated for decades. Consequently, this cause is reversed and remanded for proceedings consistent herewith.²⁸

CERTIORARI PREVIOUSLY GRANTED; MOTION FOR ORAL ARGUMENT DENIED; TRIAL COURT REVERSED AND CAUSE REMANDED. Gurich, C.J., Darby, V.C.J., Kauger, Edmondson, Colbert, Combs and Rowe (by separate writing), JJ., concur;

Winchester and Kane (by separate writing), JJ., concur in part; dissent in part.

Rowe, J., with whom, Gurich, C.J., Kauger and Combs, JJ., join, concurring:

¶1 I concur in the Court's judgment that the notice by publication provisions of 82 O.S. § 105.11 are insufficient to afford due process when applied to landowners who are known or easily discoverable. I write separately to note that the question before us has long been settled in federal jurisprudence.

¶2 The Supreme Court of the United States has previously instructed, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The right to be notified of proceedings affecting one's legally protected interests is a vital corollary to one of the most fundamental requisites of due process – the right to be heard.²

¶3 The Supreme Court has also addressed the constitutional sufficiency of notice by publication, calling it a "poor and sometimes hopeless substitute for actual service of notice."³ The Supreme Court reiterated that view in Schroeder v. City of New York, when considering facts similar to the case at bar.4 In *Schroeder*, the City of New York had initiated proceedings to acquire the right to divert water from a river that ran across the plaintiff's land. Despite the fact that the plaintiff's name and address were easily ascertainable from deed records and tax rolls, the city published notice of the proceedings in several local newspapers in accordance with a state statute.⁶ Although the notice was published in compliance with the statute, the court found it to be constitutionally insufficient, stating, "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear to resort to a means less likely than the mails to apprise them of its pendency."⁷

¶4 The value of water to landowners in Oklahoma is immeasurable, and as such, a landowner must be afforded strict due process in protecting his or her water rights. Notice by publication is no more than a mere gesture of

ostensible due process, which falls far short of the federal standard, and the standard adopted today by this opinion.

KANE, J., with whom Winchester, J. joins, concurring in part and dissenting in part:

¶1 While the judgment of the trial court is properly reversed in this action, the majority continues forward with the same error committed by the trial court – prematurely resolving a due process dispute by presuming facts, rather than establishing facts from the record. This case stands to create broad, unintended consequences for countless other classes of litigation not before us today. While I share the majority's sense of duty to protect the due process rights of our citizens, the record before us does not yet show that Petitioners' due process rights have been abridged. Therefore, I concur in part and dissent in part.

¶2 Petitioners assert that their procedural due process rights were violated by the publication of notice of the requested Oklahoma Water Resources Board (OWRB) permit. The federal and state constitutions provide that no person shall be deprived of life, liberty, or property, without due process of law. U.S. Const. Amend. XIV, § 1; Okla. Const. Art. 2, § 7. "In determining whether an individual has been denied procedural due process we engage in a two-step inquiry, asking whether the individual possessed a protected interest to which due process protection applies and if so, whether the individual was afforded an appropriate level of process." *In re A.M.*, 2000 OK 82, ¶ 7, 13 P.3d 484. In other words, a citizen is entitled to more process and greater notice as to a vital interest than as to a trivial interest. What process is due "must be determined on a case-bycase basis because the due process clause does not by itself mandate any particular form of procedure." Id. ¶ 9. In determining the appropriate level of process, there are three factors to consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

State ex rel. Bd. of Regents of the Univ. of Okla. v. Lucas, 2013 OK 14, ¶ 29, 297 P.3d 378 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¶3 Initially, we must determine the nature of Petitioners' property interests in the water before we analyze the sufficiency of the notice. While water is a natural resource with profound value to landowners, the majority appears to presume that if an administrative proceeding has water as its subject, then the interest in said proceeding to any potentially affected citizen is per se profound. The flaw in that analysis is that the impact upon the citizen is assumed, rather than determined by competent evidence. If it were to be proven that the proposed permit would have no impact whatsoever upon the citizen's property interest, there is no right to notice at all, as the first leg of our two-step inquiry has failed. It appears that the trial court erred in failing to entertain the notion Petitioners' substantial rights were abridged, and the majority erred in failing to entertain the notion Petitioners had failed to establish that substantial rights were hindered. In fact, Petitioners in another proposition of error expressly took issue with the fact that they had been denied the opportunity to make such a record.

¶4 The majority goes on to find, without a record, that the citizens potentially affected by the subject statute were "easily locatable." The record is silent as to the size of the task OWRB undertook in giving notice of the subject permit. Some bodies of water in Oklahoma have over 100 miles of shoreline.² As to the specific notice to these litigants, the majority conflates the neighbor's presumed knowledge of Petitioners with the knowledge of the government body OWRB. In any event, the issue may be moot. Petitioners filed a formal written protest prior to the hearing, appeared at the hearing, and raised their concerns before a decision was made.

¶5 Given that the protesting parties filed their written protest, appeared at the hearing, and were heard, the current record does not yet establish that Petitioners even have standing to question the constitutionality of the subject statute.

¶6 I would reverse and remand for a trial. **KAUGER**, J.:

. .

1. Title 82 O.S. 2011 §105.11 provides:

A. Except as otherwise provided by Section 2 of this act for limited quantity stream water permits, upon the acceptance of an application which complies with the provisions of Chapter 1 of this title, and the rules promulgated by the Oklahoma Water Resources Board pursuant thereto, the Board shall instruct the applicant to publish, within the time required by the Board, a notice thereof, at the applicant's expense, in a form prescribed by the Board in a newspaper of general circulation in the county of the point of diversion, and in a newspaper of general circulation published within the adjacent downstream county and any other counties designated by the Board once a week for two (2) consecutive weeks. Such notice shall give all the essential facts as to the proposed appropriation, among them, the places of appropriation and of use, amount of water, the purpose for which it is to be used, name and address of applicant, the hearing date, time and place if a hearing is scheduled by the Board before instructions to publish notice are given, and the manner in which a protest to the application may be made. In case of failure to give such notice in accordance with the rules and regulations applicable thereto within the time required, or if such notice is defective, the priority of application shall be lost; however, if proper notice shall be given within thirty (30) days after the Board has given him notice of his failure to give effective and proper notice, the application shall thereafter carry the original date of filing, and shall supersede any subsequent application to the same source of water supply. Any interested party shall have the right to protest said application and present evidence and testimony in support of such protest.

B. If the Board does not schedule a hearing on the application before instructing the applicant to publish notice, a hearing shall be scheduled by the Board upon receipt of a protest which meets the requirements of the Board's rules, the Board shall notify the applicant and protestant of such hearing.

The statute was amended effective November 1, 2019. The changes to the amended version provide in pertinent part:

A. Except as otherwise provided by Section 105.13 of this title ... At the time the Board provides the notice of application to the applicant, the Board shall publish on its website the applications and instructions for public notice, including the draft public notice prepared by the Board. The website publishing is in addition to, and not in lieu of, the requirement for applicants to publish notice in the newspaper. The time to protest shall run from the date of the first newspaper publication.

B. In case of failure to give such notice in accordance with the rules and regulations applicable thereto within the time required, or if such notice is defective, the priority of application shall be lost; however, if proper notice is given within thirty (30) days after the Board has notified the applicant of his or her failure to give effective and proper notice, the application shall thereafter carry the original date of filing, and shall supersede any subsequent application to the same source of water supply. Any interested party shall have the right to protest said application and present evidence and testimony in support of such protest.

C. If the Board does not schedule a hearing on the application

C. If the Board does not schedule a hearing on the application before instructing the applicant to publish notice, a hearing shall be scheduled by the Board upon receipt of a protest which meets the requirements of the Board's rules, the Board shall notify the applicant and protestant of such hearing.

2. Title 82 O.S. 2011 §105.1 defines provisional temporary permit as well as other types. It provides:

As used in Sections 105.2 through 105.32 of this title:

- 1. "Definite stream" means a watercourse in a definite, natural channel, with defined beds and banks, originating from a definite source or sources of supply. The stream may flow intermitently or at irregular intervals if that is characteristic of the sources of supply in the area;
- 2. "Domestic use" means the use of water by a natural individual or by a family or household for household purposes, for farm and domestic animals up to the normal grazing capacity of the land and for the irrigation of land not exceeding a total of three (3) acres in area for the growing of gardens, orchards and lawns, and for such other purposes, specified by Board rules, for which de minimis amounts are used;
- 3. "Regular permit" means a permit granted by the Oklahoma Water Resources Board authorizing the holder to appropriate water on a year-round basis in an amount and from a source approved by the Board;
- 4. "Seasonal permit" means a permit granted by the Board authorizing the holder of such permit to divert available water for specified time periods during the calendar year;

- 5. "Temporary permit" means a permit granted by the Board authorizing the appropriation of water in an amount and from a source approved by the Board which does not exceed a time period of three (3) months, which does not vest in the holder any permanent right and which may be canceled by the Board in accordance with its terms;
- 6. "Term permit" means a permit granted by the Board authorizing the appropriation of water in an amount and from a source approved by the Board for a term of years which does not vest the holder with any permanent right and which expires upon expiration of the term of the permit; and
- 7. "Provisional temporary permit" means a nonrenewable permit which may be summarily granted upon administrative approval by the Board and which authorizes an appropriation of water in an amount and from a source approved by the Board. A provisional temporary permit shall not authorize an appropriation for a period of time exceeding ninety (90) days, shall not vest in the holder any permanent water right and shall be subject to cancellation by the Board at any time within its term in accordance with its provisions.

Title 82 O.S. 2011 §105.13 provides:

- A. The Oklahoma Water Resources Board is authorized to issue, in addition to regular permits, seasonal, temporary, term or provisional temporary permits at any time the Board finds such issuance will not impair or interfere with domestic uses or existing rights of prior appropriators and may do so even where it finds no unappropriated water is available for a regular permit. All seasonal, temporary, term and provisional temporary permits shall contain a provision making them subject to all rights of prior appropriators. If any such permit is for water impounded in any works for storage, diversion or carriage of water, the applicant must comply with the provisions of Section 105.21 of this title.
- B. Except as otherwise provided by this section, application, notice and administrative hearing as provided in Sections 105.9 through 105.12 of this title shall be required for all permits. A provisional temporary permit may be immediately and summarily granted upon administrative approval by the Board. Provisional temporary permits shall:
- 1. Not be effective for a period of more than ninety (90) days;
- 2. Be granted at the discretion of the Board; and
- 3. Be subject to such terms, conditions and rules promulgated by the Board for such purposes.
- C. The Executive Director of the Board may administratively issue permits to use limited quantities of stream water. Notice, procedures and the maximum quantity authorized for limited quantity stream water permits shall be in compliance with rules promulgated by the Board. In no event shall the maximum quantity of water authorized in a limited quantity stream water permit exceed the amount of stream water that would otherwise be determined by the Board pursuant to Section 105.12 of this title.
- 3. Title 82 O.S. 2011 $\S105.1$, see note 2, supra, which defines the various types of permits.
- 4. Title 82 O.S. 2011 §105.11, see note 1, supra.
- 5. Minimum standards of due process require that administrative proceedings, which may directly and adversely affect legally protected interests, be preceded by notice calculated to provide knowledge of the exercise of adjudicative power and an opportunity to be heard. Dulaney v. The Okla. State Dept. of Health, 1993 OK 113, ¶9, 868 P.2d 676; Harry R. Carlile Trust v. Cotton Petroleum, 1986 OK 16, ¶10, 732 P.2d 438, cert. denied, 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 and 483 U.S. 1021, 107 S.Ct. 3265, 97 L.Ed.2d 764 (1987); Cate v. Archon Oil Co., 1985 OK 15, ¶10, 695 P.2d 1352. Under the Oklahoma Administrative Procedures Act, 75 O.S. 2011 §250.3, this minimum standard is met with an Individual Proceeding which is defined as:
- . . . the formal process employed by an agency having jurisdiction by law to resolve issues of law or fact between parties and which results in the exercise of discretion of a judicial nature; ... Title 75 O.S. 2011 §309 provides:
 - A. In an individual proceeding, all parties shall be afforded an opportunity for hearing after reasonable notice.
 - B. The notice shall include:
 - 1. A statement of the time, place and nature of the hearing;
 - 2. A statement of the legal authority and jurisdiction under which the hearing is to be held;
 - ${\bf 3}.$ A reference to the particular sections of the statutes and rules involved; and
 - 4. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited

- to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.
- C. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.
- D. Deliberations by administrative heads, hearing examiners, and other persons authorized by law may be held in executive session pursuant to paragraph 8 of subsection B of Section 307 of Title 25 of the Oklahoma Statutes.
- E. Unless precluded by law, informal disposition may be made of any individual proceeding by stipulation, agreed settlement, consent order, or default.
- F. The record in an individual proceeding shall include:
 - All pleadings, motions and intermediate rulings;
 - 2. Evidence received or considered at the individual proceeding;
 - 3. A statement of matters officially noticed;
 - 4. Questions and offers of proof, objections, and rulings thereon;
 - 5. Proposed findings and exceptions;
 - 6. Any decision, opinion, or report by the officer presiding at the hearing; and
 - 7. All other evidence or data submitted to the hearing examiner or administrative head in connection with their consideration of the case provided all parties have had access to such evidence
- G. Oral proceedings shall be electronically recorded. Such recordings shall be maintained for such time so as to protect the record through judicial review. Copies of the recordings shall be provided by the agency at the request of any party to the proceeding. Costs of transcription of the recordings shall be borne by the party requesting the transcription. For judicial review, electronic recordings of an individual proceeding, as certified by the agency, may be submitted to the reviewing court by the agency as part of the record of the proceedings under review without transcription unless otherwise required to be transcribed by the reviewing court. In such case, the expense of transcriptions shall be taxed and assessed against the nonprevailing party. Parties to any proceeding may have the proceedings transcribed by a court reporter at their own expense.
- H. Findings of fact shall be based exclusively on the evidence received and on matters officially noticed in the individual proceeding unless otherwise agreed upon by the parties on the record.
- 6. Title 82 O.S. 2011 §105.11, see note 1, supra.
- 7. Title 75 O.S. 2011 §318 provides:
- A. 1. Any party aggrieved by a final agency order in an individual proceeding is entitled to certain, speedy, adequate and complete judicial review thereof pursuant to the provisions of this section and Sections 319, 320, 321, 322 and 323 of this title.
- This section shall not prevent resort to other means of review, redress, relief or trial de novo, available because of constitutional provisions.
- 3. Neither a motion for new trial nor an application for rehearing shall be prerequisite to secure judicial review.
- B. 1. The judicial review prescribed by this section for final agency orders, as to agencies whose final agency orders are made subject to review, under constitutional or statutory provisions, by appellate proceedings in the Supreme Court of Oklahoma, shall be afforded by such proceedings taken in accordance with the procedure and under the conditions otherwise provided by law, but subject to the applicable provisions of Sections 319 through 324 of this title, and the rules of the Supreme Court.
- 2. In all other instances, proceedings for review shall be instituted by filing a petition, in the district court of the county in which the party seeking review resides or at the option of such party where the property interest affected is situated, naming as respondents only the agency, such other party or parties in the administrative proceeding as may be named by the petitioner or as otherwise may be allowed by law, within thirty (30) days after the appellant is notified of the final agency order as provided in Section 312 of this title.
- C. Copies of the petition shall be delivered in person or mailed, postage prepaid, to the agency and all other parties of record, and proof of such delivery or mailing shall be filed in the court within ten (10) days after the filing of the petition. Any party not named as a respondent in the petition is entitled to respond within ten (10) days of receipt of service. The court, in its discretion, may permit other interested persons to intervene.
- D. In any proceedings for review brought by a party aggrieved by a final agency order:

- 1. The agency whose final agency order was made subject to review may be entitled to recover against such aggrieved party any court costs, witness fees and reasonable attorney fees if the court determines that the proceeding brought by the party is frivolous or was brought to delay the effect of said final agency order.
- 2. The party aggrieved by the final agency order may be entitled to recover against such agency any court costs, witness fees, and reasonable attorney fees if the court determines that the proceeding brought by the agency is frivolous.
- 8. Okla. Admin. Code, Title 785:20-1-2 provides in pertinent part: The following words and terms, when used in this Chapter of this Title, shall have the following meaning, unless the context clearly indicates otherwise: . . .
- "Application" means a formal request to the Board and the first step required by law to acquire the right to perform or engage in activities regulated by the Board.
- "Appropriation" means the process under 82 O.S. 1981, §§105 et seq., by which an appropriative stream water right is acquired. A completed appropriation results in an appropriative right.
- "Appropriative right to stream water" means the right acquired under the procedure provided by law to take a specific quantity of public water, by direct diversion from a stream, an impoundment thereon, or a playa lake, and to apply such water to a specific beneficial use or uses
- "Stream water" means water in a definite stream and includes but is not limited to water in ponds, lakes, reservoirs and playa lakes. . . .
- 9. Okla. Admin. Code, Title 785:20-1-2, see note 8, supra.
- 10. Okla. Admin. Code, Title 785:20-1-1 provides:
- This Chapter of the rules is to set out the procedure and substantive requirements to establish appropriative rights to use stream water, to amend such rights, and provisions regarding loss of rights.
- 11. Okla. Admin. Code, Title 785:20-5-1 provides:
- (a) Application notice. Notice of the application, including hearing date, time and place if scheduled prior to notice, shall be provided by the applicant as required by law and Board instructions. Accuracy and adequacy of notice shall be the responsibility of the applicant.
- (b) Proof of notice. Adequate proof that notice was provided as instructed by the Board shall be submitted to the Board by the applicant within fifteen days after the last date of publication or as otherwise directed by the Board. Such proof shall show the dates on which said notice was published in the newspaper.
- (c) Failure to give adequate notice. If adequate proof of notice is not provided by the applicant, the application may be dismissed and the application fee forfeited.
- (d) Revised published notice of application. The Board may require a revised notice to be published at the applicant's expense in case material error is made, or if the applicant makes substantial revisions to his application after notice of the original application.
- 12. Okla. Admin. Code, Title 785:20-5-3 provides:
- (a) If the Board does not schedule a hearing on the application before instructing the applicant to publish notice, a hearing shall be scheduled by the Board upon receipt of a protest which meets the requirements of Section 785:4-5-4. The Board shall notify the applicant and protestant of such hearing. Any interested party shall have the right to protest any application and appear and present evidence and testimony in support of such protest [82:105.11] at the hearing thereon. If, after the application is deemed complete, the application cannot be recommended to the Board for approval, the applicant shall be notified and shall be given an opportunity for hearing.
- (b) Protests shall be made and hearings conducted in accordance with Chapter 4 of this Title.
- (c) Even if no protest to the application is received, the applicant shall be advised and shall be given an opportunity for a hearing if the application cannot be recommended to the Board.
- (d) For a limited quantity permit application, interested persons may submit written comments. A hearing on such application may be required by the Executive Director pursuant to 785:20-7-1(f) if it is shown that a significant public interest or property
- right would be affected by approval of the application.
- 13. Title 75 O.S. 2011 §309, see note 5, supra.
- 14. Title 75 O.S. 2011 §318, see note 7. supra.
- 15. Title 82 O.S. 2011 §105.11, see note 11, supra.
- 16. Title 75 O.S. 2011 $\S 306$ of the Administrative Procedures Act provides:

A. The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court of the county of the residence of the person seeking relief or, at the option of such person, in the county wherein the rule is sought to be applied, if it is alleged the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.

B. The agency shall be made a party to the action.

C. Rules promulgated pursuant to the provisions of the Administrative Procedures Act are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court. When a rule is appealed pursuant to the Administrative Procedures Act it shall be the duty of the promulgating agency to show and bear the burden of proof to show:

1. that the agency possessed the authority to promulgate the rule; 2. that the rule is consistent with any statute authorizing or controlling its issuance and does not exceed statutory authority;

3. that the rule is not violative of any other applicable statute or the Constitution; and

4. that the laws and administrative rules relating to the adoption, review and promulgation of such rules were faithfully followed. The provisions of this subsection shall not be construed to impair the power and duty of the Attorney General to review such rules and regulations and issue advisory opinions thereon.

D. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

17. Title 82 O.S. 2011 §105.11, see note 1, supra.

18. Cate v. Acron Oil Co., Inc., 1985 OK 15, 695 P.2d 1362, also recognized that the United States Supreme Court in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313015, 70 S.Ct. 652, 656-657, 94 L.Ed. 865, 872-874 (1949) determined that parties should be provided the full opportunity to appear and be heard. The Court said:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is [695 P.2d 1356] notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. * * * but when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

19. Title 82 O.S. 2011 §105.11, see note 1, supra. Title 25 O.S. 2011 §106 provides:

No legal notice, advertisement, or publication of any kind required or provided for by the laws of this state to be published in a newspaper shall have force or effect unless published in a legal newspaper of the county. A legal newspaper of the county is any newspaper which, during a period of one hundred four (104) consecutive weeks immediately prior to the first publication of such notice, advertisement, or publication:

1. has maintained a paid general subscription circulation in the county; and

2. has been admitted to the United States mails as paid secondclass mail matter; and

3. has been continuously and uninterruptedly published in the county. If there is no legal newspaper in a county, then all legal notices, advertisements, or publications of any kind required or provided for by the laws of this state shall be published in a legal newspaper in an adjoining county of this state, which newspaper has general circulation in the county or political subdivision in which such notice is required.

Nothing in this section shall invalidate the publication of such legal notices, advertisements, or publications in a newspaper which has moved its place of publication from one location in the county to another location in the same county without breaking the continuity of its regular issues for the requisite length of time, or the name of which may have been changed when said change of location was made as permitted by United States postal laws and regulations. Failure to issue or publish said newspaper for a period of fourteen (14) days due to fire, accident, or other unforeseen cause, or by reason of the pendency of mortgage foreclosure, attachment, execution, or other legal proceedings against the type, presses, or other personal property used by the newspaper, shall not be deemed a failure to maintain continuous and consecutive publication as required by the provisions of this section, nor shall said failure invalidate the publication of a notice otherwise valid. Failure to issue or publish a newspaper

qualified to publish legal notices, advertisements, or publications of any kind, for a period totaling not more than fourteen (14) consecutive days during a calendar year shall not be deemed a failure to maintain continuous and consecutive publication as required by the provisions of this section, nor shall said failure invalidate the publication of a notice otherwise valid.

20. Verified On-Line Data and Reports, https://www.verified audit.com/pubco.php?pifd=6914, accessed January 7, 2020.

21. United States Census Bureau, https://www.cencus.gov/quick facts/mcclaincountyoklahoma, accessed January 6, 2020.

22. United States Census Bureau, https://www.census.go/quick

facts/fact/table/garvincountyoklahoma, accessed January 7, 2020.
23. Oklahoma Press Association, http://www.okpress.com/ business-members, assessed January 7, 2020.

24. Mondo Times, https://www.mondotimes.com/1/world/ us/36/8562/23911, accessed January 8, 2020.

25. Randy Ellis, "The Oklahoman to Trim Circulation Area for Home Deliveries," The Oklahoman, Dec. 27, 2018.

26. For instance, in Crownover v. Keel, 2015 OK 35, 357 P.3d 470, we held that notice by publication was insufficient for a tax sale of real property, even when notice was sent by certified mail to the known landowner and returned as insufficient.

27. Title 82 O.S. 2011 §105.11, see note 1, supra.

28. The Concurring in Part/Dissenting in Part seeks to remand the matter for a trial, apparently to determine the nature of ownership interest in the land/water rights, even though the petitioners own the land containing the stream that feeds the lake, as well as land that abuts the lake. Nevertheless, the statute is constitutionally insufficient by allowing only publication notice. Landowners are easily discernable by both the Board and/or the permit applicants. Regardless, the result is exactly the same. Because of the insufficient notice, the matter is remanded for a trial in which both the petitioners and the permit applicants will have an opportunity to present their objections or acquiescence to the permits.

Rowe, J., with whom, Gurich, C.J., Kauger and Combs, JJ., join, concurring:

1. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In what is likely the seminal opinion on matters of notice and due process, the Supreme Court clarified, "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of informing the absentee might reasonably adopt to accomplish it." Id. at 315.

Id. at 314; Schroeder v. City of New York, 371 U.S. 208, 213 (1962).
 City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 296

(1962).

4. Schroeder, 371 U.S. at 213.

5. Id. at 209.

6. Id. at 210.

7. Id. at 212-13.

KANE, J., with whom Winchester, J. joins, concurring in part and dissenting in part:

1. In fact, the OWRB argued that Petitioners do not even own the water. They contend that the water involved in the subject dispute is owned by the State of Oklahoma and that the riparian rights of Petitioners were properly considered and provided for by the OWRB.

2. See, e.g., Boyd v. U.S. ex rel. Army Corps of Eng'rs, 1992 OK 51, ¶ 2, 830 P.2d 577, 577 ("Tenkiller Ferry Lake is under the jurisdiction and control of the United States through the Army Corps of Engineers (Corps or COE). The lake consists of some 12,500 acres of water with 130 miles of shoreline.").

2020 OK 84

THE STATE OF OKLAHOMA, ex rel, THE COMMISSIONERS OF THE LAND OFFICE, Plaintiff/Appellee, vs. STEPHENS AND JOHNSON OPERATING COMPANY, INC. Defendant/Appellant.

> No. 116,229. October 6, 2020 As Corrected October 8, 2020

ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION III

¶0 In an opinion released for publication, the Court of Civil Appeals, Division III, affirmed the trial court's denial of attorney fees and costs in this action brought under the Surface Damages Act. Appellant sought, and this Court granted, certiorari.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS WITHDRAWN; JUDGMENT OF THE TRIAL COURT AFFIRMED.

Mart Tisdal, Pat O'Hara, Patrick O'Hara, Jr., W. Jason Hartwig, TISDAL & O'Hara, Oklahoma City, Oklahoma, and Deborah Jacobson, COMMISSIONERS OF THE LAND OFFICE, Oklahoma City, Oklahoma, for THE STATE OF OKLAHOMA ex rel. THE COMMISSIONERS OF THE LAND OFFICE

Andrew J. Waldron, WALKER & WALKER, Oklahoma City, Oklahoma, for STEPHENS AND JOHNSON OPERATING COMPANY, INC.

WINCHESTER, J.

¶1 Appellant operating company, Stephens and Johnson Operating Company (Operator), requested an award of attorney fees and costs in this case brought under the Surface Damages Act. Operator claims entitlement to the fees and costs as the prevailing party herein since the State of Oklahoma ex rel. the Commissioners of the Land Office (Surface Owner) did not recover a jury verdict greater than the appraisers' award. We find the statutes in question do not provide for fees and costs to the prevailing party but instead impose specific conditions which were not satisfied in this case.

BACKGROUND

¶2 Oklahoma's Surface Damages Act (the Act or the SDA), 52 O.S.2011, §§ 318.2-318.9, provides the framework for assessing the amount of surface damages an oil and gas operator must pay to a surface owner for damage to the owner's property. *Davis Oil. Co. v Cloud*, 1986 OK 73, ¶16, 766 P.2d 1347, 1351. The Act requires an operator to negotiate for the payment of "any damages which may be caused by the drilling operation." 52 O.S.2011, § 318.5 (A). If the parties cannot reach an agreement regarding damages, the operator must file a petition in district court of the county where the property is located to have the amount determined by three, court-appointed apprais-

ers. *Id.* If either party disagrees with the appraisers' award, that party may file a demand for jury trial which should be "conducted and judgment entered in the same manner as railroad condemnation actions tried in the court." *Id.* at § 318.5(F). Where "the party demanding the jury trial does not recover a more favorable verdict than the assessment award of the appraisers, all court costs including reasonable attorney fees shall be assessed against the party." *Id.*

¶3 Operator drilled and completed four oil and gas wells in Oklahoma County on property owned by Surface Owner. The parties were unable to reach an agreement in regard to the amount of surface damages incurred by Surface Owner as a result of the drilling operations. Surface Owner brought suit under the SDA seeking just compensation. Pursuant to the Act, the trial court appointed three appraisers to assess the damages. 52 O.S.2011, § 318.5 (A). Two of the three appraisers issued a majority report in which they set damages at \$450,000.00 while the minority appraiser estimated damages at \$120,515.00. Operator rejected the majority report and demanded a jury trial

¶4 After a jury trial, the jury returned a verdict in favor of Surface Owner for \$206,192.97. Neither party appealed this judgment. Operator then filed an application for attorney fees and costs in the amount of \$359,458.71. The trial court heard the matter and denied Operator's request. Operator appealed the denial which was affirmed by the Court of Civil Appeals, Division III (COCA). Both the trial court and COCA found that the SDA did not provide for an award of fees and costs under the facts of this case. COCA found that the Act provides for costs and attorney fees to be assessed only when the jury-demanding party fails to obtain a verdict more favorable than the appraisers' assessment. Operator petitioned for certiorari which this Court previously granted.

STANDARD OF REVIEW

¶5 The reasonableness of an attorney fee award is generally reviewed using the abuse of discretion standard. However, where the question of whether an attorney fee is authorized by law is presented, such a claim is reviewed *de novo*. Under this standard, this Court affords a "non-deferential, plenary and independent review" of the trial court's legal ruling. *See Bos-*

ton Ave. Mgmt., Inc. v. Associated Res., Inc., 2007 OK 5, ¶10, 152 P.3d 880, 884--885.

DISCUSSION

¶6 In Oklahoma, the right of a litigant to recover attorney fees is governed by the American Rule. TRW/Reda Pump v. Brewington, 1992 OK 31, ¶13, 829 P.2d 15, 22. Under this Rule, each party bears the cost of his/her legal representation and the courts are without authority to award attorney fees in the absence of a specific statute or a contractual provision allowing the recovery of such fees, with certain exceptions. Kay v. Venezuelan Sun Oil Co., 1991 OK 16, 806 P.2d 648, 650. Statutes authorizing the award of attorney fees must be strictly construed, and exceptions to the American Rule are carved out with great caution because liberality of attorney fees awards against the nonprevailing party have a chilling effect on open access to the courts. Beard v. Richards, 1991 OK 117, ¶12, 820 P.2d 812, 816.

¶7 Here, the express requirements for Operator's requested award of attorney fees and costs under § 318.5(F) have not been satisfied. Under the plain terms of the Act, only the nonjury demanding party may recover its fees and costs and only when the jury-demanding party failed to obtain a more favorable verdict than the appraiser's award. 52 O.S.2011, § 318.5(F). The terms of § 318.5(F) are equally applicable in their treatment of the demanding party, regardless of whether a surface owner or an operator demands the jury trial. Tower Oil & Gas Co., Inc. v. Keeler, 1989 OK 104, ¶5, 776 P.2d 1277, 1278. This is not a prevailing party provision. Because Operator was the jury-demanding party and received a more favorable verdict, it is not entitled to fees herein under the plain terms of the SDA.

¶8 Recognizing the unavailability of fees under the SDA, Operator argues that incorporation of attorney fees provisions from the railroad condemnation statutes, specifically 66 O.S.2011, § 55(D), would permit recovery of its attorney fees. Operator points to the following language from the Act in support of its theory: "The trial shall be conducted and judgment entered in the same manner as railroad condemnation actions tried in the court." 52 O.S. 2011, § 318.5(F). Operator urges that this language contemplates an award of attorney fees through incorporation of the following provision of the railroad condemnation statutes:

... [I]f the award of the jury exceeds the award of the court-appointed commissioners by at least ten percent (10%), then the owner of any right, title or interest in the property involved may be paid such sum as in the opinion of the court will reimburse such owner for his reasonable attorney, appraisal, engineering, and expert witness fees actually incurred because of the condemnation proceeding. The sum awarded shall be paid by the party instituting the condemnation proceeding.

66 O.S.2011, § 55(D)(in pertinent part).

¶9 Operator misconstrues the plain language of § 55(D) which allows an award of fees *solely* to the successful landowner. The courts have specifically rejected an approach such as that advanced by Operator, holding that § 55(D) does not authorize an award of attorney fees to a condemning party. *See, e.g., Moore,* 2009 OK CIV APP 63, ¶ 7, 217 P.3d 165, 167 ("The language of § 55 clearly subjects the condemning authority to the assessment of attorney, appraisal, engineering and expert witness fees. However, there is no corresponding provision subjecting the landowner to the assessment of such fees in the event the jury's award is less than the commissioners' award.").

¶10 Operator cites two COCA opinions from other divisions which it claims were rendered in conflict with COCA's decision herein regarding the application of condemnation authority to attorney fees under the SDA: TXO Prod. Corp. v. Stanton, 1992 OK CIV APP 101, 847 P.2d 821 and Bays Expl., Inc. v. Jones, 2007 OK CIV APP 111, 172 P.3d 217. Both Stanton and Jones involved actions under the SDA wherein the surface owners demanded a jury trial and the jury verdict awards were higher than the appraisers' awards in favor of the surface owners. These facts are easily distinguishable from the present case where Operator was the jury demanding party and also recovered a more favorable verdict since the jury verdict was less than the appraisers' award.

¶11 In *Stanton*, COCA's Division II held that "the legislature did not intend to restrict recovery of attorney fees to situations covered by § 318.5(F), but contemplated application of 66 O.S.1991 § 55(D), by virtue of the kindred nature of those actions and the reference to the railroad condemnation statutes in § 318.5(F)." *TXO Prod. Corp. v. Stanton*, 1992 OK CIV APP 101, ¶4, 847 P.2d 821, 822. Likewise, in *Jones*,

COCA's Division IV specifically agreed with the holding in Stanton that "the legislature intended to authorize costs and attorney fees by virtue of its incorporation of the procedures of railroad condemnation proceedings as to trials and judgments conducted under the Surface Damages Act, in § 318.5(F)." Bays Expl., Inc. v. Jones, 2007 OK CIV APP 111, ¶28, 172 P.3d 217, 223.

¶12 Operator points to Andress v. Bowlby, 1989 OK 78, 773 P.2d 1265, as support for the incorporation of § 55(D) to attorney fees reguests under the SDA. However, much like Stanton and Jones, Andress is also distinguishable from the instant matter. In Andress, the operator and the landowner both filed demands for jury trial in an action brought under the SDA. The operator withdrew its demand just before the start of the jury trial, but the trial proceeded and the jury returned a verdict less favorable to the operator than the appraisers' award. The landowner filed a motion for attorney fees pursuant to § 318.5(F), which the trial court denied. On appeal, the operator argued that the withdrawal of his demand for jury trial before the trial commenced prohibited any assessment of attorney fees against him. The Court, finding that § 318.5(F) squarely fit the facts of that case, rejected this argument and held that the landowner was entitled to an award of attorney fees under that provision of the Act. Andress v. Bowlby, 1989 OK 78, ¶¶ 9, 12, 773 P.2d 1265, 1268. See also, Union Oil Co. of *Cal. v. Heinsohn*, 43 F.3d 500, 503 (10th Cir. 1994) (applying the Court's analysis in *Andress*, denying the operator's requested attorney fees because § 318.5(F) "does not permit the fees here ordered against Union because Union did not request a jury which is an express condition in the Act.").

¶13 Even if we applied § 55(D) to the facts of this case as urged by Operator, Operator would still not be entitled to the requested fees and costs. As mentioned above, the plain terms of the statute provide for an award of attorney fees solely to successful landowners, not successful operators or condemnors. 66 O.S.1991, § 55(D). The courts in *Stanton* and *Jones* incorporated the attorney fee provision from § 55(D) to justify attorney fees awards to surface owners who demanded a jury trial and received a jury verdict that exceeded the appraisers' award by at least 10%. This is so because the Legislature intended to make the damaged land owner as whole as possible after the tak-

ing. Oklahoma Turnpike Auth. v. New Life Church, 1994 OK 9, ¶ 12, 870 P.2d 762, 766. (Land owners should be placed as fully as possible in the same position as that before the government's taking.) See also YDF, Inc. v. Schlumar, Inc., 2006 OK 32, ¶10, 136 P.3d 656, 659 (The SDA was established to promptly compensate surface owners for damages which may result from oil and gas exploration.).

¶14 As noted by COCA in *Stanton*, the *Andress* case provides "little guidance" because it involved a request for attorney fees that fell squarely within § 318.5(F). We agree with *Stan*ton that *Andress* must not be read as a rejection of applying § 55(D) in an analysis of attorney fees awards: "Andress did not reach the situation presented by the case at bar and must be read as a rejection of applying § 55(D) in surface damages cases only with respect to recovery of expert fees as part of the costs that are otherwise recoverable under § 318.5(F)." The Legislature clearly did not intend to restrict the recovery of attorney fees to situations covered by § 318.5(F) but instead contemplated incorporation of § 55(D) by virtue of the kindred nature of those actions and the reference to the railroad condemnation statutes as set forth in § 318.5(F). Accordingly, per the plain terms of § 55(D), we find Operator is not entitled to its requested fees thereunder.

¶15 Finally, Operator argues that equal protection principles demand that a successful defendant must be entitled to an award of attorney fees if a successful plaintiff is statutorily entitled to the fees. As mentioned previously, the attorney fees provided for by statute under the SDA and the railroad condemnation provisions are not typical "prevailing party" awards. Further, the SDA subjects *either* party to the payment of the other party's costs and attorney fees depending on the facts, which were not present herein. See Tower Oil & Gas Co., Inc. v. Paulk, 1989 OK 105, ¶6, 776 P.2d 1279, 1281 (By making either party subject to payment of the other party's court costs and attorney fees, § 318.5(F) ensures that a demand for jury trial will not be filed as a delaying tactic but instead used when a good faith belief in success exists on the part of the party seeking a jury trial.)

¶16 As to the award of fees provided only to landowners in condemnation cases as requested under § 55(D), this Court has consistently found that such treatment does not create an equal protection violation. See, e.g., McAlester Urban Renewal Authority v. Cuzalina, 1973 OK

144, ¶10, 520 P.2d 656, 658-659 (Court found statute allowing landowners and not condemners to recover attorney fees did not violate equal protection provision); *Root v. Kamo Electric Co-op, Inc.*, 1985 OK 8, ¶¶38-40, 699 P.2d 1083, 1091-1092 (Court followed ruling in *McAlester*, and denied equal protection argument as to the application of attorney fees award under § 55(D)); *State ex rel. Department of Transportation v. Lamar Advertising of Oklahoma, Inc.*, 2014 OK 47, 335 P.3d 771 (Court denied constitutional due process argument where only landowner could obtain attorney fees under statute). Thus, Operator's equal protection arguments fail.

CONCLUSION

¶17 Operator demanded the jury trial herein and the jury returned a verdict for less than the amount of the appraisers' award, a more favorable result to Operator. The cases awarding fees and costs to surface owners under § 318.5 (F) of the SDA have no application in this case because that provision is limited to situations where the jury demanding party fails to obtain a verdict more favorable than the appraisers' award. Likewise, cases awarding attorney fees under § 55(D) to land owners that obtained a verdict in excess of the appraisers' award by 10% are also inapplicable in this case because that statute allows an award of fees solely to land owners. Consequently, Operator, the party demanding the jury trial in this case, is not entitled to an award of attorney fees under Oklahoma statutory or case law. The trial court properly denied Operator's request for fees and costs.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS WITHDRAWN; JUDGMENT OF THE TRIAL COURT AFFIRMED.

Concur: Gurich, C.J., Kauger, Winchester, Edmondson, Colbert, Combs, Kane and Rowe, JJ.

Recused: Darby, V.C.J.

WINCHESTER, J.

1. Similarly, the Court in *Tower Oil & Gas Co., Inc. v. Keeler,* 1989 OK 104, 776 P.2d 1277, rejected the operator's argument that a subsequent withdrawal of the jury demand precluded an imposition of attorney fees against him under § 318.5(F). The Court held:

[S]ection 318.5(F) very clearly states that if a party demanding a jury trial fails to obtain a verdict more favorable than the appraisers' award, that party shall be subject to having court costs and attorney fees assessed against him. If, as here, a party demands a jury trial and then later withdraws that request, that party has clearly failed to a recover a verdict more favorable than the appraisers' award. We find that the proper reading of the provi-

sion is that the filing of the demand for jury trial is the activating event rather than the entry of the jury verdict.

Tower Oil & Gas Co., Inc. v. Keeler, 1989 OK 104, ¶4,776 P.2d 1277, 1278.

2020 OK 86

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Shelley Lynne Levisay, Respondent.

SCBD 6827. October 6, 2020

PROCEEDING FOR BAR DISCIPLINE

¶0 This is a summary disciplinary proceeding initiated pursuant to Rule 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings ("RGDP"), 5 O.S.2011, ch. 1, app. 1-A, after Respondent Shelley Levisay pled no contest to a felony count of Harboring a Fugitive from Justice in violation of 21 O.S. 2011, § 440. Respondent received a twoyear suspended sentence, community service, and a fine. On September 20, 2019, the Oklahoma Bar Association ("OBA") transmitted a certified copy of the record relating to the conviction, and on October 7, 2019, this Court ordered Respondent's interim suspension. Following a mitigation hearing before the Professional Responsibility Tribunal ("PRT"), the OBA and Respondent submitted an agreed Joint Proposed Findings of Fact and Conclusions of Law. The PRT adopted these findings and concluded that Respondent had proven mitigating factors of domestic abuse victimization, had no prior discipline, and candidly accepted responsibility for the events that gave rise to her conviction. The PRT recommended a two-year suspension "at maximum" effective from the date of her interim suspension. Upon *de novo* review, we find a suspension of one year serves the important goals of discipline.

RESPONDENT IS SUSPENDED FOR ONE YEAR EFFECTIVE FROM THE DATE OF INTERIM SUSPENSION, OCTOBER 7, 2019, AND ORDERED TO PAY COSTS.

Attorneys and Law Firms:

Loraine Dillinder Farabow, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Carlos M. Henry, Henry Law Firm, Oklahoma City, Oklahoma, for Respondent.

DARBY, V.C.J.:

I. FACTUAL BACKGROUND

¶1 Respondent, Shelley Lynne Levisay, was admitted to the practice of law in Oklahoma in 2011. She has had no prior discipline. The PRT describes this summary disciplinary matter as "a very unfortunate picture of an attorney who found herself embroiled in a relationship which ultimately made her the victim of domestic abuse." PRT Report, 1. The PRT recounts how the testimony of Respondent and character witnesses depicted "a sound individual and very capable attorney who became romantically involved with a former client." Id. This former client, Adrian David Ray Gerdon, physically and mentally abused Respondent throughout their relationship, including strangulation, death threats, punching, hitting, and whipping with a belt. *Id.* at Ex. A, ¶ 14; Hr'g Tr., 225-37.

¶2 In September 2016, after a fight in which Gerdon felt Respondent was "being disrespectful," he beat her multiple times with a belt, asking: "Did you learn your lesson about having an attitude?" Hr'g Tr., 237. Respondent went to bed in severe pain, and a few hours later Gerdon woke her in the middle of the night standing over her body, throwing water on her with a lighter in his hand. Id. at 237-38; see also PRT Report, Ex. A, ¶ 18. He told her he was covering her in gasoline and was going to set her on fire. Gerdon often joked about how funny this incident was and how he would like to do it again. Hr'g Ex. 20, JEX 625; Hr'g Tr., 238-39. Record text messages confirm one instance in which Respondent tried to leave Gerdon and he responded: "You are F***ing psychotic! You aren't going anywhere! Stay your ass there[;] we are about to have a come to Jesus moment! I am seriously pisse[d] the f*** off!" Hr'g Ex. 18, JEX 602.

¶3 Throughout their relationship, Respondent met Gerdon's every financial and personal need at great personal cost. Hr'g Tr., 98-111. Respondent hired and paid for attorneys to represent Gerdon in at least five (5) separate criminal cases, including cases in which she was the victim. PRT Report, Ex. A, ¶¶ 20-21. Respondent spent over \$7,500 in attorney fees and over \$30,000 in bond premiums on Gerdon's behalf. Id. at ¶ 21; Hr'g Tr., 252. In total, Respondent incurred between \$50,000 and \$75,000 in debt because of Gerdon.1 Id. On several occasions, Gerdon threatened to try to get Respondent's law license taken away if she left or did not comply with his demands. Hr'g Ex. 18, JEX 608. In one such

instance, Gerdon told her in a text message: "Going to make your life a living hell now. . . . Hope you enjoy being an attorney[.] You want to f*** with me!!!! It's [o]n I guarantee it!!!!" *Id.* at 22, JEX 636. At the mitigation hearing, Respondent's former co-worker testified that he witnessed Gerdon's intimidation and emotional abuse of Respondent and, based on his experience as a domestic violence lawyer and as a prosecutor, he believed Gerdon would kill Respondent. Hr'g Tr., 29, 40.

¶4 Following a vicious assault by Gerdon with a knife in January 2016, Respondent obtained a protective order against him.² The State brought criminal charges, and on June 21, 2016, Gerdon pled guilty to domestic abuse assault and battery, assault with a dangerous weapon, larceny from a house, and unauthorized use of a vehicle.3 On the same date, Gerdon also pled guilty and received convictions in seven separately styled cases involving Respondent and other victims.⁴ Pursuant to plea negotiations, the district court ordered all cases and counts to run concurrently for a combined twelve-year sentence, all suspended, with stated conditions including in-patient treatment through the VA Hospital Psychiatric Unit.

¶5 Gerdon later violated the terms and conditions of his probation, and the State moved to revoke his suspended sentences on November 2, 2017. Gerdon failed to appear at the revocation hearing on December 27, 2017, because he had checked into the VA facility the night before, reporting suicidal thoughts. Respondent was present in the courtroom when Gerdon's cases were called, and she informed the court honestly of Gerdon's location. The district court reset the hearing for January 31, 2018, but also issued arrest warrants, advising the warrants were not to be recalled despite the setting of a later hearing date.

¶6 Respondent then secured Gerdon's bail bondsman, who stated in a sworn affidavit that Respondent contacted her immediately after the hearing, advised of Gerdon's commitment at the VA, and offered to provide the address of this location if needed. Hr'g Ex. 3, JEX 44. The bondsman and her bonding agents agreed they did not need to pick up Gerdon, even after discharge from the VA facility, "since he had a court date to turn himself in." *Id.* The bondsman advised the Pottawatomie County Court Clerk's Office that she would "wait for [Gerdon] to turn himself in at his court date because

[the bondsman] did not believe he was a flight risk." *Id.* Respondent told the bondsman if for whatever reason Gerdon failed to show up on the 31st, she would take the bondsman to him. Hr'g Tr., 264-65. Indeed, as cosigner on the bond, Respondent would be responsible for the full amount if Gerdon fled. After Gerdon left the VA facility on December 29, 2017, he returned to his personal residence where he had been living since October 2017. Hr'g Ex. 2, JEX 37.

¶7 With full knowledge that the district court had not withdrawn the warrants, Respondent continued to provide Gerdon with the same financial, emotional, and physical support she had provided throughout their relationship. She repeatedly brought him whatever food, cash, and supplies he requested, and he continued to use the vehicle she had previously bought him. Based on Gerdon's continued threats, Respondent testified that she believed: "[I]f I don't do what he wants, he's going to hurt me or he's going to ruin my career." Hr'g Tr., 330. On January 24, 2018, Gerdon was arrested on his outstanding warrants and taken into custody.

¶8 Soon after, on February 7, 2018, the Cleveland County District Attorney's Office charged Respondent with one felony count of Harboring a Fugitive From Justice, in violation of 21 O.S.2011, § 440.5 On September 11, 2019, Respondent entered a blind plea of no contest, and the district court sentenced Respondent to two years, all suspended, 100 hours of community service, and a \$5,000 fine. On September 20, 2019, the OBA transmitted a certified copy of the record relating to the conviction, and pursuant to Rule 7.3 of the RGDP, the Court entered an order of immediate interim suspension on October 7, 2019. The order directed Respondent to show cause, if any, no later than October 21, 2019, why the interim suspension should be set aside. Respondent did not contest the interim suspension, but requested a mitigation hearing before the PRT. On November 18, 2019, the Court granted the Rule 7 hearing on the limited scope of mitigation and recommendation of discipline. At the hearing on January 15, 2020, Respondent presented sworn testimony from five character witnesses, including herself. The OBA did not present witnesses or refute the testimony of Respondent's witnesses. The PRT filed its report on February 14, 2020, adopting and attaching with it the parties' agreed Joint Proposed Findings of Fact and Conclusions of Law. On June 2, 2020, the Court received the completed record sufficient for review.⁶

¶9 Both the PRT and OBA note the "unique circumstances of this case" and compelling mitigation evidence. PRT Report, 6, Ex. A, ¶ 46. The PRT and OBA conclude that based on the evidence presented, Respondent supported Gerdon as she had before, "under threat of violence." Id. at 2 (emphasis added). As the PRT states, "[b]ecause Gerdon was then a fleeing felon, Respondent's continued support of him caused her to be charged with harboring a fugitive." *Id.* Strikingly, this is despite the reset court date and the bondsman's assurances that Gerdon did not pose a flight risk. The record reflects that throughout the twenty-six days of providing Gerdon the food and items he requested, Respondent repeatedly encouraged him to check-in with his probation officer and/ or return to treatment at the VA hospital. Hr'g Ex. 4, JEX 45-46, 52, 57, 142-45, 166-67. Respondent testified that she had every belief Gerdon would appear for the revocation hearing as scheduled. Respondent never encouraged Gerdon to flee the jurisdiction or change locations as a result of the outstanding warrants. *Id.* at 2, JEX 37. Gerdon was still living in his trailer home in the same location he had been living since October 2017, before the State moved to revoke his probation. Id. Law enforcement officers never questioned Respondent about Gerdon's whereabouts in effort to execute the warrants, but she never took it upon herself to alert them after alerting the bondsman of his location. *Id.*

¶10 Balanced against Respondent's efforts to encourage Gerdon to appear is her knowledge of Gerdon's overall propensity for violence. Text messages show Respondent asking Gerdon if he was involved in an officer-related shooting she heard about in the news during this period. Respondent admitted that she knew Gerdon was dangerous and she "could have seen him attacking an officer and an officer having to shoot him." Hr'g Tr., 268. Additionally, during this time Gerdon physically assaulted one of his former girlfriends, chasing her around the trailer property with a gun. Respondent did not learn of this incident until much later, but she agreed on cross-examination that the harm could have potentially been avoided had she reported Gerdon after he left the VA facility. Hr'g Ex. 4, JEX 229-32. Respondent admits that even with the very real fear for her safety if she reported him, it was not an impossibility and that she had successfully done so following Gerdon's violence against her in the past. Alongside this acknowledgment, Respondent avers that she "did the best [she] could to use whatever influence [she] had to get Gerdon to court and the help he so desperately needs." *Id.* at 2, JEX 38.7

¶11 In her response letter to the OBA, Respondent stated, in part, the following:

I can see that what I did violated the clear black letter of the harboring statute. Never did I imagine I was harboring Gerdon. I was doing as I had been doing for the past two years supporting him and trying to get him the therapeutic help he needed. Knowing leaving him would be difficult, if not dangerous for me, I chose to help his [sic] understanding that soon, very soon, he would be going to prison and I would be forced to separate from him and seek help to solve the issues that drew me to him. Never did I interfere with the administration of justice, or at least so I thought. All my actions were aimed at getting him to court, and getting him the help he needed to live life productively.

Id. At her criminal sentencing hearing, Respondent testified:

"[O]ne of the things that I've really learned through counseling and getting away from this codependent relationship was my whole world was engrossed and encircled by this guy, including my relationship with God. Everything was secondary to this guy. And I just realize how dysfunctional it was. . . . I was just blind.

Id. at 4, JEX 213.

¶12 The extensive record of Respondent's educational and professional achievements, civic and religious involvement, and upstanding reputation in the community all draw a sharp contrast to the decisions she made after becoming entrenched in this abusive relationship. Respondent was valedictorian of her high school class. She graduated *magna cum laude* from the honors college at Oklahoma Baptist University with a double major in political science and music performance. She then attended law school at The University of Oklahoma College of Law where she earned numerous awards for oral advocacy as well as three "American Jurisprudence" honors for the high-

est grade in her class. Respondent is a past president of the Shawnee Bar Association, officer in the Shawnee Rotary Club, officer in the philanthropic nonprofit "Soldiers for Christ," board member for Youth and Family Services, auxiliary member for Project Safe (domestic violence agency), and member of the Shawnee Area Music Teachers Association.

¶13 Before Gerdon, Respondent had never previously been in a romantic relationship. Until age thirty, she lived with her mother who treated her like a young child, controlling her finances, personal life, and social life.8 Hr'g Tr., 198, 201, 205-07, 212-14; PRT Report, Ex. A, ¶¶ 10-12. Respondent described that since her parents' divorce at age ten and her father's abusive, inappropriate behavior toward her, she knew she wanted to become a lawyer to advocate for women and children. Hr'g Tr., 189-90; PRT Report, Ex. A, ¶ 40. Pursuing this goal in law school, Respondent began interning in the District Attorney's Office in Pottawatomie and Lincoln Counties, and by her third year she was hired as the director for the Unzner Child Advocacy Center. She secured grant funding, regained the Center's accreditation, oversaw forensic interviews, and coordinated multidisciplinary teams of law enforcement, child welfare workers, and prosecutors. Hr'g Tr., 196.

¶14 Upon finishing law school and passing the Bar, the District Attorney hired Respondent as an ADA to prosecute domestic violence cases in the same counties. While working as a prosecutor, Respondent's maternal grandmother, to whom she was very close, was placed on hospice and died within three days. Hr'g Ex. 2, JEX 32. The District Attorney unexpectedly fired Respondent during this time. Respondent's former co-worker at the DA's Office testified to his belief that Respondent's sudden termination was "politically charged" because Respondent had recently announced her intention to run against her boss for District Attorney in the next election. Hr'g Tr., 42-43. Respondent testified that she was devastated by her termination and felt like quitting her life-long passion of practicing law. Id. at 289. It was four months later that she met Gerdon.9 Id. at 214.

II. MITIGATION

¶15 There are a number of mitigating factors present in the case before us. The PRT and OBA found the following considerations compelling mitigation with respect to Respondent's conviction: 1) Respondent's lack of any prior disci-

pline; 2) her acceptance of responsibility; 3) her family of origin-derived personality issues; 4) her life calamities occurring shortly before her relationship with Gerdon began – particularly the death of her only grandparent and her termination from the DA's Office; 5) her personal/emotional issues arising from years of domestic violence; 6) the fact that Respondent sought counseling in 2016 prior to her commission of the crime and has continued in therapy; 7) her involvement and commitment to her community; 8) her commitment to serving domestic violence and child abuse victims; and 9) her remorse. PRT Report, Ex. A, ¶ 44.

¶16 The Court has previously recognized domestic violence victimization as an appropriate mitigating factor in disciplinary proceedings. See State ex rel. Okla. Bar Ass'n v. Black, 2018 OK 85, ¶¶ 11-12, 432 P.3d 227, 230; State ex rel. Okla. Bar Ass'n v. Hastings, 2017 OK 43, ¶¶ 28, 30, 395 P.3d 552, 559. The PRT found compelling the testimony of Respondent's certified therapist, former co-worker at the DA's Office, former professor, and pastor in understanding Respondent's behavior with regard to Gerdon. Respondent's therapist testified at length how forgiveness and rationalization of an intimate partner's past behaviors are common responses for victims both before and after reporting abuse. See Hr'g Tr., 100-05, 107-11, 125-28. She testified that, consistent with Respondent's relationship with Gerdon, reporting often escalates future violence and reasonably prompts victims to consider whether they will be in greater pain if their partner is arrested and released from custody. Id. at 128-29. She stated that in the face of extreme difficulties, Respondent has nonetheless ended all contact with Gerdon, taken responsibility for her actions, and been proactive in her treatment and continued healing. Id. at 117-18, 128-29, 134, 153-54.

¶17 Respondent's former co-worker at the DA's Office, now the current District Attorney, testified that Respondent was a competent and ethical attorney in both her capacities as a prosecutor and as a solo practitioner. *Id.* at 28, 52, 59. He testified that since her conviction, Respondent has further insulated herself with positive community support and that he strongly believed she would never reoffend. *Id.* at 51-52. Respondent has fully complied with the Court's interim suspension and has notified clients and withdrawn from all her cases in accordance with RGDP, Rule 9.1. PRT Report, Ex. A, ¶ 32.

III. STANDARD OF REVIEW

¶18 This Court possesses original, exclusive, and nondelegable jurisdiction over all attorney disciplinary proceedings in this State. 5 O.S. 2011, § 13; RGDP, Rule 1.1. The purpose of the Court's licensing authority is not to punish the offending lawyer but to safeguard the interests of the public, the courts, and the legal profession. State ex rel. Okla. Bar Ass'n v. Friesen, 2016 OK 109, ¶ 8, 384 P.3d 1129, 1133. In a Rule 7 summary disciplinary proceeding, generally the central concern is to inquire into the lawyer's continued fitness to practice and determine what discipline should be imposed. State ex rel. Okla. Bar Ass'n v. Drummond, 2017 OK 24, ¶ 19, 393 P.3d 207, 214; Hastings, 2017 OK 43, ¶ 17, 395 P.3d at 557. The Court considers de novo every aspect of a disciplinary inquiry, and the PRT's findings of fact, conclusions of law, and recommendation of discipline are not binding on this Court. State ex rel. Okla. Bar Ass'n v. Ezell, 2020 OK 55, ¶ 13, 466 P.3d 551, 554; State ex rel. Okla. Bar Ass'n v. Cooley, 2013 OK 42, ¶ 4, 304 P.3d 453, 454.

IV. DISCIPLINE

¶19 "A lawyer who has been convicted or has tendered a plea of guilty or nolo contendere . . . in any jurisdiction of a crime which demonstrates such lawyer's unfitness to practice law . . . shall be subject to discipline." RGDP, Rule 7.1. The record of conviction constitutes "conclusive evidence of the commission of the crime . . . and shall suffice as the basis for discipline." RGDP, Rule 7.2. While "a criminal conviction does not ipso facto establish an attorney's unfitness to practice law," State ex rel. Okla. Bar Ass'n v. Trenary, 2016 OK 8, ¶ 12, 368 P.3d 801, 806, the commission of any act that would reasonably "bring discredit upon the legal profession, shall be grounds for disciplinary action." RGDP, Rule 1.3. Additionally, it is professional misconduct for an attorney to "commit a criminal act which reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule 8.4(b), Oklahoma Rules of Professional Conduct ("ORPC"), 5 O.S.2011, ch.1, app. 3-A. The PRT and OBA concluded that Respondent violated ORPC, Rule 8.4(b) and RGDP, Rule 1.3, and that a suspension from the practice of law for two years "at maximum" would serve the interests of the Court's discipline. PRT Report, Ex. A, ¶ 45. In addition, the PRT recommended continued counseling sessions, drug testing, and a contract with Lawyers Helping Lawyers,

all under the supervision of the OBA. The PRT characterized Respondent's misconduct in this case as "a one-time, albeit significant, event." PRT Report, 2.

¶20 Implicitly, the Court's order of interim suspension on October 7, 2019, carries a finding of unfitness to practice law for a period of time. See Drummond, 2017 OK 24, ¶ 20, 393 P.3d at 214. Determining the appropriate length of that period of time is the Court's central concern today. After an order of interim suspension, we are obliged "to again weigh the criminal conduct, together with all evidence bearing on the commensurate level of discipline." Id. In doing so, the Court notes the unique circumstances of Respondent's criminal conviction under the harboring statute, 21 O.S. 2011, § 440. Convictions under this statute have typically involved the harboring defendant actively providing shelter to a fugitive on his or her property and/or making false statements to law enforcement about the fugitive's whereabouts. See Shockley v. State, 1986 OK CR 124, ¶ 2, 724 P.2d 256, 257-58 (making false statements to officers regarding fugitive's location when actually inside defendant's home); Spears v. State, 1986 OK CR 155, ¶ 2, 727 P.2d 96, 97 (allowing fugitives to sleep in house); Zempel v. State, 1976 OK CR 232, ¶ 12, 554 P.2d 1209, 1210-11 (making false statements to officers about knowledge and location of fugitive later found hiding in defendant's home); Davis v. State, 1935 OK CR 163, 57 P.2d 634, 637-38, 59 Okla. Cr. 26, 35, 37 (lying to officers in calculated effort to deceive and thwart fugitives' arrest, colluding in fugitives' escape plan, and furnishing shelter in defendant's home); State v. Franks, 1922 OK CR 90, 206 P. 258, 260, 21 Okla. Cr. 213, 219 (sheltering and concealing fugitives in defendant's home).

¶21 In contrast, Respondent's conviction did not involve an act of physical concealment or making a false statement to law enforcement. The lack of these typical characteristics of Respondent's conviction and the history of manipulation she experienced do not excuse her conduct, but they are appropriate factors for this to Court consider in upholding the goals of protecting the public and preserving the integrity of the bar.

¶22 To administer discipline evenhandedly, the Court considers prior disciplinary decisions involving similar misconduct, but "the extent of discipline must be decided on a case-by-case basis because each situation will usually involve different transgressions and different mitigating

circumstances." State ex rel. Okla. Bar Ass'n v. *Wilcox*, 2014 OK 1, ¶ 48, 318 P.3d 1114, 1128. We note that State ex rel. Okla. Bar Ass'n v. Blasdel, 2014 OK 44, 360 P.3d 498, is the only previous bar discipline case found where the Court has confronted an attorney's conduct with regard to 21 O.S.2011, § 440. There, however, the State dismissed its criminal case, and the attorney later voluntarily resigned from membership in the OBA before the Court imposed any final discipline. Blasdel, 2014 OK 44, ¶ 1, 360 P.3d at 498.¹⁰ Very dissimilar from the Rule 7 summary disciplinary proceeding before the Court today, Blasdel is a procedurally and factually distinct Rule 8 case which offers little assistance in determining appropriate discipline.

¶23 Making its recommendation of discipline, the PRT cites to State ex rel. Okla. Bar Ass'n v. Hastings, 2017 OK 43, 395 P.3d 552; State ex rel. Okla. Bar Ass'n v. Zannotti, 2014 OK 25, 330 P.3d 11; and State ex rel. Okla. Bar Ass'n v. Ijams, 2014 OK 93, 338 P.3d 639. In Hastings, the offending attorney was a victim of years of domestic violence by his former spouse. 2017 OK 43, 395 P.3d at 553-54. The Rule 7 disciplinary proceeding against him arose after he pointed a firearm at his former spouse, threatened to kill her, and subsequently resisted officers on scene. On the day of the incident, Hastings had been on a drinking binge, and his ex-wife gained access to his home. Their children, present in the home at the time, reported that Hastings pointed his gun at her and said: "You are going to die today. Where do you want it, the gut or the head?" Id. ¶ 4, n.8, 395 P.3d at 554, n.8. When police arrived, Hastings refused to come out. A stand-off ensued, and police used tear gas to force Hastings from his home. The incident was publicized in local newspapers and media. Hastings pled no contest to a misdemeanor charge of pointing a firearm and received a two-year deferred sentence. 11 We did not adopt the recommendation of the PRT and OBA for a suspension of two years and a day. Instead, we found that a two-year suspension was appropriate based, in part, on the attorney's lack of prior discipline, remorse for his actions, commitment to substance abuse treatment, the compliant manner in which he handled the disciplinary process, and the fact that his conduct stemmed from years of domestic violence against him. *Id.* at ¶ 30. Like in *Hast*ings, Respondent's misconduct relates to her own experience of years of domestic abuse; however, unlike *Hastings*, Respondent was not the aggressor nor did she threaten physical violence against her abusive partner with the use of a firearm. Rather, Respondent's misconduct was continuing to support her abuser under his threats of violence.

¶24 In Zannotti, the offending attorney severely physically assaulted his former client and girlfriend. 2014 OK 25, ¶¶ 5-9, 330 P.3d at 13-14. In that case, however, Zannotti had not experienced a history of domestic violence by this intimate partner, J.D.; he alone was the perpetrator. The dispute began after Zannotti came to the ex-girlfriend's home to discuss resuming a romantic relationship, took her phone, and smashed it on the driveway saying: "You don't need this. You just need to pay attention to me." J.D. attempted to leave, and Zannotti took her keys, dragged her into the house, and pushed her onto the bed. When J.D. started screaming, Respondent lifted her up by her shoulders, threw her into the bedroom wall, and head-butted her in the face, causing a gash across her nose and two black eyes. Respondent then ordered J.D. to undress and lie down on the bed. He then got on top of her and put his hands around her neck tightly several times, asking her if she loved him and would marry him. Zannotti pleaded no contest to misdemeanor domestic abuse assault and battery and malicious injury to property. We found that in the disciplinary process, Zannotti made claims not supported by evidence, did not fully accept responsibility for his actions, and did not show sincere remorse to his victim. We concluded that a two-year suspension from the practice of law served the goals of protecting the public and the integrity of the judicial system. Unlike Zannotti's severe physical violence and lack of remorse, Respondent's misconduct in no way involved her committing violence against her intimate partner, and she full accepts responsibility for her actions. Imposing the same period of discipline as in *Hastings* and *Zannotti* for misconduct of a completely different nature would not be evenhanded and would not serve the goals of discipline.

¶25 Lastly, in *Ijams*, the attorney received a one-year suspended sentence following a domestic dispute with his former spouse. 2014 OK 93, ¶ 3, 338 P.3d at 641. On the day of the incident, Ijams was under the influence of alcohol and ultimately led police on a high-speed chase. After officers deployed road spikes, Ijams exited his vehicle and continued running until a canine police officer apprehended him. Ijams pled guilty to misdemeanor DUI, elud-

ing a police officer, and operating a vehicle in unsafe condition, and no contest to obstructing a police officer (K9). The district court sentenced Ijams on the DUI to one year, all suspended except seven weekends, deferred sentencing on two counts for eighteen months, and assessed a fine in one count. The suspended sentence was to run consecutive to one deferred sentence and concurrent with another. In mitigation, Ijams showed remorse for the seriousness of his actions, sought treatment, and attended AA to maintain his sobriety. We noted no clients were harmed by his conduct. The Court held that the goals of discipline were satisfied by suspending Ijams until the end of his deferment, eighteen months. This discipline was appropriate even as the suspension would conclude before completion of the attorney's criminal sentence, running consecutively.

¶26 In other instances, we have imposed discipline for periods shorter than the length of the lawyer's criminal felony conviction. In State ex rel. Okla. Bar Ass'n v. Dennison, 1994 OK 33, 872 P.2d 403, the attorney pled no contest to a felony charge of making false statements to a financial institution and received a five-year suspended sentence. We suspended Dennison for two years and seven months, finding mitigating evidence showing his upstanding reputation and the fact that he had no prior discipline and had not violated the terms and conditions of his federal sentence. In State ex rel. Okla. Bar Ass'n v. Burns, 2006 OK 75, 145 P.3d 1088, Burns pled guilty to two felony charges of driving a motor vehicle while under the influence of alcohol on two occasions and for transporting an open container during the second arrest. He received a three-year sentence, all suspended, on the first DUI and a five-year deferment on the second felony, to run concurrently. In mitigation, Burns abstained from alcohol for more than a year, expressed remorse, and accepted responsibility for his actions. We noted that his criminal misconduct did not involve or injure any client. We found the goals of discipline were met by suspending the attorney for six months and placing him under supervised probation for two years. In State ex rel. Okla. Bar Ass'n v. Willis, 1993 OK 138, 863 P.2d 1211, the attorney pled guilty to a felony count of obtaining a controlled substance by misrepresentation and was sentenced to three years federal probation. We imposed a suspension of fifteen months effective from the date of interim suspension. The Court considers Respondent's two-year suspended sentence. Based on the facts presented, the Court finds that a suspension from the practice of law for two years is not necessary to meet the goals of discipline.

V. DISCUSSION

¶27 In this case, Respondent's crime was assisting Gerdon while knowing he had outstanding arrest warrants. As a former Assistant District Attorney, a criminal conviction for harboring a fugitive connotes a particularly significant violation of her ethical obligations. Respondent's arrest and conviction were publicized in local media and reflected poorly on the Bar and legal profession as a whole. Additionally, Respondent admits that she understood Gerdon's propensity for violence and recognized the potential that he could injure someone in the weeks leading up to his court date. Even so, the PRT was convinced that Respondent's actions were motivated by self-protection and colored by a consistent history of Gerdon acting on his threats of violence against her. The Court finds significant the voluminous record evidence of Respondent's attempts to get Gerdon to communicate with his probation officer, return to in-patient treatment before his reset hearing, and affirmatively appear for his upcoming court date. Respondent's efforts to ensure Gerdon appeared are corroborated by the fact that she cosigned on his bond and by testimony of the State's investigating officer at her criminal sentencing hearing.¹² In evaluating Respondent's misconduct, we specifically note that Respondent made no attempt to actively lie to law enforcement, assist Gerdon to flee the jurisdiction, or in any way encourage him to not appear at his upcoming revocation hearing. We also do not overlook the bondsman's statements made to Respondent and to the district court that Gerdon did not need to be picked up on the warrants because he did not pose a flight risk and he had a reset court date.

¶28 The compelling mitigation in this record reflects that Respondent acted, and failed to take action, more as a victimized partner than as a lawyer. Her misconduct did not involve or implicate any breach in her duty to competently represent her clients. Respondent has made significant efforts to take responsibility and productively move beyond this chapter in her life. She has terminated all contact with Gerdon, committed to regular therapeutic counseling, and continued to serve within her community. She has complied with the terms and conditions of her suspended sentence as well as this Court's interim suspension. Respondent has had no

prior discipline, and evidence presented at the PRT hearing ardently shows she is unlikely to reoffend. Respondent is exceedingly contrite and remorseful. She takes full responsibility that her support of Gerdon was wrong. Her decisions have carried significant emotional, financial, and professional costs, and she is now a convicted felon.

VI. CONCLUSION

¶29 Upon *de novo* review, the Court finds that a suspension from the practice of law for one year serves the important goals of protecting the public, deterring similar misconduct, and instilling public trust in the legal profession and administration of justice. Respondent's suspension shall be coupled with the conditions that she continue therapeutic counseling sessions and not violate the terms and conditions of her suspended sentence, as ordered in Cleveland County District Court Case No. CF-2018-169. We note that the PRT recommended, without explanation, that Respondent submit to drug testing. The OBA did not make this recommendation. Consistent with Respondent's testimony that she has never taken illegal substances, Respondent has never been charged with or implicated in any drugrelated offense nor tested positive on any court-ordered drug test. We find no evidence to support such a condition, and that condition is stricken.

¶30 Respondent is directed to report compliance with these terms and conditions to the General Counsel of the OBA, and the OBA is likewise directed to notify this Court upon information of any violation. We reserve the right to impose further discipline if Respondent, at any point, violates her suspension from the practice of law or her suspended sentence. The OBA's Application to Assess Costs is granted. Respondent is ordered to pay costs in the amount of \$4,250.13, within ninety (90) days after the effective date of this opinion. RGDP, Rule 6.16.

RESPONDENT IS SUSPENDED FOR ONE YEAR EFFECTIVE FROM THE DATE OF INTERIM SUSPENSION, OCTOBER 7, 2019, AND ORDERED TO PAY COSTS.

CONCUR: Gurich, C.J., Darby, V.C.J., Kauger, Winchester (by separate writing), Edmondson, Colbert and Rowe, JJ.

CONCUR IN PART; DISSENT IN PART: Kane, J.

RECUSED: Combs, J.

Winchester, J., with whom Kauger, J. and Rowe, J. join, concurring specially:

¶1 I concur, but I am compelled to express the need to exercise discretion under these very unfortunate circumstances in which this attorney finds herself. Those circumstances are primarily the abuse inflicted on Respondent by a former client, Adrian David Ray Gerdon – including assault by knife, strangulation, death threats, punching, hitting, and whipping with a belt. Respondent's attempts to leave this relationship were met with threats to her career and life.

¶2 After a series of events that caused the district court to issue several warrants for Gerdon's arrest, Respondent secured and cooperated with Gerdon's bail bondsman, advising the bondsman of Gerdon's current location. The bondsman agreed to wait for Gerdon to turn himself in at the upcoming hearing, and Respondent agreed to take the bondsman to Gerdon if he did not attend the hearing. Respondent continued to support Gerdon for a period of twenty-six days. Respondent supported Gerdon out of fear for her career and life. Yet despite that danger, Respondent encouraged Gerdon to contact his probation officer, obtain help by returning to treatment, and appear at his revocation hearing as scheduled.

¶3 Respondent found herself in an untenable situation, which led the Cleveland County District Attorney's Office to charge Respondent with Harboring a Fugitive From Justice, a felony, because of her actions in supporting Gerdon. Respondent pled no contest, and the district court imposed on Respondent a suspended two-year sentence, along with 100 hours of community service and a \$5,000 fine.¹ Respondent has served one year of this sentence, but the district court retained discretion to review the sentence.

¶4 The district court scheduled a one-year modification hearing for November 18, 2020. Pursuant to 22 O.S. Supp. 2018, § 982a(A)(1),² the district court has the authority and discretion to modify Respondent's criminal sentence at this hearing. Because of the compelling circumstances of this case, this Court used its authority and discretion to suspend Respondent from practice for only one year.

DARBY, V.C.J.:

1. Respondent secured and paid for Gerdon's attorneys in: Pottawatomie Cnty. Dist. Ct. Case Nos.: CF-2015-820 (domestic assault and battery by strangulation, threatening, and act of violence); CF-2015-925 (burglary in the first degree and aggravated domestic assault and battery); CF-2016-150 (bringing contraband into a penal institution and possession of a controlled dangerous substance); CF-2016-245 (domestic assault and battery by strangulation), and CF-2016-94 (domestic abuse assault and battery, assault with a dangerous weapon, larceny from a house, and unauthorized use of a vehicle).

2. The district court granted the protective order for the maximum period of five years, extending to 2022, in Pottawatomie Cnty. Dist. Ct. Case No. PO-2016-27. Shortly thereafter, however, Respondent dropped the protective order. At the mitigation hearing, Respondent's former coworker also testified about the common cycle he witnessed as a prosecutor, of victims paying for their abuser's court costs and often dropping

charges or dismissing protective orders. Hr'g Tr., 39-40.
3. Pottawatomie Cnty. Dist. Ct. Case No. CF-2016-94.

4. These cases are Pottawatomie Cnty. Dist. Ct. Case Nos.: CF-2015-820, CF-2015-925, CF-2016-150, CF-2016-245, CM-2016-162, CM-2016-163, and CM-2016-164. As referenced, Respondent paid for Gerdon's representation in the majority of these cases.

5. According to the plain language of 21 O.S.2011, § 440(A), the actus reus element of harboring a fugitive may be established by evidence of other forms of assistance, even without the act of providing

physical shelter to the person. The statute provides:

Any person who shall knowingly feed, lodge, clothe, arm, equip in whole or in part, harbor, aid, assist or conceal in any manner any ... fugitive from justice ... shall be guilty of a felony punishable by imprisonment ... for a period not exceeding ten (10)

years. 21 O.S.2011, § 440(A) (emphasis added).

6. The Court notes that the district court set a one-year modification hearing at the conclusion of her criminal sentencing on September 11, 2019. The docket reflects that on September 9, 2020, the district court continued the modification hearing, and as of the date of this opinion that review is scheduled to take place November 18, 2020. 7. Gerdon is currently incarcerated. After he was arrested on Janu-

7. Gerdon is currently incarcerated. After he was arrested on January 24, 2018, he entered stipulations in his revocation cases (Pottawatomie Cnty. Dist. Ct. Case. Nos.: CF-2015-820, CF-2015-925, CF-2016-94, CF-2016-150, and CF-2016-245 and Cleveland Cnty. Dist. Ct. Case No. CF-2018-170). These state cases were thereafter run concurrently with his 210-month federal sentence for being a felon in possession of a firearm in *United States v. Gerdon*, CR-2018-53-1-M, 2018 WL 2050166 (W. Dist. of Okla. May 2, 2018). PRT Report, Ex. A, ¶ 27.

8. Respondent was not allowed to drive outside of town unless absolutely necessary for work. When she would get "in trouble" at home, her mother would confiscate her phone. When Respondent finally moved out in 2016, as a practicing attorney, her mother would only allow her to "take what [she] could carry." Hr'g Tr., 205, 207. She emptied Respondent's savings account of \$28,000 to repay her for helping with college and law school. Her mother demanded that Respondent pay her an additional \$7,500 before she could collect the remainder of her personal belongings.

9. The PRT notes that Respondent fully complied with her professional and ethical obligations to discontinue her representation of Gerdon before ever entering a romantic relationship with him. PRT

10. The dismissed criminal allegations were that Blasdel unlawfully employed a woman as a legal assistant while knowing she had an outstanding arrest warrant and actively concealed her from sheriff's deputies attempting to arrest her at his law office. *Blasdel*, 2014 OK 44, ¶ 1, 360 P.3d at 498.

11. Initially, Hastings was charged with two separate felony counts: 1) pointing a firearm, and 2) resisting an officer. Hastings entered into a plea agreement in which the State dismissed both felony counts in exchange for his plea of no contest to a misdemeanor charge, a two-year deferred sentence, and other conditions of drug and alcohol treatment. *Hastings*, 2017 OK 43, ¶ 6, 395 P.3d at 554-55.

12. Regarding the many communications between Respondent and Gerdon while he had outstanding warrants, the lead investigator for the Violent Crime Task Force of Pottawatomie County provided testimony as follows:

Q: Were any of those more than 1,000 text messages about fleeing the jurisdiction?

A: . . . [N]o, sir.

Q: There were no text messages about fleeing?

A: Fleeing the country, no, sir.

Q: Okay. And there were a lot of text messages about going to the VA hospital?

A: That is correct, yes, sir.

Q: And there were text messages about calling his probation officer?

A: Yes, sir.

Q: And she texted him over and over again about going to the VA hospital?

A: Yes, sir.

Hr'g Ex. 4, JEX 164-66.

Winchester, J., with whom Kauger, J. and Rowe, J. join, concurring specially:

1. I note that Respondent's abuser also received a *suspended sentence* – albeit it was for 12 years – for convictions in **eight** separately styled cases involving Respondent and other victims.

2. Title 22 O.S. Supp. 2018, § 982a(A)(1) states as follows:

A. 1. Any time within sixty (60) months after the initial sentence is imposed or within sixty (60) months after probation has been revoked, the court imposing sentence or revocation of probation may modify such sentence or revocation by directing that another sentence be imposed, if the court is satisfied that the best interests of the public will not be jeopardized; provided, however, the court shall not impose a deferred sentence. Any application for sentence modification that is filed and ruled upon beyond twelve (12) months of the initial sentence being imposed must be approved by the district attorney who shall provide written notice to any victims in the case which is being considered for modification.

2020 OK 87

ISAAC SUTTON and CELESTE SUTTON, Plaintiffs/Appellees, v. DAVID STANLEY CHEVROLET, INC., Defendant/Appellant

Case No. 117,587; Comp. w/117,588 October 13, 2020

ON CERTIORARI FROM THE COURT OF CIVIL APPEALS, DIVISION IV

¶0 Plaintiffs, Isaac and Celeste Sutton, sued the defendant, David Stanley Chevrolet, Inc., concerning their purchase of a vehicle at the defendant's car dealership. The defendant moved to compel arbitration. The plaintiffs alleged they were fraudulently induced into entering the arbitration agreement. The trial court found there was fraudulent inducement and overruled the motion to compel arbitration. The Oklahoma Court of Civil Appeals, Div. IV, reversed the trial court and remanded for further proceedings concerning the unconscionability of the arbitration agreement. We previously granted certiorari. We hold the trial court's order finds full support in the evidence. The opinion of the Oklahoma Court of Civil Appeals is vacated and we remand to the trial court for further proceedings.

COURT OF CIVIL APPEALS' OPINION VACATED; ORDER OF THE TRIAL COURT AFFIRMED AND REMAND FOR FURTHER PROCEEDINGS

James L. Gibbs, II, Goolsby, Proctor, Heefner & Gibbs, PC, Oklahoma City, OK, for Defendant/ Appellant M. Kathi Rawls and Minal Gahlot, Rawls Gahlot, P.L.L.C., Moore, OK, for Plaintiffs/Appellees

COMBS, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 On or about April 29, 2016, Isaac Sutton, plaintiff/appellee, (hereafter Sutton), went shopping for a vehicle at the defendant/appellant's, David Stanley Chevrolet, Inc., (hereafter DSC), car dealership. He agreed to purchase a 2016 Chevy Silverado on credit and he agreed to trade-in his 2013 Challenger. He was informed by DSC that his credit was approved. In addition, he was given \$22,800.00 for the Challenger for which he still owed \$25,400.00. The documents for the purchase of the vehicle amounted to approximately eighty-six pages. This included a purchase agreement as well as a retail installment sale contract (RISC). He left the dealership that evening with the Silverado and left his Challenger. Several days later he was informed by DSC that his financing was not approved and he would need a co-signor to purchase the Silverado. Sutton visited DSC but was then told he did not need a co-signor and there was no need to return the vehicle. At the end of June his lender for his 2013 Challenger contacted him about late payments. Sutton contacted DSC who said it was not their responsibility to make those payments since they did not own the Challenger he traded-in. A few days later, he was notified by DSC that his Challenger had been stolen and the matter was not the responsibility of DSC. Sutton had to make an insurance claim on his Challenger and DSC took back the Silverado. In the meantime, Sutton continued to make payments on the Challenger.

¶2 On February 24, 2017, Sutton and his wife filed a petition against DSC. They alleged DSC's failure to abide by the terms of its contract with Sutton negatively affected Sutton's health and financial situation and he has suffered actual, statutory, and consequential damages. Their causes of action include, fraud in the inducement to purchase the vehicle, conversion, violations of the Oklahoma Consumer Protection Act, breach of contract, negligence, and intentional infliction of emotional distress. On March 20, 2017, DSC filed a motion to compel arbitration based upon a Dispute Resolution Clause (DRC) which provided for arbitration and is found in the two-page purchase agreement. The plaintiffs filed a response on April 6, 2017, wherein they alleged the RISC contained a merger clause which provided it represented the entire contract and it contained no arbitration agreement. They also claimed Sutton's alleged agreement to the provisions of the DRC was fraudulently induced and the DRC's provisions were unconscionable. On June 14, 2018, the plaintiffs filed a motion for an evidentiary hearing concerning the motion to compel arbitration.

¶3 On October 4, 2018, the district court held an evidentiary hearing. Only Isaac Sutton testified at the hearing. Certain exhibits were also admitted into evidence, including the purchase agreement and a written declaration that Sutton had made which had been attached to the plaintiffs' response to the motion to compel arbitration. From the testimony and evidence admitted, Sutton explained, what appear to be, undisputed facts surrounding the purchase transaction. Sutton placed his signature on four separate signature lines found on the two-page purchase agreement. He agrees these are all his signatures and he was not forced into executing this document. The top of the purchase agreement contains the dealer name, Sutton's name, address and telephone numbers, as well as a date of April 29, 2016. It also lists the name of the salesman. Immediately below this information is a section titled "VEHICLE PUR-CHASED DESCRIPTION." It contains all relevant information including the vehicle identification number of the Silverado Sutton was purchasing. Underneath this section is a signature line. To the right of this section, is another section titled "PURCHASE PRICE DISCLO-SURE." It contains the price of the vehicle as well as other information including the tradein payoff amount and rebate. Underneath this section is a signature line. At the bottom of the page, in a much smaller font, is a section titled "SECURITY AGREEMENT." Immediately underneath this section is a signature line. Under the vehicle purchased description is another section titled "TRADE-IN VEHICLE." Like the vehicle purchase description, it contains vehicle information but it only concerns Sutton's Challenger he was trading-in. However, unlike the other sections of the purchase agreement, there is no signature line immediately following the trade-in vehicle section. In fact, what is immediately underneath this section, in a small red-colored font, is a "DISPUTE RESOLUTION CLAUSE." Underneath the DRC is the signature line. As mentioned, Sutton executed each of these signature lines.

¶4 From his testimony and declaration, Sutton stated the DSC finance manager showed him the purchase agreement and said that this document was for verifying his personal information, the vehicle information on both vehicles, and how much he would be paying. The finance manager went over Sutton's personal information, the vehicle information and pointed out the trade-in value as well as the rebate. The finance manager would hold the various documents in one hand and with the other he showed Sutton where he needed to sign. He would then take away the documents. At no time was the DRC discussed. On cross-examination Sutton was asked whether he read the DRC at the time he executed the purchase agreement. He replied he had not due to various reasons that will be discussed later in this opinion. The DRC provides that all matters under the DRC shall be submitted to binding arbitration pursuant to the Federal Arbitration Act (FAA), Title 9 U.S.C. §1, et seq. It also provides for the arbitrator's fee to be divided equally between the parties to arbitration. On direct examination, Sutton testified his family is on a tight budget and he would not have the money to pay any arbitration fees. If he was required to pay such fees he would have to find a new home.

¶5 The district court asked Sutton's attorney whether it was her position that when DSC's finance manager explained some of the terms of the purchase agreement and other documents, but without mentioning at all the dispute resolution clause, that that in and of itself is fraudulent inducement. She agreed that was her position. Defendant's counsel disagreed and said the finance managers' actions were not enough to constitute fraudulent inducement. In concluding the hearing, the district court stated "I'm going to rule consistent with what I ruled the other day, that I believe it is enough to get to fraudulent inducement. I'm not going to rule on the unconscionability issue." The issue of whether or not the RISC with the merger clause would defeat the purchase agreement's DRC was not discussed at the hearing or ruled upon by the court. On November 7, 2018, the district court issued an order. It states that after hearing Sutton's testimony, the evidence and arguments of counsel, defendant's motion to compel arbitration should be overruled. The order does not specify the grounds for denying the motion but it would appear from the court's statements at the hearing it was based upon fraudulent inducement.

¶6 On December 5, 2018, DSC appealed the order overruling their motion to compel arbitration. The appeal is one from an interlocutory order appealable by right. Okla.Sup.Ct.R. 1.60 (i); 12 O.S. 2011, § 1879. The matter was assigned to the Oklahoma Court of Civil Appeals, Div. IV. on April 17, 2019. On October 30, 2019, the court filed its opinion. The court noted:

A duty to speak may arise from partial disclosure, the speaker being under a duty to say nothing or to tell the whole truth. One conveying a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, even though his statement is true as far as it goes, since such concealment is in effect a false representation that what is disclosed is the whole truth.

Deardorf v. Rosenbusch, 1949 OK 117, ¶0, 206 P.2d 996 (Syllabus by the Court). The court agreed with DSC that Deardorf does not say that when one explains part of a written contract one must always then also explain or read aloud every other provision of the contract, including provisions unrelated to the portions of the contract discussed. It found the decision in Specialty Beverages, L.L.C. v. Pabst Brewing Co., 537 F.3d 1165 (10th Cir. 2008) to be particularly accurate on this point. The court therein found, a "duty [to speak] could also arise, even though it might not exist in the first instance [one based upon fiduciary duty], once a defendant voluntarily chooses to speak to [a] plaintiff about a particular subject matter." Id. at 1180 (emphasis added). See also 37 Am. Jur. 2d Fraud and Deceit § 203 ("In general, once a person undertakes to speak, that person assumes a duty to tell the whole truth and to make a full and fair disclosure as to the matters about which the person assumes to speak." (emphasis added) (footnotes omitted)); 37 Am. Jur. 2d Fraud and Deceit § 204 ("[W]hen a party makes a disclosure upon a subject during negotiation, it has a duty to clarify the matter and ensure it is truthful[.]" (emphasis added)). The court noted, however, under our jurisprudence we have held "[w] here the peculiar circumstances give rise to a duty on the part of one of the parties to a contract to disclose material facts and the party remains silent to his or her benefit and to the other party's detriment, the failure to speak constitutes fraud." Croslin v. Enerlex, Inc., 2013 OK 34, ¶17, 308 P.3d 1041. But the court did not find any peculiar circumstances here. It found under the "particular circumstances" Sutton's allegations of fraud were based only on the

finance manager mentioning and confirming the following matters in the purchase agreement: "Mr. Sutton's name, address, and phone number; the year, make, model and color of the vehicle being purchased; and the purchase price, including the negotiated value for Mr. Sutton's trade-in vehicle, and the rebate to be applied." The court's conclusion was bolstered by the fact that other contents of the purchase agreement were not discussed, such as the security agreement. It found if the finance manager was required by duty to read aloud or explain all of these provisions merely because he verified certain details it would "swallow[] up the time-honored rule that the plain, unambiguous terms of a written contract are binding on the parties." Thrifty Rent-A-Car Sys., Inc. v. Brown Flight Rental One Corp., 24 F.3d 1190, 1195 (10th Cir. 1994) (applying Oklahoma law). It also noted our decision in Silk v. Phillips Petro*leum Co.*, where this Court concluded a literate adult involved in an arms-length business transaction could not claim to be unaware of a provision in a written contract that was plainly captioned and separately signed by her, even though the provision, which she did not read, was not mentioned by the other party during contract discussions. 1988 OK 93, ¶¶22 & 34, 760 P.2d 174. The court then concluded, the trial court erred as a matter of law in holding there was enough evidence presented to find that fraudulent inducement occurred. The court reversed and remanded for further proceedings concerning the issue of unconscionability.

¶7 On November 11, 2019, the Suttons filed a petition for certiorari with this Court. We granted the petition on April 30, 2020. The matter was assigned to this office on May 2, 2020.

II. STANDARD OF REVIEW

¶9 Under the proceedings governing applications to compel arbitration, the existence of an agreement to arbitrate is a question of law. Rogers v. Dell Computer Corp., 2005 OK 51, ¶18, 138 P.3d 826. Questions of laws are reviewed de novo. Hill v. Blevins, 2005 OK 11, ¶3, 109 P.3d 332. A claim which attacks the enforceability of an arbitration provision itself, rather than just the existence of the contract in general, may be challenged in court. Signature Leasing LLC v. Buyer's Group LLC, 2020 OK 50, ¶3, 466 P.3d 544 (COMBS, J., concurring); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). In Oklahoma state courts, the Oklahoma version of the Uniform Arbitration Act, 12 O.S. 2011, §1851 et seq., determines how proceedings on an application to compel arbitration shall be conducted so long as the Act does not frustrate the purposes underlying the FAA. *See Rogers*, 2005 OK 51, ¶15. Title 12 O.S. 2011, §1857 (A) provides:

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract. (emphasis added).

Here, the Suttons specifically challenged the enforceability of the arbitration agreement contained in the purchase agreement's DRC based upon grounds that exist at law or in equity for the revocation of a contract, i.e., fraudulent inducement. This specific challenge as to the enforceability of the arbitration agreement itself, places the matter correctly in the district court.

III. ANALYSIS

¶10 The district court's order overruling the motion to compel is based upon Suttons' allegations of fraud in the inducement. Fraud is a generic term with multiple meanings and is divided into actual fraud and constructive fraud. *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, ¶34, 987 P.2d 1185. The district court did not specify whether her ruling was based upon actual fraud or constructive fraud.

¶11 Actual fraud is defined in 15 O.S. 2011, §58 and consists of any of the following acts, committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

- 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.
- 2. The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true.
- 3. The suppression of that which is true, by one having knowledge or belief of the fact.
- 4. A promise made without any intention of performing it; or,
- 5. Any other act fitted to deceive.

Actual fraud is always a question of fact and must be proved at law. *Croslin v. Enerlex, Inc.*, 2013 OK 34, ¶12, 308 P.3d 1041. It represents the intentional misrepresentation or concealment of a material fact which substantially affects another person. *Patel*, 1999 OK 33, ¶34. To constitute actual fraud, there must be an intentional deception. *Faulkenberry v. Kansas City Southern Ry. Co.*, 1979 OK 142, ¶4, n.6, 602 P.2d 203, *U.S. cert. denied*, 464 U.S. 850, 104 S. Ct. 159, 78 L. Ed. 2d 146 (1983).

¶12 In contrast with actual fraud, constructive fraud does not require an intent to deceive. *Gentry v. American Motorist Ins. Co.*, 1994 OK 4, ¶8, 867 P.2d 468. Constructive fraud is defined in 15 O.S. 2011, §59 and consists of:

- 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
- 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Constructive fraud is a breach of either a legal or equitable duty and does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose. Patel, 1999 OK 33, ¶34; See Faulkenberry, 1979 OK 142, ¶4, n.6 ("Liability for constructive fraud may be based on a negligent misrepresentation. Even an innocent misrepresentation may constitute constructive fraud where there is an underlying right to be correctly informed of the facts."). It has been defined as "the concealment of material facts which one is bound under the circumstances to disclose." Bankers Trust Company v. Brown, 2005 OK CIV App 1, ¶14, 107 P.3d 609 (quoting Varn v. Maloney, 1973 OK 133, ¶18, 516 P.2d 1328).

¶13 Constructive fraud has the very same legal consequences as actual fraud.¹ Patel, ¶34. The court in Specialty Beverages, L.L.C. faced a similar dilemma. It noted the pretrial order therein did not limit the plaintiff's fraud claim to a theory of constructive fraud, although the parties focused upon that theory. Specialty Beverages, L.L.C. v. Pabst Brewing Co., 537 F.3d 1165, 1182 (10th Cir. 2008). It found, however, that a theory under constructive fraud was specifically relevant to the facts of the case. Id. at 1180. Here, although the order overruling the motion to compel arbitration does not specify a par-

ticular theory of fraud, we find the theory of constructive fraud to be specifically relevant to the facts of this case.

¶14 Fraud has been described as:

"a generic term, which embraces all the multifarious means which human ingenuity can devise, and are resorted to by one individual to get an advantage over another by false suggestions or by the suppression of the truth. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. The only boundaries defining it are those which limit human knavery."

Van Winkle v. Henkle, 1919 OK 373, ¶8, 186 P. 942. In *Griffith v. Scott*, 1927 OK 361, ¶18, 261 P. 371, the Court quoted the following language concerning fraud and the evidence to establish it:

"Fraud may be proved by circumstantial evidence. Indeed, from its nature, it is difficult to prove it by direct evidence, and it is seldom that it can be so proved. Hence it is more often shown by circumstances than in any other way. It is impossible, however, to enumerate the facts from which it may be inferred. Each case must depend on its own facts, and all the facts and circumstances connected with and surrounding the transaction are to be considered together in determining whether it was fraudulent. Facts of trifling importance, when considered separately, or slight circumstances trivial and inconclusive in themselves, may afford clear evidence of fraud when considered in connection with each other. It has been said that in most cases fraud can be made out only by a concatenation of circumstances, many of which in themselves amount to very little but in connection with others make a strong case."

When fraud is alleged, every fact or circumstance from which a legal inference of fraud may be drawn is admissible. *Berry v. Stevens,* 1934 OK 167, ¶16, 31 P.2d 950. The gist of a fraudulent misrepresentation is the producing of a false impression upon the mind of the other party, and, if this result is accomplished, the means of its accomplishment are immaterial. *Id.*, ¶15.

¶15 Constructive fraud may be defined as any breach of a duty which, regardless of the

actor's intent, gains an advantage by misleading another to his prejudice. Patel, ¶34. When dealing with alleged omissions and partial disclosures, the first question is always whether there was a duty upon the actor to disclose the whole truth. A fiduciary relationship requires full disclosure of material facts. Barry v. Orahood, 1942 OK 419, ¶14, 132 P.2d 645. Where there is no fiduciary relationship a legal or equitable duty to disclose all material facts may arise out of the situation of the parties, the nature of the subject matter of the contract, or the particular circumstances surrounding the transaction. Croslin v. Enerlex, Inc., 2013 OK 34, ¶17, 308 P.3d 1041 (discussing Barry, ¶10). In order that suppression of the truth may constitute fraud, there must be a suppression of facts which one party is under a legal or equitable obligation to communicate to the other, and which the other party is entitled to have communicated to him. Barry, ¶13 (citations omitted). In other words, the facts concealed must be such as in fair dealing, the one party has a right to expect to be disclosed, and such as the other party is bound to disclose. *Id.* One may be under no duty to speak, but if he or she undertakes to do so, the truth must be told without suppression of material facts within his or her knowledge or materially qualifying those stated. See Barry, ¶0 (Syllabus by the Court). Fraudulent representations may consist of half-truths calculated to deceive, and a representation literally true is actionable if used to create an impression substantially false. *Id.* Where the peculiar circumstances give rise to a duty on the part of one of the parties to a contract to disclose material facts and the party remains silent to his or her benefit and to the other party's detriment, the failure to speak constitutes fraud. See Croslin, ¶17, (discussing Morris v. McLendon, 1933 OK 619, ¶0, 27 P.2d 811 (Syllabus by the Court)).

¶16 A review of our jurisprudence in constructive fraud cases reveal a variety of facts and circumstances that will give rise to a duty to disclose material facts. We have consistently found the existence of the requisite circumstances, i.e., that which is necessary to create a duty to disclose, when the offending party created a false impression concerning material facts that was relied upon by the other party to his detriment and to the benefit of the offending party. In *Deardorf v. Rosenbusch*, Deardorf solicited to buy Rosenbusch's one acre mineral interests she owned in Oklahoma. 1949 OK 117, 206 P.2d 996. She was not living in Oklahoma

at the time and when she purchased the mineral interest in 1934 for \$350.00, the land was undeveloped. The two corresponded by letter but unbeknownst to Rosenbusch and known to Deardorf, the land now had one producing well with two others being drilled. In Deardorf's correspondence, he specifically mentioned that Rosenbusch had in 1934 acquired a nonproducing royalty interest but he never made any mention of the current production. In addition, he stated he was trying to clear title to a farm for a client and offered her \$10 for a quitclaim deed which was included in his correspondence. Rosenbusch replied stating she hated to sell her interest for so little but because of her age she would probably not see any benefit in returns from her investment. She executed the quitclaim deed and sent it with her reply. The grantee on the deed was blank and was later inserted by Deardorf. The grantee, Revnolds, later instituted action against Rosenbusch to quiet title. Rosenbusch only discovered the later development on the property after she executed the quitclaim deed. She cross-petitioned Deardorf, alleged fraud, and prayed for the reasonable value of the mineral interest. The trial court ruled in favor of Rosenbusch.

¶17 On appeal, this Court quoted the following from *Berry v. Stevens*, 1934 OK 167, ¶20, 31 P.2d 950:

A duty to speak may arise from partial disclosure, the speaker being under a duty to say nothing or to tell the whole truth. One conveying a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, even though his statement is true as far as it goes, since such concealment is in effect a false representation that what is disclosed is the whole truth.

Deardorf, 1949 OK 117, ¶8. We held the offer to buy the mineral interest was fraudulent because it created a false impression that there was no production of minerals on the land. *Id.*, ¶6. Because of the false impression created by Deardorf, a duty arose for him to tell the truth when he began the negotiations. *Id.*, ¶¶6-8. "And on disclosing in part the pertinent facts such duty would be breached by withholding other pertinent truths." *Id.*, ¶8. We held, the holding of the trial court that the deed was obtained by fraud finds full support in the evidence. *Id.*, ¶9.

¶18 In *Berry v. Stevens*, Berry owned land in Caddo County and had previously lived there.

He later moved to Craig County. He was acquainted with Stevens who owned a real estate business in Caddo County. Stevens wrote Berry concerning his property. Berry replied that he would like to sell his property. Stevens indicated he might be able to find a purchaser for the property; however, upon receiving Berry's reply, Stevens made an arrangement with two other men for the three to purchase Berry's property together. Berry was not told of this arrangement. Prior to this time various operators for oil and gas in the vicinity of Berry's property had discovered a new and deeper oilbearing sand. But only just recently had a new and large oil well come in which was producing 1,000 barrels a day. Berry knew about the discovery of the deeper oil-bearing sand but did not know about the new oil well. Stevens arranged to visit Berry in Craig County on the pretense he had a client who was looking to purchase land there. The client was actually Steven's son-in-law pretending to be a client. They drove to Craig County and met with Berry. During this meeting Stevens made various statements to Berry about the different oil companies in the area of Berry's property and the size and production of the wells, as well as the discovery of the new and deeper sand. At no time did Stevens mention the new and large producing well. Berry agreed to sell his property and executed a deed. He was unaware that Stevens and his two associates were going to be the purchasers. Two days after executing the deed, Berry learned of the new and large producing well near his property. Berry filed an action against Stevens and his associates to rescind the contract and cancel the deed based upon the grounds of fraud. The trial court denied his petition and entered judgment in favor of the defendants. Berry appealed. On appeal, this Court found the "most potent contention made by the plaintiffs is that Stevens, while giving plaintiffs information as to the oil field in the vicinity of the lands involved in the action, gave them only such information as they already had, at least in part, but that he did not disclose to them the existence of the large well that had come in from the new and deeper sand just a day or two prior to the purchase of their lands." Berry, 1934 OK 167, ¶18. We then quoted the following from our earlier opinion in Gidney v. Chappell, 1910 OK 216, ¶15, 110 P. 1099:

Although a party may keep absolute silence and violate no rule of law or equity, yet, if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover the whole truth. A partial statement, then, becomes a fraudulent concealment, and even amounts to a false and fraudulent misrepresentation.

Berry, ¶18. Concluding that half-truths calculated to deceive and representations literally true but used to create false impressions are actionable, we reversed the judgement of the trial court and remanded the matter for a new trial.

¶19 In Croslin v. Enerlex, Inc., W.M. Croslin, owned a four net acre mineral interest in Seminole County at the time of his death in 1994. In 2000, his unleased mineral interest was included in an Oklahoma Corporation Commission pooling order. His wife later died in 2005 and was survived by their children, the plaintiffs. In 2008, nearly \$10,000.00 had accrued from the production of the unleased mineral interest under the pooling order and had been transmitted to the State for the benefit of W.M. Croslin. The defendant, Enerlex, knew of the pooling order and solicited the plaintiffs to buy their mineral interest. They sent an offer letter to each plaintiff in 2008 which included a mineral deed and mentioned that two bank drafts totaling \$1,350.00 would be paid after completion of the title examination. The letter also stated that upon receipt of the mineral deed, Enerlex would begin a title examination. Enerlex did not disclose the existence of the pooling order or the accrued mineral proceeds held by the State. The provided mineral deed also stated that "this transfer and assignment covers and includes that the grantee shall have, receive, and enjoy the herein granted undivided interests in and to all royalties, accruals and other benefits, if any, from all Oil and Gas heretofore or hereafter run." Croslin, 2013 OK 34, ¶5. Without knowledge of the pooling order or accrued mineral proceeds held by the State, the plaintiffs executed the mineral deeds. They later discovered the pooling order and accrued mineral proceeds and filed suit against Enerlex for rescission and damages. They alleged the defendant had a duty to disclose this information and failure to do so amounted to constructive fraud. The trial court granted summary judgment in favor of the plaintiffs. On appeal the Oklahoma Court of Civil Appeals (COCA) reversed the judgment of the trial court and we granted certiorari.

¶20 We vacated the opinion of COCA and affirmed summary judgment. In our analysis, we looked at two false impressions created by the defendant. Instead of disclosing the nearly \$10,000.00 of accrued mineral proceeds the defendant chose to remain silent. However, the "if any" language in the mineral deed indirectly or directly created a false impression that the defendant did not know of any production or accruals. Id., ¶30. The plaintiffs relied to their detriment on this false impression. The language discouraged rather than encouraged the plaintiffs to make their own investigation into the mineral interest. Further, the language in the letter that Enerlex will begin their title examination after receipt of the mineral deed, discouraged the plaintiffs from doubting Enerlex's truthfulness through the false impression that the defendant had not investigated the ownership of the mineral interest. *Id.*, ¶31. We determined the false impression created by the "if any" language "gave rise to a duty on the part of the defendant to disclose the whole truth, including all material facts about the accrual of the mineral proceeds." Id., ¶32. Our analysis relied heavily upon the principles expressed in *Deardorf*, which we found to be:

[W]here defendant is under a duty to say nothing or to tell the whole truth, defendant's duty to tell the whole truth may arise from partial disclosure and defendant conveying a false impression by disclosing some facts and concealing others is guilty of fraud in that the concealment is in effect a false representation that what is disclosed is the whole truth.

Id. (emphasis added). We held, the plaintiffs were entitled to summary judgment on the legal issue of defendant's disclosure duty as a matter of law. Id. "Before allowing defendant to benefit from the mineral deeds, equity can and will, under the circumstances of this case, cause to be done what defendant was obligated to do." Id., ¶36 (emphasis added).

¶21 Under the circumstances of the present case, a duty arose to inform Sutton of the DRC. This is due to the false impression created by both the finance manager and the structure of the purchase agreement itself. The admitted evidence² showed the finance manager stated the purpose of the purchase agreement was for verifying Sutton's personal information, the vehicle information on both vehicles, and how much he would be paying. The finance manager would hold the purchase agreement in

one hand and then point to the four signature lines that Sutton needed to sign with the other hand. Sutton executed the signature lines on the purchase agreement because of the representation he was only verifying information. The vehicle purchased description section contained information nearly identical to the trade-in vehicle section, and immediately below it was a signature line. The apparent purpose of this section was to verify the information on the vehicle he was purchasing. The purchase price disclosure section contained information concerning the price of the vehicle and immediately following it was a signature line. The apparent purpose of this section was also to verify the information on pricing. The trade-in vehicle section contained information on the vehicle he was trading-in. As with the other sections of the purchase agreement, his impression was that his signature was needed only for the purpose of verifying this information. However, unlike these other sections of the purchase agreement, a totally unrelated provision is tucked-in right before the apparent signature line for the trade-in vehicle section. This unrelated provision is the DRC which is in a much smaller font size. When questioned several times at the evidentiary hearing as to why Sutton did not read the DRC he answered:

Because the part that was pointed out for the signature was my trade-in and the VIN and the mileage on my trade-in.

Because what was pointed out in that paragraph was that it was my trade-in value, I made sure all that was correct and then I signed it.

I verified what he had pointed out, which was the 2013 Dodge Challenger, and the amount they were going to give for the trade-in value and how much was owed on it and then I signed it.

Here, the representations of the finance manager combined with the structure of the purchase agreement created a false impression that the purpose of Sutton's signature was to only verify information concerning his trade-in vehicle. He surely was not under the impression he was agreeing to waive his right to a jury trial and obligating himself to pay a share of the costs of arbitration when he signed underneath the trade-in vehicle section of the purchase agreement. The DRC which provided for arbitration was a material provision of the purchase agreement. Because of the creation of

the false impression which shrouded the existence of the DRC, a duty to disclose this material provision arose.

¶22 It is no defense here that Sutton did not read the DRC provisions. In *Dusbabek v. Bowers*, 1934 OK 594, 43 P.2d 97, we found the following quote from the Appellate Court of Indiana to be instructive:

Every man or woman, even though illiterate, is presumed to know the contents of a written instrument signed by him; but no presumption of knowledge will stand in the way of a charge of fraud made in regard to the contents of the writing. No doubt it would be imprudent, in a sense, not to read or to require the reading of an instrument before signing or accepting it; indeed the courts would turn a deaf ear to a man who sought to get rid of a contract solely on the ground that its terms were not what he supposed them to be. But the courts would not refuse to listen, on the contrary they would give relief, where a plaintiff charged fraud upon the defendant in reading the contract to him, or in stating its nature or terms; and also in leaving out terms agreed upon, or in inserting terms not agreed upon. This would obviously be true of cases in which the complaining party could not read, or could read only with difficulty, or in which a printed document was concerned containing much fine print. But the rule is not confined to such cases; on the contrary it is very general.

Id., ¶34 (emphasis added) (quoting from *Cole v. McLean*, 93 Ind. App. 526, 177 N.E. 348, 350 (1931)).³ Likewise, in *Uptegraft v. Dome Petroleum Corp.*, 1988 OK 129, 764 P.2d 1350 we found an early Kansas opinion to be instructive on this point:

It is sufficient for present purposes to say that one who has misled another by a fraudulent misrepresentation cannot escape the ordinary consequences of his wrong by showing that, although his victim in fact knew nothing of the matter, knowledge was to be imputed to him upon some legal theory.

Id., ¶13 (quoting Int'l Harvester Co. of Am. v. Franklin Cty. Hardware Co., 101 Kan. 488, 167 P. 1057, 1058 (1917)). And, in rejecting constructive knowledge as a defense, the *Uptegraft* Court again quoted from the Kansas opinion:

The policy of the courts is, on the one hand, to suppress fraud, and, on the other, not to encourage negligence and inattention to one's own interests. The rule of law is one of policy. Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has obvious dangers. But judicial experience exemplifies that the former is the less objectionable, and hampers less the administration of pure justice. The law is not designed to protect the vigilant, or tolerably vigilant, alone, although it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly wicked....

Uptegraft, ¶13. In conclusion, from the circumstances presented which created a false impression concerning the DRC, we hold the finance manager was under a duty to disclose this material information to Sutton and Sutton's failure to read the finely printed DRC is no defense here against establishing such duty.

¶23 We have no doubt that Sutton relied upon the false impressions made and the failure to disclose the DRC when he signed under the trade-in vehicle section. Nor do we have any doubt that Sutton was prejudiced under these circumstances to the advantage of DSC. Sutton unknowingly gave up his right to a jury trial. In addition, he testified that if he had to pay a share of the arbitration costs it would put him out of home. DSC certainly received an advantage, i.e., to forgo a potential jury trial and to have certain costs of arbitration paid by the customer.

¶24 The Oklahoma Court of Civil Appeals held there was no duty on the part of the finance manager to disclose any information because the DRC was never discussed and therefore there was nothing upon which a false impression could have been made regarding dispute resolution. It noted, another provision in the purchase agreement was also not discussed, i.e., the security agreement section. The court determined to hold otherwise would require the finance manager to read aloud or explain all of the provisions of the contract just because he verified certain details. The court, however, did not focus on the combination of the representations made by the finance manager in relation to the structure of the purchase agreement. The duty to disclose here is not a duty to read an entire contract; it is the duty to disclose enough information that will clear the

false impression created, which under the circumstances, only concerned the DRC. The plaintiffs did not assert they were fraudulently induced into signing the security agreement. However, unlike the trade-in vehicle section, the security agreement section contained one signature line that only concerned the security agreement. In *Silk v. Phillips Petroleum Co.*, we noted how it would be difficult to argue one did not understand what they were signing when it was a separate rider, plainly captioned and separately signed. 1988 OK 93, ¶34, 760 P.2d 174.

IV. CONCLUSION

¶25 Based upon the specific facts of this case, we hold, under a theory of constructive fraud, the order of the trial court overruling the motion to compel arbitration, which was based upon her oral findings of fraudulent inducement, finds full support in the evidence. The opinion of the Oklahoma Court of Civil Appeals is hereby vacated and the order of the trial court is affirmed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

COURT OF CIVIL APPEALS' OPINION VACATED; ORDER OF THE TRIAL COURT AFFIRMED AND REMAND FOR FURTHER PROCEEDINGS

¶26 Gurich, C.J., Kauger, Edmondson, Colbert and Combs, JJ., concur.

¶27 Darby, V.C.J., Winchester (by separate writing), Kane, and Rowe (by separate writing), JJ., dissent.

Winchester, J., with whom Darby, V.C.J. and Kane, J. join, dissenting:

¶1 Parties enter into arbitration agreements to resolve disputes more efficiently. Arbitration gives the parties the benefit of having a third party mediate a dispute outside of court; this form of dispute resolution results in speedy and less costly results. The United States Supreme Court emphasized that the national policy favored arbitration of disputes through the Federal Arbitration Act (FAA) when it recently vacated a decision from this Court holding an employment-agreement arbitration clause unenforceable. See Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 20 (2012). Despite this recent correction, the Court attempts to again thwart the FAA by striking down another arbitration clause.

¶2 Sutton went to David Stanley Chevrolet (DSC) to purchase a vehicle. DSC's finance manager gave him a purchase agreement to sign. The purchase agreement contained an arbitration clause that was in red ink located in the middle of the first page of the agreement. Sutton did not read the arbitration clause but signed immediately underneath it. This was a simple car deal. Yet the Court seizes on constructive fraud in executing the arbitration clause because a car dealership finance manager's omission – specifically failing to read or discuss with the buyers the arbitration clause in a purchase agreement.

¶3 The Court ignores two long-standing contract duties to create the result it reaches: (1) the duty to disclose, and (2) the duty to read when entering into a contract. The Court attempts to temper its holding by limiting it to the facts of this case, but that limitation is destined to fail. The Court's pronouncement here will have a profound impact on *all* contracts, even those that do not include an arbitration clause and not limited to real estate, commercial, construction, employment, and sales contracts.

¶4 The Court states that a duty arose for DSC to inform Sutton of the dispute resolution clause due to the finance manager's representations and the structure of the purchase agreement; both the representations and the purchase agreement created a "false impression which shrouded the existence of the [dispute resolution clause]." The Court's conclusion contradicts its long-standing precedent.

¶5 A duty to speak may arise from a partial disclosure, as the speaker is obligated to say nothing or tell the entire truth. *Deardorf v. Rosenbusch*, 1949 OK 117, ¶ 0, 206 P.2d 996. Specifically, this Court held:

One conveying a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, even though his statement is true as far as it goes, since such concealment is in effect a false representation that what is disclosed is the whole truth.

Id. (emphasis added); see also Specialty Beverages, L.L.C. v. Pabst Brewing Co., 537 F.3d 1165, 1180 (10th Cir. 2008) (applying Oklahoma law) (explaining that such a "duty could . . . arise, even though it might not exist in the first instance, once a defendant voluntarily chooses to speak to [a] plaintiff about a particular subject matter") (emphasis omitted). DSC's finance

manager said nothing about the dispute resolution clause; Sutton also did not inquire about it. The finance manager did not disclose some facts and conceal others. The finance manager, by saying nothing about the clause, did not create a false impression regarding the subject of dispute resolution. Instead, Sutton simply assumed, without reading the purchase agreement before him, that the finance manager's statements about verifying certain information constituted the entirety of the multi-page agreement.

¶6 The Court disregards that the purchase agreement had numerous other provisions that were not discussed. For example, DSC's finance manager did not discuss the security interest granted to DSC through the purchase agreement, the warranty provisions, or any of the 13 provisions on the back of the agreement. Under this Court's pronouncement today, DSC could have committed fraud by failing to discuss any of these provisions. Its decision is too far-reaching and creates uncertainty.

¶7 Further, *Deardorf*, 1949 OK 117, 206 P.2d 996, *Berry v. Stevens*, 1934 OK 167, 31 P.2d 950, and *Croslin v. Enerlex, Inc.*, 2013 OK 34, 308 P.3d 1041, cited by the majority to support its finding of fraud all concerned a duty to disclose material facts underlying a transaction, *not* written contractual terms or obligations. Extending those cases to create a new rule that discussion of any contractual term or provision requires discussion of the entire contract runs contrary to existing precedent regarding the duty of individuals signing contracts to read them.

¶8 Established Oklahoma precedent is that if one can read and is not prevented from doing so, one has a duty to read the contract. See Silk v. Phillips Petroleum Co., 1988 OK 93, ¶ 34, 760 P.2d 174, 179 (concluding that "a literate adult" "involved in an arms-length business transaction" could not claim to be "unaware" of a provision in a written that was "plainly captioned" and "separately signed" by her, even though the provision in question, which she did not read, was not mentioned by the corporate agent during the parties' contract discussion). Even more, this Court recently held concerning an arbitration agreement, "[c]ourts presume that a buyer who had the opportunity to read a contract but did not is bound by the unread terms." Williams v. TAMKO Bldg. Prods. Inc., 2019 OK 61, ¶ 9, 451 P.3d 146, 151 (finding an arbitration agreement unenforceable because the plaintiffs did not have an opportunity to read the contract) (emphasis added). Sutton without question had the opportunity to read the dispute resolution clause.

¶9 More importantly, the dispute resolution clause was not hidden nor did the structure of the purchase agreement in any way create a false impression. The dispute resolution clause was the only provision in red ink, and it was located in the middle of the agreement. The heading in all capital letters stated "DISPUTE RESOLUTION CLAUSE." Sutton signed immediately beneath the clause. The dispute resolution clause was clearly marked, but Sutton chose not to read the provision.

¶10 The Court also takes issue that Sutton was prejudiced by "unknowingly" waiving his right to a jury trial. There is no question that the dispute resolution clause included a waiver of a jury trial. However, the issue of whether such a waiver is proper in an arbitration clause has already been decided by this Court. See e.g., Rollings v. Thermodyne Indus. Inc., 1996 OK 6, ¶¶ 33-36, 910 P.2d 1030, 1036 (holding that jury waiver in arbitration agreement found not to violate Okla. Const. art. 23, § 8 or art. 2, § 6 (access to courts)). The fact that Sutton did not read the dispute resolution clause does not amount to him being prejudiced by the implications of the clause.

CONCLUSION

¶11 The Court has long-established duties for parties who draft contracts and those that sign contracts. Instead of balancing those duties, the Court creates a new duty for the contract drafter to discuss *every* provision of the contract to avoid committing constructive fraud. However, even if the contract drafter reads the entire contract, a signer can still claim fraudulent inducement because the signer understood the contract differently or not at all. Under either scenario, arbitration is thwarted. The Court has further eliminated the duty to read a contract for anyone signing a contract.

¶12 The parties in this matter desired to buy and sell a car. The purpose of the arbitration clause in the purchase agreement was to quickly settle any dispute that might arise from this transaction. If Sutton read the arbitration clause and did not want to sign it, he always had the option of going to another car dealership to purchase a vehicle. Yet Sutton chose to sign the arbitration clause without reading it, and this Court should not ignore Oklahoma precedent regarding Sutton's duty to read the contract.

For these reasons, I respectfully dissent to the Court's decision.

Rowe, J., with whom Kane, J., joins, dissenting:

¶1 The majority concludes that the finance manager for David Stanley Chevrolet, Inc. (Appellant) committed constructive fraud by failing to adequately point out that the purchase agreement included a Dispute Resolution Clause (DRC). The majority holds that the finance manager's representation to Mr. Sutton (Appellee) regarding the purpose of the form purchase agreement, combined with its structure, gave Mr. Sutton the false impression that his four separate signatures were only to verify his personal information, the vehicle information for the trade-in and new vehicle, and the amount he was paying.

¶2 The three cases on which the majority relies all involved purchases of real property and extended contract negotiations during which the buyers did not disclose material facts regarding the property.¹ In each case, discovery of the fraud required the sellers to go outside the four corners of each deed.

¶3 In contrast, Mr. Sutton did not need to read anything outside the four corners of the purchase agreement; rather, the conspicuously labeled DRC was located immediately above one of the four lines on which he signed. Further, the DRC is the only paragraph printed in red in the entire two-page purchase agreement.

¶4 There is also no evidence Mr. Sutton was unable to read or to see the color differentiation of the DRC paragraph. The undisputed facts disclose Mr. Sutton had previously financed a vehicle. Based on similar facts and arguments in *Silk v. Phillips Petroleum Co.*, 1988 OK 93, ¶ 34, 760 P.2d 174, we held there are "no peculiar circumstances that would give rise to a positive duty *to point out or explain*" a particular lease provision to a literate adult who had previously executed oil and gas leases.² (Emphasis added). As relevant here, the defendant in *Silk* explained some lease terms to the plaintiff but failed to inform her about the never-discussed option to renew clause.

¶5 Today, the majority places the distinguished burden of explaining a DRC upon a finance manager of a car dealership; a duty that would rightfully be more at home in a law office. The majority opinion specifically holds "the duty to disclose here is not a duty to read

an entire contract; it is the duty to disclose enough information that will clear the false impression created, which, under the circumstances, only concerned the DRC."

¶6 In my opinion, today's decision will create uncertainty and negative repercussions for Oklahoma business owners and customers executing otherwise arms-length transactions with typically quick turn-around times. To avoid circumstances from which a duty to disclose material facts arises, it would appear the best course is for the customer to seek advice from an attorney, rather than impose a duty upon a car dealership finance manager.

¶7 Accordingly, I respectfully dissent.

COMBS, J.:

1. In Patel, the trial court granted a petition to vacate a judgment based upon fraud. Patel, 1999 OK 33, ¶33. The defendants argued in order for the vacation to succeed, all of the elements of actual fraud must be established, including an intent to deceive. Id. The order made no such findings. Id. This Court rejected the argument and held "constructive fraud has the very same legal consequences as actual fraud, such a restriction can no longer be considered a correct exposition of our statutory law." *Id.*, ¶¶33 & 35. 2. Plaintiff's Ex. 2., Transcript of Proceedings held October 4, 2018.

3. The Syllabus of the Dusbabek Court in ¶0 also states:

Where a party seeks to enforce an instrument against the person who signed it, and the signer charges such person with fraud in inducing him to sign said instrument on account of false and fraudulent representations concerning the contents of such instrument, and where the person signing such instrument acts upon such positive representations of fact, notwithstanding the fact that the means of knowledge were directly at hand and open to the person signing such instrument, and where said representations are of the character to induce action upon the person signing said instrument, and, in fact, did induce the signing of such instrument, such inducement constitutes fraud and it is sufficient to vitiate such instrument, and it becomes immaterial whether the person signing such instrument was negligent in failing to use diligence or ordinary prudence to discover the falsity of such representation.

Rowe, J., with whom Kane, J., joins, dissent-

1. Deardorf v. Rosenbusch, 1949 OK 117, 206 P.2d 996 (mineral interest owner learned about oil development after executing the conveyance); Berry v. Stevens, 1934 OK 167, 31 P.2d 950 (landowner unaware of nearby production, discovery of deeper oil source, or that real estate agent agreed with two other men to buy the property); Croslin v. Enerlex, Inc., 2013 OK 34, 308 P.3d 1041 (purchaser knew about but did not disclose to survivors of the deceased mineral interest owner about accrued production proceeds held by State; mineral deed language that assigned "all royalties, accruals and other benefits, if any" created false impression of purchaser's lack of knowledge).

2. In Silk, the plaintiff admitted she did not read the lease document before signing it and that while she had signed the option to renew clause, she had not seen it. 1988 OK 93, ¶22. She testified the option was not taped to the bottom of the oil and gas lease when she signed it, unlike the lease introduced into evidence. Id. at ¶ 27. The plaintiff also testified the defendant had already marked the signature lines with an "X" and directed her where to sign. Id. at ¶ 28. On appeal, she alleged the defendant's failure to inform her of the existence of the option, after having undertaken the duty of informing her of the terms of the lease, constituted fraud. Id. at ¶ 32. The Court acknowledged the option was material to the leasing agreement and that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation; there must have been an obligation to speak." Id. at ¶ 33. After its holding (quoted above), the Silk Court noted the parties

were involved in an arms-length transaction and the plaintiff had not alleged a confidential or fiduciary relationship. Id. at ¶ 34. The Court then pointed out that "the plainly captioned option to renew clause was separately signed, making it difficult for the signing lessor to be unaware of the rider - whether or not it was attached to the printed oil and gas lease." Id. Due to the lack of evidence of fraud, the Court reversed the verdict-based judgment in favor of the plaintiff.

2020 OK 88

IN THE MATTER OF THE ESTATE OF THOMAS ALLEN FORESEE, DAYNA FORESEE, Respondent/Appellant, v. JEREMY FORESEE, JACIE MICHELLE **COOK Petitioners/Appellees.**

Case No. 118,599. October 13, 2020

APPEAL FROM THE DISTRICT COURT OF MCINTOSH COUNTY, STATE OF OKLAHOMA, HONORABLE **BRIAN MCLAUGHLIN**

¶0 A dispute concerning control over a deceased individual's remains arose between the surviving spouse and two of the parties' adult children named as co-personal representatives of estate. The trial court ruled the decedent's last will and testament sufficiently vested power over his remains in the named personal representatives, citing 21 O.S. 2011 §§ 1151(B) and 1158(2). The Court retained this appeal as a question of first impression and affirm the trial court's ruling in part. We hold the will did not expressly assign authority over the remains such that it satisfied the requirements of § 1151 (B); however, the personal representatives did have priority over the body according to § 1158(2). As such, the trial court properly denied surviving spouse's request for a temporary injunction.

TRIAL COURT ORDER DENYING TEMPORARY INJUNCTION AFFIRMED ON OTHER GROUNDS.

Brian J. Nowline and Raymond E. Penny, Jr., HALL, ESTILL, HARDWICK, GABLE, GOLD-EN & NELSON, P.C., Oklahoma City, OK, for **Appellant**

James R. Pratt and Teresa G. Pratt, PRATT LAW OFFICES, P.C., Eufaula, OK, for Appellees

GURICH, C.J.

Facts & Procedural History¹

¶1 Dayna Foresee (Dayna) and Thomas Allen Foresee (Decedent) were married for thirtynine years. Although the record is unclear as to precisely when the parties separated, Dayna moved out of the parties' marital residence in Eufaula and filed a divorce proceeding in Tulsa County on July 17, 2019.²

¶2 Decedent had been diagnosed with amyotrophic lateral sclerosis (Lou Gehrig's disease). On December 31, 2019, he executed an instrument entitled Last Will and Testament, naming two of the parties' children, Jeremy Foresee and Jacie Michelle Cook (collectively Appellees), to serve as co-personal representatives. Further, the will expressly excluded Dayna from taking anything from Decedent's estate.³ Decedent passed away from Lou Gehrig's disease on January 11, 2020.

¶3 On January 13, 2020, Appellees filed a probate petition in McIntosh County, seeking appointment as special administrators of Decedent's estate. Appellees alleged the Decedent had "orally expressed wishes for disposition of his bodily remains."4 Additionally, the petition maintained that a dispute regarding the disposition of Decedent's body had arisen between heirs of the estate. Appellees claimed that as representatives of the Decedent's estate, duly appointed under the terms of his will, they were to be afforded statutory priority to control the disposition of the remains. The will vested the co-personal representatives with the power to pay debts associated with Decedent's "last illness, funeral, and burial;"5 however, nothing in the will explicitly entrusted them with control over decedent's remains.

¶4 In connection with Appellees' filing, the trial judge entered two separate *ex parte* rulings on January 13: (1) an order appointing Appellees as co-personal representatives; and (2) a "58 O.S. 212 Minute of the Court." In the latter edict, the trial judge awarded Appellees "sole responsibility of the planning, preparation, services, and payment from Estate assets, according to the decedent's will, and 21 O.S. 1158(2), for the disposition of decedent's bodily remains."

¶5 On January 15, 2020, Dayna filed an objection contesting the admission of Decedent's will to probate, Appellees' appointment as cospecial administrators, and Appellees' control over Decedent's body. Simultaneously, Dayna filed a second pleading in which she sought an emergency temporary restraining order and preliminary injunction. Both filings alleged *inter alia* that Decedent's will was invalid because: (1) Decedent was of unsound mind at the time the will was executed; and (2) the will was the byproduct of undue influence. In her demand

for injunctive relief, Dayna maintained: (1) by statute she was entitled to priority and control of Decedent's body; (2) Decedent's will did not satisfy statutory prerequisites for assigning the right to control disposition of a body postmortem; and (3) the will was invalid, therefore any assignment of the right to control Decedent's body contained in that instrument is likewise invalid.

¶6 Dayna's objection and motion were presented to the trial court on an emergency basis. Other than her verified pleadings, no additional evidence was offered at the hearing. There was no transcript made of the proceeding and no narrative statement has been submitted by Dayna as authorized in Okla. Sup. Ct. R. 1.30. In a journal entry filed on January 15, 2020, the district court found the Decedent's will "satisfies the requirements of 21 O.S. § 1151(B) such that [Appellees] are entitled to control of the Decedent's remains pursuant to 21 O.S. § 1158(2)."8 The trial court denied injunctive relief, but did authorize Dayna to attend Decedent's funeral without interference. Dayna timely filed her appeal from the trial court's decision, and we retained the matter to address this first-impression question regarding the proper reading of 21 O.S. 2011 §§ 1151 and 1158.9

Standard of Review

¶7 At issue in this interlocutory appeal is whether the trial court erred in denying Appellant's request for a temporary injunction. We will not disturb a trial court ruling either granting or denying a temporary injunction absent a finding the judge abused his or her discretion. Edwards v. Bd. of Cnty. Comm'rs of Canadian Cnty., 2015 OK 58, ¶ 11, 378 P.3d 54, 58. An abuse of discretion is deemed to have occurred when a trial court's legal conclusions are clearly erroneous. Wright City Pub. Sch. v. Okla. Secondary Sch. Activities Ass'n, 2013 OK 35, ¶ 17, 303 P.3d 884, 888, see also Christian v. Gray, 2003 OK 10, ¶ 43, 65 P.3d 591, 608.

¶8 To assess the propriety of the trial court's equitable ruling in this case, we must examine the precise wording and interplay between two statutes: 21 O.S. 2011 § 1158 and 21 O.S. 2011 § 1151. Questions concerning statutory interpretation are subject to this Court's *de novo* review. Christian v. Christian, 2018 OK 91, ¶ 6, 434 P.3d 941, 942. In exercising *de novo* review, "this court possesses plenary, independent, and non-deferential authority to examine the issues present-

ed." <u>Benedetti v. Cimarex Energy Co.</u>, 2018 OK 21, ¶ 5, 415 P.3d 43, 45.

Analysis

¶9 Dayna argues on appeal that she sufficiently demonstrated entitlement to a preliminary injunction, and that the trial court's denial of such was an abuse of discretion and against the weight of the evidence. In particular, Dayna claims the Decedent's will does not contain specific language entitling Appellees to control over his remains, a requirement she argues is mandated by 21 O.S. 2011 § 1151(B). Appellees contend that the will need not specifically assign control of Decedent's remains to the copersonal representatives. Rather, they insist that under 21 O.S. 2011 § 1158(2), a personal representative properly appointed by a will, executed in conformity with Oklahoma law, is given priority over a surviving spouse. Alternatively, Appellees allege that even if Dayna was entitled to statutory priority over Decedent's remains, she forfeited that right when she became "estranged" from Decedent as specified in 21 O.S. 2011 § 1151a.

¶10 The purpose of a temporary injunction is to "preserve the status quo and prevent the perpetuation of a wrong or the doing of an act whereby the rights of the moving party may be materially invaded, injured, or endangered." Id., ¶ 10, 378 P.3d at 58. It is an extraordinary remedy, not to be granted lightly. Dowell v. Pletcher, 2013 OK 50, ¶ 6, 304 P.3d 457, 460. A preliminary injunction may be imposed:

When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain

such removal or disposition. It may, also, be granted in any case where it is specially authorized by statute.

12 O.S. 2011 § 1382. It is a movant's duty to establish: 1) the likelihood of success on the merits; 2) irreparable harm to the party seeking injunction relief if the injunction is denied; 3) his threatened injury outweighs the injury the opposing party will suffer under the injunction; and 4) the injunction is in the public interest. Dowell, ¶ 7, 304 P.3d at 460.

¶11 Although they were in the midst of a divorce proceeding, the parties in this case had been married for thirty-nine years; thus, the threatened harm in denying Dayna control over Decedent's remains was very real. Yet, entitlement to a temporary injunction still depended upon Dayna demonstrating she was likely to succeed on the merits. This, of course, required Dayna to prove that she should be given statutory priority over Decedent's remains.¹⁰

¶12 The trial court concluded Decedent's will fulfilled the requirements for assigning control over Decedent's remains. This was an erroneous legal determination. Section 1151, which is entitled, "Right to Direct the Disposal of One's Body," reads:

A. Any person has the right to direct the manner in which his or her body shall be disposed of after death, and to direct the manner in which any part of his or her body which becomes separated therefrom during his or her lifetime shall be disposed of. The provisions of Section 1151 et seq. of this title do not apply where such person has given directions for the disposal of his or her body or any part thereof inconsistent with these provisions.

B. A person may assign the right to direct the manner in which his or her body shall be disposed of after death by executing a sworn affidavit stating the assignment of the right and the name of the person or persons to whom the right has been assigned.

C. If the decedent died while serving in any branch of the United States Armed Forces, the United States Reserve Forces or the National Guard, and completed a United States Department of Defense Record of Emergency Data, DD Form 93, or its successor form, the person authorized by the decedent pursuant to that form shall have the right to bury the decedent or to

provide other funeral and disposition arrangements, including but not limited to cremation.

D. Any person who knowingly fails to follow the directions as to the manner in which the body of a person shall be disposed of pursuant to subsection A, B or C of this section, upon conviction thereof, shall be guilty of a misdemeanor punishable by a fine of not more than Five Thousand Dollars (\$5,000.00). (emphasis added).

Subsection B commands a sworn instrument which plainly delegates the right to "direct the manner in which his or her body shall be disposed." Further, the statutory subsection requires identification of the individual to whom the right has been assigned. Even if we assume a lawfully executed will could serve as a sufficient sworn vehicle to invoke § 1151(B), the will makes no mention of the right to control Decedent's remains. Consequently, the will wholly fails to meet the requirements of 21 O.S. 2011 § 1151(B), and the trial court's finding was partially defective. 11 Notwithstanding, our inquiry does not end here because we may affirm a judgment below when the trial court reaches the correct result but for the wrong reason. Hall v. GEO Grp., Inc., 2014 OK 22, ¶ 17, 324 P.3d 399, 406.

¶13 Because the Decedent did not execute a sworn instrument explicitly assigning the right to control his remains, we next turn our attention to 21 O.S. 2011 § 1158. This section establishes a priority list of individuals for purposes of conferring control over a deceased person's remains. Section 1158 reads as follows:

The right to control the disposition of the remains of a deceased person, the location, manner and conditions of disposition, and arrangements for funeral goods and services vests in the following order, provided the person is eighteen (18) years of age or older and of sound mind:

- 1. The decedent, provided the decedent has entered into a pre-need funeral services contract or executed a written document that meets the requirements of the State of Oklahoma;
- 2. A representative appointed by the decedent by means of an executed and witnessed written document meeting the requirements of the State of Oklahoma;

3. The surviving spouse;

- 4. The sole surviving adult child of the decedent whose whereabouts is reasonably ascertained or if there is more than one adult child of the decedent, the majority of the surviving adult children whose whereabouts are reasonably ascertained;
- 5. The surviving parent or parents of the decedent, whose whereabouts are reasonably ascertained;
- 6. The surviving adult brother or sister of the decedent whose whereabouts is reasonably ascertained, or if there is more than one adult sibling of the decedent, the majority of the adult surviving siblings, whose whereabouts are reasonably ascertained;
- 7. The guardian of the person of the decedent at the time of the death of the decedent, if one had been appointed;
- 8. The person in the classes of the next degree of kinship, in descending order, under the laws of descent and distribution to inherit the estate of the decedent. If there is more than one person of the same degree, any person of that degree may exercise the right of disposition;
- 9. If the decedent was an indigent person or other person the final disposition of whose body is the financial responsibility of the state or a political subdivision of the state, the public officer or employee responsible for arranging the final disposition of the remains of the decedent; and
- 10. In the absence of any person under paragraphs 1 through 9 of this section, any other person willing to assume the responsibilities to act and arrange the final disposition of the remains of the decedent, including the personal representative of the estate of the decedent or the funeral director with custody of the body, after attesting in writing that a good-faith effort has been made to no avail to contact the individuals under paragraphs 1 through 9 of this section. (emphasis added).

Our inquiry centers around whether the Decedent's will satisfied § 1158(2) as "an executed and witnessed written document meeting the requirements of the State of Oklahoma." Further, we must decide whether § 1158(2) implicitly incorporates § 1151(B), thereby mandating

specific language in the will assigning the right to control Decedent's remains.

¶14 When the Court embarks on an examination of statutory enactments, our primary goal is to determine legislative intent through the "plain and ordinary meaning" of the statutory language. Kohler v. Chambers, 2019 OK 2, ¶ 6, 435 P.3d 109, 111. We will only employ rules of statutory construction when legislative intent cannot be ascertained (e.g., in cases of ambiguity). Christian v. Christian, ¶ 5, 434 P.3d at 942. Our test for determining if a statute contains an ambiguity is whether its language is susceptible to more than one meaning. Id., ¶ 5, 434 P.3d at 942-43.

¶15 In the present appeal, it is undisputed that Decedent's will was drafted and signed in conformity with 84 O.S. 2011 § 55, including the Decedent executing the will before two witnesses, and having the same notarized under oath. Accordingly, a properly executed will satisfies the plain language of § 1158(2).¹² Similarly, Decedent's will names two of the parties' children, Jeremy and Jacie, to serve as co-personal representatives over his estate. Again, a plain reading of § 1158(2) requires a finding that Appellees are "representatives appointed by the decedent." Finally, we note that nothing in § 1158(2) mandates compliance with § 1151.

¶16 Dayna maintains that to qualify as "the representative" referred to in § 1158(2), such appointment must specifically assign the right to dispose of a decedent's body and specifically name the individuals to whom the precise right has been assigned. In other words, she asks the Court to incorporate § 1151(B) into § 1158(2) by implication. The problem with Dayna's argument is that it would render § 1158(2) both redundant and superfluous. Section 1158 (1) allows a decedent to control the disposition of his remains via an executed "written document that meets the requirements of the State of Oklahoma." Ostensibly, subsection one relates specifically to the assignment process outlined in § 1151(B). If the Legislature had intended to give statutory priority to only those individuals nominated in accordance with § 1151(B), there would have been no need to enact § 1158(2) because the individual identified in § 1158(2) would have already been covered by the language in $\S 1158(1)$.

¶17 In addition, § 1158 does not reference § 1151. In fact, a reading of the version of 21 O.S. § 1158, in effect prior to the last legisla-

tive amendment, solidifies our reading of the statute. Before being amended the statute read as follows:

The duty of burying the body of a deceased person devolves upon the persons hereinafter specified:

- 1. The person or persons designated in subsection B of Section 1151 of this title.
- 2. If the deceased was married at the time of his or her death, the duty of burial devolves upon the spouse of the deceased.
- 3. If the deceased was not married, but left any kindred, the duty of burial devolves upon any person or persons in the same degree nearest of kin to the deceased, being of adult age, and possessed of sufficient means to defray the necessary expenses.
- 4. If the deceased left no spouse, nor kindred, answering to the foregoing description, the duty of burial devolves upon the officer conducting an inquest upon the body of the deceased, if any such inquest is held; if none, then upon the persons charged with the support of the poor in the locality in which the death occurs.
- 5. In case the person upon whom the duty of burial is cast by the foregoing provisions omits to make such burial within a reasonable time, the duty devolves upon the person next specified; and if all omit to act, it devolves upon the tenant, or, if there be no tenant, upon the owner of the premises where the death occurs or the body is found.¹³

(emphasis added). If the Legislature had intended to limit the priority afforded in § 1158 (2) to instruments executed in accordance with § 1151(B), it could have easily done so by leaving the reference to § 1151 in the statute.

¶18 Finally, we believe our reading of § 1158 (2) is the only sensible outcome. An instrument expressly assigning the right to dispose of one's body most clearly carries out a decedent's intent. A personal representative is, seemingly, the individual most trusted by a decedent to properly carry out his or her affairs after death. Therefore, the most logical second choice to assume responsibility for handling a decedent's body should be the representative(s) appointed under a lawfully executed will. In this case, the named co-personal representatives were entrusted with managing the Decedent's affairs,

including the responsibility to pay debts associated with Decedent's "last illness, funeral and burial." It would make little sense to allow an individual who was not responsible for paying expenses associated with the funeral and/ or handling of the body to control the manner in which these matters are performed.

¶19 Appellees also urge us to affirm the district court ruling based on the forfeiture provisions outlined in O.S. 2011 § 1151a. Appellees argue that under § 1151a, Dayna has relinquished the right to control Decedent's remains because (1) she did not timely exercise the right and (2) the parties were "estranged." Because we have concluded the co-personal representatives have priority over Decedent's remains, it is unnecessary to address this matter. Although there is likely sufficient evidence to support a finding that the parties were estranged, the question was not raised below or addressed by the trial court. Issues not presented by the parties below, may not be raised by an appellee for the first time on appeal. In re M.K.T., 2016 OK 4, ¶ 86, 368 P.3d 771, 798.

Conclusion

¶20 Considering the construction of the statute and the record before us, the trial judge did not abuse his discretion in denying the temporary injunction. The decedent clearly expressed an intent to vest power over his person and estate in the named co-personal representatives identified in his Last Will and Testament. Because the will meets the requirements of 21 O.S. 2011 § 1158(2), the trial court's decision denying a temporary injunction is affirmed.

TRIAL COURT ORDER DENYING TEMPORARY INJUNCTION AFFIRMED ON OTHER GROUNDS.

ALL JUSTICES CONCUR

GURICH, C.J.

- 1. The material facts in this case are undisputed.
- 2. In Re Marriage of Dayna Foresee v. Thomas A. Foresee, Tulsa County District Court, FD-2019-1666. The pendency of the divorce proceeding in Tulsa is set forth in Decedent's will, which is part of the origi-

nal appellate record. (Last Will and Testament of Thomas Allen Foresee, O.R. at 5). Although pleadings from the dissolution case are not in the record, the Court takes judicial notice of the matter for purposes of this appeal through its access to the Court's files on www.oscn.net.

- 3. This opinion does not address the efficacy of Decedent's attempt to disinherit Dayna. For a short discussion of testamentary efforts by a decedent to disinherit a surviving spouse, see In re Estate of Jackson, 2008 OK 83, ¶ 21, 194 P.3d 1269, 1274.
 - 4. (Petition for Letters of Special Administration, O.R. at 1).
- 5. (Last Will and Testament, O.R. at 7).
 6. (Minute, O.R. at 13). Title 58 O.S. 2011 § 211 allows for the appointment of a special administrator when there is a pressing need to appoint an interim representative "for the preservation of the estate." Such appointment may be made without notice, as was done in the present case. 58 O.S. 2011 § 212. Priority is given to a person or persons entitled to appointment as executor or administrator by testamentary nomination or via statutory priority. 58 O.S. 2011 § 213.
 - 7. (Minute, O.R. at 13).
 - 8. (Journal Entry, O.R. at 40).
- 9. Appellee filed a motion to dismiss alleging: (1) the appeal was moot; and (2) the proceeding had arisen from an interlocutory order, not subject to immediate appeal. We denied the motion to dismiss by Order issued March 30, 2020. The interlocutory order was appealable as a matter of right. See 12 O.S. Supp. 2019 § 993(A) (2) and Okla. Sup. Ct. R. 1.60. Moreover, this appeal is not moot, as it meets both of the exceptions to the mootness doctrine. See State ex rel. Okla. Firefighters Pension and Ret. Sys. v. City of Spencer, 2009 OK 73, ¶¶ 4-5, 237 P.3d
- 10. In this case, Dayna raised several claims which could have impacted the trial court's adjudication of her likelihood of success on the merits. These included assertions that Decedent's will was invalid because it was subject to undue influence and executed while Decedent lacked capacity. No evidence in support of these claims was presented during the trial court's hearing and the issues have not been briefed on appeal, therefore we will not consider these matters.
- 11. While §1151 (B) refers to a sworn affidavit, we believe sworn instruments such as a will or power of attorney could meet the statutory mandates if a provision expressly assigning control over the testator/affiant's remains is included in the written documents. In fact, it is probably good practice for attorneys drafting powers of attorney, wills, and other legal instruments, to inquire of their clients regarding disposition of their remains.
- 12. The Court is not ruling on the validity of the will; whether it satisfied 84 O.S. 2011 § 55; whether it was subject to undue influence; or whether Decedent lacked capacity.
 - 13. 21 O.S. Supp. 1997 § 1158. 14. Section 1151a provides:

 - Any person entitled by law to the right to dispose of the body of the decedent shall forfeit that right, and the right shall be passed on to the next qualifying person as listed in Section 1158 of Title 21 of the Oklahoma Statutes, in the following circumstances:
 - 1. Any person charged with first or second degree murder or voluntary manslaughter in connection with the death of the decedent, and whose charges are known to the funeral director; provided, however that if the charges against such person are dropped, or if such person is acquitted of the charges, the right of disposition shall be returned to the person;
 - 2. Any person who does not exercise the right of disposition within three (3) days of notification of the death of the decedent or within five (5) days of the death of the decedent, whichever is earlier: or
 - 3. If the district court, pursuant to Title 58 of the Oklahoma Statutes, determines that the person entitled to the right of disposition and the decedent were estranged at the time of death. For purposes of this paragraph, "estranged" means a physical and emotional separation from the decedent at the time of death that clearly demonstrates an absence of due affection, trust and regard for the decedent.



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BAR NEWS

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 Iudicial 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 were 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 TO-DAY 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.



TITLE EXAMINATION STANDARDS

2020 Report of the Title Examination Standards Committee of the Real Property Law Section

Proposed Amendments to Title Standards for 2021, to be presented for approval by the House of Delegates, Oklahoma Bar Association prior to or at the 2020 OBA Annual Meeting. Additions are <u>underlined</u>, deletions are indicated by strikeout. Formatting requests that are not to be printed are contained within {curly brackets}.

The Title Examination Standards Sub-Committee of the Real Property Law Section proposes the following revisions and additions to the Title Standards for action by the Real Property Law Section prior to or at its annual meeting in 2020.

Proposals approved by the Section will be presented to the House of Delegates prior to or at the 2020 OBA Annual Meeting. Proposals adopted by the House of Delegates become effective immediately.

An explanatory note precedes each proposed Title Standard, indicating the nature and reason for the change proposed.

PROPOSAL NO. 1

The Committee proposes to make changes to Standards 8.1, 15.4, 25.5 and 25.7 to reflect the passage of 10 years since the repeal of the Oklahoma Estate Tax.

8.1 TERMINATION OF JOINT TENANCY ESTATE AND LIFE ESTATES

• • • •

C. A waiver or release of the Oklahoma estate tax lien for the joint tenant or life tenant must be obtained unless:

1. A district court has ruled pursuant to 58 O.S. § 282.1 that there is no estate—tax liability;

- 2. The sole surviving joint tenant or remainder interest holder is the surviving spouse of the deceased joint tenant or sole life tenant:
- 3. The death of the joint tenant is on or after January 1, 2010; or
- 4. The Oklahoma estate tax lien has otherwise been released by operation of law.

<u>See TES Standard 25.5 Oklahoma Estate</u> <u>Tax Lien.</u>

15.4 ESTATE TAX CONCERNS OF REVOCABLE TRUSTS

Where title to real property is vested in the name of a revocable trust, or in the name of a trustee(s) of a revocable trust, and a subsequent conveyance of such real property is made by a trustee(s) of a revocable trust, who is other than the settlor(s) of such revocable trust, a copy of the order of the Oklahoma Tax Commission releasing or exempting the estate of the non-joining settlors from the lien of the Oklahoma estate tax, and a closing letter from the Internal Revenue Service, if the estate is of sufficient size to warrant the filing of a federal estate tax return, should be filed of record in the office of the county clerk where such real property is located unless evidence, such as an affidavit by a currently serving trustee of the revocable trust is provided to the title examiner to indicate that one of the following conditions exists:

...

D. More than ten (10) years have elapsed since the date of the death of the non-joining settlor(s) or since the date of the conveyance from the trustee(s) and no Federal estate tax lien or warrant against the estate of the non-joining settlor(s) appears of record in the county where the property is located, or

E. As to the requirement for a copy of the order of the Oklahoma Tax Commission releasing or exempting the estate of the non-joining settlor(s) from the lien of the Oklahoma estate tax only, the date of death of the non-joining settlor(s) is on or after January 1, 2010.

<u>See TES Standard 25.5 Oklahoma Estate</u> Tax Lien.

25.5 OKLAHOMA ESTATE TAX LIEN

<u>Caveat</u>: Generally, the Oklahoma estatetax was repealed for deaths occurring on or after January 1, 2010. No estate taxlien attaches to real property passing from the decedents dying January 1, 2010, and after, and no estate tax release is required to render such real property marketable under these title standards. 68 O.S. § 804.1.

Oklahoma estate tax lien obligations for decedents dying prior to January 1, 2010 remain in effect but are extinguished ten (10) years after the date of death. 68 O.S. § 804.1.

The Oklahoma estate tax survives for deaths occurring subsequent to January 1, 2010, to the extent the Oklahoma estate tax may be imposed due to the interaction of the Oklahoma statutes and the computed Federal estate tax credit for state estate and inheritances allowable in the computation of Federal estate taxes on the Federal estate tax return 68 O.S. § 804. Pursuant to 68 O.S. § 804.1, no Oklahoma estate tax lien attaches to any property for deaths occurring on or after January 1, 2010.

A. Scope

For decedents who die on or before December 31, 2009, the Oklahoma estate tax lien attaches to all of the property which is part of the gross estate of the decedent, as defined under Article 8 of the Oklahoma Tax Code, immediately upon the death of

the decedent, with the exception of property which falls under one (1) or more of the following categories:

1. Property used for the payment of charges against the estate and expenses of administration, allowed by the court having jurisdiction thereof; or

2. Property reported to the Oklahoma Tax Commission by the responsible party or parties which shall have passed to a bona fide purchaser for value, in which case such tax lien shall attach to the consideration received from such purchaser by the heirs, legatees, devisees, distributees, donees, or transferees; or

3. Property passing to a surviving spouse, either through the estate of the decedent, by joint tenancy, or otherwise.

Authority: 68 O.S. § 811.

Comment: The title examiner should be provided with sufficient written evidence to be satisfied that the particular real property falls under one or more of the exceptions as listed above. Otherwise, the title examiner should assume that all real property which is part of the gross estate of the decedent is subject to the lien of the Oklahomaestate tax.

B. Duration

The Oklahoma estate tax lien continues as a lien on all of the property in the decedent's gross estate, except for the categories of property as described in "A" above, for ten (10) years from the death of the decedent, unless an order releasing taxable estate or order exempting the estate from estate tax is obtained from the Oklahoma Tax Commission as to the property in question.

Subsequent to the lapse of ten (10) years after the death of any decedent, title acquired through such decedent shall be considered marketable as to Oklahoma inheritance, estate or transfer tax liability unless prior thereto a tax warrant filed by the Oklahoma Tax Commission appears of record. If the Oklahoma Tax Commission causes a

tax warrant to be filed of record within said ten (10) year period, then a release of that tax warrant must be obtained and filed of record.

Authority: 68 O.S. §§ 811(e) and 815(c); Okla. Atty. Gen. Op. No. 72-122 (May 1, 1972); State ex rel. Williamson v. Longmire, 281 P.2d 949 (Okla. 1955).

<u>Comment: Said statutes are constitutional under authority of Love v. Silverthorn, 187 Okla. 114, 101 P.2d 254, 129 A.L.R. 676 (1940).</u>

C. Repealer

There will be no Oklahoma estate tax lien on the estate of a decedent with a date of death on or after January 1, 2010.

Authority: 68 O.S. § 802 Repealed by Laws 2006, 2nd Extr. Sess., HB 1172, c. 42 § 6, eff. January 1, 2010.

For deaths occurring on or after January 1, 2010, no Oklahoma estate tax lien attaches to the property of the decedent. For deaths occurring prior to January 1, 2010, the Oklahoma estate tax lien is extinguished upon the expiration of ten (10) years from the date of death of the decedent unless prior thereto the Oklahoma Tax Commission causes a tax warrant to be filed of record in the County where the decedent owned property. In that case, the Oklahoma estate tax lien shall continue as a lien for a period of ten (10) years on all property which was part of the decedent's gross estate not otherwise exempt by the law in any county where the tax warrant was filed until a release of the tax warrant is issued and filed of record. Prior to the release or extinguishment of any such tax warrant, the Oklahoma Tax Commission may refile the tax warrant in the office of the county clerk. A tax warrant so refiled shall constitute and be evidence of the state's lien upon the title to any interest in real property until released or for a maximum of ten (10) years from the date of the refiled tax warrant.

Absent an unreleased tax warrant of record which has not expired, no release or order exempting estate tax liability is

required for any of the decedent's property to be marketable.

See also TES 25.6 (B)

Authority: 68 O.S. §§231 and 234; 68 O.S. § 804.1 and OAC 710:35-3-9

25.7 GIFT TAXES, OKLAHOMA

The procedure for the enforcement of any gift tax which might be due the State of Oklahoma is that prescribed in the Uniform Tax Procedure Act, 68 O.S. §§ 201-249, under which no lien attaches until and unless a tax warrant or certificate is filed in the office of the county clerk of the county where the land is located. See 68 O.S. §§ 230, 231 and 234.

Gifts made on or after January 1, 1982, are not subject to Oklahoma Gift Tax. The Gift Tax Code was repealed by 1981 Okla. Sess. Laws, ch. 237, § 5, effective January 1, 1982.

Repealed.

PROPOSAL NO. 2

The Committee recommends a Comment to Standard 14.8 be added to clarify the authority of a Foreign Limited Liability Company to aquire and convey title to real property located in Oklahoma.

14.8 FOREIGN LIMITED LIABILITY COMPANIES DEEMED TO BE LAWFULLY ORGANIZED AND REGISTERED TO DO BUSINESS

. . . .

Authority: 18 O.S. §§ 2042, 2043, 2048, 2049.

Comment: A foreign limited liability company need not be registered in Oklahoma to acquire and convey title to real property located in Oklahoma.

Authority: 18 O.S. §§ 2048, 2049 and 2055.3.

PROPOSAL NO. 3.

The Committee recommends Standard 24.14 be amended as follows to reflect the effect of Hub Partners XXVI, Ltd v. Barnett, 2019 OK 69.

24.14 INCOMPLETE MORTGAGE FORECLOSURES

The title to real property shall be deemed marketable regarding a mortgage fore-closure action in which no sheriff's sale has occurred, or, the sheriff's sale has been vacated or set aside by order of the

<u>court</u>, if the following appear in the abstract:

- A. A properly executed and recorded release of all of the mortgages set out in the foreclosure action <u>as to the real property covered by the title examination</u>,; and
- B. If a statement of judgment or affidavit of judgment has been filed in the land records of the county clerk in the county in which the real property is located evidencing a judgment lien for a money judgment granted in the foreclosure action and the judgment lien has not expired by the passage of time, a release of the judgment lien filed in the land records of the county clerk in the county in which the real property is located,; and
- C. (1) A dismissal, with or without prejudice, of the entire mortgage foreclosure action, filed in the court case, by the plaintiff and any cross-petitioners in the action, or dismissal by court order; or (2) a partial dismissal, with or without prejudice, of the mortgage foreclosure action, filed in the court case, by the plaintiff and any cross-petitioners in the action or partial dismissal by court order, dismissing the action insofar as it relates to or affects the subject real property; and
- D. If a deed-in-lieu of foreclosure has been recorded, the items listed <u>in</u> A, B, and C above, as applicable, and a release of any attorney's lien created pursuant to 5 O.S. § 6.

Authority: 12 O.S. §§ 686 and 706; Anderson v. Barr, 1936 OK 471, 62 P.2d 1242; Bank of the Panhandle v. Irving Hill, 1998 OK CIV APP 140, 965 P.2d 413; Mehojah v. Moore, 1987 OK CIV APP 43, 744 P.2d 222; and White v. Wensauer, 1985 OK 26, 702 P.2d 15; and Hub Partners XXVI, Ltd. V. Barnett, 2019 OK 69.

PROPOSAL NO. 4.

The Committee recommends Standard 30.13 be amended as follows to clarify previous subparagraph G and move the language to the front of the standard.

30.13 ABSTRACTING

On September 18, 1996, the State Auditor and Inspector issued Declaratory Ruling

96-1, which rejected the concept of "thirtyyear" abstracts and prohibited abstractors from preparing abstracts under this standard after May 1, 1996. Abstracts, compiled and certified on or before May 1, 1996 may still be used as a base abstract when a separate supplemental abstract has been prepared.

For historical reference, base abstracts created in reliance of this standard prior to May 1, 1996, Abstracting under the Marketable Record Title Act shall be are sufficient for examination purposes when the following is shown in the abstract:

A. The patent, grant or other conveyance from the government.

. . . .

G. On September 18, 1996, the State
Auditor and Inspector issued Declaratory Ruling 96-1, which prohibits
abstractors from preparing abstracts
under this standard after May 1, 1996.
Abstracts, compiled and certified on
or before May 1, 1996, may still be
used as a base abstract when a separate supplemental abstract has been
prepared.

PROPOSAL NO. 5.

The Committee recommends a new Standard 1.5 be included to assist title examiners with the various 2020 SCAD order related to Covid-19 (Coronavirus).

1.5 2020 COVID-19 PANDEMIC

- A. Pursuant to a series of Emergency
 Joint Orders, the Oklahoma Supreme
 Court suspended all deadlines, prescribed by statute, rule, or order in
 any civil, juvenile, or criminal cases
 for the period from March 16, 2020 to
 May 15, 2020.
- B. Pursuant to the *Third Emergency Joint*Order Regarding The COVID-19 State of
 Disaster issued by the Oklahoma
 Supreme Court, for the period from
 March 16, 2020 to May 15, 2020, all
 rules, procedures, and deadlines,
 whether prescribed by statute, rule or
 order in any civil, juvenile or criminal
 case were suspended, will be treated
 as a tolling period. May 16 shall be the
 first day counted in determining the
 remaining time to act. The entire time

- permitted by statute, rule or procedure is not renewed.
- C. Pursuant to the *Third Emergency Joint* Order, "all dispositive orders entered by judges between March 16, 2020 and May 15, 2020 are presumptively valid and enforceable." When an examiner finds a situation in proceedings under examination where a Judge held a hearing, signed an order, entered a judgment, or otherwise issued a ruling between March 16, 2020 and May 15, 2020, the examiner may rely on the Third Emergency Joint Order's presumption of validity and enforceability absent instruments in the record or other evidence that rebuts that presumption.

Authority: Third Emergency Joint Order Regarding the COVID-19 State of Disaster. 2020 OK 23, 462 P.3d 703. Second Emergency Joint Order Regarding the COVID-19 State of Disaster. 2020 OK 24, 462 P.3d 262. First Emergency Joint Order Regarding the COVID-19 State of Disaster. 2020 OK 25, 462 P.3d 704.

Comment 1: Paragraphs 7 and 8 of the *Third Emergency Joint Order* provide instructions for computing deadlines impacted by the period from March 16, 2020 to May 15, 2020:

- "7. For all cases pending before March 16, 2020, the deadlines are extended for only the amount of days remaining to complete the action. For example, if the rule required the filing of an appellate brief within 20 days, and as of March 16, ten (10) days remained to file the brief, then the party has 10 days with May 16, 2020 being the first day.
- 8. For all cases where the time for completing the action did not commence until a date between March 16 and May 15, 2020, the full amount of time to complete the action will be available. May 16th shall be the first day counted in determining the time to act."

Comment 2: The *Third Emergency Joint*Order clarifies that the period between

March 16, 2020 and May 15, 2020 is a
tolling period. All applicable statutes of
limitations under Oklahoma law were
tolled for this period.

Comment 3: The *Third Emergency Joint*Order encouraged Judges "to continue to
use remote participation to the extent
possible by use of telephone conferencing, video conferencing pursuant to Rule
34 of the Rules for District Courts, Skype,
Bluejeans.com and webinar based platforms...Judges are encouraged to develop methods to give reasonable notice
and access to the participants and the
public."

PROPOSAL NO. 6.

The Committee recommends Standard 3.2(A) be amended as follows to clarify affidavits cannot be used in place of an estate administration and to clarify that an affidavit related to severed minerals as provided in 16 O.S. §67 is an exception to 3.2(A).

3.2 AFFIDAVITS AND RECITALS

A. Recorded affidavits and recitals should cover the matters set forth in 16 O.S. §§ 82 and 83; they cannot substitute for a conveyance, <u>administration of an estate</u>, or probate of a will, <u>except as provided in 16 O.S.</u> §67.

PROPOSAL NO. 7.

The Committee recommends the following editorial changes to the Title Standards <u>as they appear on OSCN</u> to bring the printed handbook and OSCN into conformity.

1.3 REFERENCE TO TITLE STANDARDS

It is often practicable and highly desirable that, in substance, the following language be included in contracts for a sale of real estate: "It is mutually understood and agreed that no matter shall be construed as an encumbrance or defect in title so long as the same is not so construed under the real estate <u>Title title Examination examination Standards</u> standards of the Oklahoma Bar Association where applicable."

2.1 RECERTIFICATION UNNECESSARY

Comment: 1:: Title Standard 26, requiring re-certification of abstractors' certificates after five (5) years, adopted November 1946, was repealed by the House of Delegates on November 30, 1960. The request for withdrawal came from counties where re-certification charges were considered excessive. Investigation disclosed Standard 26 was not in the line with sim-

ilar standards <u>Standards</u> of other states and particularly the model standard <u>Standard</u> prepared by Professor Lewis M. Simes and Mr. Clarence D. Taylor, under the auspices of the Section of Real Property, Probate and Trust Law of the American Bar Association. The 1960 Title Examination Standards Committee recommended that Title Standard 26 be withdrawn and the model standard approved in lieu thereof. The House of Delegates approved this proposal, November 30, 1960, and the new Standard re-numbered Standard 1.1.

Comment 2:: It is not the purpose of the standard Standard to discourage or prevent the examining attorney from requiring re-certification when in the examining attorney's judgment abstracting errors or omissions have occurred, or when the examining attorney has reason to question the accuracy of all or a particular portion of an abstract record.

Comment 3:: Abstractors in Oklahoma have been required to be bonded since prior to statehood. The 1899 Okla. Sess. Laws Pp. 53 was enacted March 10, 1899. It has been retained since that time subject to the Revision of 1910, which added a provision for a corporate surety and made it clear that the abstractor's liability on the bond extended to any person injured.

Comment 4: The limitation applicable to an action for damages on an abstractor's bond is five (5) years from the date of the abstractor's certificate, 74 O.S. § 227.29. In 1984, these provisions were made a part of the "Oklahoma Abstractors Law." See 74 O.S. § 227.14.

3.1 INSTRUMENTS BY STRANGERS

• • • •

Comment: Since the decision in *Tenneco*, *supra*, the Standard as it existed prior to *Tenneco* permitting examiners to ignore stray instruments, even with its caveat, and the Standard as it was amended in 1976 (see Standard 3.1, 1988 Title Examination Standards Handbook) are not supported by the law and therefore ought not to be continued. While it is true that many stray instruments are the result of a scrivener's error in drafting the description, it is also true that an

instrument may appear to be stray because the grantor failed to record the instrument which carried title to said grantor. When the situation is of this latter kind, the case comes under the facts and decision in *Tenneco*, *supra*. For this reason, the examiner who knows of a stray instrument must make such inquiry that will assure the examiner that the grantor in the stray instrument did not have some interest in the property even though it be not of record.

A stray instrument or abstract thereof which is or could be a root of title under the Marketable Record Title Act, 16 O.S. §§ 71-80, may not be disregarded by the examiner, but must be regarded as creating, or potentially creating, a root of title under the Marketable Record Title Act.

{editor's note to OSCN: please indent this second paragraph of the comment to reflect it is a continuation of the comment rather than a continuation of paragraph A}

. . . .

Caveat: 16 O.S. § 76 does not directly address the situation where an otherwise "stray" instrument, as defined under the Statute has been of record for more than thirty (30) years and is, at the time, the apparent root of title. However, because of the requirement of Section 76(b)(1), that there must be an "otherwise" valid chain traceable to an instrument "which is a root of title as defined by Sections 71 through 80" of Title 16, it would appear that the mere recording of an affidavit after the stray instrument had already ripened into a root of title would not be sufficient to revoke the status of such stray instrument as a root of title. The issue is not directly addressed by the Statute, nor by a an reported decision.

3.2 AFFIDAVITS AND RECITALS

. . . .

C. Oklahoma Statutes have authorized the use of affidavits to affect title to real property for several purposes. The specific statute Statute should be consulted and the requirements of the Statute should be followed carefully.

- D. Special attention should be given to the provisions of 16 O.S. § 67 – Acquiring Severed Mineral Interests from Decedent – Establishing Marketable Title:
- 1. In part, 16 O.S. § 67 provides that a person who claims a severed mineral interest, through an affidavit of death and heirship recorded pursuant to 16 O.S. §§ 82 and 83, shall acquire a marketable title ten (10) years after the recording of the affidavit by following the five (5) specific steps set forth in Part part C of Section 67. The Act applies only to severed minerals, not leasehold interests. Section 82 provides that such an affidavit creates a rebuttable presumption that the facts stated in the recorded affidavit are true as they relate to the severed minerals.
- 2. Although not specifically required by 16 O.S. § 67, it is recommended that the affidavit contain sufficient factual information to make a proper determination of heirship. Such information includes the date of death of the decedent, a copy of the death certificate, marital history of the decedent, names and dates of death of all spouses, a listing of all children of the decedent including any adopted children, identity of the other parent of all children of the decedent, the date of death of any deceased children, and the identity of the deceased child's spouse and issue, if any. During the ten year period of 16 O.S. § 67, if an affidavit fails to include factual information necessary to make a proper determination of heirship, the examiner should call for a new affidavit that contains the additional facts necessary for a proper determination of heirship. If a new or corrected affidavit is filed, the statutory ten-year period would run from the date of recordation of the new or corrected affidavit.

. . . .

Comment 1: This Standard does not supplant other Standards or statutes providing for use of affidavits, such as 16 O.S. § 67 or 58 O.S. § 912.

Comment <u>2</u>: Affidavits affecting real property include: Affidavits to Terminate Joint Tenancy or Life Estates (58 O.S.

§ 912); Multi Subject Information Affidavit (16 O.S. §§ 82-83); Memorandum of Trust (60 O.S. § 175.6a).

Comment 13: Affidavits to Terminate Joint Tenancy or Life Estates under 58 O.S. § 912 may be recorded with only a jurat or only an acknowledgment, or both. Since this provision is specific to §912, prudence dictates that an affidavit which is not prepared under 912 contain both a jurat and acknowledgment. See 16 O.S. § 26.

Comment 24: Before the affidavit or unprobated will has been of record for ten years, it is not uncommon for the title examiner to recommend to the party paying royalty owners to consider assuming the business risk of waiving the requirements of marketable title, which might include a probate administration, or judicial determination of death and heirship, and assume the business risk of relying upon the affidavit called for in Section 67 16 O.S. § 67.

Comment 35: Yeldell v. Moore, 1954 OK 260; 275 P.2d 281. Oklahoma cases discuss the "factum" of a will: whether the will is legally executed in statutory form; legal capacity of the testator; the absence of undue influence, fraud and duress, Ferguson v. Paterson, 191 F.2d 584 (10th Cir. 1951); Matter of the Estate of Snead, 1998 OK 8, 953 P.2d 1111; Foote v. Carter, 1960 OK 234, 357 P.2d 1000. In Oklahoma the district court determines the validity of a will, interprets the will and determines the heirs. A probate proceeding is necessary to determine if there are pretermitted heirs, allow for spousal elections, determine if there is any marital property, and confirm the absence of liens for taxes and debts.

Comment 46: *Smith v. Reneau*, 1941 OK 99; 2112 P.2d 160. The decree of the court administering the estate is conclusive as to the legatees, devisees and heirs of the decedent, *Wells v. Helms*, 105 F.2d 402 (10th Cir. 1939).

Comment 57: The use of (non-judicial) heirship affidavits under 16 O.S. § 67 may also be suspect in the context of restricted citizens (members) of the Five Civilized Tribes in light of the Act of June 14, 1918, 40 Stat. 606 (25 U.S.C. 375) and Sec-

tion 3 of the Act of August 4, 1947, 61 Stat.731 which confers exclusive jurisdiction upon the courts of Oklahoma to judicially determine such heirship in accordance with the Oklahoma probate code.

3.3 OIL AND GAS LEASES AND MINERAL AND ROYALTY INTERESTS

. . . .

Comment: Said Act originally applied only to oil and gas leases, as did the Standard as originally adopted October 1947. The Act was amended in 1951 so as to cover term mineral conveyances, as well as oil and gas leases, and the standard Standard was then amended in November 1954. By said Act, such certificates constitute prima facie prima facie evidence that no such oil and gas lease or term mineral conveyance is in force, which, if not refuted, will support a decree for specific performance of a contract to deliver a marketable title. The facts in Wilson v. Shasta Oil Co., 171 Okla. 467, 43 P.2d 769 (1935), disclose that the Court only held that proof to establish marketability cannot be shown by affidavit of non-development. Beatty v. Baxter, 208 Okla. 686, 258 P.2d 626 (1953), is deemed not to affect prima faci e facie marketability as provided for in the statute.

3.4 CORRECTIVE INSTRUMENTS

. . . .

Authority: Patton & Palomar on Land Titles § 83 (3d ed.–20022003); Decennial Digests, *Deeds*, Key No. 43; *Kirkpatrick v. Ault*, 177 Kan. 552, 280 P.2d 637 (1955); *Walters v. Mitchell*, 6 Cal. App. 410, 92 P. 315 (1907); *Lytle v. Hulen*, 128 Or. 483, 275 P. 45 (1929).

3.5 INSTRUMENTS WHICH ARE ALTERED AND RE-RECORDED

. . . .

Authority: 15 O.S. § 239; Briggs v. Sarkey, 418 P.2d 620 (Okla. 1966); Smith v. Fox, 289 P.2d 126 (Okla. 1954); Boys v. Long, 268 P.2d 890 (Okla. 1954); DeWeese v. Baker-Kemp Land Trust Corporation, et al., 187 Okla. 1341, 102 P.2d 884 (1940); Sandlin v. Henry, 180 Okla. 334, 69 P.2d 332 (1937); Criner v. Davenport-Bethel Co., 144 Okla. 74, 289 P. 742 (1930); Eneff v. Scott, 120

Okla. 33, 250 P. 86 ((1926); Sipes v. Perdomo, 118 Okla. 181, 127 P. 689 (1925); Orr v. Murray, 95 Okla. 206, 219 P. 333 (1923); Francen et ux. v. Okla. Star Oil Co., 80 Okla. 103, 194 P. 193 (1921); Patton & Palomar on Land Titles, § 65 (3rd ed. 20022003).

4.1 MINORITY

...

Authority: 16 O.S. § 53; Patton & Palomar on Land Titles § 336 (3d ed.-20022003); C. Flick, Abstract and Title Practice § 343 (2d ed. 1958); *cf. Giles v. Latimer*, 40 Okla. 301, 137 P. 113 (1914); 10 O.S. §§ 91-94; 15 O.S. §§17, 19; 16 O.S. § 1.

4.2 MENTAL CAPACITY TO CONVEY

. . . .

Authority: 16 O.S. § 53; Patton & Palomar on Land Titles §§ 336, 536 and 538 (3d ed. 20022003); Flick, Abstract and Title Practice §3 444 (2d ed. 1958); *cf. Robertson v. Robertson*, 654 P.2d 600 (Okla. 1982).

5.1 ABBREVIATIONS AND IDEM SONANS

. . . .

B. Nicknames of first or middle names: Where there are used commonly recognized nicknames, such as, "Susan" for Suzanna, "Ellen" for Eleanor, "Liz" for Elizabeth, "Katie" for "Katherine, "Jack" for John, "Rick" for Richard, "Bob" for Robert, "Bill" for William; and

. . . .

Authority: 16 O.S. § 53; Patton & Palomar on Land Titles §§ 73-78 (3d ed. 2003); King v. Slepka, 194 Okla. 11, 146 P.2d 1002 (1944); Collingsworth v. Hutchinson, 185 Okla. 101, 90 P.2d 416 (1939); Maine v. Edmonds, 58 Okla. 645, 160 P. 483 (1916); Annot., 57 A.L.R. 1478 (1928). West Digest System, Century Digest, Names, Key Number 4; Decennials, 4 and 5, Deeds, Key Number 31.

5.2 VARIANCE BETWEEN SIGNATURE OF BODY OF DEED AND ACKNOWLEDG-MENT

• • • •

Authority: 16 O.S. § 33; Patton & Palomar on Land Titles §§ 79 and 80 (3d ed. 20022003); Basye, Clearing Land Titles

§ 36 (1953); 1 C.J.S. Acknowledgments § 92(3); Woodward v. McCollum, 16 N.D. 42, 111 N.W. 623 (1907) (Henry S. Woodward and Harry S. Woodward); Blomberg v. Montgomery, 69 Minn. 149, 72 N.W. 56 (1897) (Isabella A. Dern and Isabella Dern, Myrtie B. Thorp and Myrtie Thorp, and George B. Conwell, Sr., and G.B. Conwell, Sr.); Paxton v. Ross, 89 Iowa 661, 57 N.W. 428 (1894) (Michael Thompson and M. Thompson); Rupert v. Penner, 35 Neb. 587, 53 N.W. 598, 17 L.R.A. 824 (1892) (Archibald T. Finn and Arch T. Finn); Gardner v. City of McAlester, 198 Okla. 547, 179 P.2d 894 (1946); O'Banion v. Morris Plan Industrial Bank, 201 Okla. 256, 204 P.2d 872 (1948); L. Simes & C. Taylor, Model Title Standards, P. 38 (1960).

Comment: The Oklahoma form of acknowledgment for individuals provides that the official taking the acknowledgment shall certify that the person named was known to the official to be the identical person who executed the instrument. This is similar to the acknowledgment forms in most other states and is sufficient to create a presumption of identity when the signature differs from the body of the deed but the acknowledgment agrees with one or the other.

The cases from North Dakota, Minnesota, Iowa and Nebraska, cited above, support this rule and are typical of the many cases on the subject. No Oklahoma cases directly in on point have been found. However, in the *Gardner* and *O'Banion* cases, *supra*, the Court held the acknowledgments sufficient to identify the persons executing the instruments although the names were omitted from the acknowledgments. This indicates the rule will be sustained in Oklahoma, if and when the point is raised.

5.3 RECITAL OF IDENTITY

. . . .

Authority: 16 O.S. § 53; Basye, Clearing Land Titles § 36 (1953); Patton & Palomar on Land Titles § 79 (3d ed. 20022003); L. Simes & C. Taylor, Model Title Standards, Standard 5.4 at 37 (1960).

7.1 MARITAL INTERESTS: DEFINITION; APPLICABILITY OF STANDARDS; BAR

OR PRESUMPTION OF THEIR NON-EXISTENCE

...

Severed minerals cannot be impressed with homestead character and therefore, the <u>Standards</u> standards contained in this chapter are inapplicable to instruments relating solely to previously severed mineral interests.

. . . .

Authority: *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Obergefell v. Hodges*, 576 U.S. 644 (2015)

7.2 MARITAL INTERESTS AND MARKETABLE TITLE

. . . .

Comment 3: If an individual grantor is unmarried and the grantor's marital status is inadvertently omitted from an instrument, or if two (2) grantors are married to each other and the grantors' marital status is inadvertently omitted from an instrument, a title examiner may rely on an affidavit executed and recorded pursuant to 16 O.S. § 82 which recites that the individual grantor was unmarried or that the two (2) grantors were married to each other at the date of such conveyance.

. . . .

Caveat: These recitations may not be relied upon if, upon "reasonable inquiry" the purchaser could have determined otherwise. *Keel v. Jones* 413 P.2d 549 (Okla. 1966).

8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

. . . .

- B. The termination of the interest of a deceased joint tenant or life tenant may be established on a *prima facie* basis by one of the following methods:
- By recording certified copies of letters testamentary or letters of administration for the estate of the deceased joint tenant or life tenant, or
- 2. By recording an affidavit from a person other than those listed in 58 O.S. § 912C which:
 - a. has Has a certified copy of the decedent's death certificate attached;

- b. includes Includes a legal description of the property; and
- c. states <u>States</u> that the person named in the death certificate is one and the same person as the deceased joint tenant or life tenant named in the previously recorded instrument which created or purported to create the joint tenancy or life tenancy in such property, and identifying such instrument by book and page where recorded.

. . . .

Authority: 16 O.S. §§ 53 A(10);, 82-84; 58 O.S. §§ 23, 133, 282.1, 911 and 912; 60 O.S. §§ 36.1 and 74; 68 O.S. §§ 804, 804.1, 811 and 815.

8.2 DIRECT CONVEYANCES

. . . .

Comment: While the section has not been passed on by the Supreme Court, it is expected the Court will follow the standard because: (1) the The section is constitutional, Hill v. Donnelly, 56 Cal. App.2d 387, 132 P.2d 867 (1942).; (2) the-The court has not previously held direct conveyances executed prior to May 7, 1945, to be invalid.; (3) the The enactment of the section establishes the legislative policy or intention of approving direct conveyances, whether created before or after the adoption of the section. Hence, it is to be presumed that the court will recognize this policy and approve direct conveyances made prior to May 7, 1945. This was done by the court in United States v. 12,800 Acres of Land, 69 F.Supp. 767 (D. Neb., 1947). Also, see former Title Standard No. 9.3, repealed in 1987 as obsolete because of the passage of time, which approved corporate deeds attested by an assistant secretary prior to the amendment of 16 O.S. § 94, in 1933, to permit such attestation.

12.1 NAME VARIANCES

Where a corporation appears in the title, the fact that there are minor differences in the name due to the use of abbreviations such as "Co." in place of "Company," or "Corp." in place of "Corporation," or "&" in place of "aAnd," or "Inc." in place of "Incorporated," or "Ltd." In place of "Limited," does not

overcome the presumption that the names refer to the same corporation. A greater degree of liberality should be indulged with the greater lapse of time and in the absence of circumstances appearing in the abstract to raise reasonable doubt as to the identity of the corporation.

12.3 CONCLUSIVE PRESUMPTIONS CONCERNING INSTRUMENTS RECORDED FOR MORE THAN FIVE (5) YEARS

The following defects may be disregarded after an instrument from a legal entity has been recorded for five (5) years:

. . . .

12.4 RECITAL OF IDENTITY, OR SUCCES-SORSHIP, OR CONVERSION

Unless there is some reason disclosed of record to doubt the truth of the recital (*e.g*-., the recordation of a conflicting certificate prepared pursuant to 18 O.S. § 1144 or § 1090.2), then:

. . . .

- C. On or after November 1, 1998, a recital of succession by merger or consolidation or one or more corporations with one or more business entities, as defined in 18 O.S. § 1090.2(A), may be relied upon if contained in a recorded title document properly executed by the surviving or resulting entity.
- D. On or after January 1, 2010, a recital by a business entity, as defined in 18 O.S. § 2054.1(A), of a conversion to a domestic limited liability company may be relied upon if contained in a recorded title document properly executed by the domestic limited liability company.

Authority: 18 O.S. § 1144 (effective November 1, 1987), § 1088 (effective November 1, 1986), and § 1090.2 (effective November 1, 1998), and 2054.1 (effective January 1, 2010).

12.5 POWERS OF ATTORNEY BY LEGAL ENTITIES

A. If a recorded instrument has been executed by an attorney-in-fact on behalf of a legal entity, the examiner should accept the instrument if:

- the power of attorney authorizing the attorney-in-fact to act on behalf of the legal entity is executed in the same manner as a conveyance by a legal entity,
- 2. the power of attorney is recorded in the office of the county clerk,
- 3. the power of attorney shows that the attorney_in_fact had the authority to execute the recorded instrument, and
- 4. the power of attorney was executed before the recorded instrument was executed.

B. Notwithstanding paragraph A above, if a recorded instrument has been executed by an attorney-in-fact on behalf of a legal entity, the examiner should accept the instrument if the instrument has been of record for at least five (5) years even though power of attorney has not been recorded in the office of the county clerk of the county in which the property is located.

PROPOSAL NO. 8.

The Committee recommends the following editorial changes to the Title Standards <u>as they appear</u> in the handbook to bring the printed handbook and OSCN into conformity.

1.1 MARKETABLE TITLE DEFINED

. . . .

Authority: *Pearce v. Freeman*, 122 Okla. 285, 254 P. 719 (1927); *Campbell v. Harsh*, 31 Okla. 436, 122 P. 127 91912(1912); *Empire Gas & Fuel Co. v. Stern*, 15 F.2d 323 (8th Cir. 1926); *Sipe v. Greenfield*, 116 Okla. 241, 244 P. 424 (1926); *McCubbins v. Simpson*, 186 Okla. 417, 98 P.2d 49 (1939); *Hawkins v. Wright*, 204 Okla. 955, 226 P.2d 957 (1951).

1.4 REMEDIAL EFFECT OF CURATIVE LEGISLATION

. . . .

C. The presumption of constitutionality extends to and includes the Simplification of Land Titles Act, the marketable Marketable Record Title Act, the Limitations on Power of Foreclosure Act and legislation of like purpose.

2.1 RECERTIFICATION UNNECESSARY

It is unnecessary that attorneys require the entire abstract to be certified every time an extension is made. For the purpose of examination, an abstract should be considered to be sufficiently certified if it is indicated that the abstractors were bonded at the dates of their respective certificates. It is not a defect that at the date of the examination the statute Statute of limitations Limitations may have run against the bonds of some of the abstractors.

Authority: L. Simes & C. Taylor, Model Title, Standards Standard 1.3, at 12 (1960); Kansas Title Standard 2.2; Montana Title Standard 22; Nebraska Title Standard 22; 74 O.S. §§ 227.14 and 227.29.

. . . .

The Report of the 1960 Title Examination Standards Committee: Recommended that Title Standard 26 be withdrawn and the model Standard approved in lieu thereof. Recommendation approved by the Real Property Law Section and adopted by the House of Delegates on November 30, 1960, and the new Standard re-numbered Standard 1.1.

. . . .

Comment 4: The limitation applicable to an action for damages on an abstractor's bond is five (5) years from the date of the abstractor's certificate, 74 O.S. § 227.29. In 1984, these provisions were made a part of the "Oklahoma Abstractors Law." See 74 O.S. § 227.14.

The Report of the 1960 Title Examination Standards Committee: Recommended that Title Standard 26 be withdrawn and the model Standard approved in lieu thereof. Recommendation approved by the Real Property Law Section and adopted by the House of Delegates on November 30, 1960, and the new Standard re-numbered Standard 1.1.

2.2 TRANSCRIPTS OF COURT PROCEEDINGS

. . . .

Authority: 20 O.S. § 1005; 12 O.S. §§ 2902, 3001, 3002, 3003 and 3005; 28 O.S. § 31; 19 O.S. § 167; 74 O.S. §§ 227.14 and 227.29; Op. Atty. Gen. No. 80-95 (July 31, 1980); *Arnold v. Board of Com'rs. of Creek County*, 124 Okla. 42, 254 P. 31 (1926).

Abstractors are required to be bonded or maintain errors and omissions insurance

in specified amounts, 74 O.S. § 227.14. Court clerks are required to be bonded under the county officers' blanket bond, 19 O.S. § 167; Op. Atty. Gen. No. 80-95 (July 31, 1980). The 5 five year setatute of leimitations applies to both bonds. The Statute begins to run as to the court clerk's bond from the accrual of the cause of action, Arnold v. Board of Com'rs. of Creek County, supra. The setatute begins to run as to the abstractor's bond or errors and omissions insurance from the date of issuance of the abstract certificate. See, 74 O.S. § 227.29.

2.3 UNMATURED SPECIAL ASSESSMENTS

<u>A</u> Title Examiner is warranted in requiring that the abstract have a certificate showing unmatured installments of special assessments, if any, which may affect the land under examination.

3.1 INSTRUMENTS BY STRANGERS

. . . .

Comment: Since the decision in Tenneco, supra, the Standard as it existed prior to *Tenneco* permitting examiners to ignore stray instruments, even with its Caveat caveat, and the Standard as it was amended in 1976 (see Standard 3.1, 1988 Title Examination Standards Handbook) are not supported by the law and therefore ought not to be continued. While it is true that many stray instruments are the result of a scrivener's error in drafting the description, it is also true that an instrument may appear to be stray because the grantor failed to record the instrument which carried title to said grantor. When the situation is of this latter kind, the case comes under the facts and decision in *Tenneco*, supra. For this reason, the examiner who knows of a stray instrument must make such inquiry that will assure the examiner that the grantor in the stray instrument did not have some interest in the property even though it be not of record.

A stray instrument or abstract thereof which is or could be a root of title under the Marketable Record Title Act, 16 O.S. §§ 71-80, may not be disregarded by the examiner, but must be regarded as creating, or potentially creating, a root of title

under the Marketable Record <u>Title</u> title

3.2 AFFIDAVITS AND RECITALS

. . . .

- D. Special attention should be given to the provisions of 16 O.S. § 67 – Acquiring Severed Mineral Interests from Decedent – Establishing Marketable Title:
 - 1. In part, 16 O.S. § 67 provides that a person who claims a severed mineral interest, through an affidavit of death and heirship recorded pursuant to 16 O.S. §§ 82 and 83, shall acquire a marketable title ten (10) years after the recording of the affidavit by following the five (5) specific steps set forth in Part C of Section 67. The Act applies only to severed minerals, not leasehold interests. Section 82 provides that such an affidavit creates a rebuttable presumption that the facts stated in the recorded affidavit are true as they relate to the severed minerals.
 - 2. Although not specifically required by 16 O.S. § 67, it is recommended that the affidavit contain sufficient factual information to make a proper determination of heirship. Such information includes the date of death of the decedent, a copy of the death certificate, marital history of the decedent, names and dates of death of all spouses, a listing of all children of the decedent including any adopted children, identity of the other parent of all children of the decedent, the date of death of any deceased children, and the identity of the other parent of all children of the decedent, the date of death of any deceased children and the identity of the deceased child's spouse and issue, if any. During the ten year period of 16 O.S. § 67, if an affidavit fails to include factual information necessary to make a proper determination of heirship, the examiner should call for a new affidavit that contains the additional facts necessary for a proper determination of heirship. If a new or corrected affidavit is filed, the statutory 10 ten-year period would run from

the date of recordation of the new or corrected affidavit.

. . . .

4. If the decedent died intestate, strong consideration should be given to an administration of the estate or a judicial determination of death and heirship during the 10 ten-year period before the title becomes marketable by a properly prepared 16 O.S. § 67 affidavit.

Comment 1: This Standard does not supplant other Standards or statutes providing for use of affidavits, such as 16 O.S. § 67 or 58, or 58 O.S. § 912.

. . . .

Comment 4: Before the affidavit or unprobated will has been of record for ten (10) years, it is not uncommon for the title examiner to recommend to the party paying royalty owners to consider assuming the business risk of waiving the requirements of marketable title, which might include a probate administration, or judicial determination of death and heirship, and assume the business risk of relying upon the affidavit called for in Section 67 16 O.S. § 67.

3.3 OIL AND GAS LEASES AND MINERAL AND ROYALTY INTERESTS

The recording of a certificate supplied by the Oklahoma Corporation Commission under 17 O.S. §§ 167 and 168, covering property described in an unreleased oil and gas lease or a mineral or royalty conveyance or reservation for a term of years, the primary term of which has expired prior to the date of the certificate, which certificate reflects no production and no exceptions from the property described in the lease, mineral or royalty conveyance or reservation, creates a presumption of the marketability of the title to such property as against third parties who may assert that such lease, conveyance or reservation is, in fact, valid and subsisting. Provided: such a certificate must also include such additional land which said property may have been spaced or unitized by either the Corporation Commission or by recorded declaration pursuant to the lease or other recorded instrument as of the date of the expiration of the primary term.

3.5 INSTRUMENTS WHICH ARE ALTERED AND RE-RECORDED

. . . .

Authority: 15 O.S. § 239; Briggs v. Sarkey, 418 P.2d 620 (Okla. 1966); Smith v. Fox, 289 P.2d 126 (Okla. 1954); Boys v. Long, 268 P.2d 890 (Okla. 1954); DeWeese v. Baker-Kemp Land Trust Corporation, et al., 187 Okla. 1341, 102 P.2d 884 (1940); Sandlin v. Henry, 180 Okla. 334, 69 P.2d 332 (1937); Criner v. Davenport-Bethel Co., 144 Okla. 74, 289 P. 742 (1930); Eneff v. Scott, 120 Okla. 33, 250 P. 86 (1926); Sipes v. Perdomo, 118 Okla. 181, 127 P. 689 (1925); Orr v. Murray, 95 Okla. 206, 219 P. 333 (1923); Francen et ux. v. Okla. Star Oil Co., 80 Okla. 103, 194 P. 193 (1921); Patton & Palomar on Land Titles, § 65 (3rd ed. 2003).

Caveat: There is an important distinction in authority between alteration of instruments which evidence a completed and fully executed transaction (deeds, mortgages, ete <u>etc.</u>) and alteration of instruments which are executory in nature (promissory notes, checks, contracts, etc.). The general rule is that alteration of an executory instrument vitiates the executory duties of non-consenting parties, while unconsented alteration of an instrument evidencing an executed transaction does not destroy the rights of the parties to the original agreement, but does vitiate the altered document.

Authority for Caveat: 15 O.S. § 177 (definition of executed and executory); *Valley State Bank v. Dean*, 47 P.2d 924 (Colo. 1935); *McMillan v. Pawnee Petroleum Corp.*, 151 Okla. 4, <u>1</u> P.2d 775 (1931) (deed as executed contract); *Eastman Nat. Bank v. Naylor*, 130 Okla. 229, 266 P. 778 (1928); *First National Bank v. Ketchum*, 68 Okla. 104, 172 P. 81 (1918);, (material alteration in a negotiable instrument after its execution and delivery as a complete contract avoids it except as to parties consenting to the alteration); 2 Am. Jur. 2d, *Alteration of Instruments*, § 9.

4.2 MENTAL CAPACITY TO CONVEY

{Titles of subsections A. and B. to be all capitalized.}

4.3 CAPACITY OF CONSERVATEES TO CONVEY

. . . .

Authority: 30 O.S. §§ 3-215 and 3-219 (formerly 58 O.S. §§ 890.5 & 890.10 prior to December 1, 1988; and 30 O.S. §§ 3-205 & 3-210 from December 1, 1988 to November 1, 1989).

Comment: In *Lindsay v. Gibson*, 635 P.2d 331 (Okla. 1981), the Oklahoma Supreme Court held that a gift conveyance from the conservatee to the conservator and other siblings of the conservatee was invalid. In *Matter of Conservatorship of Spindle*, 733 P.2d 388 (Okla. 1986), the Court held that a physically disabled but mentally competent ward is not legally disabled from making a gift to their her conservator, overruling *Lindsay* to that extent.

Caveat: 1989 Okla. Sess. Laws, ch. 276, (codified as 30 O.S. § 3-211 et seq.) amended the conservatorship statutes to provide that a conservator may only be appointed with the consent of the ward, and further that all conservatorships created prior to November 1, 1989, with the consent of the ward would remain valid. 1992 Okla. Sess. Laws, ch. 395, § 2, effective September 1, 1992, (codified as 30 O.S. § 3-220), further provides that each such conservatorship shall be presumed to have been created by consent unless otherwise established by documents filed in the conservatorship or by other evidence.

5.1 ABBREVIATIONS AND IDEM SONANS

Identity of parties should be accepted as sufficiently established in the following cases, unless the examiner is otherwise put on inquiry.

. . . .

- B. Nicknames of first or middle names: Where there are used commonly recognized nicknames, such as, "Susan" for Suzanna, "Ellen" for Eleanor, "Liz" for Elizabeth, "Katie" for "Katherine, "Jack" for John, "Rick" for Richard, "Bob" for Robert, "Bill" for William; and
- C. Application of Doctrine of *Idem Sonans* to first, middle and last

names or surnames: Where the names, although spelled differently, sound alike or phonetically similar or when their sounds cannot be distinguished, such first names as in "Sarah" and "Sara", "Catherine" and "Katherine", "Jeff" and "Geoff", "Mohammed" and "Mohammad", "Li" and "Lee", and such last names as in "Fallin" and "Fallon", "Green" and "Greene", "McArthur" and "MacArthur"; and

5.2 VARIANCE BETWEEN SIGNATURE OF BODY OF DEED AND ACKNOWLEDGMENT

. . . .

Comment: The Oklahoma form of acknowledgment for individuals provides that the official taking the acknowledgment shall certify that the person named was known to the official to be the identical person who executed the instrument. This is similar to the acknowledgment forms in most other states and is sufficient to create a presumption of identity when the signature differs from the body of the deed but the acknowledgment agrees with one or the other.

The cases from North Dakota, Minnesota, Iowa and Nebraska, cited above, support this rule and are typical of the many cases on the subject. No Oklahoma cases directly in on point have been found. However, in the *Gardner* and *O'Banion* cases, *supra*, the Court held the acknowledgments sufficient to identify the persons executing the instruments although the names were omitted from the acknowledgments. This indicates the rule will be sustained in Oklahoma, if and when the point is raised.

7.1 MARITAL INTERESTS: DEFINITION; APPLICABILITY OF STANDARDS; BAR OR PRESUMPTION OF THEIR NON-EXISTENCE

The term "Mineral Interest,", as used in this chapter, means the rights and restrictions placed by law upon an individual landowner's ability to convey or encumber the homestead and the protections afford the landowner's spouse therein.

. . . .

Comment 2: Following the decisions of the Court of Appeals for the Tenth Circuit in *Bishop v. Smith* and the United States Supreme Court in *Obergefell v. Hodges*, same sex marriages are legal in Oklahoma. All standards that refer to a Marital Interest are equally applicable to same sex married couples. Any references to husband and wife, spouses, or married couples should be read to apply to all legal marriages.

<u>Authority: Bishop v. Smith, 760 F.3d 1070</u> (10th Cir. 2014); Obergefell v. Hodges, 576 U.S. 644 (2015)

7.2 MARITAL INTERESTS AND MARKETABLE TITLE

. . . .

Comment 4: A non-owner spouse may join in a conveyance as part of a special phrase placed after the habendum clause, yet be omitted from the grantor line of a deed, and still be considered a grantor to satisfy pParagraph "B". of this title Standard. *Melton v. Sneed*, 188 Okla. 388, 109 P.2d 509 (1940).

8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

. . . .

B. The termination of the interest of a deceased joint tenant or life tenant may be established on a *prima facie* basis by one of the following methods:

. . . .

2. By recording an affidavit from a person other than those listed in 58 O.S. § 912C which:

. . . .

- c. States that the person named in the death certificate is one and the same person as the deceased joint tenant or life tenant named in a the previously recorded instrument which created or purported to create the joint tenancy or life tenancy in such property, and identifying such instrument by book and page where recorded.
- C. A waiver or release of the Oklahoma estate tax lien for the joint tenant or life tenant must be obtained unless:

. . .

3. The <u>date of</u> death of the joint tenant is on or after January 1, 2010; or

. . . .

Authority: 16 O.S. §§ 53 A(10); 82-84; 58 O.S. §§ 23, 133, 282.1, 911 and 912; 60 O.S. §§ 36.1 and 74; 68 O.S. §§ 804, 811 and 815.

Comment: Title 58 O.S. § 912 is a procedural statute, and may be applied retroactively because it does not affect substantive rights; see Opin. Atty. Gen. 74-271 (February 10, 1975), *Texas County Irr. & Water v. Okla. Water*, 803 P.2d 1119 (Okla. 1990), and *Shelby-Downard Asphalt Co. v. Enyart*, 67 Okla. 237, 170 P. 708 (1918). The death of a joint tenant or a life tenant may be conclusively established under § 912 regardless of the date of death and regardless of the date of the affidavit.

A retained life estate [e.g., Mom conveys Blackacre to Son, reserving a life estate to herselfl is included in the life tenant's taxable estate at death, 68 O.S. § 807(A) (3). However, a non-retained pure life estate, unaccompanied by a general power of appointment, is not subject to Oklahoma estate tax, and an estate tax lien release is not required in such instance. For example, if Mom conveys Blackacre for life to Son, remainder over to Granddaughter, Son has a pure life estate which is not included in his gross estate at his death and is not taxable nor subject to the estate tax lien. An estate tax lien release is not required in such a case. But if Mom were to have given Son not only the life estate but also a general power of appointment [as specially defined at 68 O.S. § 807(A)(9)] over the remainder, such a life estate with a power *would* would be included in Son's taxable estate, and a lien release would be required.

The marketability of title may also be impaired by the lien of <u>Federal</u> federal estate tax. See Title Standard No. 25.2.

12.2 REBUTTABLE PRESUMPTIONS CONCERNING CORPORATE INSTRUMENTS EXECUTED IN PROPER FORM

If a recorded instrument from a corporation is executed and acknowledged in proper form, the title examiner may presume that:

- A. <u>the</u> The persons executing the instrument were the officers they purported to be;
- B. <u>the The</u> officers were authorized to execute the instrument on behalf of the corporation;
- C. the The corporation was authorized to acquire and sell the property affected by the recorded instrument;, and
- D. <u>the</u> The corporation was legally in existence when the instrument was executed.
- 12.3 CONCLUSIVE PRESUMPTIONS CON-CERNING INSTRUMENTS RECORDED FOR MORE THAN FIVE (5) YEARS

The following defects may be disregarded after an instrument from a legal entity has been recorded for five (5) years:

- A. <u>the</u> The instrument has not been signed by the proper representative of the legal entity;
- B. <u>the The</u> representative is not authorized to execute the instrument on behalf of the legal entity;
- C. the The instrument is not acknowledged; and
- D. <u>the The</u> defect in the execution, acknowledgment, recording or certificate of recording the same.
- 12.4 RECITAL OF IDENTITY, SUCCESSOR-SHIP, OR CONVERSION

. . . .

Comment: While there seems to be no exact precedent for this standard, it is justified as a parallel to Standard 5.3 and as an extension of Standard 12.1.

12.5 POWERS OF ATTORNEY BY LEGAL ENTITIES

- A. If a recorded instrument has been executed by an attorney-in-fact on behalf of a legal entity, the examiner should accept the instrument if:
 - 1. <u>the The power of attorney authorizing the attorney-in-fact to act on</u> behalf of the legal entity is executed in the same manner as a conveyance by a legal entity;
 - 2. <u>the</u> The power of attorney is recorded in the office of the county clerk;
 - 3. the The power of attorney shows that the attorney-in-fact had the authority to execute the recorded instrument;, and
 - 4. <u>the</u> The power of attorney was executed before the recorded instrument was executed.
- B. Notwithstanding <u>paragraph</u> <u>Paragraph</u> "A" above, if a recorded instrument has been executed by an attorney-in-fact on behalf of a legal entity, the examiner should accept the instrument if the instrument has been of record for at least five (5) years even though <u>a</u> power of attorney has not been recorded in the office of the county clerk of the county in which the property is located.

Authority: 16 O.S. §§ 3, 20, 53, 27a, 53, 93.

15.2.1 CONVEYANCES BY AN EXPRESS PRIVATE TRUST OR BY THE TRUSTEE OR TRUSTEES OF AN EXPRESS PRIVATE TRUST

. . . .

Authority: 16 O.S. § 1 and 60 O.S. §§175.6a, 175.7, 175.16, 175.17, 175.24, and 175.45.

NOTICE OF JUDICIAL VACANCY

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

Associate District Judge Tenth Judicial District Osage County, Oklahoma

This vacancy is due to the appointment of the Honorable Stuart L. Tate to District Judge effective September 17, 2020.

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

Application forms can be obtained 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 23, 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 23, 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

OF JOEL EDWARD SCOTT III, SCBD #6962 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

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

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Tuesday, October 27, 2020**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

Opinions of Court of Civil Appeals

2020 OK CIV APP 48

THE HAROLD AND KATHY EWING JOINT LIVING TRUST AGREEMENT DATED JULY 28, 2011, Plaintiff/Appellee, vs. LORA BELL MCHENRY, Defendant/Third-Party Plaintiff/Appellant, vs. JOHN DAVID ROSELLE and RCB BANK, Third-Party Defendants/Appellees.

Case No. 117,649. August 27, 2020

APPEAL FROM THE DISTRICT COURT OF MAYES COUNTY, OKLAHOMA

HONORABLE REBECCA J. GORE, TRIAL JUDGE

AFFIRMED

Fred H. Sordahl, Pryor, Oklahoma, for Appellees

Michael P. Van Tassell, Tulsa, Oklahoma, for Appellant

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Lora Bell McHenry appeals from the trial court's denial of her motion for new trial. Ms. McHenry asserts the trial court erred when it viewed the premises at issue in this case in person and, according to Ms. McHenry, relied upon that viewing in "large part, if not exclusively," in reaching its determination. Based on our review, we affirm.

BACKGROUND

¶2 This case arises from a dispute as to whether a certain chain-linked fence, constructed approximately thirteen years before the commencement of this action, runs along the relevant boundary line, or whether it instead encroaches on neighboring properties. The parties agree the chain-linked fence replaced a long-existing barbed-wire fence that previously ran along the boundary line, but they disagree as to whether the chain-linked fence was placed in the exact location of the previous barbed-wire fence.

¶3 As stated in the pre-trial conference order,

Both the Plaintiff [i.e., the Harold and Kathy Ewing Joint Living Trust Agreement Dated July 28, 2011 (the Trust)] and the

Third Party Defendant [i.e., John David Roselle¹ claim that the chain-linked fence built by [Ms. McHenry] extends approximately four (4) feet further to the West than the barbed wire fence that it replaced. [Ms. McHenry alleges that the chain-link fence she had installed was placed in exactly the same location as the old barbed wire fence. [The Trust] and [Mr. Roselle] seek an Order of the Court directing [Ms. McHenry] to remove the fence that encroaches upon their properties, and seek an Order of the Court permanently enjoining [Ms. McHenry] from any future encroachments. [Ms. McHenry seeks an Order of the Court quieting title to her property determining that the current chain-link fence is on the current boundary line between the parties' properties.

¶4 After a non-jury trial, the trial judge viewed the area in controversy in person upon the request of Ms. McHenry's counsel and with the consent of the parties.

¶5 In its Journal Entry of Judgment filed on October 17, 2018, the trial court ordered, among other things, that Ms. McHenry "immediately remove her fence from the properties owned by [the Trust] and [Mr. Roselle], and . . . place her fence on the parties' property line as reflected in the [survey attached to the Judgment]." Within ten business days, Ms. McHenry filed a motion for new trial in which she asserted, among other things, that the trial court erred "when it viewed the property . . . and relied upon said viewing as an evidentiary basis for its decision"

¶6 In an order filed in November 2018, the trial court denied Ms. McHenry's motion, stating:

1. The Court viewed the property in question upon the request of [Ms. McHenry], and as agreed upon by the other parties. The Court, by agreement of the parties, was to accompany both [Ms. McHenry's] attorney and [the attorney for the Trust and Mr. Roselle] to the property on or about the 30th of May 2018, at 4:00 p.m., per the filed Order for Setting Matter for Trial.

- 2. The parties cancelled that scheduled viewing, but asked the Court to view the property upon the conclusion of the trial on the 31st day of May 2018.
- 3. After the conclusion of all evidence and at the continued request of the parties, the Court agreed to view the property in the late afternoon of May 31.
- 4. The Court then viewed the real property in question around 4:00 p.m. on the 31st day of May 2018, in accordance with the parties' agreement. The Court walked the fence line and viewed the fence, the gates, the posts, and markers that had been mentioned through the parties' witnesses and exhibits. The Court stayed approximately 15 minutes.
- 5. The Court finds no improper viewing took place as to the property. The Court viewed the property as had been agreed by the parties and in accordance with the parties' stipulations. Since there was no improper viewing, there was no irregularity in the proceedings. . . .
- 6. . . . The Court carefully considered and weighed the testimony of every witness and reviewed fully every exhibit admitted into evidence. After much consideration, the Court simply found the Ewing Trust/Roselle testimony more convincing in light of all the evidence.

. . . .

¶7 From the trial court's order denying her motion for new trial, Ms. McHenry appeals.

STANDARD OF REVIEW

¶8 "[A]n abuse of discretion standard is used for appellate review of an order denying a motion for new trial. An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Grisham v. City of Okla. City,* 2017 OK 69, ¶ 4, 404 P.3d 843 (footnotes omitted).

ANALYSIS

¶9 Ms. McHenry asserts on appeal as follows:

The issue in this case is whether the District Court erred when it relied on evidence obtained during its *ex parte* viewing of the properties in rendering its decision against [Ms. McHenry]. This is not a direct challenge

to the sufficiency of evidence presented on the record. Rather, it is a challenge to the District Court's use of its observations made during an ex parte view of the properties.

¶10 To make her argument, Ms. McHenry relies on multiple cases from other jurisdictions. She first relies on Valentine v. Malone, 257 N.W. 900 (Mich. 1934), in which the court concluded "[t]he trial court was in error in arriving at conclusions based upon his personal observation and not upon the testimony." 257 N.W. at 904. That case arose from an automobile accident at an intersection which the trial court visited. However, unlike in the present case, the trial court in Valentine visited the scene without the knowledge or consent of the parties. See id. (The court compared the circumstances presented in Valentine with a case in which "the trial judge, without the knowledge or consent of either of the parties, visited the scene of action," and the Valentine Court stated, "This is substantially what the trial judge did in the case at bar."). The Valentine Court explained:

We know of no rule of law or practice which authorizes a trial judge, after a cause has been submitted to him for determination, to search, of his own motion and without the consent of the parties, for extrinsic testimony and circumstances, and apply what he may learn in this way to corroborate the testimony upon one side or to cast discredit on the testimony of the adverse party.

Id. (emphasis added) (quoting Denver Omnibus & Cab Co. v. J.R. Ward Auction Co., 107 P. 1073, 1074 (Colo. 1910)). See also Lillie v. United States, 953 F.2d 1188, 1191 (10th Cir. 1992) ("When a judge engages in off-the-record fact gathering, he essentially has become a witness in the case.").

¶11 In the present case, the trial court viewed the property at the request of Ms. McHenry's counsel² and with the consent of the parties. Although Ms. McHenry asserts that "[t]he fact that a party, or parties, consent to the *ex parte* viewing does not change the outcome of the analysis," we agree, instead, with the *Valentine* Court's analysis that it is of great importance whether the parties, as here, requested, and consented to, the viewing, or whether, as in *Valentine*, the trier of fact viewed the premises without the knowledge or consent of the parties. Indeed, in another case cited by Ms. Mc-

Henry, the court stated that where the parties have "notice of the judge's intent to view the property and the opportunity to attend" and do not object to that viewing, "[t]hese circumstances remove a direct challenge to the view itself as improper." *Tarpley v. Hornyak*, 174 S.W. 3d 736, 750 (Tenn. Ct. App. 2004).

¶12 Moreover, the Trust and Mr. Roselle, who accurately state in their Answer Brief that Ms. McHenry "provides no Oklahoma authority in regards to the Court's view of real property in a bench trial," refer this Court to Evans v. City of Eufaula, 1974 OK 116, 527 P.2d 329, in which the Oklahoma Supreme Court did not disapprove of the viewing of real property by the trial court, and further concluded that the failure of the trial court to notify the parties of its viewing did not constitute reversible error in that case, stating: "Recognizing that it would have been better practice for the trial court to have viewed the scene after notification to parties[,] we conclude failure to do so in this case did not constitute reversible error." Id. ¶ 35.3

¶13 Returning to *Valentine*, that court stated that "[b]y the great weight of authority" a trial court, when acting as the trier of fact, is authorized to view premises when the viewing is undertaken with the knowledge and consent of the parties. The court emphasized, however, that such a viewing must be for the purpose of "more clearly comprehend[ing] the evidence given," and not for the purpose of procuring new evidence. 257 N.W. at 904.4 Ms. McHenry acknowledges as much in her appellate brief when she states: "The only legitimate purpose of an inspection is to enable the court to understand the issues and apply the evidence which is properly admitted." Ms. McHenry states that "the most important question . . . [is] . . . what use a judge makes of [the] observations."6

¶14 Here, the trial court heard the testimony at trial of six witnesses on behalf of the Trust and Mr. Roselle, and eight witnesses on behalf of Ms. McHenry. The evidence introduced also includes survey plats and several photographs of the disputed boundary line. As quoted above, the trial court stated in its order denying the motion for new trial that it "carefully considered and weighed the testimony of every witness and reviewed fully every exhibit admitted into evidence. After much consideration, the Court simply found the Ewing Trust/Roselle testimony more convincing in light of all the evidence."

¶15 Ms. McHenry attempts to cast doubt on this assertion by pointing out that in the trial court's Findings of Facts and Conclusions of Law (Findings) filed in August 2018, the trial court stated: "While Mr. Doshier, testifying for Ms. McHenry, was certain that he removed the brace post and immediately replaced it with the metal post of the chain link fence, the new fence, nonetheless, is out of place upon viewing the disputed properties and all other properties adjacent thereto." Based on this one sentence in the trial court's lengthy Findings, Ms. McHenry states "it is clear that the District Court based its decision in a large part, if not exclusively, on its observations of the properties in question."

¶16 To the contrary, the trial court's Findings include meticulous summaries of all the witness testimony. Moreover, the trial court also states in its Findings as follows:

All of [the Trust's] witnesses testified that the old barbed wire fence was to the east of the current chain link fence. Dr. Mobley, Mr. Kinder, Mr. Blackwell, and even Mr. Mibb specifically testified that the current standing wooden posts, as depicted in the exhibits, certainly looked to be the corner posts of the old barbed wire fence. Mr. Kinder and Mr. Mibb also testified that they believed the metal gate was located next to the corner post. Mr. Blackwell, most compellingly, testified that he had a conversation with Ms. McHenry about the location of the chain link fence being different than the original barbed wire fence.

Additionally, Mr. Ewing, who had been present in the area prior to the chain link fence being erected, testified that he had marked the boundaries of his Meadows property with metal decorative fencing, such that the apex of that fencing hovered over the property marker.

The trial court then stated: "Upon viewing the disputed properties, Mr. Ewing's decorative fencing lines up with [the Trust's] witnesses' accounts as to the placement of the old barbed wire fence."

¶17 Ms. McHenry, citing *Tarpley*, states that a party's consent to a judge's view of controverted property "cannot be interpreted as an agreement that the trial court make its decision solely on the basis of [its] personal observations at the view." 174 S.W.3d at 750. With this we agree. However, the trial court in the pres-

ent case clearly did not make its decision solely on the basis of its personal observations. Instead, the trial court, at the request of Ms. McHenry's counsel and after providing an opportunity for all counsel to attend,7 inspected the premises for the legitimate purpose of enabling the court to understand the issues and apply the evidence admitted at trial. Consequently, we conclude the trial court did not abuse its discretion in denying Ms. McHenry's motion for new trial.

CONCLUSION

¶18 We conclude the trial court did not abuse its discretion in denying Ms. McHenry's motion for new trial. Therefore, we affirm.

¶19 **AFFIRMED**.

RAPP, J., and FISCHER, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

- 1. While RCB Bank is listed as a Third-Party Defendant in the pretrial conference order, the order here refers only to Mr. Roselle.
- 2. Counsel for Ms. McHenry stated to the trial court at the end of the trial, "I think it would be helpful for you to see this."
- 3. We note that 12 O.S. 2011 § 579 "permits views by juries[.]" Evans, ¶ 19. Section 579 states:

Whenever, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order[] them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

It is clear from Evans that a trial court, when trying a case without a jury, may also view property which is the subject of litigation, though the better practice is for the trial court to at least notify the parties prior to doing so and, as noted further below, to provide counsel the opportunity to attend the viewing.

4. In Lillie v. United States, the Tenth Circuit Court of Appeals took issue with this distinction, explaining:

We acknowledge that jurisdictions vary as to whether a view is treated as evidence or simply as an aid to help the trier of fact understand the evidence. However, we believe such a distinction is only semantic, because any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence. The United States Supreme Court has stated that the "inevitable effect [of a view] is that of evidence, no matter what label the judge may choose to give it.'

953 F.2d at 1190 (footnote omitted) (citation omitted). However, even that court concluded that a viewing is proper if accomplished with the consent of the parties and if counsel are given an opportunity to attend, which occurred in the present case. If not, then, according to the Lillie Court, the viewing is "improper" and is "to be judged by the general standard regarding the erroneous admission of evidence, which "is harmless only if . . . the improper evidence had no effect on the decision." *Id.* at 1192 (citation omitted).
5. Ms. McHenry quotes *Belmont Nursing Home v. Illinois Department*

- of Public Aid, 439 N.E.2d 511, 514 (Ill. App. Ct. 1982).
- 6. Ms. McHenry quotes Risher v. South Carolina Department of Health and Environmental Control, 712 S.E.2d 428, 435 (S.C. 2011) (Toal, C.J.,
- 7. "Most authorities agree that it is error for a judge to take a view without providing an opportunity for counsel to attend." Lillie, 953 F.2d at 1190 (citations omitted).

2020 OK CIV APP 49

HILAND PARTNERS HOLDINGS, LLC, as successor-in-interest to HILAND PARTNERS, LP, HILAND OPERATING LLC, and HILAND PARTNERS GP HOLDINGS, LLC, Plaintiffs/Appellants, vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA and AIG CLAIMS, INC., Defendants/Appellees.

Case No. 117,677. April 28, 2020

APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY, OKLAHOMA

HONORABLE PAUL K. WOODWARD, TRIAL JUDGE

REVERSED AND REMANDED FOR **FURTHER PROCEEDINGS**

Rachel C. Mathis, John A.L. Campbell, Roger Gassett, ASTON MATHIS CAMPBELL, CLARKE & TIGER, PLLC, Tulsa, Oklahoma, for Plaintiffs/Appellants

William D. Perrine, Catherine C. Taylor, Reagan Madison Fort, PERRINE, REDEMANN, BERRY, TAYLOR & FRETTE, P.L.L.C., Tulsa, Oklahoma, for Defendants/Appellees

JANE P. WISEMAN, CHIEF JUDGE:

¶1 Hiland Partners Holdings, LLC, as successor-in-interest to Hiland Partners, LP, Hiland Operating, LLC, and Hiland Partners GP Holdings, LLC (collectively, Hiland) appeal a December 13, 2018, order granting the motion for summary judgment of National Union Fire Insurance Company of Pittsburgh, PA and AIG Claims, Inc. (collectively, Defendants). Based on our review of the record and applicable law, we reverse and remand for further proceedings.

BACKGROUND

¶2 On October 19, 2011, an explosion occurred at a natural gas processing facility in North Dakota owned and operated by Hiland. Lenny Chapman was removing water from condensate tanks at the facility when the explosion occurred, and he sustained burns to his face and body. Hiland reported the explosion to Zurich American Insurance Company, its primary general liability insurer. Hiland's policy had a per occurrence limit of \$1 million and a general aggregate limit of \$2 million. Hiland also had a commercial umbrella liability policy issued by National with a per occurrence limit of \$25 million and a general aggregate limit of \$25 million. Finally, Hiland held a commercial excess liability policy issued by RSUI which provided \$10 million in limits of liability in excess of the National policy.

¶3 On April 26, 2013, Chapman and his wife filed a negligence and public nuisance suit against Hiland Partners GP Holdings, LLC, in the United States District Court for the District of North Dakota, Southwestern Division.¹ The Chapmans reserved the right to assert claims for punitive damages.

¶4 Zurich retained attorney Patrick Durick to represent Hiland in the lawsuit, and Hiland retained Margaret Clarke and Michael C. Holmes to assist in the representation. National exercised its right to participate in the defense and brought in attorneys John Fitzpatrick and Stephen Oertle to take the lead in Hiland's defense.²

¶5 Before scheduled mediation, Durick evaluated the case at \$3 to \$7 million, noting Hiland had little to present to defeat liability as it had permitted the tanks to overflow. But he did not believe the evidence supported a finding of injuries rendering Chapman completely disabled. Similarly, Fitzpatrick evaluated the case at \$3 to \$5 million, stating Chapman's injuries were largely lawyer-driven. Hiland's mediation statement said, "Hiland [would] neither entertain nor pay any settlement that ha[d] 8 figures."

¶6 On May 29, 2014, the Chapmans filed a motion to amend, seeking punitive damages. The motion contained allegations of direct liability against Hiland on theories of design defect and allegations of vicarious liability based on its employees' conduct. Hiland requested Defendants' position on its insurance coverage for punitive damages.

¶7 At mediation on June 4, 2014, Defendants' settlement value was \$4 to \$6 million, inclusive of Zurich's \$1 million. Mediation was unsuccessful and ended with Defendants' offer of \$4 million and the Chapmans' demand of \$32 million.

¶8 AIG's claims adjuster, Stephanie Holzback, subsequently received a coverage opinion on punitive damages which provided vicarious punitive damages would be covered losses but direct punitive damages would be barred by public policy. The opinion recommended a reservation of rights as to direct punitive damages. After being repeatedly

asked for its coverage position, Holzback informed Hiland on August 12, 2014, that a reservation of rights was premature and that it was Defendants' position that Oklahoma and North Dakota law prevented an insurer from insuring against direct punitive damages.

¶9 At a second mediation on August 15, 2014, Defendants' settlement authority was \$7.5 million, inclusive of Zurich's \$1 million. The Chapmans began at \$25.9 million. Late in the evening, Fitzpatrick suggested a bracket of \$8 to \$12 million. The parties dispute what occurred next. Hiland asked Holzback to offer \$8 million. Holzback refused, stating that was not Defendants' value of the case. Holzback offered \$7 million, inclusive of Zurich's \$1 million. The Chapmans ultimately accepted the \$8 to \$12 million bracket. After Holzback refused additional requests to offer further funds, Hiland agreed to the bracket and informed Holzback it was reserving the right to sue Defendants for bad faith. Although Hiland asserts Holzback threatened to withdraw the \$7 million if Hiland insisted on retaining this right, she ultimately made the offer with no conditions. Hiland eventually offered \$10 million, which the Chapmans accepted. Thus, Zurich paid \$1 million, National \$6 million, and Hiland \$3 million of the final settlement.

¶10 Hiland subsequently met with AIG regarding its handling of the claim and asked Defendants to pay Hiland's contribution. Defendants denied Hiland's request.

¶11 On August 15, 2016, Hiland filed suit against Defendants in the District Court of Garfield County, Oklahoma, asserting breach of insurance contract, breach of the duty of good faith and fair dealing (bad faith), and punitive damages.³

¶12 On September 21, 2018, Defendants filed a joint motion for summary judgment, asserting the undisputed facts showed Hiland voluntarily contributed funds to effect a settlement in breach of the policy's clause prohibiting voluntary payments. Defendants also asserted Hiland could not prove the elements of a bad faith claim, because its actions in handling the claim were reasonable.

¶13 Hiland responded, asserting material questions of fact existed. Hiland maintained it did not voluntarily contribute toward settlement but was coerced to pay because of Defendants' bad faith conduct.

¶14 By order filed on December 13, 2018, the district court granted Defendants' motion for summary judgment, and Hiland appeals.

STANDARD OF REVIEW

¶15 "A moving party is entitled to summary judgment as a matter of law when the pleadings, affidavits, depositions, admission or other evidentiary materials establish that no genuine issue of material fact exists." *Smith v. City of Stillwater*, 2014 OK 42, ¶ 21, 328 P.3d 1192. "In reviewing the grant or denial of summary judgment, this Court views all inferences and conclusions to be drawn from the evidentiary materials in a light most favorable to the non-moving party." *Id.*

¶16 "The standard for appellate review of a summary judgment is *de novo*" by which "an appellate court makes an independent and nondeferential review of that judgment without deference to the decision or reasoning of the trial court." *McIntosh v. Watkins*, 2019 OK 6, ¶ 3, 441 P.3d 1094.

ANALYSIS

¶17 The dispositive issue before us is whether the district court erred in sustaining Defendants' summary judgment motion.

1. Bad Faith

¶18 An insurer has an implied duty to deal fairly and act in good faith with its insured so as not to deprive the insured of the benefits of the policy. See Christian v. American Home Assurance Co., 1977 OK 141, 577 P.2d 899. The essence of the tort is the unreasonable, bad faith conduct of the insurer. Badillo v. Mid Century Ins. Co., 2005 OK 48, ¶ 28, 121 P.3d 1080. The duty "applies to activities after the establishment of the insurer-insured relationship, and includes the claims handling process." Wather v. Mutual Assurance Adm'rs, Inc., 2004 OK 2, ¶ 7, 87 P.3d 559. The central issue is gauging whether Defendants "had a good faith belief in some justifiable reason for the actions it took or omitted to take that are claimed violative of the duty of good faith and fair dealing." Badillo, 2005 OK 48, ¶ 28. "'[I]f there is conflicting evidence from which different inferences may be drawn regarding the reasonableness of insurer's conduct, then what is reasonable is always a question to be determined by the trier of fact by a consideration of the circumstances in each case." Id. ¶ 28 (quoting McCorkle v. Great Atl. Ins. Co., 1981 OK 128, ¶ 21, 637 P.2d 583).

¶19 Hiland asserts Defendants acted in bad faith in handling the Chapman claim, coercing it into offering and paying \$3 million to settle. Hiland contends Defendants continually withheld a punitive damages coverage opinion and, when finally provided, intentionally misled Hiland, leaving it without the necessary information to make an informed decision on potential exposure and whether to contribute towards settlement. Hiland further asserts Holzback suggested and encouraged Hiland to contribute while refusing to contribute her full settlement authority.⁴

¶20 Defendants dispute this, contending that because the Chapman claim was within the limits and coverage of Hiland's policies, it was accorded absolute control of the claim and had the right to elect to compromise and settle or to defend in Hiland's name. Defendants further assert punitive damages were simply not an issue in the case and that Hiland usurped its right to control settlement negotiations by voluntarily approving a settlement above case evaluations.

¶21 We conclude conflicting inferences could be drawn from the evidence regarding the reasonableness of Defendants' conduct. The record shows Hiland was particularly concerned that an award of uninsured punitive damages could trigger loan covenants with a devastating impact on the company. The Chapmans' motion seeking punitive damages contained allegations of direct liability against Hiland and vicarious liability based on the conduct of its employees. Although the district court had not yet ruled on the motion, Hiland repeatedly requested Defendants' coverage position. AIG admits Hiland doggedly pursued a coverage position and that AIG told them it was premature.

¶22 During this time, however, AIG actively pursued a coverage opinion from outside counsel, stating the issue was a rush. This coverage opinion advised that punitive damages assessed against Hiland for its employees' wrongdoing would be covered losses but punitive damages for Hiland's direct wrongdoing were barred by public policy. The opinion recommended a reservation of rights as to a potential award of direct punitive damages.⁵ Although a reservation of rights was drafted, AIG refused Hiland's requests for Defendants' position, stating the issue was not ripe. However, internal AIG documentation finds punitive damages were an issue. Holzback drafted

a major loss report (MLR) in preparation for the second mediation that provided "[p]unitive damages capped twice compensatory. Direct punitive damages not insurable/vicarious is insurable." Further, during a July 17, 2014 meeting, Holzback and her supervisors engaged in a roundtable discussion and analysis of the Chapman claim. Notes from the meeting state: "Direct – Non Insurable Vicarious – Insurabil. . . 6 Will ROR." Finally, Fitzpatrick gave his worst-case scenario, stating if punitive damages were awarded, their exposure could be \$20 million.

¶23 On August 12, 2014, three days before mediation, Holzback responded to another Hiland request, stating a reservation of rights was premature. However, for the first time she provided Defendants' position, stating Oklahoma and North Dakota law prevented an insurer from insuring against direct punitive damages. Holzback's correspondence lacked any reference to potential coverage for vicarious punitive damages. Holzback also acknowledged she knew before mediation that punitive damages were of significant importance to Hiland. But despite repeated requests and discussions about punitive damages during mediation, Holzback did not inform Hiland there could be coverage. Holzback admitted that although Hiland wanted to know what was covered, she told them what was not covered.

¶24 During mediation, Fitzpatrick suggested a bracket of \$8 to \$12 million knowing Hiland desperately wanted the case settled and was willing to contribute, though the parties dispute whether this was voluntary. The parties further dispute exactly what occurred at mediation. Hiland asserts it asked Holzback to offer \$8 million. Holzback refused, stating she did not have it and would offer \$7 million, inclusive of Zurich's \$1 million. After Hiland and the Chapmans agreed to the bracket, Hiland again asked Holzback to offer \$8 million. She again refused. Fitzpatrick noted Hiland begged Holzback to pay an additional \$500,000. Holzback testified it never came up. She stated, however, she did not offer the additional \$500,000 because it would not settle the case, negotiations were out of her control, and she was not feeling well. Hiland also contends Holzback threatened to withhold the \$7 million if Hiland insisted on retaining the right to sue for bad faith. However, after speaking with her supervisor, Holzback offered the money with no conditions. Holzback, conversely, asserts she informed Hiland she could not settle the case because it would not be a complete settlement. Later, she also testified she spoke with her supervisor who told her to let Hiland reserve its right.

¶25 The record is replete with considerable conflict between Hiland and Holzback. Fitzpatrick noted Holzback was "rough around the edges" and had made it clear she was in charge. We note that one of the principal "reasons a consumer purchases any type of insurance . . . is for the peace of mind and security that it provides in the event of loss." McCorkle, 1981 OK 128, ¶ 26. Thus, an insurer, "in dealing with a third-party claim against its insured, is acting in a fiduciary capacity toward its insured." Badillo v. Mid Century Ins. Co., 2005 OK 48, ¶ 27, 121 P.3d 1080. "'An insurer may not treat its own insured in the manner in which an insurer may treat third-party claimants to whom no duty of good faith and fair dealing is owed." Id. ¶ 26 (quoting Newport v. USAA, 2000 OK 59, ¶ 15, 11 P.3d 190). The insurer's duty is to act in the insured's best interest. An "insured's interests must be given faithful consideration and the insurer must treat a claim being made by a third party against its insured's liability policy 'as if the insurer alone were liable for the entire amount' of the claim." Badillo, 2005 OK 48, ¶ 26 (quoted citation omitted).

¶26 Although Defendants claim punitive damages were simply not an issue, one could reasonably infer otherwise. A motion to add vicarious and direct punitive damages was pending. Hiland continually requested Defendants' coverage position due to the potentially devastating financial implications of a punitive damages award without insurance coverage. Though AIG promptly sought and received a coverage opinion and reservation of rights, and internal documentation shows it would issue Hiland a reservation of rights, it did not. When it did provide Hiland with its position, it provided, at best, an incomplete answer and, at worst, an intentionally misleading or disingenuous answer. Hiland wanted and needed to know what was covered, but Holzback only advised what was not covered.

¶27 Defendants had the duty of good faith and fair dealing to act reasonably for the protection of its insured, whose financial survival could be hanging in the balance. See id. ¶ 30. The evidence submitted is sufficient to support a reasonable finding that Defendants did not approach the matter or make decisions concerning its insured as if it alone were responsible for

the entire amount of the claim. Accordingly, based on the specific facts of this case, we find conflicting evidence from which different inferences may be drawn regarding the reasonableness of AIG's handling of the Chapman claim.

¶28 We also conclude reasonable persons could reach different conclusions about whether Defendants had a good faith belief that a justifiable reason existed for withholding the additional \$500,000 at mediation. An insurer has a duty to "promptly settle the claim for the value or within the range of value assigned to the claim as a result of its investigation." Newport, 2000 OK 59, ¶ 16. Its "failure to do so may subject it to a claim for bad faith." Id. "This is not to say an insurer may not negotiate or litigate the value of the claim. The duty of good faith and fair dealing merely prevents an insurer from offering less than what its own investigation reveals to be the claim's value." Id. "The decisive question is whether the insurer had a good faith belief, at the time its performance was requested, that it had justifiable reason for withholding payment." Duensing v. State Farm Fire & Cas. Co., 2006 OK CIV APP 15, ¶ 38, 131 P.3d 127 (emphasis omitted).

¶29 According to the record, Hiland asked Defendants to settle the claim between \$10 and \$12 million.8 However, defense counsel consistently valued the case between \$3 and \$7 million. In its roundtable analysis of the Chapman case before the second mediation, AIG considered the law, the facts, damages, their experience, advice of counsel, Holzback's suggested reserve of \$9 million (plus Zurich's \$1 million), and defense counsels' evaluations. AIG thought the Chapmans' attorney tended to overvalue his cases and mediated multiple times before settling close to trial. AIG authorized \$7.5 million, inclusive of Zurich's \$1 million, if it settled the case. However, during mediation Holzback refused to offer more than \$7 million. Although the evidence in the record is conflicting, Holzback testified she did not offer the additional \$500,000 because it would not settle the case, negotiations were out of her control, and she was not feeling well. Based on the record before us, a jury could reasonably conclude AIG was not negotiating in good faith and that its offer at mediation fell below the value it had assigned to the Chapman claim.

¶30 Accordingly, viewing the inferences and conclusions to be drawn from the evidentiary materials in the light most favorable to Hiland, we conclude that reasonable persons could dif-

fer on the reasonableness of AIG's conduct under the circumstances presented. The summary judgment granted to Defendants on Hiland's bad faith claim must be reversed as improper as a matter of law.

2. Breach of Insurance Contract

¶31 "[A]n insurance policy is a contract." *American Econ. Ins. Co. v. Bogdahn*, 2004 OK 9, ¶ 8, 89 P.3d 1051. "To recover under a claim for breach of contract in Oklahoma, a plaintiff must show: 1) formation of a contract; 2) breach of the contract; and 3) damages as a direct result of the breach." *OPYI*, *L.L.C. v. First American Title Ins. Co., Inc.*, 2015 OK CIV APP 49, n. 3, 350 P.3d 163 (citing *Digital Design Grp., Inc. v. Information Builders, Inc.*, 2001 OK 21, ¶ 33, 24 P.3d 834).

¶32 Hiland asserts the existence of a valid insurance contract, Defendants' breach of the contract by failing to indemnify it for the full amount of the Chapman settlement, and damages it sustained in being coerced and pressured into paying a portion of the settlement through Defendants' bad faith conduct.

¶33 Defendants disagree, asserting Hiland breached the policy's voluntary payments clause. On this point, the policy provides: "No Insured will, except at that Insured's own cost, voluntarily make a payment, assume any obligation or incur any expense, other than for first aid, without our consent."

¶34 Liability policies typically include this type of clause. See 1 Insurance Claims and Disputes § 3:9 (6th ed.). If an insured breaches this provision, an insurer's obligation to indemnify the insured under the policy may be deemed waived or relieved, as the payment is designated as voluntary. See 1 Practical Tools for Handling Insurance Cases § 2:30 (June 2019). Courts around the country differ on the question of whether a showing of prejudice is required before an insurer is relieved of its obligation to indemnify the insured. Courts that impose a prejudice requirement note the purpose of a voluntary payment clause is similar to notice, consent-to-settle, and cooperation clauses: to ensure an insurer has an opportunity to protect its interests by permitting it to investigate and participate in any resulting litigation or settlement discussions. 10 Rent-A-Roofer, Inc. v. Farm Bureau Prop. & Cas. Insurance. Co., 869 N.W.2d 99 (Neb. 2015). In Bond/Tec, Inc. v. Scottsdale *Insurance Co.*, 622 S.E.2d 165, 168 (N.C. Ct. App. 2005), the Court noted that in North Carolina, "an insurer may not rely upon the breach of

consent-to-settle, notice, or cooperation provisions" to waive liability unless the insurer "demonstrates prejudice to its ability to investigate or defend the claim." By analogy, the Court concluded an insurer must show prejudice if the insured has breached the voluntary payments clause, noting "[a]n insurer will not be relieved of its obligation because of an immaterial or mere technical failure to comply with the policy provisions. The failure must be material and prejudicial." *Id.* (quoting *Henderson v. Rochester American Ins. Co.*, 118 S.E.2d 885, 887 (N.C. 1961)).

¶35 Conversely, courts that do not impose a prejudice requirement note the clause is a fundamental term defining the limits or extent of coverage, and requiring a showing of prejudice ignores competing interests and risks of collusion or fraud and denies insurers the ability to contract for the right to defend or negotiate settlements. See e.g., Travelers Ins. Cos. v. Maplehurst Farms, Inc., 953 N.E.2d 1153 (Ind. Ct. App. 2011). In Travelers Property Casualty Co. of America v. Stresscon Corp., 370 P.3d 140, 144 (Colo. 2016), the Court noted a voluntary payments clause was a fundamental term defining the limits or extent of coverage.

"[W]hether the insured acts out of ignorance of the coverage or by design in an attempt to deprive the insurer of its contractually-granted choice to provide a defense or settle the claim, . . . the enforcement of such a provision according to its terms can hardly be characterized as 'reap[ing] a windfall' by invoking a technicality to deny coverage."

Id. (quoted citations omitted). Conversely, violations of timely notice provisions, "in the absence of any resulting prejudice, [are] technicalities from which insurers 'reap a windfall.'" *Id.* at 143.

¶36 Oklahoma has not addressed whether a showing of prejudice is required before an insurer is relieved of its obligation to indemnify on a breach of the voluntary payments clause. However, in *First Bank of Turley v. Fidelity and Deposit Insurance Co. of Maryland*, 1996 OK 105, ¶ 16, 928 P.2d 29, the Oklahoma Supreme Court addressed an insured's notice and cooperation duties, noting a breach of which could "modify, excuse, or defeat the insurer's performance under the [policy]." (Emphasis omitted.) The insurer's defense to liability depended on the impact of the in-sured's actions on the insurer's opportunity to meet its

contractual obligations. *Id.* \P 25. As a result, the insurer was required to show its interests were prejudiced by the insured's actions.

¶37 We conclude an insurer is required to show prejudice when it asserts an insured has breached the voluntary payments clause. As in *Turley,* the insurer's defense to liability depends on the impact of the insured's actions on its ability to meet its contractual obligations. Immaterial or mere technical failures to comply with the clause are insufficient to waive or relieve an insurer of liability.

¶38 Hiland asserts, however, that the voluntary payments clause is inapplicable because Defendants breached the policy by its bad faith conduct. Despite the testimony of Hiland's CEO and President Joseph Griffin that Hiland's contribution was "voluntary," it contends it was coerced to pay to settle the claim or risk a devastating uninsured punitive damages award and its payment was therefore not voluntary.

¶39 Oklahoma recognizes "in certain instances, an insurer is estopped from insisting on the forfeiture of benefits." *See Buzzard v. Farmers Ins. Co., Inc.,* 1991 OK 127, ¶ 39, 824 P.2d 1105. For example, in *Old Surety Life Insurance Co. v. Miller,* 1958 OK 291, 333 P.2d 504, the Supreme Court stated:

"Any agreement, declaration, or course of action on the part of the insurance company, which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, although it might be claimed under the express letter of the contract."

Id. ¶ 15 (quoted citations omitted). And, in Sexton v. Continental Casualty Co., 1991 OK 84, 816 P.2d 1135, the Court noted a denial of coverage under an uninsured motorist policy estopped the insurer from raising the uninsured's settlement and the defense of loss of subrogation rights. See also St. Louis Dressed Beef & Provision Co. v. Maryland Cas. Co., 201 U.S. 173, 181, 26 S. Ct. 400, 402, 50 L. Ed. 712 (1906) (by denying benefits or failing to defend in breach of the contract, the insurer "cut at the very root of the mutual obligation, and put an end to its right to demand further compliance with the supposed term of the contract on the other side").

¶40 Courts have held that if an insurer breaches its duty of good faith and fair dealing,

it may not enforce the voluntary payments or settlement clause and an insured may settle and enforce the settlement against the insurer. In Traders & General Insurance Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 628 (10th Cir. 1942), the Tenth Circuit, applying Oklahoma law, stated "before [an insurer] may interpose the voluntary settlement [by insured] as a bar to recovery upon the policy, it must be shown that it acted, not alone in furtherance of its own interest, but it must also appear that it acted in good faith and dealt fairly with the assured." See also Insurance Claims and Disputes § 3:11 at 227 (6th ed. 2020) (insured is not bound by contractual obligations if the insurer breaches its duty to act reasonably and diligently to safeguard the insured's interests during settlement of a dispute in which the insured is or could be sued); Weber v. Indemnity Ins. Co. of N. Am., 345 F. SupP.2d 1139, 1146 (D. Haw. 2004) (insured excused from its duties if insurer commits bad faith); Crawford v. Infinity Ins. Co., 139 F. SupP.2d 1226, 1230 (D. Wyo. 2001), aff'd, 64 F. App'x 146 (10th Cir. 2003) (insured may enter into a reasonable settlement when insurer acts with bad faith in failing to settle a claim); Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C., 801 S.W.2d 382, 389 (Mo. Ct. App. 1990) (if insurer breaches its good faith duty to consider offers of settlement, insured may enforce reasonable good faith settlements against insurer); and Isadore Rosen & Sons, Inc. v. Security Mut. Ins. Co., 291 N.E.2d 380, 382 (N.Y. App. Div. 1972) (insurer's duty of good faith "may be breached by neglect and failure to act protectively when the insured is compelled to make settlement at his peril").

¶41 We find these cases persuasive. Hiland claims Defendants acted in bad faith in their handling and settling of the Chapman claim and that Hiland was coerced into contributing money to get the case settled. In the previous section, we concluded there is conflicting evidence from which different inferences could be drawn regarding the reasonableness of Defendants' conduct. If Defendants violated their duty of good faith and fair dealing, they would be estopped from raising Hiland's violation of the voluntary payments clause. And, if Hiland did not have full knowledge of all material facts and it was coerced or pressured into contributing, its payment may not be voluntary. These disputed questions of fact remain for resolution by the trier of fact. Summary judgment on such disputed fact issues cannot withstand appellate scrutiny and must be reversed.

CONCLUSION

¶42 After *de novo* review, we conclude that the facts elicited by the evidentiary materials presented to the trial court and all reasonable inferences from those facts, considered in a light most favorable to Hiland, do not lead inexorably to the conclusion that Defendants are entitled to summary judgment as a matter of law. Because disputed material facts remain to be resolved and fall outside the aegis of summary disposition, the district court's judgment is reversed and the case is remanded for further proceedings.

¶43 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THORNBRUGH, P.J., and FISCHER, J. (sitting by designation), concur.

JANE P. WISEMAN, CHIEF JUDGE:

- 1. A second and third amended complaint were filed adding other Hiland entities.
- 2. Because all evaluations of the Chapman suit exceeded Zurich's \$1 million policy limit, Zurich tendered policy limits to National for use in negotiating a settlement.
 - 3. Hiland's principal place of business is in Enid, Oklahoma.
- 4. Hiland also contends AIG's refusal to mediate two days, attempt to secure a waiver of its bad faith claim, and deletion of any reference to coverage for punitive damages from a major loss report constitute bad faith conduct.
- 5. Under Oklahoma law, if coverage is questionable, the insurer may defend the insured under a reservation of rights. See First Bank of Turley v. Fidelity and Deposit Ins. Co. of Maryland, 1996 OK 105, ¶ 14, 928 P.2d 298.
 - 6. The writing here is partly illegible.
- 7. In a memo to Defendants, Fitzpatrick stated "the ND statute has punitive damages capped at 2 x the compensatory damages. Our comps were 'all in' \$6 million so punitives would be capped at \$12 million. 10-20% of \$10 million made a potential settlement number of something between \$1-2 million for purposes of settlement at the mediation."
- 8. Hiland asserts the claim was uniformly valued at \$10 million, noting AIG's initial claims adjuster stated it would pay \$10 million to settle, a statement the adjuster denies. Hiland also asserts the first mediator believed he could settle the case for \$10 million and Fitzpatrick and the second mediator indicated that \$10 million was reasonable. However, Fitzpatrick testified he did not recommend paying over \$7 million. Finally, Hiland asserts AIG valued the case at \$10 million in a draft MLR. However, the record shows AIG rejected this figure before mediation.
- 9. Fitzpatrick's memo to Defendants further states "[the attorney had] a reputation of being impossible to deal with . . . he will invariably add a count for punitive damages to exert more pressure on the defendant to settle; and that he will either go through about 3 mediations before settlement or approach the trial date before settling the case. . . . He also would generally 'cave' from his outrageous demand but only on the eve of trial. So the defendant would get his best settlement on the eve of trial not in mediation months before trial"
- 10. Some courts have held an insured's failure to comply with a voluntary payment clause gives rise to a presumption of prejudice that is rebuttable. *See Roberts Oil Co. v. Transamerica Ins. Co.*, 833 P.2d 222, 231 (N. Mex. 1992).

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF GLEN L. WORK, SCBD #6924 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

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

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Thursday, November 19, 2020**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL



Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS Thursday, October 1, 2020

F-2017-869 — Jose Tyler Vaught, Appellant, was tried by jury for the crimes of Count 1: Murder in the First Degree and Count 2: Felonious Possession of a Firearm, After Former Conviction of a Felony, in Case No. CF-2015-4067, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment on Count 1 and fifteen years imprisonment plus a \$10,000.00 fine on Count 2. The Honorable James M. Caputo, District Judge, sentenced accordingly ordering sentences in Counts 1 and 2 to run consecutively each to the other and consecutively to the sentence imposed in Case No. CF-2011-2853. From this judgment and sentence Jose Tyler Vaught has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Appellant's Application for Evidentiary Hearing and Supplementation of the Record is DENIED. The Cherokee Nation's Unopposed Application For Authorization To File Amicus Brief is DENIED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

M-2019-685 — Following a jury trial, Appellant Bryan Lee Crumb was found guilty of Violation of a Protective Order in Tulsa County District Court Case No. CM-2018-3759. Appellant was convicted and sentenced six months in the county jail and to a \$1,000 fine. Appellant appeals. The Judgment and Sentence of the trial court is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

F-2019-556 — Leslie Sue Joshua Hulbatta, Appellant, appeals from an order of the District Court of Seminole County, entered by the Honorable Brett W. Butner, Associate District Judge, terminating Appellant from the Anna McBride mental health court program and imposing concurrent sentences totaling twenty years in Case Nos. CF-2014-157, CF-2014-237, CF-2015-122 and CF-2015-123. AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs;

Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-1285 — Bryan O. Cleary, Appellant, was tried by jury for the crimes of Count 3, possession of a firearm after former conviction of a felony; Count 5, conspiracy to commit first degree murder; and Count 6, gang-related offense while in association with a street gang, in Case No. CF-2016-1352 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment three years imprisonment on Count 3 and twenty years imprisonment on Count 5. Punishment on Count 6 is fixed by statute at five years imprisonment. The trial court sentenced accordingly and ordered the sentences served consecutively. From this judgment and sentence Bryan O. Cleary has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in result; Hudson, J., concurs; Rowland, J., recuses.

F-2019-822 — Appellant Kejuantae Adrien Butler was tried by jury for the crimes of Counts I , II and III – Sexual Abuse of a Child Under Twelve in Tulsa County District Court Case No. CF-2019-363. In accordance with the jury's recommendation the trial court sentenced Appellant to 25 years imprisonment on each count, to run consecutively with credit for time served. From this judgment and sentence Kejuantae Adrien Butler has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

RE-2019-699 — Appellant entered a plea of guilty to Domestic Assault and Battery by Strangulation in Marshall County District Court Case No. CF-2018-71 and was sentenced to five years imprisonment with all but the first ninety days suspended. The State filed a petition to revoke Appellant's suspended sentence. Following a hearing the trial court revoked Appellant's remaining suspended sentence. Appellant appeals. The revocation is AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

Thursday, October 8, 2020

F-2017-869 — Raymond Eugene Johnson, Petitioner, was tried by jury in Case No. CF-2007-3514, in the District Court of Tulsa County, and convicted of two counts of First Degree Felony Murder (Counts 1 and 2) and First Degree Arson, After Former Conviction of Two or More Felonies (Count 3). The jury recommended the death penalty on Counts 1 and 2 and life imprisonment on Count 3. The Honorable Dana L. Kuehn sentenced accordingly. Johnson now submits his third application for post-conviction relief and related motion for evidentiary hearing. Johnson's Third Application for Post-Conviction Relief and related motion for evidentiary hearing are DENIED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Recuses; Lumpkin, J., Concurs; Rowland, J., Concurs in Results.

COURT OF CIVIL APPEALS (Division No. 1) Thursday, September 24, 2020

117,990 — Jackie Duane Smith, Plaintiff/ Appellee, V. Barbara Leinn Smith and Marty Dale Hern, Defendants/Appellants. Barbara Leinn Smith and Marty Dale Hern (Appellants) and Jackie Duane Smith (Appellee) dispute whether equipment on a cattle ranch was conveyed by deed as an improvement to real estate, or remained property of the trust to be distributed as personal property. The trial court decided the property was portable and neither a fixture nor appurtenant to the real estate. We affirm because the factual determinations in this case involving administration of a trust were not clearly against the weight of the evidence. AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Friday, September 25, 2020

117,701 — (Cons. w/ 117,702, 117,703) In the Matter of the Estate of Joe L. Norton, Jr.: Shane Lewis, Plaintiff/Appellee, v. Frances G. Norton, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt G. Glassco, Judge. In this consolidated appeal concerning the administration and interpretation of a trust, Defendant/Appellant Frances G. Norton (Frances) seeks review of three separate rulings granting summary judgment to Plaintiff/Appellee Shane Lewis (Lewis). Lewis, an employee of Frances' late husband, filed this action seeking an accounting of the trust, the suspension or

removal of Frances as trustee, and damages for breach of the trust. The court granted summary judgment to Lewis on Frances' counterclaims (1) alleging the trust amendment her husband made before his death was void due to undue influence exerted by Lewis and (2) seeking declaratory judgments that (a) because Frances had established the presumption of undue influence, the burden shifted to Lewis to prove the amendment was not the result of undue influence; (b) the marital trust, rather than the bypass trust, was funded; and (c) Lewis had violated the trust's in terrorem clause and had forfeited any benefit to which he claimed entitlement. After de novo review, we reverse summary judgment concerning funding of the bypass trust and affirm the other determinations. Opinion by Goree, J.; Swinton, V.C.J., concurs and Mitchell, P.J., dissents.

118,112 — In the Matter of D.B., D.B., and D.B., Alleged Deprived Children. State of Oklahoma, Petitioner/Appellee, v. Davlynn Brice, Respondent/Appellant. Appeal from the District Court of Muskogee County, Oklahoma. Honorable Robin Adair, Judge. Respondent/ Appellant Davlynn Brice appeals from a judgment terminating her parental rights to two of her children, D.B. and D.B. (Children). After Children and their older half-sibling D.B. were adjudicated deprived, the oldest child returned to Brice's home pursuant to an expressed preference and has now reached majority. Petitioner/Appellee sought termination of Brice's parental rights as to the two younger Children. Following trial, the jury found termination was in Children's best interests on the grounds of length of time in foster care, failure to correct the condition of child abuse, and Brice's conviction of felony child abuse. On appeal, Brice asserts the trial court erred in allowing Petitioner/Appellee the State of Oklahoma to seek termination on two grounds added to its petition the day before trial. We find no abuse of discretion in the trial court's finding that Brice had notice of those two grounds and therefore allowing the State to add those grounds to its petition, because one of the grounds for termination found by the jury was asserted in the original petition and the added grounds were known to Brice before the amended petition. The verdicts were supported by clear and convincing evidence presented at trial and we AFFIRM termination. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

Wednesday, September 30, 2020

118,231 — Cianna Resources, Inc., an Oklahoma Corporation; and Kyle D. Shutt, an individual, Plaintiffs/Appellants, v. Wendell Holland, an individual; Defendant, John H. Carney, an individual; and Jeff P. Prostok, an indivudual, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Don Andrews. Cianna Resources, Inc. and Kyle D. Shutt, Appellants and Plaintiffs below, appeal the trial court's orders dismissing John H. Carney and Jeff P. Prostok, Appellees and Defendants below. The issue is whether the trial court had personal jurisdiction over Defendants Carney and Prostok ("Defendant Attorneys"). Defendant Attorneys were practicing law and living in Texas. Plaintiffs hired Defendant Attorneys to represent Cianna in Texas. The Texas litigation involved an adversary proceeding by a trustee in a bankruptcy action. Because Defendant Attorneys lack the requisite contacts with Oklahoma the trial court correctly dismissed Defendant Attorneys for lack of personal jurisdiction. Affirmed. Opinion by Goree, J., Bell, P.J., and Pemberton, J., concur.

(Division No. 2) Tuesday, September 29, 2020

117,739 — Lance Graves, Plaintiff/Appellee, vs. Bess Chan Graves, Defendant/Appellant. Appeal from an Order of the District Court of Pittsburg County, Hon. Timothy Mills, Trial Judge. Bess Chan Graves (Mother) appeals a judgment entered on February 25, 2019, granting Lance Graves (Son) ownership of a certain portion of real property. First, Mother alleges the district court erred by not holding a jury trial. The Oklahoma Supreme Court has long held that a jury trial will be denied in questions of purely equitable cognizance. Son sought specific performance of an oral contract or promise to convey land, which is an equitable action where a jury trial is not required as a matter of right. Son alternatively brought a cause of action for unjust enrichment, seeking restitution as a remedy, which is also an equitable theory of recovery. Next, Mother brings multiple claims of error, the crux of which being that the district court erred by awarding Son a portion of the real property at issue because she held legal title to the property, and there was no written contract to convey the property to him. The Oklahoma Supreme Court has long held where the facts and circumstances would make it unequitable to apply the Statute of Frauds, the powers of equitable estoppel would be applied so as to promote justice. Given the evidence Son presented at trial, the district court's decision finding the existence of an oral contract or promise and Son's partial performance thereof, was not clearly against the weight of the evidence so as to require reversal in this equity proceeding. Additionally, Mother alleges the district court's Judgment violates her homestead rights. The purpose of the constitutional homestead exemption, which is a personal right that may be waived or abandoned, is to protect the entire family in its occupancy from improvidence and the urgent demands of creditors. These provisions are inapplicable to the present case, where Son presented evidence that both his parents promised to convey him the land on which he lived, worked, and made improvements as a matter of equity. Moreover, the district court specifically held that the house where Mother lives and the area within her fence line was her property. Mother also alleges the district court erred by finding the statute of limitations did not bar Son's recovery based on the enforcement of an oral contract. The district court did not err by finding Son's theory of recovery based on an oral contract or promise was not barred by the statute of limitations. Lastly, Mother makes multiple arguments that we deem waived. We therefore affirm the district court's Judgment. AF-FIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

(Division No. 3) Thursday, October 1, 2020

117,120 — Newfield Exploration Mid-Continent, Inc., Applicant/Appellee, vs. Almont Energy, L.L.C., and TLS Oil & Gas, Inc., Protestants/Appellants., and Singer Oil Co. L.L.C., Protestant, and State of Oklahoma ex rel., The Oklahoma Corporation Commission, composed of the Honorable Dana L. Murphy, Chairman, the Honorable J. Todd Hiett, Vice Chairman, and the Honorable Bob Anthony, Appellee. Almont Energy, L.L.C. and TLS Oil & Gas, Inc. ("Appellants"), seek review of a July 12, 2018 decision of the Oklahoma Corporation Commission granting in part the April 6, 2017 application of Newfield Exploration Mid-Continent, Inc. ("Appellee"), which sought exceptions to the general horizontal well setback rule. OAC 165:10-3-28(c)(2)(B). The standard of review afforded to the Corporation Commission's decision is outlined in the Oklahoma Constitution, Okla. Const. art. 9, § 20, and Sundown Energy, L.P. v. Harding & Shelton, Inc., 2010 OK 88, ¶8, 245 P.3d 1226, 1229 ("The Commission has a wide discretion in the performance of its statutory duties, and this Court may not substitute its judgment upon disputed factual determinations for that of the Commission but is restricted to a determination of substantial evidentiary support for the order issued under authority of the statutes."). Appellants raise three propositions of error on appeal. First, Appellants assert the Commission violated their due process and equal protection rights. Second, Appellants contend the Commission erred by placing the consideration of avoiding waste above the interest of correlative rights. Third, Appellants assert substantive evidence and the law support the denial of Newfield's application for an exception to the setback rule. For the reasons provided in the opinion, the July 12, 2018 decision of the Oklahoma Corporation Commission is AFFIRMED. Opinion by Pemberton, J.; Swinton, V.C.J., and Mitchell, P.J., concur.

117,811 — Lynne Turman, now Hames, Petitioner/Appellant, v. Marvin Turman, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Larry Shaw, Judge. Petitioner/Appellant Lynne Turman, now Hames (Hames) appeals from the trial court's vacation of a twenty-three-year-old permanent protective order (PPO) against her ex-husband, Respondent/Appellee Marvin Turman (Turman). Hames argues we should reverse the trial court because (1) the court lacked jurisdiction to vacate the PPO due to Turman's failure to file a petition to vacate the PPO within two years; (2) Turman failed to allege or prove he suffered an "unavoidable casualty" from the PPO; and (3) the court violated her due process rights by not allowing her to present evidence to justify maintaining the protective order. Because none of Hames' assertions are supported by the record or the law, we affirm. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Pemberton, J., concur.

118,025 — Randy Yount, Individually and as Guardian of Louwana Yount, Plaintiff/Appellant, vs. Mills Sisters, Inc., d/b/a The Old Store & Monograms by Janice, Defendant/Appellee. Appeal from the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Trial Judge. Plaintiff/Appellant Randy Yount, individually and as guardian of LouWana Yount (Plaintiff) appeals from an order grant-

ing summary judgment in favor of Defendant/ Appellant Mills Sisters, Inc. (Defendant) related to a personal injury claim that Plaintiff slipped on what she alleged was black ice in front of Defendant's store. Plaintiff argues that there was a genuine dispute of material facts concerning whether there was an open and obvious condition, whether Defendant caused or contributed to the ice accumulation, and whether Defendant created distractions from the dangerous condition. We find that Defendant had no duty to protect Plaintiff from an open and obvious hazard, and that the exceptions cited by Plaintiff are inapplicable. We therefore AFFIRM the order of the trial court. Opinion by Swinton, V.C.J.; Pemberton, J., concurs, and Mitchell, P.J., concurs specially.

118,202 — Bank of America, N.A., Plaintiff/ Appellee, vs.Carl Moaning, Defendant/Appellant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Jack Mc-Curdy II, Trial Judge. Carl Moaning, ("Moaning"), seeks review of the July 29, 2019 order of the Canadian County District Court granting Bank of America, N.A.'s ("Bank") Motion for Summary Judgment. Bank filed its Petition seeking \$5,852.52, plus court costs, for a credit card account balance Moaning did not pay after having obtained the card and making purchases with it. Bank filed a Motion for Summary Judgment and brief in support establishing there was no substantial controversy as to any material fact. Appellate review of the district court's grant of summary judgment is de novo. Carmichael v. Beller, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. Having reviewed the record on appeal, we find no controversy of material fact as to Bank's entitlement to judgment against Moaning. The July 29, 2019 order of the Canadian County District Court granting the Motion for Summary Judgment of Bank of America, N.A. is AFFIRMED. Opinion by Pemberton, J.; Swinton, V.C.J., and Mitchell, P.J., concurs.

(Division No. 4) Wednesday, September 23, 2020

118,590 (Companion to Case No. 118,307) — Cashland Holdings, LLC, Plaintiff/ Appellant, v. John Curtis Bramble Family Trust Dated April 17th, 2017, Defendant/Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Susan C. Stallings, Trial Judge, granting summary judgment to Defendant. Cashland's appeal is premised on the argument that the trial court erred "in concluding that the right of first refusal contained in

the parties' Lease did not survive during a month-to-month tenancy even though the Lease plainly states that any month-to-month tenancy is 'subject to all terms' of the Lease." The trenchant language of the Lease Agreement establishes that the parties did not intend the right of first refusal to extend into a hold-over tenancy. After *de novo* review, we conclude, as did the trial court, that the Trust was entitled to summary judgment under the material undisputed facts established in the record. The judgment of the trial court is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Thursday, September 24, 2020

117,916 — Glen Denson, Plaintiff/Appellee, v. ANK, LLC, d/b/a Magnolia Inn; Arvindbhai Patel, individually; and Nayana Patel, individually, Defendants/Appellants. Appeal from an order of the District Court of Bryan County, Hon. Mark Campbell, Trial Judge, entered against ANK, LLC, d/b/a Magnolia Inn, Arvindbhai Patel and Nayana Patel in favor of Glen Denson in his action for retaliatory discharge and violation of the Oklahoma Protection of Labor Act. The salient issue before us is whether it was an abuse of discretion to find that Denson made his case for piercing the corporate veil and establishing successor in interest liability. Defendants seemed to have little compunction about Denson's claims when they thought they would avoid liability due to the corporate veil's protection, but now seek to avail themselves of a defense after the veil has been pierced. There is no "do over" for Defendants after making the strategic decision to abandon defense of the lawsuit and allow default judgment to be entered against SAI. Defendants have not shown trial court error or abuse of discretion, and we affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Friday, September 25, 2020

118,489 — In the Matter of Z.R.K. and E.M., Alleged Deprived Children: Kelsey Kiernan, Appellant, vs. State of Oklahoma, Appellee. Appeal from and Order of the District Court of Pottawatomie County, Hon. Emily Mueller, Trial Judge. Kelsey Kiernan (Mother) appeals from the trial court's termination of her parental rights to minor children Z.R.K. and E.M., following bench trial. Mother asserts that the

trial court erred by failing to consider Mother's efforts to complete the ISP within 90 days, and by determining that the evidence demonstrated no behavioral change by Mother following the services she did attempt within the ISP. Mother also maintains that State did not establish termination was in the best interest of Z.R.K. and E.M. The trial court's determination that Mother had failed to correct the conditions that led the minor children to be adjudicated deprived, and that termination of her parental rights was in their best interests, is supported by clear and convincing evidence. Therefore, we affirm the trial court's Order Terminating Parental Rights of November 13, 2019, as to Z.R.K. and E.M. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

117,775 — In the Matter of the Guardianship of R.D.M., a Minor Child, Kathy McGee, Appellant, vs. Jennifer Jack, Appellee. Appeal from an order of the District Court of Okmulgee County, Hon. Kenneth E. Adair, Trial Judge, granting the motion to terminate guardianship filed by Jennifer Jack (Mother). Kathy McGee argues the trial court erred because (1) the evidence established Mother had not and could not become a fit parent and (2) terminating the guardianship was against the child's best interests. The record evidence undoubtedly shows Mother was never found to be "unfit" and she presented evidence that she has remedied the impediments that led to the temporary guardianship. The trial court concluded that Mother proved by clear and convincing evidence that she can care for the educational and medical needs of her son with the help of family members and the Muscogee (Creek) Nation. We find that the trial court's decision was not against the clear weight of the evidence. The trial court appropriately ended this guardianship, and its order granting Mother's motion to terminate the guardianship is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Monday, September 28, 2020

117,716 — Renundes Avila Perez, Petitioner/ Appellant, v. Priscilla Rodriguez Perez, Respondent/Appellee. Appeal from an order of the District Court of Carter County, Hon. Thomas K. Baldwin, Trial Judge, requiring the withdrawal of Petitioner Renundes Avila Perez's attorney of record. The issue on appeal is whether the trial court erred in disqualifying Petitioner's counsel. Despite the undisputed evidence of Petitioner's counsel's improper tactics with an unrepresented opposing party, we must still address the Supreme Court's enunciated standard set forth in Jensen v. Poindexter, 2015 OK 49, 352 P.3d 1201, against which we measure this disqualification order. We conclude that the order does not meet the standard because there is no finding that "the integrity of the judicial process will likely suffer real harm unless the attorney is disqualified" or factual findings supporting such a conclusion. The lack of factual findings requires remand to correct the deficiency to allow us to evaluate the correctness of the trial court's determination. The order directing the withdrawal of Petitioner's counsel is therefore reversed and remanded for further proceedings in order to comply with Jensen. REVERSED AND REMANDED FOR FURTHER PROCEED-INGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Hixon, J., concurs, and Thornbrugh, P.J., concurs specially.

Friday, October 2, 2020

118,363 — In the Matter of: M.B., Deprived Child, State of Oklahoma, Petitioner/Appellee, vs. Andrea London, Respondent/Appellant. Appeal from an order of the District Court of Tulsa County, Hon. Theresa Dreiling, Trial Judge, terminating Mother Andrea London's parental rights to her minor child, MB. We are asked to review whether the State of Oklahoma proved by clear and convincing evidence that Mother's parental rights should be terminated and that the termination is in the child's best interests. The record provides clear and convincing evidence that MB cannot be safely returned to Mother's home given her failure and apparent inability to grasp the gravity of his medical condition. State also presented clear and convincing evidence that it is in MB's best interest for Mother's parental rights to be terminated, not only for her failure to administer his medications, but also to meet his need for permanency and stability. After careful review of the record and applicable law, we conclude the trial court's thorough, careful, and detailed decision to terminate Mother's parental rights is supported by clear and convincing evidence. Finding no other error, we affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

ORDERS DENYING REHEARING (Division No. 1) Thursday, September 24, 2020

118,347 (comp. w/117,175) — Franklin L. Allen, Plaintiff/Appellee/Counter-Appellant, and Virginia L. Allen, Plaintiff, vs. Bela D. and Shirley A. Csendes, Defendants/Appellants/Counter-Appellees. Appellee's Petition for Rehearing, filed August 31, 2020, is *DENIED*.

(Division No. 2) Wednesday, September 23, 2020

118,034 — LL Oak Two LLC, LL Ark Properties, LLC and Scott Landers, Plaintiffs/Appellants, vs. Moorenouri, LLC; David Stanley CJD of Norman, LLC; and David Stanley, Defendants/Appellees. Appellants' Petition for Rehearing is hereby DENIED.

117,433 — Grand Crest Owners Association Inc., an Oklahoma Not For Profit Corporation, Plaintiff/Appellant, vs. Jeffrey T. Stites, an individual, a/k/a Jef T. Stites, Beverly L. Stites, an individual, a/k/a Beverly Stites, Grand Crest Association, Inc., an Oklahoma Corporation, O'Connor Legacy Home, LLC, Defendants/Appellees. Appellees Stites' and Grand Crest Association, Inc.'s Petition for Rehearing is hereby *DENIED*.

(Division No. 3) Thursday, September 24, 2020

117,998 — Janice Steidley, Plaintiff/Appellant, and David Iski, Plaintiff, vs. William "Bill" Higgins, Erin O'Quin, Carl Williams, Sally Williams, and Edith Singer, Defendants, and Randy Cowling, Bailey Dabney, Salesha Wilken, Newspaper Holdings d/b/a Claremore Daily Progress, Community Newspaper Holding, Defendants/Appellees. Appellant's Petition for Rehearing, filed September 3rd, 2020, is DENIED.

Friday, September 25, 2020

118,076 — Richard J. Mitchell, Plaintiff/ Appellee, vs. City of Okmulgee, Defendant/ Appellant. Appellee's Petition for Rehearing and Brief in Support, filed September 17, 2020, is *DENIED*.

(Division No. 4) Monday, October 5, 2020

118,197 — Joel Rabin, Petitioner/Appellant, vs. The Oklahoma Housing Finance Agency, an Agency of the State of Oklahoma, Respondent/Appellee, and Arcadian Housing, Intervenor/Appellee. Appellant's Petition for Rehearing is hereby *DENIED*.

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WATKINS TAX RESOLUTION AND ACCOUNTING FIRM is hiring attorneys for its Oklahoma City and Tulsa offices. The firm is a growing, fast-paced setting with a focus on client service in federal and state tax help (e.g. offers in compromise, penalty abatement, innocent spouse relief). Previous tax experience is not required, but previous work in customer service is preferred. Competitive salary, health insurance and 401K available. Please send a one-page resume with one-page cover letter to Info@TaxHelpOK.com.

NORMAN BASED LAW FIRM IS SEEKING SHARP, MOTIVATED ATTORNEYS for fast-paced transactional work. Members of our growing firm enjoy a team atmosphere and an energetic environment. Attorneys will be part of a creative process in solving tax cases, handle an assigned caseload and will be assisted by an experienced support staff. Our firm offers health insurance benefits, paid vacation, paid personal days and a 401k matching program. No tax experience necessary. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to Ryan@PolstonTax.com.

THE OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact 405-416-7086 or heroes@okbar.org.

DOWNTOWN TULSA LAW FIRM SEEKING AN ASSOCIATE ATTORNEY. The position will involve all stages of a case from intake, negotiations, pleadings, motion practice, discovery, depositions, mediation and trial. Successful candidate will need to have good research and writing skills. Salary commensurate with credentials and experience. Send Resume, References and Writing Sample to: associateattorney2@rodelaw.com.

ESTABLISHED, AV-RATED TULSA INSURANCE DEFENSE FIRM seeks motivated associate attorney to perform all aspects of litigation including motion practice, discovery, and trial. 2 to 5 years of experience preferred. Great opportunity to gain litigation experience in a firm that delivers consistent, positive results for clients. Submit cover letter, resume, and writing sample to amy.hampton@wilburnmasterson.com.

POSITIONS AVAILABLE

SEEKING EXPERIENCED PROSECUTOR to work in Osage and Pawnee counties. Must have at least two years' experience prosecuting felonies in the Oklahoma D.A. system. Minimum salary of \$62,000 along with full state benefits. Please send resume and writing sample to Sharie Yates at sharie.yates@dac.state.ok.us.

THE CHOCTAW NATION OF OKLAHOMA is now hiring Assistant Prosecuting Attorneys. Some Assistant Prosecutor positions will be assigned to ICW deprived cases and other positions will handle criminal prosecution. Salary range for these positions is \$65,000-\$85,000 commensurate upon experience. For more information see https://jobs.choctawnation.com/jobs/assistant-prosecuting-attorney-8129.

THE U.S. ATTORNEY'S OFFICE FOR THE WESTERN DISTRICT OF OKLAHOMA seeks applicants for multiple Criminal AUSA positions to serve 12-month temporary appointments to assist with prosecutions arising out of Indian Country due to the recent U.S. Supreme Court decision in McGirt v. Oklahoma. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D. degree, be an active member of the bar in good standing (any U.S. jurisdiction) and have at least one year of post-J.D. legal or other relevant experience. Prosecution experience is preferred. This is an open continuous announcement to fill current and future vacancies for this District with multiple review dates. See vacancy announcement 21-OKW-10930091-A-01 at www.usajobs.gov (Exec Office for US Attorneys). See How to Apply section of announcement for instructions to apply online. Questions may be directed to Lisa Engelke, Administrative Officer, via e-mail at lisa.engelke@usdoj.gov. This announcement is open through December 31, 2020.

POSITIONS AVAILABLE

MCATEE & WOODS, P.C., an AV Rated firm with offices in Midtown OKC and Tulsa, seeks an associate who desires to be a litigator. Prefer candidates with 3-5 years' experience, strong writing skills, attention to detail, and a solid work ethic. The firm provides Medical/Dental/401K with matching/HSA benefits. Please send your resume and writing sample with a cover letter to Office@McAteeandWoods.com.

CLASSIFIED INFORMATION

REGULAR CLASSIFIED ADS: \$1.50 per word with \$35 minimum per insertion. Additional \$15 for blind box. Blind box word count must include "Box ____," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152."

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THURSDAY, OCTOBER 22, 2020 9 A.M. - 2:50 P.M.



MCLE 6/1

WORKSHOP LEADERS:

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

A. Daniel Woska, Woska Law Firm, PLLC

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GUARDIANSHIPS: THE NEW NORMAL

Co-Sponsored by the OBA Estate Planning, Probate, and Trust Section

PROGRAM DESCRIPTION:

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

TOPICS INCLUDE:

- 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

TUITION: Registration is \$175. Members licensed 2 years or less may register for \$85 (no walk-ins). This program may be audited (no materials or CLE credit) for \$50 by emailing ReneeM@okbar.org or call 405-416-7029 to register.

ODO . CE

FRIDAY, OCTOBER 30, 2020 9 A.M. - 2:50 P.M.



MCLE 6/1

PROGRAM PLANNER:

Eric L. Johnson,
OBA Financial Institutions and
Commercial Law Section

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2020 BANKING AND COMMERCIAL LAW UPDATE

Co-Sponsored by the OBA Financial and Commercial Law Section

PROGRAM DESCRIPTION:

The 2020 Banking and Commercial Law Update will educate participants on new developments in these areas of law including Uniform Commercial Code Articles 3, 4, 4A and 9, banking issues, and CFPB updates of interest to the banking and commercial law practitioner. Instructors include a law school professor, commercial and consumer law practitioners. The Update also contains one hour of ethics credit.

TUITION: Registration for the live webcast is \$175. Members licensed 2 years or less may register for \$85 for the live webcast. This program may be audited (no materials or CLE credit) for \$50 by emailing ReneeM@okbar.org or call 405-416-7029 to register.