ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE THE MARRIAGE OF:

[redacted]
Petitioner/Appellant,

vs.

[redacted]
Respondent/Appellee.

NO. [redacted]

Appeal from the District Court of Muskogee County
The Honorable Norman D. Thygesen, Presiding
Muskogee County Case No. [redacted]
Nature of Action: Dissolution of Marriage

BRIEF-IN-CHIEF OF APPELLANT [redacted]

James R. Gotwals, OBA No. 3499
Mary L. Gutierrez, OBA No. 18386
Benjamin D. Aycock, OBA No. 21472
JAMES R. GOTWALS & ASSOCIATES, INC.
525 South Main, Suite 1130
Tulsa, OK 74103-4512
Telephone (918) 599-7088
Facsimile (918) 599-7153
ATTORNEYS FOR PETITIONER,
[redacted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE THE MARRIAGE OF:

[redacted]
Petitioner/Appellant,

vs.

[redacted]
Respondent/Appellee.

No. [redacted]

Appeal from the District Court of Muskogee County
The Honorable Norman D. Thygesen, Presiding
Muskogee County Case No. [redacted]
Nature of Action: Dissolution of Marriage

BRIEF-IN-CHIEF OF APPELLANT [redacted]

James R. Gotwals, OBA No. 3499
Mary L. Gutierrez, OBA No. 18386
Benjamin D. Aycock, OBA No. 21472
JAMES R. GOTWALS & ASSOCIATES, INC.
525 South Main, Suite 1130
Tulsa, OK 74103-4512
Telephone (918) 599-7088
Facsimile (918) 599-7153
ATTORNEYS FOR PETITIONER,
[redacted]

INDEX

INTRODUCTION

[redacted] ("Appellant" or "Teresa") and [redacted] ("Appellee" or "Damon") were married for 41 years at the time Teresa filed for divorce. They have two children, both adults now. A trial on the merits was conducted by Judge Norman D. Thygesen, Associate District Judge in and for the District Court of Muskogee County. Judge Thygesen divided their marital property and debts, but declined to find certain real property to be marital, or to order Damon to pay Teresa any spousal support or attorney's fees. Teresa appeals these issues, among others.

SUMMARY OF THE RECORD

On October 3, 2012, Teresa filed her petition for dissolution of marriage and application for temporary orders. R. 1-4; R. 5-9. In her petition, Teresa requested a fair and equitable division of their marital debts and property, restoration of separate property to each party and support alimony. R. 1-4. In her application for temporary orders, Teresa requested possession of the marital residence and her car, and that Damon pay temporary support alimony and maintain the parties' monthly debt obligations which he had historically serviced, among other things. R. 5-9. On October 17, 2012, Damon filed his Response and Cross-Petition Application for Temporary Order. R. 10-13. In his Response, Damon likewise requested each party be awarded and set aside all of his or her separate property, among other things. R. 10-13.

On December 27, 2012, the parties entered a Consent Temporary Order. R. 14-17. Among other things, the Temporary Order granted temporary possession of the marital residence to Teresa and ordered Damon to timely pay the homeowner's insurance, real property taxes, cell phone bill, water bill, natural gas bill, electric bill, trash pickup bill, internet bill, all of the parties' automobile insurance and life insurance premiums. *Id.* Damon was also ordered to pay

Teresa $350.00 every other Friday beginning December 14, 2012, with characterization of said funds as support alimony or advance distributions of property division reserved until time of trial. *Id.* Teresa was ordered to maintain health insurance on both parties. *Id.*

In the fall of 2013, Damon applied for, and Teresa agreed to, the inspection and appraisal of certain household contents and personal property located at the marital residence. R. 18; R. 19; R. 20. In October 2013, Damon cited Teresa for a violation of the ATI, contending that she "caused the sale of Respondent's Horton 175 Crossbow." R. 21-23; R. 24-25. Teresa pled not guilty. R. 26; R. 27-28. [Although testimony was taken on the crossbow issue, the same was never addressed by the trial court.]

A trial on the merits was held on August 18th and 19th, and October 30, 2014. On the first day of trial (R. 37), Teresa filed her request findings of fact and conclusions of law (R. 30-31); Damon filed an unauthorized trial brief (R. 32-36); and Teresa, April Belecik and Don Wilson testified. Damon's trial brief contained hearsay statements that he put certain real property in joint tenancy because an employee of the title company advised him to do so, and for the first time identified a witness who purportedly made these hearsay statements. R. 32-36.

On the second day of trial (R. 42), Teresa filed her objection to Damon's trial brief (R. 38-41); and Teresa, Cindy Kennedy and Gary Bishop testified, after which Teresa rested her case. Teresa requested the trial court to strike the trial brief on the inherited property and hearsay issue. R. 38-41. Damon's oral request at the end of the second day, to modify the Temporary Order, was denied by the trial court. R. 42.

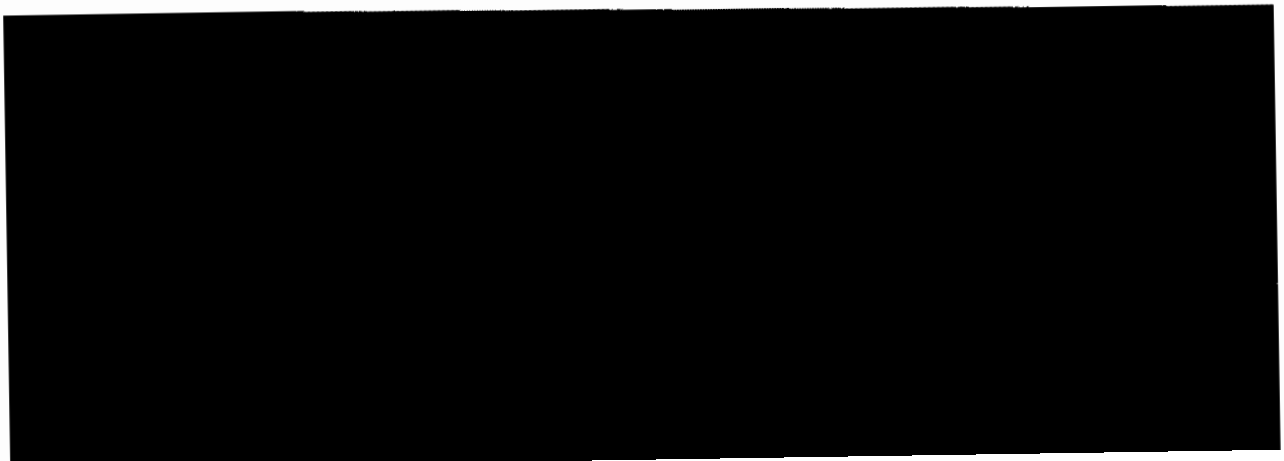
On the third day of trial (R. 43), Damon testified in his case in chief, after which the trial court heard rebuttal testimony from Teresa. Judge Thygesen overruled Teresa's motion to strike Damon's trial brief, and allowed Damon to introduce hearsay evidence as to what Jenny Thunder,

the title company agent, said to him in 1998, to cause him to put Teresa's name on the deed to the 130 acres in Warner, OK. 10/30/14 Tr., Page 63, Lines 4-5. The trial court directed the parties to submit findings of fact and conclusions of law by December 1, 2014. Damon's second request to be relieved of paying Teresa $350.00, every other Friday, was denied by the trial court. R. 43.

On December 1, 2014, both parties submitted written findings of fact and conclusions of law. R. 44-57; R. 58-85. On December 5, 2015, Judge Thygesen issued his findings of fact and conclusions of law in letter form. R. 86-87. Teresa thereafter filed a Motion for Clarification, Including Motion for Stay (R. 88-92); Motion for New Trial and Alternative Motion to Correct, Open, Modify, Reconsider or Vacate Judgment and Brief in Support (R. 94-106); and Motion to Stay and Brief in Support (R. 107-110), all on December 15, 2014.

On January 28, 2015, Damon filed a Motion to Settle Journal Entry, attaching a proposed Decree of Divorce which Damon asserted "accurately sets forth the Court's Ruling in accordance with the Court's Order dated December 5, 2014." (R. 111-128). On January 29, 2015, Damon filed his Respondent's Response to Petitioner's Motion for Clarification. R. 129-131. On January 30, 2015, Damon filed his Response to Petitioner's Motion for New Trial (R. 132-135, and Response to Petitioner's Motion to Stay (R. 136-138).

On February 2, 2015, Teresa filed her Response to Respondent's Motion to Settle Journal Entry (R. 140-142), asserting that the proposed decree did not accurately reflect the trial court's ruling issued by letter dated December 5, 2014, and appeared for hearing on her post trial motions. Teresa argued that Damon's proposed decree included language and values for various items of property not included in, and issues not addressed by, the trial court's December 5, 2014 letter (e.g., it addressed attorney's fees); it also omitted mention of a Bank of America CD. R. 140-142. The trial judge denied Teresa's motion to reconsider and her motion for new trial;



granted her motion to stay; and directed Damon's counsel to prepare a decree consistent with the trial court's minute order/ruling of December 5, 2014. R. 139.

On March 16, 2015, Damon filed his Amended Motion to Settle Journal Entry, with virtually the same Decree of Divorce as before, attached thereto. R. 143-160. On March 20, 2015, the trial court entered a Consent Order permitting Damon access to the former marital residence to pick up the property awarded to him. R. 161-162. On March 30, 2015, Teresa filed her Response to Respondent's Amended Motion to Settle Journal Entry and Counter Motion to Settle (R. 163-208), again asserting that the proposed decree did not accurately reflect the trial court's ruling issued by letter dated December 5, 2014, and attaching her version of an acceptable journal entry. Teresa expressly noted instances where Damon's proposed decree included legal authorities and values for various items of property not addressed by the trial court's December 5, 2014 letter; it also contained various formatting/editing errors; it also omitted mention of a Bank of America CD. R. 163-208.

On April 6, 2015, the parties appeared before Judge Thygesen to settle the journal entry. R. 209. The trial court took the issue under advisement. *Id.* On April 13, 2015, Judge Thygesen entered Damon's revised version of the Decree of Divorce and Dissolution of Marriage. R. 210-226.

On May 13, 2015, Teresa perfected this appeal. The same day, (May 13, 2015), Teresa filed her application for attorney's fees and costs in district court, along with a brief in support. R. 234-242. She also filed the Affidavit of James R. Gotwals, which contained detailed time sheets. R. 243-333. Teresa sought a conduct-based award of fees and costs in the amount of $58,723.00, pursuant to 43 O.S. § 110; *Finger v. Finger* 1996 OK CIV APP 91, 923 P.2d 1195; *Gardner v. Gardner*, 1981 OK CIV APP 9, 629 P.2d 1283; and other case law. On June 4, 2015,

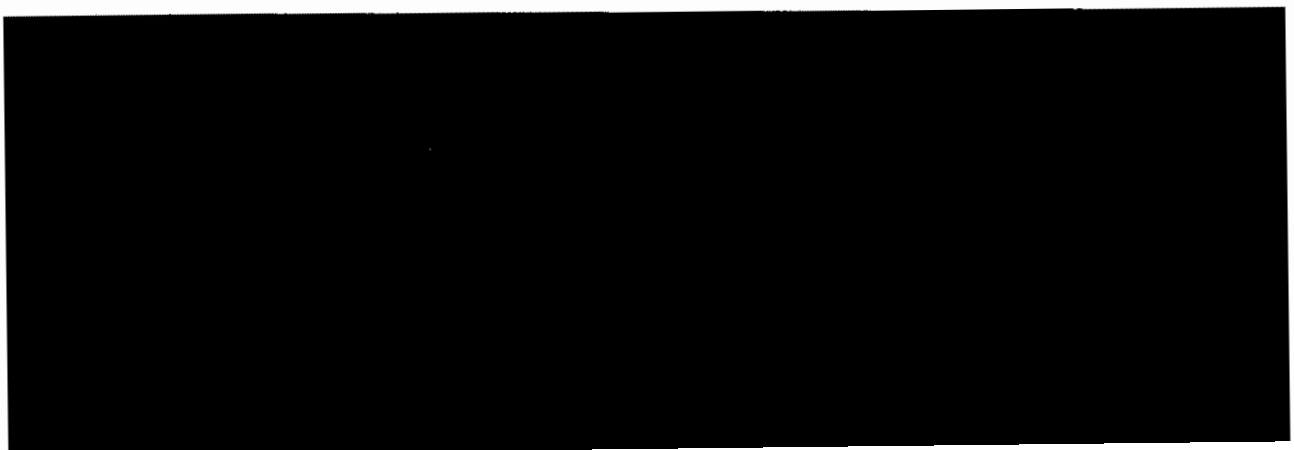
Damon filed his Response to Petitioner's Application for Attorney's Fees. R. 338-342. Damon deemed Teresa's application as "a sharp turn into the land of illogic and nonsense." On June 25, 2015, the parties appeared before Judge Thygesen for hearing on Teresa's application for attorney fees. R. 343. The trial court took the issue under advisement. R. *Id.* On July 2, 205, Judge Thygesen thereafter denied Teresa's application for attorney fees without stating any reason or grounds for the ruling. R. 344. On July 9, 2015, an Order Denying Motion for Attorney Fees was entered. R. 345. On July 22, 2015, Teresa amended this appeal to include the issue of attorney fees.

STANDARD OF REVIEW

"A divorce suit is one of equitable cognizance in which the trial court has discretionary power to divide the marital estate." *Colclasure v. Colclasure*, 2012 OK 97, ¶16, 295 P.3d 1123. The division of property acquired during the marriage by the joint industry of the husband and wife must be fair, just and reasonable. *Id.*; *see also* 43 O.S. § 121(B).

"A marital estate need not necessarily be equally divided to be an equitable division because the words just and reasonable in § 121 are not synonymous with equal." *Colclasure* at ¶16. "The trial court has wide latitude in determining what part of jointly-acquired property shall be awarded to each party." *Id.*

This Court will not disturb the trial court's decision regarding property division unless the trial court abused its discretion or the decision is clearly against the weight of the evidence. *Smith v. Villareal*, 2012 OK 114, ¶7, 298 P.3d 533. The same review standard applies to the court's decision to classify property as marital or separate, *Standefer v. Standefer*, 2001 OK 37, ¶18, 26 P.3d 104, and to the court's "choice of method for the valuation of property and its



determination of value." *Ballinger v. Ballinger*, 2014 OK CIV APP 92, ¶11, 340 P.3d 644 (citing *In re Marriage of Lahman*, 2009 OK CIV APP 26, ¶13, 209 P.3d 793).

In granting a decree of divorce or separate maintenance, the trial court may require either party to pay such reasonable expenses of the other as may be "just and proper" under the circumstances. 43 O.S. 110(D). The decision as to whether to award attorney fees in a divorce action is within the discretion of the court and involves judicial balancing of the equities. *Barnett v. Barnett*, 1996 OK 60, ¶¶14-15, 917 P.2d 473. The trial court's decision to grant or to deny attorney fees will not be reversed absent an abuse of discretion. *Finger v. Finger*, 1996 OK CIV APP 91, ¶9, 923 P.2d 1195; *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659. The *Burk* criteria are the standard by which our courts test the reasonableness of attorney fee awards. *In re Adoption of Baby Boy A*, 2010 OK 39, ¶19, 236 P.3d 116.

To the extent Appellant argues the trial court's evidentiary rulings were in error, in matters pertaining to the admission and exclusion of evidence, this Court reviews both issues of fact and law under a clear abuse of discretion standard. "[A] judgment will not be reversed on a trial judge's ruling to admit or exclude evidence absent a clear abuse of discretion." *Myers v. Mo. Pac. R.R. Co.*, 2002 OK 60, ¶36, 52 P.3d 1014 (footnote omitted).

Finally, "interpretation of statutory law presents a question of law and statutes are construed to determine legislative intent in light of the general policy and purpose that underlie them." *Troxell v. Okla. Dep't of Human Servs.*, 2013 OK 100, ¶4, 318 P.3d 206 (citation omitted).

ARGUMENT AND AUTHORITIES

Proposition 1. The trial court committed error, abused its discretion and reached inequitable result on December 5, 2014, when it failed to: (1) provide findings of fact sufficient to support its conclusions of law; (2) provide any definable conclusions of law; (3) set out the findings of fact separately from the conclusions of law as required by 12 O.S.

§ 611; (4) perform its duty to state material facts in sufficient detail for a correct decision of law in the case, in the event the action is reviewed by a higher court; and (5) grant either party a dissolution from the other, and thereby disposing of all issues presented to the Court for decision.

12 O.S. § 611 provides:

> "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state, in writing, the findings of fact found, separately from the conclusions of law."

The object of 12 O.S. § 611 is to enable parties to take exception to the specific views of the trial court as to the facts upon which the rights litigated depend and the conclusions drawn from those facts. The central purpose behind 12 O.S. § 611 is that a non-prevailing party will be able to intelligently take exception to a trial court's ruling. *Gaddis v. City of Bartlesville*, 1990 OK 36, ¶24, 790 P.2d 1108 (quoting *Coleman v. James*, 1917 OK 601, 169 P. 1064). While a trial court is not "required to find material facts in greater detail than necessary for a correct decision of questions of law involved in the case in the event the action is reviewed by a higher court", *Davis v. School Dist. No. D-14, LeFlore County*, 1981 OK 24, ¶5, 625 P.2d 630, something more is required than what was set forth in Judge Thygesen's purported "*Findings of Fact and Conclusions of Law*" filed December 5, 2014. R. 86-87.

In this case, Teresa timely filed a *Request for Findings of Fact and Conclusions of Law* on August 18, 2014, triggering the trial court's duty to state its own findings of fact and conclusions of law. R. 30-31. The dissolution trial on the merits was held August 18-19, 2014, and October 30, 2014. On December 5, 2014, the docket sheet reflects that Judge Thygesen filed his "*Findings of Fact and Conclusions of Law*" in the court file. R. 86-87. Though denominated as such, the trial judge's purported findings and conclusions were contained in an informal two-page letter written to counsel for the parties, on the judge's letterhead. *Id.*

In his letter, Judge Thygesen denied Teresa's request for support alimony and divided the parties' property as follows:

> **Property:**
>
> **Since the Respondent has proposed a distribution which awards a disproportionately higher amount to the Petitioner and a lesser amount to himself, the Court adopts the Respondent's proposed disposition of the property, more particularly as follows: Both parties will keep their respective retirement accounts, intact; Petitioner is awarded the residence; the Respondent is awarded the 130 and 80 acre tracts; the vehicles and farm equipment as allocated in Respondent's proposed distribution. The other personal property will be distributed as set out in Respondent's proposed distribution.**

R. 87. Taking Judge Thygesen's letter at face value, the above suggests to the reader that the trial judge believed Damon was generously proposing a distribution which would more than fairly compensate Teresa. The phrase "Since the Respondent has proposed a distribution which awards a disproportionately higher amount to the Petitioner and a lesser amount to himself" is the sum total of Judge Thygesen's reasoning and analysis set forth in the letter, with regard to property division. Put another way, Judge Thygesen found as an ultimate fact that the property division was unequal but offered nothing to support it other than an inference that Damon was more generous than Teresa.

However, Damon's proposed distribution clearly states that "[t]he marital equity is disproportionately awarded to petitioner based upon respondent's proposal and *restoration of his inherited property.*" R. 53 (emphasis added). This means Damon's proposed distribution did *not* include the value of the Warner, OK properties (the 130 acres- and 80-acres) in the marital estate, thereby leaving at least $400,000.00, (*see* Appellant's Trial Exhibit 11, appraisal), off the table and out of Judge Thygesen's property division. Judge Thygesen's letter did not state any facts or make any findings that any of the assets being "distributed" were separate in nature, or specifically adopt Damon's "Separate Property Issues" section at pages 11-13 (R. 54-56), of Damon's proposed distribution. As a result, one must assume that Judge Thygesen adopted Damon's proposed distribution *in toto*, without any changes thereto.

While the practice of adopting one party's findings is not reversible error per se, adopting findings that contain internal evidence suggesting that the judge may not have read them, *is* reversible error, if the law or facts are unsupported and cause prejudice. "A critical view of a challenged finding is appropriate where, as here, the findings of fact and conclusions of law of which it is a part were not the original product of a disinterested mind." *Flowers v. Crouch-Walker Corp*, 552 F.2d 1277, 1284 (7th Cir.1977) (citations omitted). There must be evidence in the record demonstrating that the district court exercised "independent judgment" in adopting a party's proposed findings. *Bright v. Westmoreland County*, 380 F.3d 729, 731-32 (3rd Cir.2004).

In addition to blindly adopting and relying on Damon's distribution, Judge Thygesen's letter did not divorce the parties on any grounds or determine whether many of the assets being "distributed" were marital or separate in nature. Judge Thygesen's letter actually contained very little that could be denominated a finding and there were no conclusions of law whatsoever. Finally, the Judge Thygesen's purported "findings of fact" were not set out separately from his "conclusions of law," if any, as required by 12 O.S. § 611. In sum, Judge Thygesen's December 5th letter was legally insufficient to constitute findings of fact or conclusions of law. It simply does not adequately express the basis of the trial judge's decision.

The trial court's failure to prepare findings of fact and conclusions of law in the form prescribed by 12 O.S. § 611, prejudiced Teresa. She was unable to take exception to the specific views of the trial court because the facts upon which the rights litigated depended, and the conclusions by the trial court drawn from those facts, were missing. *Coleman v. James*, 1917 OK 601, 169 P. 1064. As a result of the ensuing confusion, Teresa was forced to file motions to clarify, for new trial, for stay and to vacate. The trial court's failure to sufficiently support its determinations with written findings of fact and conclusions of law, not only thwarted the just,

speedy and inexpensive process of ligation, it constitutes reversible error. *Weavel v. US. Fidelity & Guar. Co.*, 1993 OK CIV APP 4, ¶ 29, 848 P.2d 54.

Proposition II. The trial court committed error, abused its discretion and reached an inequitable result when it misclassified some of the parties' marital property as separate property or vice versa, or did not classify it all, based only on Appellee's uncorroborated testimony, said property including but not limited to: (1) The Bank of America CD; (2) The 130-acre tract in Warner, OK; (3) The 80-acre tract in Warner, OK; (4) Funds received by Appellee in 1997, from his late mother's estate; (5) certain personal property.

And,

Proposition VI. The trial court committed error, abused its discretion and reached an inequitable result when it failed to consider that, in adopting Appellee's proposed distribution and proposed *Decree of Divorce* in *toto*, the same (1) contained minimal findings and no conclusions of law whatsoever regarding property division, the characteristics of separate vs. joint property, and the enhancement of value of separate property, if any, during the marriage; (2) lacked any quantification of any funds allegedly inherited by Appellee or tracing said alleged funds to any specific accounts/purchases; (3) was based on faulty and flawed reasoning, to wit: among other things, Appellee omitted to include the value of the Warner properties (130 acres and 80 acres) in his proposed distribution, thereby leaving at least $400,000.00 off the table; and (4) failed to consider that the personal property listed in Appellee's proposed distribution was mis-categorized as "uncontested", "contested", "inherited" or "separate property issue" based on one party's erroneous version of the facts and law.

Damon and Teresa were married on August 28, 1971. R. 1-4. From 1984, to approximately 1989 or 1990, Damon and Teresa were licensed real estate brokers, owning and operating Showcase Realtors. 8/18/14 Tr., Page 16, Lines 18-25; Page 17; Page 18, Lines 1-5. Damon testified he knew the difference between taking title in joint tenancy, as tenants in common, and as a married man holding title separately (the last until 1998) from his training as a real estate broker. 10/30/14 Tr., Page 99; Page 100, Lines 1-9:

QUESTION:	Well, first of all, sir, you and your wife had owned a real estate company; had you not?
ANSWER:	Yeah.
QUESTION:	And you were a licensed broker, were you not?
ANSWER:	Yes.
QUESTION:	And you know the difference between hold tenancy as joint tenants, don't you --

ANSWER: Yes.

QUESTION: -- and as tenants in common?
ANSWER: Yes.

****

QUESTION: ...But you knew, prior to 1998, the difference between holding title as married, holding title separately?
ANSWER: Yes.

Damon's mother died on September 1, 1997. 8/18/14 Tr., Page 48, Lines 12-13.

On February 20, 1998, the parties purchased a 130 acre tract of land located in Warner, OK. Appellant's Trial Exhibit 7, Joint Tenancy Warranty Deed. The parties hold title to this property in joint tenancy with right of survivorship. *Id.* On May 9, 2002, the parties purchased an additional 80 acres located in Warner, OK. Appellant's Trial Exhibit 8, Joint Tenancy Warranty Deed. The parties also hold title to this property in joint tenancy with right of survivorship. *Id.*

Damon testified the 130 acre- and 80-acre tracts of land are his separate property, but he never told Teresa that he considered them to he his separate property. 8/18/14 Tr., Page 53, Lines 17-25; Page 54, Lines 1-7. Teresa testified she first heard Damon claimed these properties as separate, at his deposition, after she filed for dissolution of marriage. 8/18/14 Tr., Page 199, Lines 14-22; Page 203, Lines 20-25; Page 204, Lines 1-23.

Damon testified he used funds inherited from his mother to purchase the 130 acre tract in Warner in 1998. 8/18/14 Tr., Page 54, Lines 8-15. Damon further testified that he only put Teresa's name on the deed because and employee of the closing company advised him to do so. 8/18/14 Tr., Page 59, Lines 4-19; Page 60, Lines 23-25; Page 61, Lines 1-3. However, the contract to purchase the land dated January 24, 1998 – a month *before* closing – stated title would be taken in the names of Damon L. Drake *and* Teresa D. Drake. Appellant's Trial Exhibit 11, Bate Stamp Page 84; 8/18/14 Tr., Page 62; Page 63; Page 64, Lines 1-14. The contract was

signed by Damon without Teresa even being present. 8/18/14 Tr., Page 60, Lines 11-12. Further, Damon through counsel, filed a Trial Brief identifying the title company employee at Jenny Thunder and stating Ms. Thunder was unwilling to come from Tennessee to Oklahoma to testify. R. 32-36. Damon argued in his brief that what Ms. Thunder said at the closing that caused him to agree to put the 130 acres in joint tenancy, was not hearsay. *Id.* However when Teresa's counsel located Ms. Thunder, and sought to have an affidavit from Ms. Thunder introduced into evidence which stated that Ms. Thunder would never have explained/advised any client regarding how to take title, Damon objected. 10/30/14 Tr., Page 118, Lines 23-25; Pages 119-121; Page 122, Lines 1-5. Judge Thygesen refused to allow admission of Jenny Thunder's Affidavit, but directed Teresa's counsel to mark it as a Court Exhibit pertaining to her counsel's "offer of proof." *Id.* at Lines 6-10. After filing his Trial Brief, Damon admitted on the stand he didn't know who at the real estate company told him that. 81/8/14 Tr., Page 58, Lines 4-11.

Damon also testified he used funds derived from the sale of a café he received as part of his inheritance from his mother, to purchase the 80 acre tract in Warner in 2002. 8/18/14 Tr., Page 64, Lines 23-25. Teresa produced a HUD-1 settlement statement showing the parties took out a loan with Armstrong Bank to purchase the 80 acres. Appellant's Trial Exhibit 10. The Mortgage signed by the parties for the 80 acres was admitted at trial as Appellant's Trial Exhibit 9. Damon testified that he had to put Teresa's name on the deed in order to borrow money to buy the 80 acres, but insisted at trial the mortgage was only in existence for a matter of months because he paid it off in full, when he sold the café. 8/18/14 Tr., Page 64, Lines 15-25; Page 65, Lines 1-14. Teresa produced the parties' 2005 tax return which reflects that the sale of the café occurred on May 20, 2005, or 3 years after the purchase of the 80 acre tract in Warner in 2002. Appellant's Trial Exhibit 48, Bate Stamp Page 787. Their 2002 tax return confirms they still

owned the café and received café rents in 2002, the year they purchased the 80 acres. Appellant's Trial Exhibit 51, Bate Stamp Page 921. Damon's recall was clearly incorrect and unreliable.

Damon admitted on the stand there was no evidence he intended for the property to be his separate property:

QUESTION:	So in the 10 years since you acquired both those pieces of property, up until the date this divorce was filed, have you had any discussions with my client that these properties were claimed by you as separate, ever?
ANSWER:	No.
QUESTION:	Have you had any conversations with anyone at all, prior to this divorce being filed, that these properties were claimed by you as separate?
ANSWER:	Yes.
QUESTION:	Who?
ANSWER:	Well, it would be hearsay. All my friends.
QUESTION:	All your friends" All – did you –
ANSWER:	Breakfast buddies.
QUESTION:	Did you bring anybody here to testify to that?
ANSWER:	No.
MR. HAYES:	To which I'm going to object as being irrelevant. I mean, why would you bring someone you eat breakfast with to –
THE COURT:	Yeah. Sustained.
QUESTION:	(By Mr. Gotwals) Sir, is there any evidence other than your unilateral statement, that you intended for this property to be your separate property?
ANSWER:	No.

Not subject to equitable division, separate property is that which is acquired before a marriage or after separation of the parties. The term includes inheritances and gifts, as well as property traceable to separate property. *In the Matter of the Estate of Hardaway*, 1994 OK 30, ¶9, 872 P.2d 395. "Separate property includes, *inter alio* property owned by a spouse before marriage, which retains its separate status during coverture because it is maintained in an uncommingled state as a spouse's individual property," *Thielenhaus v. Thielenhaus*, 1995 OK 5, ¶9, 890 P.2d 925, i.e., in a state that would allow tracing of the funds back to a separate source.

"It has long been the rule in Oklahoma that when spouses own property in joint tenancy,

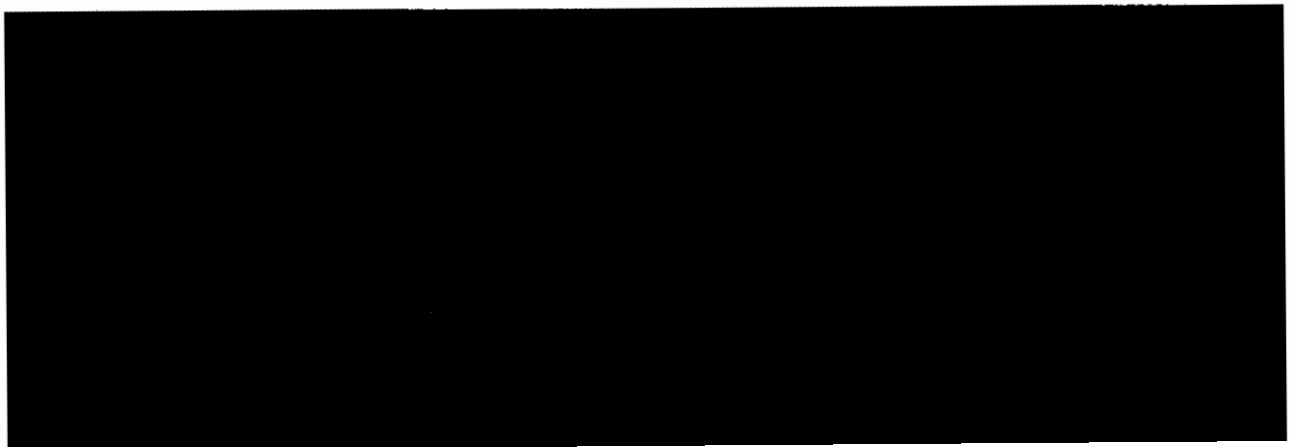
regardless of the source of the funds used for purchasing the property, a gift of the property to the marital estate is presumed." *Bartlett v. Bartlett*, 2006 OK CIV APP 112, ¶7, 144 P.3d 173 (citation omitted). "The party [here, Damon] seeking to rebut that presumption must present clear and convincing evidence that no gift was intended. *Id.* (citing *Chastain v. Posey*, 1983 OK 46, 665 P.2d 1179). This holding has been clarified "to require a party seeking to rebut the gift presumption to present clear and convincing evidence of a purpose for placing the property in joint tenancy which is collateral to intending a gift." *Larman v. Larman*, 1999 OK 83, ¶9, 991 P.2d 536. "'The presumption that property held in joint tenancy form is marital property is a strong one, which can only be overcome by clear and convincing evidence. A presumption may be attacked by the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact; where the presumption is a strong one, the weight of the evidence to rebut it must be great.'" *Id.* at ¶ 8.

In this case, the record contains *no* evidence other than his own testimony, that Damon used funds alleged to have been inherited from his mother to purchase the 130- and 80-acre tracts, as alleged by Damon in his Trial Brief and as testified to by him at trial. In fact, Damon did not produce a single sheet of paper tracing his alleged separate property funds to the property acquired during marriage. Damon presented no evidence beyond his own uncorroborated testimony concerning the funds he received from his mother's estate when she passed away in 1997. He not only failed to quantify these funds, he also failed to trace these funds to any specific accounts, and failed to trace the alleged separate funds to any specific purchases. Instead, he simply testified that he believed certain items of both real and personal property acquired during the marriage came from his inheritance. Teresa asserts Damon's "self serving testimony" that he had no donative intent to make a gift should not have been relied upon by the

trial judge in making its decision.

In *Crocker v. Crocker*, 2003 OK CIV APP 58, 72 P.3d 65, the wife used her separate assets to purchase a ranch which she directed to be placed in joint tenancy. At trial, she testified that she did not intend to make a gift. The trial court agreed and another Court of Civil Appeals (the "COCA") division reversed. The Court noted that in the *Larman* case, the wife did not understand the legal consequences of joint tenancy; the lender insisted upon joint tenancy in order to refinance; and the husband admitted the wife had never told him she was making a gift. The Court in *Crocker* noted that, in contrast to *Larman*, the wife had experience and "knew what she was doing" when she instructed an attorney to place the property in joint tenancy. *Crocker* at ¶14. The Court held there was no evidence rebutting the presumption of a gift beyond *the wife's own statement*, which if conclusive, would make the presumption meaningless. *Id.* at ¶15.

In the *Bartlett* case, the COCA reversed a finding that a house bought with the husband's separate funds was his separate property. The Court cited *Larman* for the principle that the presumption of a gift could be rebutted by clear and convincing evidence of a "collateral purpose" for placing the property in joint tenancy, and held the husband had failed to present such evidence. *Bartlett* at ¶7. The Court held that the husband's transfer of other properties for estate planning or tax-avoidance purposes did not rebut the presumption of a gift, especially since a "gift" was exactly what the parties' tax strategy required them to do. *Id.* at ¶20. The COCA pointed out that some states have held that a creditor's insistence that property be taken in joint title does not rebut a presumption of a gift, because the change is done deliberately, regardless of reason. *Id.* at ¶19. The Court distinguished the *Larman* lender's requirement of a "legal fiction" of joint ownership from a conveyance of joint tenancy through what in fact is a gift. *Id.* at ¶22.



Both *Crocker* and *Larman* stand for the principle that if one spouse has caused his or her separate property to be transferred to both spouses jointly, **mere self-serving testimony that it was not intended as a gift is entitled to little weight**. Here Damon's only testimony about his intent at the time each Warner property was initially purchased, was that he never intended a gift. Damon agreed he had treated the properties as marital property until the time of trial. From his real estate broker experience, Damon knew what the legal consequences of joint tenancy. He produced no evidence other than his testimony, that the properties were placed in joint tenancy for any reason other than a gift. As to the 130 acres, he testified that an employee of the title company advised him he had to put it in joint tenancy to avoid probate. Tr. 10/30/14, Page 62, Lines 4-25; Page 63, Lines 1-5. The *Bartlett* case holds that transfers of properties for purposes of estate planning or to avoid probate or taxes do not rebut the presumption of a gift, especially since a "gift" was exactly what the parties' tax strategy required them to do. *Bartlett* at ¶20. As to the 80 acres, Damon testified he had to put Teresa's name on the deed to obtain financing, and that he used marital funds to pay for the 80 acres for a two year period but conveniently did not recall the amount of the payments or if he paid anything on the principal. 10/30/14 Tr., Page 64, Lines 3-25; Page 65, Lines 1-18. None of these facts support a finding by clear and convincing evidence that a collateral purpose existed at the time the two Warner tracts were acquired. Damon's testimony was simply not credible and unsupported by the evidence in the record.

Damon further admitted that he had no evidence that the "CD" allegedly consisting of funds leftover after the sale of his mother's café were ever held in his name alone. 10/30/14 Tr., Page 74, Lines 1-21. Teresa introduced evidence that the CD was held jointly. *See* Appellant's Trial Exhibit 20; 8/18/14 Tr., Page 183, Lines 14-25; Page 184, Lines 1-17. Damon once again demonstrated that his recall was incorrect and unreliable; he stated Teresa nagged him from 2004

until 2007, until he finally put her name on the CD. 10/30/14 Tr., Page 75, Lines 4-25; Page 76, Lines 1-3. As pointed out before, the café was sold in May 2005. Appellant's Trial Exhibit 48, Bate Stamp Page 787. This couldn't have happened as he testified.

More importantly, the trial court did not address this issue and make an affirmative determination in its findings of fact and conclusions of law, as to whether Damon gifted the 130- and 80-acre Warner properties held in JTROS, to the marital estate and whether he rebutted the presumption of a gift through clear and convincing evidence of a collateral purpose for placing the properties in joint tenancy. Nor did the trial court make an affirmative finding that the CD was Damon's separate property. Accordingly, the April 13, 2015, decree of divorce should be reversed and the matter remanded to the trial court with specific instructions for further proceedings.

In sum, when maintained in an uncommingled state, separate property funds can always be traced to the property acquired during marriage to overcome the presumption of marital property. A husband's conduct evidencing joint ownership simply cannot be overcome by the mere unsubstantiated claim – raised for the first time during a dissolution proceeding – that he never intended a gift to the wife at the time of conveyance. *Bartlett* at ¶8. Damon's self-serving statements (over 16 years after the 130-acre Warner property and over 12 years after the 80-acre Warner property were acquired in joint tenancy), concerning the lack of donative intent, without more, are insufficient to rebut the presumption of interspousal gift. *See, e.g., Bartlett* at ¶9; *Crocker* at ¶15. Moreover, the trial judge utterly failed to provide findings of fact sufficient to support its conclusion of law, if any, with regard to its division or "distribution" of property in all respects. Together, Damon's failure to meet his burden and the trial court's faulty findings of fact and conclusions of law rendered the division of the marital estate inequitable enough so as to

warrant appellate intervention.

Proposition III. The trial court committed error, abused its discretion and reached an inequitable result with regard to its determination of the value of the marital assets and liabilities and the division of the marital estate between the parties, to wit: it misvalued all marital property and committed both mathematical and judgmental errors in its award to Appellant.

Judge Thygesen's reason for adopting Damon's proposed distribution of property was that "Respondent has proposed a distribution which awards a disproportionately higher amount to the Petitioner and a lesser amount to himself." R. 86-87. However, the only reason Damon's distribution appeared so generous was that Damon omitted to include the two Warner properties in his proposed distribution of marital property. According to Daman's Trial Exhibits 2 and 3, they are worth a combined $354,000.00. According to Teresa's Trial Exhibit 12, they are worth a combined $400,000.00.

Division of property in a divorce proceeding is an equitable matter and will be reversed on appeal only if it is determined that the trial court abused its discretion. *Primrose v. Primrose*, 1983 OK CIV APP 22, 663 P.2d 755. Furthermore, the courts must look at the overall division in determining whether a division of property is equitable, and a division of property need not be equal in order to be equitable. *Id.* at 9. The division of property need not be equal, just fair and equitable. *Larman v. Larman*, 1999 OK 83, ¶17, 991 P.2d 536.

In this case, by Damon's math, it appeared that Teresa received $580,949.00 or 63%, in property division while he only received $347,973.00 or 37%, for a total "marital" estate of $928,922.00. Due to blatant mathematical and judgment errors, Damon actually received a net amount of $747,973.00 or 56% in property following the divorce, including the two Warner properties, while Teresa only received $580,949.00 or 44%, for a total marital estate of $1,328,922.00. The two Warner properties that were held in joint tenancy constitute 30% of

their marital estate.

The trial court's adoption of Damon's proposed distribution of property was therefore based on faulty and flawed reasoning, and given the actual percentage of marital estate consisting of the two Warner properties, rendered the division of the marital estate inequitable enough so as to warrant appellate intervention. Since Damon did not meet his burden to rebut the presumption of a gift through clear and convincing evidence of a collateral purpose for placing the properties in joint tenancy, *Larman at* ¶9, and the trial judge failed to provide findings of fact sufficient to support its conclusion of law, if any, with regard to its division or "distribution" of property in all respects, 12 O.S. 611, this issue needs to be reversed and remanded with instructions.

Proposition IV. The trial court committed error, abused its discretion and reached an inequitable result with regard to its division of the parties' personal property when failed to consider that certain personal property listed in Appellee's proposed findings of fact and conclusions of law included items gifted to/owned prior to the marriage by Appellant.

"In deciding divorce cases this Court has construed separate property to mean: (1) property owned by a spouse prior to the marriage, which retained its separate status during the marriage because it was maintained as separate property, (2) *gifts to one spouse from a third-party during the marriage and gifts from one spouse to the other spouse, during the marriage*, (3) descents or devises to one spouse during the marriage, maintained as separate property, (4) an exchange, during the marriage, of property in which the owning spouse exchanges separate property for other separate property, (5) the owning spouse's purchase of other property with his/her separate funds during the marriage, (6) compensation received by one spouse for personal injury. *In the Matter of the Estate of Hardaway*, 1994 OK 30, ¶9, 872 P.2d 395 (citations omitted) (emphasis added).

In this case, the trial court utterly failed to provide findings of fact sufficient to support its conclusion of law, if any, with regard to its division or "distribution" of personal property in all

respects. It failed to consider that Damon's allocation of the "personal property" – contained in Damon's proposed findings of fact and conclusions of law – contained categories denominated "Uncontested Marital Property", "Contested Marital Property", "Inherited Personal Property", and "Separate Property Issues". R. 44-57. The wholesale adoption of Damon's obviously flawed proposed distribution created confusion and lacked the clarity that trial court's own written findings of fact and conclusions of law would have brought to the process.

For example, the Woman's saddle and tack listed by Damon and apparently awarded to Damon, was given to Teresa by her father for her 13th birthday. *Id.* Damon's allocation of the "personal property" – contained in his proposed findings of fact and conclusions of law – generally included items gifted to or owned by Teresa, including but not limited to: the 1998 Jeep; the Trailer (referred to as the car hauler); the Polaris 4-wheeler; and the Roll-top desk. *Id.*

43 O.S. § 121(B) directs the trial court to "enter its decree confirming in each spouse the property owned by him or her before marriage and the undisposed-of property acquired after marriage by him or her in his or her own right." "The gift of property to a spouse during marriage is considered separate property of such spouse and upon divorce it cannot be considered as having been acquired by the joint industry, or efforts of the parties to the subject marriage." *Mothershed v. Mothershed*, 1985 OK 23, ¶13, 701 P.2d 405. The evidence shows Damon requested all the disputed items, but some of them were Teresa's separate property and not subject to distribution as part of the marital estate. *Sien v. Sien*, 1994 OK CIV APP 159, n.2, 889 P.2d 1268. As such the trial court erred as a matter of law in awarding Damon items of personal property which were Teresa's separate property.

Proposition V. The trial court committed error, abused its discretion and reached an inequitable result with regard to its finding that Appellant is not entitled to an award of support alimony, when it (1) made no findings or conclusions of law regarding Appellant's need or Appellee's ability to pay, (2) gave no consideration to the myriad factors identified

by the Oklahoma Supreme Court that the trial court may consider in awarding alimony and (3) wholly disregard testimony evidence of Appellee's lucrative gambling habit and new business formed post-separation and other critical factors.

Unlike child support, there is no state requirement for spousal support and the calculation of support alimony in Oklahoma does not proceed according to strict guidelines or formulas. Support alimony is awarded at the discretion of the Trial Court based on many factors. *See, e.g., Peyravy v. Peyravy*, 2003 OK 92, ¶14, 84 P.3d 720; *Bowman v. Bowman*, 1981 OK CIV APP 71, n.8, 639 P.2d 1257, (approved for publication by the Oklahoma Supreme Court); and *Agent v. Agent*, 1979 OK CIV APP 62, &19, 604 P.2d 862.

In the case below, the trial court failed to provide findings of fact and conclusions of law sufficient to support its decision that Teresa is not entitled to support alimony in all respects. In *Peyravy v. Peyravy*, 2003 OK 92, ¶14, 84 P.3d 720, this Court held:

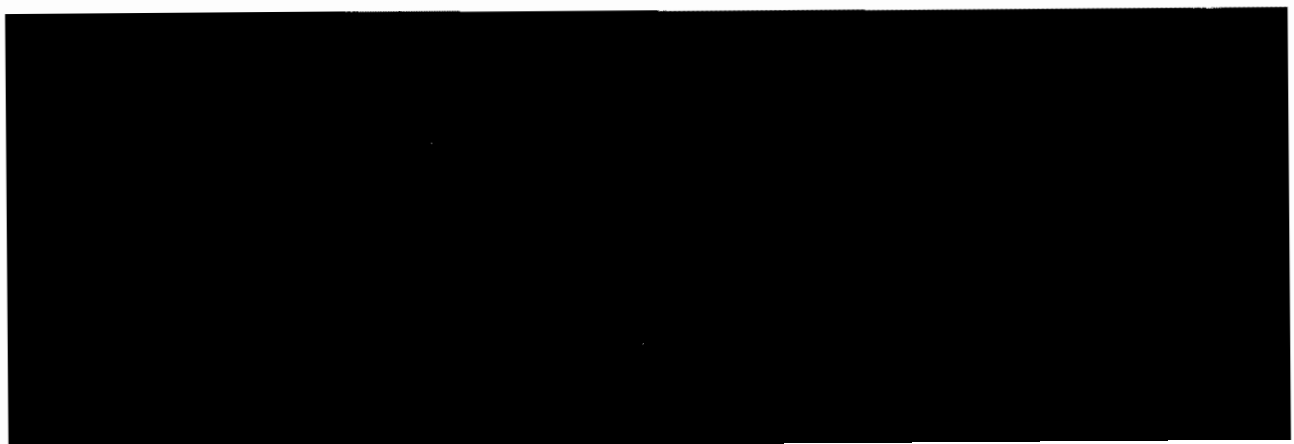
> "Ability to pay is not the sole criterion for an award of alimony. Support alimony is awarded based on the recipient's demonstrated need. A consideration of appropriate factors to base support alimony include: demonstrated need during the post-matrimonial economic readjustment period; the parties' station in life; the length of the marriage and the ages of the parties; the earning capacity of each spouse; the parties' physical condition and financial means; the mode of living to which each spouse has become accustomed during the marriage; and evidence of a spouse's own income-producing capacity and the time necessary to make the transition for self-support.") (citations omitted).

In the absence of any findings or conclusions of law regarding Teresa's need or Damon's ability to pay, it is impossible to determine if any consideration was given to the myriad factors that have been identified by the Oklahoma Supreme Court when awarding alimony.

Damon's contentions that Teresa had no "need" did not factor in that Teresa's recent income was aberrationally high due to overtime she was working (8/18/14 Tr. Page 163, Lines 4-17; 8/19/14 Tr., Page 91, Lines 2-11), that she wanted to retire (8/19/14 Tr., Page 24, Lines 4-9), that her expenses would be increasing due to her assumption of all expenses paid by Damon

during the pendency of the action (by his testimony, nearly $2,000.00, per month), that she had no extra money (8/19/14 Tr., Page 94, Lines 21-25; Page 95, Lines 1-14), and that she would also be responsible for the debt on the time shares and other obligations that she did not have to pay during the pendency of the action(8/19/14 Tr., Page 20, Lines 8-14). Almost as important, Teresa testified she had life-style needs emanating from her 43-year marriage to Damon, and Damon earns more than 1 ½ times what Teresa is capable of earning. 8/19/14 Tr. Pages 24-25. Damon has income from other sources (8/18/14 Tr., Page 13, Lines 12-25; Page 14, Lines 1-5; Page 14, Lines 10-21; Page 14, Lines 24-25; Page 15, Lines 1-10) as well as a lucrative gambling habit (8/18/14 Tr., Page 38, Lines 1-25; Pages 39-40; Page 41, Lines 1-12) and formed a new business post-separation (8/18/14 Tr., Page 43, Lines 16-25; Pages 44-45; Page 46, Lines 1-14), evidence of which the trial court chose to ignore. Pursuant to these facts – Teresa's station in life (she is 62 years old and while gainfully employed, does not have a college degree (8/18/14 Tr. Page 154, Lines 23-25)), her earning capacity contrasted with Damon's, and her average monthly expenses – Teresa demonstrated that she has a need for support alimony and that Damon has an ability to pay.

In *Ray v. Ray*, 2006 OK 30, 136 P.3d 634, the Oklahoma Supreme Court was clear that "Oklahoma's extant jurisprudence defines support alimony as a need-based concept." *Ray* at ¶10. "Demonstrated need is established by the totality of proof of the obligee's financial condition." *Id.* (emphasis added). "The seeker of support alimony carries the burden of affirmatively demonstrating the need for excess funds to cushion the economic transition from marital dependency to employment." *Id.* at ¶11. *Ray* is clear that ability to pay is a limiting factor that may reduce an otherwise justified award, but not a "primary" or independent basis for calculating demonstrated need. However, while support alimony is intended as a transitional measure to



cushion the change between lifestyles caused by divorce and Teresa will have to downsize her lifestyle after divorce, the trial court's failure to award any support alimony whatsoever creates a substantial and sudden decline in Teresa's living standard and does not "cushion" in the manner intended by *Ray*. The amount the trial court believed Teresa to have received – $40,000.00 in the form of the CD at $22,400.00 and $19,000.00 in alimony already paid – is simply insufficient to provide her the necessary opportunity for post-marital economic readjustment, particularly given the length of the marriage (43 years at the time of trial), the age of the parties, the ability of the husband to pay, the needs of the wife for living expenses and her current income potential. It was an abuse of discretion to not award support alimony in this case.

Once again, however, there is little that can be denominated a finding and there are no conclusions of law whatsoever regarding Teresa's need and Damon's ability to pay or the other *Bowman* factors, which would support the trial court's decision to not award support alimony to Teresa.

Proposition VII. The trial court committed error and abused its discretion when it committed errors in procedure, including but not limited to, allowing Appellee to testify as to hearsay statements and precluding Appellant from submitting an affidavit to controvert Appellee's statement and impeach him on the critical fact of whether anything was said at all at the closing on the 130 acre tract in Warner relating to how title to that property should be taken, which grossly affected the substantial rights of the Appellant.

The admission or exclusion of evidence constitutes a matter addressed to the sound discretion of the trial court, which commits no abuse of discretion in refusing to admit speculative, potentially confusing or cumulative evidence. *Cities Service Co. v. Gulf Oil Corp.*, 1999 OK 14, ¶46, 980 P.2d 116; *State ex rel. Dept. of Public Safety v. 1988 Chevrolet Pickup VIN No. 1GCDC14K8JZ323, OK Tag No. GFX19*, 1993 OK CIV APP 6, ¶8, 852 P.2d 786. Before the appellate courts will intervene, "there must be a strong showing of prejudice to the proponent, or a breach of his fundamental rights." *American Biomedical Group, Inc. v. Norman*

Regional Hosp. Authority, 1993 OK CIV APP 83, ¶30, 855 P.2d 1074. Furthermore, requests to reopen cases for introduction of additional evidence is addressed to sound discretion of trial court, and its ruling will not be disturbed on appeal unless it clearly appears that trial court abused its discretion. *In re Guardianship of Durnell*, 1967 OK 62, ¶9, 434 P.2d 905. In other words, a "trial judge is responsible for the just outcome of a trial and has broad discretion in its conduct, so unless it appears that a trial court has abused its discretion in reaching a decision, its ruling will not be reversed." *Cities Service Co.*, 1999 OK 14, ¶43, 980 P.2d 116.

In this case, the evidence sought to be elicited [in the form of Jenny Thunder's Affidavit] went to the every essence of Daman's testimony, to wit: that he was advised by an employee of the title company to put the 130-acre Warner property in joint tenancy with right of survivorship, to avoid probate. The trial judge's refusal to admit this affidavit resulted in a miscarriage of justice or a substantial violation of the appellant's rights. *Jordan v. Cates*, 1997 OK 9, ¶17, 935 P.2d 289. 12 O.S § 2104(A).

Teresa's counsel made a proper offer of proof of the excluded evidence, to wit: that Ms. Thunder if allowed to testify, would state to the contrary of Daman's evidence that: "At no time did I ever explain any documents to anyone or advise anyone on how to take title to property." 10/30/14 Tr., Page 120, Lines 17-22. Teresa's counsel explicitly demonstrated in his offer of proof how the trial court's ruling prejudiced the outcome of the trial: "That goes to the very essence of what this man's testimony was, that he heard from someone there...But it's – you know, for the truth of the matter asserted, that it was even said, she's refuting the fact that it was even said...there has been no testimony, whatsoever, short of this man's testimony, as to what occurred at that closing 16 years ago." *Id.* at Lines 21-22; Page 121, Lines 20-22; and Page 122, Lines 14-16. This is an adequate prima facie showing that Daman was never told he should put

the properties into joint tenancy by Jenny Thunder, and it was error to preclude Ms. Thunder's affidavit.

Proposition VIII. The trial court committed error, abused its discretion and reached an inequitable result when it failed to find that it is just and proper under the circumstances for Appellee to pay all or part of Appellant's fees and costs due to the balancing of the equities, frivolous claims or defenses and vexatious litigation associated with this action.

Under the "American rule," attorney fees are not recoverable unless expressly allowed by statute, contract, or common-law exception. *City Nat'l Bank & Trust Co. v. Owens*, 1977 OK 86, ¶¶11-12, 565 P.2d 4. In Oklahoma domestic relations cases, the statutes and cases permit an award of fees based upon a review the totality of the circumstances, based on equity, and what appears just and equitable. Also, conduct-based awards of attorney fees are authorized by both statute, 43 O.S. § 110, and the common-law exception for bad faith litigation conduct under *Sicking v. Sicking*, 2000 OK CIV APP 32, ¶24, 996 P.2d 471, *Gardner v. Gardner*, 1981 OK CIV APP 9, 629 P.2d 1283, *Finger v. Finger*, 1996 OK CIV APP 91, 923 P.2d 1195, and other cases. In the instant case, Teresa's entitlement to fees stem from both 43 O.S. § 110, *equity*, what is just and proper under the circumstances, and the fact that Teresa was forced to incur some fees as a result of the Damon's conduct during the course of the litigation.

Under § 110, attorney fees and costs may be assessed by the trial court "as may be just and proper under the circumstances" (43 O.S. § 110(D)). Attorney fee allowances in marital disputes do not depend on any one factor but are granted to those litigants who qualify through the process of a "judicial balancing of the equities." *Thielenhaus v. Thielenhaus*, 1995 OK 5, ¶19, 890 P.2d 925 (emphasis omitted.) When considering what is just and proper under the circumstances, the court in the exercise of its discretion should consider the totality of circumstances including, but not limited to, whether either party unnecessarily complicated or delayed the proceedings, or made the subsequent litigation more vexatious than it needed to be;

and finally, the means and property of the respective parties. *Finger v. Finger*, 1996 OK CIV APP 91, &4, 923 P.2d 1195. *Sicking v. Sicking*, 2000 OK CIV APP 32, ¶24, 996 P.2d 471. In that event, the offending party may be surcharged to the extent this has occurred. Fees never depend upon one's status as prevailing party. *Stork v. Stork*, 1995 OK 61, 898 P.2d 732. The *Burk* criteria are the standard by which our courts test the reasonableness of attorney fee awards. *In re Adoption of Baby Boy A*, 2010 OK 39, ¶19, 236 P.3d 116.

In the instant case, the disparity in the means and property of the parties is clear. Teresa presented evidence at trial that her and Damon's respective W-2's reflected income as follows:

Year	Damon's Income	Teresa's Income	Difference
2005	$116,593.00	$65,116.00	$51,477.00
2006	$121,864.00	$69,783.00	$52,081.00
2007	$118,864.00	$70,061.00	$48,803.00
2008	Not Available	Not Available	
2009	Not Available	Not Available	
2010	$132,598.00	$78,729.00	$53,869.00
2011	Not Available	Not Available	
2012	$125,484.00	$79,263.00	$46,221.00
2013	$138,615.00	$92,241.00	$46,374.00
Total	**$754,018.00**	**$455,193.00**	**$298,825.00**

Appellant's Trial Exhibits 39-48. Per the above chart, Damon's average W-2 income (over 6 years) is $125,670.00, while Teresa's is $75,866.00. Clearly, even without including ***any*** of the income Damon receives from selling cattle, gambling, or the liquidation of retirement funds, he has always earned considerably more than Teresa. Even in her best year (2013) wherein she had extensive overtime, she earned only two thirds of what Damon did. On average for the other years she earned 59% of what Damon earned. Stated another way, Teresa has earned less than 38% of the parties' income and Damon has earned more than 62% of their W-2 income (not counting any Gambling winnings, expense reimbursements or income from the cattle or farming operations). Teresa has no source of income other than her W-2 wages, (8/18/14 Tr., Page 191,

Lines 11-15), certainly nothing like Damon has testified to at trial concerning his current income from farming and his new business ventures. Considering the means of each party, and their respective future earning potential, it was inequitable not to require Damon to pay at least a portion of Teresa's fees.

Not only are Damon's income and earning potential superior to Teresa's, he was also awarded a substantial amount of property that he did not have to share with Teresa, to wit: Damon received the two Warner properties in the Court's final distribution of property, which even at his proposed values, are worth a combined $354,000.00.

In addition to the substantial disparity in income and property between the parties, the following demonstrates that Damon actively created most all of Teresa's attorney's fees and costs totaling **$66,246.57,** which were needlessly incurred. *See* R. 234-242.

- Teresa did not find out until *after the divorce was filed* that Damon had gambled extensively during their marriage and had hidden it from her. An inordinate amount of time was spent in discovery/deposition tracing the amount of marital funds spent by Damon gambling. He kept no records even though his gambling continued during the dissolution proceedings which made the process more difficult and expensive.

- Damon did not affirmatively take the position that the Warner properties were his separate property until February of 2014. The parties litigated for over a year, with Damon taking inconsistent positions on whether he considered the properties to be separate, and what the source of funds was that was used to purchase the properties.

- Damon attempted to introduce hearsay testimony of Jenny Thunder on the eve of trial which caused Teresa to incur unnecessary expense. Jenny Thunder was the closing agent who allegedly handled the closing on the Warner farm and *allegedly* advised Damon that he had to take title in joint tenancy. Damon's counsel provided notice of his intent to introduce hearsay testimony concerning the transaction on the basis that Ms. Thunder could not be located. However, Teresa's counsel was able to easily locate Ms. Thunder in Tennessee within hours of receiving Damon's hearsay notice, spoke with her, and advised Damon's counsel that her proposed testimony would be much different than what was alleged by Damon. Damon then sought to elicit inadmissible and irrelevant evidence from the Muskogee title manager about policies and procedures that were not probative of any issue before the Court.

- Damon did not litigate in good faith. Damon did not present any evidence, other than

his own uncorroborated testimony, that the cash money in the safe was inherited.

- Damon did not present any evidence, other than his own uncorroborated testimony, explaining why he chose to put the Warner properties in joint tenancy.

- Damon did not litigate in good faith. Damon did not present any evidence, other than his own uncorroborated testimony that Warner properties were purchased with inherited money.

- Damon was not credible in his testimony. At trial he admitted he intentionally hid his gambling from Teresa, and that he forged her signature on tax returns for years to keep her from discovering his gambling. It was necessary to obtain the testimony of the parties' accountant as well as Teresa's files from the accountant, to provide evidence of Damon's fraudulent acts to the court.

- A hearing on the Motions to Settle Journal Entry (R. 111-128 and R. 143-160) was necessary because Damon's drafts of the Decree contained numerous provisions, extra information, and legal argument that were not contained in the Court's Decision. By including such, Damon thwarted the just, speedy and inexpensive process of litigation in this matter, to which Teresa was entitled.

Throughout this matter Damon was not been required to pay for, nor did he pay for ANY of, Teresa's fees or costs. The trial court erred in not awarding Teresa some or all of her attorney's fees and costs.

Proposition IX. That although the trial court conducted a *Burk* hearing, it committed error, abused its discretion and reached an inequitable result by summarily denying Appellant's application for fees.

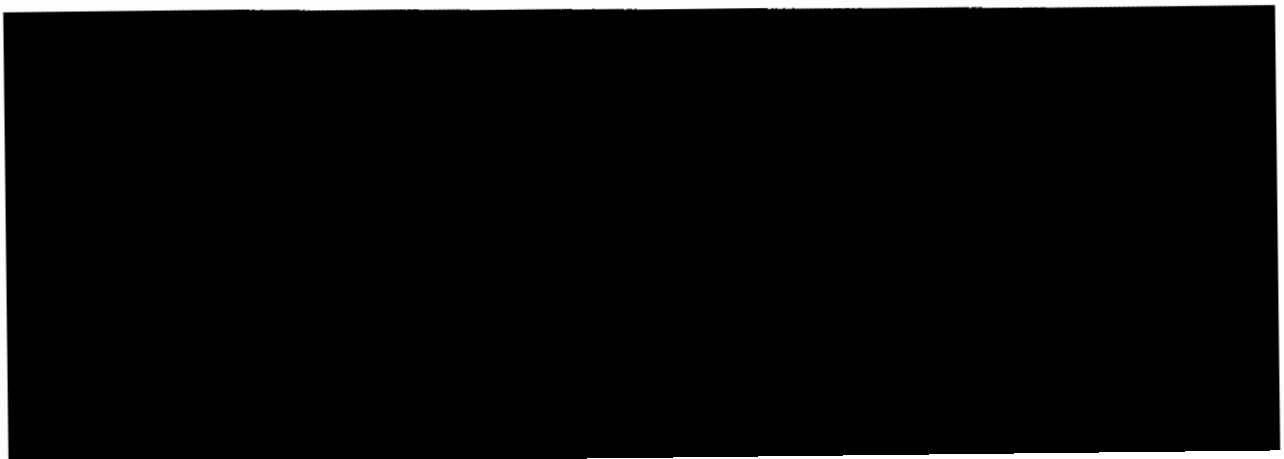
A. In its Order denying attorney's fees the trial court did not "set forth with specificity the facts, and computation" supporting how it arrived at its award. *See State ex rel Burk v. City of Oklahoma City*, 1979 OK 115, ¶22, 598 P.2d 659.

Lawyers seeking an award of attorney fees are required to "present detailed time records to the court and to offer evidence of the reasonable value for the services preformed, predicated on the standards within the local legal community." *Greenbay Packaging v. Preferred Packaging*, 1996 OK 121, 932 P.2d 1091. The criteria for calculation of fees are set out in *Burk*. Counsel for Teresa presented the attorney fee request in conformity with this rule.

In order to reach a decision regarding what will be a reasonable sum to award, the trial court, after conducting a *Burk* hearing, must specifically state in the record the basis and calculation for its determination that the fee awarded is reasonable. *Greenbay Packaging v. Preferred Packaging*, 1996 OK 121, 932 P.2d 1091. The final calculation of the compensatory fee must bear some reasonable relationship to the amount in controversy. *Arkoma Gas Company v. Otis Engineering Corp.*, 1993 OK 27, 849 P.2d 392; *Southwestern Bell Telephone Co. v. Parker Pest Control, Inc.*, 1987 OK 16, 737 P.2d 1186. Here, Teresa alleged Damon's arbitrary, capricious and/or bad faith in the trial court entitled her to fees; in denying Teresa's motion for attorney's fees and costs, the trial court tacitly rejected evidence of Damon's bad faith litigation conduct. In its Order denying attorney's fees the trial court did not "set forth with specificity the facts, and computation" supporting how it arrived at its award. *See State ex rel Burk v. City of Oklahoma City*, 1979 OK 115, ¶22, 598 P.2d 659.

B. Failure to follow the *Burk* directives and to award attorney fees consistent with the evidence constitutes an abuse of discretion requiring reversal. *Spencer v. Okla. Gas & Elec. Co.*, 2007 OK 76, ¶13, 171 P.3d 890.

Although the right to recover attorney's fees in this case is created by statute, the Oklahoma Supreme Court has imposed a requirement that trial courts apply the factors set out in *Burk* and *Finger* as a basis of evaluating the amount of attorney's fees to award. When a trial judge, as here, does not make any findings of fact justifying his decision on fees, this Court is unable to discern exactly on what basis the trial court did so. Even if one assumes for the sake of argument that the perfunctory hearing conducted on June 25, 2015 by Judge Thygesen constituted a *Burk* hearing, his Order denying attorney's fees did not "set forth with specificity the facts, and computation" supporting how it arrived at its award. *See Burk* at ¶2. Failure to follow the *Burk* directives and to award attorney fees consistent with the evidence constitutes an



abuse of discretion requiring reversal. *Spencer v. Okla. Gas & Elec. Co.*, 2007 OK 76, ¶13, 171 P.3d 890.

APPELLANT'S REQUEST FOR APPEAL-RELATED FEES

Pursuant to 12 O.S. § 696.4(C) and Oklahoma Supreme Court Rule 1.14(b), Appellant requests appeal-related counsel fees. Whenever there is statutory authority to award attorney fees in the trial of a matter, additional fees may be allowed (to the prevailing party) for legal services rendered in the appellate court. *Sisney v. Smalley*, 1984 OK 70, ¶20, 690 P.2d 1048. Just as an award in the lower court divorce proceedings is subject to a judicial balancing of the equities, so is an award of appeal-related attorney fees. *Hickman v. Hickman*, 1997 OK 49, ¶15, 937 P.2d 85 (quoting *Thielenhaus v. Thielenhaus*, 1995 OK 5, 890 P.2d 925). *See also, Chacon v. Chacon*, 2012 OK CIV APP 2, ¶60, 275 P.3d 943.

In this case, Damon adopted unreasonable positions with regard to the separate nature of the Warner properties, he forged Teresa's signatures on tax returns to conceal his gambling habit, and he unduly exacerbated the amount of time involved in settling the journal entry. Accordingly – and legally and equitably and under the totality of circumstances described herein – Teresa should be awarded her appeal-related attorney fees in this case based on Damon's conduct of the litigation.

WHEREFORE, for all of the above and foregoing reasons Appellant [redacted] prays this Court reverse the lower court's decision and remand this matter to the trial court with instructions, vacate the *Decree of Divorce and Dissolution of Marriage* entered December 5, 2014, filed April 13, 2015, as requested above, and enter an order granting some or all of Appellant's trial fees, for her reasonable attorney fees and costs incurred herein, and for all other just and equitable relief to which she may be entitled.

Respectfully submitted,

By _____

James R. Gotwals, OBA N. 3499
Mary L. Gutierrez, OBA No. 18386
Benjamin D. Aycock, OBA No. 21472
JAMES R. GOTWALS & ASSOCIATES, INC.
525 South Main, Suite 1130
Tulsa, Oklahoma 74103-4512
Telephone: 918-599-7088
Facsimile: 918-599-7153
ATTORNEYS FOR PETITIONER/APPELLANT,
[redacted]

CERTIFICATE OF SERVICE

I, James R. Gotwals, hereby certify that in addition to filing APPELLANT'S BRIEF-IN-CHIEF in the district court, a copy of the foregoing APPELLANT'S BRIEF-IN-CHIEF was mailed by first class mail, postage prepaid, this 11TH day of December, 2015, to the following: D.D. Hayes, Esq. HAYES LAW OFFICE, 222 N. 4th, P.O. Box 1389, Muskogee, OK 74402-1389, hayeslaw2@gmail.com, ATTORNEYS FOR RESPONDENT/APPELLEE.

I further certify that a copy of the APPELLANT'S BRIEF IN CHIEF was mailed to the Office of the Muskogee County Court Clerk for filing, on or about the 11TH day of December, 2015.

_____

James R. Gotwals