



ORIGINAL

113,922

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE THE MARRIAGE OF:

TERESA [REDACTED]
Petitioner/Appellant,

vs.

DAMON [REDACTED]
Respondent/Appellee.

FILED
SUPREME COURT
STATE OF OKLAHOMA
FEB 16 2016
MICHAEL S. RICHIE
CLERK

Received: 2-16-16
Docketed:
Number:
COA/CLERK
COA/TUE

ANSWER BRIEF OF APPELLEE

In an Appeal from Final Judgment of the District Court

In an Action for Dissolution of Marriage

In the District Court of Muskogee County

The Hon. Norman, D. Thygesen, Judge of the District Court

BARRY K. ROBERTS, OBA# 7627
111 N. Peters Ave., Suite 490
Norman, OK 73069-7200
(405) 329-1974

Attorney for Appellee

February 16, 2016

113,922

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE THE MARRIAGE OF:

TERESA [REDACTED]
Petitioner/Appellant,

vs.

DAMON [REDACTED]
Respondent/Appellee.

ANSWER BRIEF OF APPELLEE

In an Appeal from Final Judgment of the District Court

In an Action for Dissolution of Marriage

In the District Court of Muskogee County

The Hon. Norman, D. Thygesen, Judge of the District Court

BARRY K. ROBERTS, OBA# 7627
111 N. Peters Ave., Suite 490
Norman, OK 73069-7200
(405) 329-1974

Attorney for Appellee

February 16, 2016

INDEX

INTRODUCTION 1

APPELLEE’S SUMMARY OF THE RECORD 2

STANDARDS OF REVIEW 19

Kiddie v. Kiddie, 1977 OK 69; 563 P.2d 139 (Okl. 1977) 19

Kingery v. Kingery, 2011 OK CIV APP 122; 270 P.3d 192 (Okla. Ct. App. 2011) 19

Mothershed v. Mothershed, 1985 OK 23; 701 P.2d 405 (Okl. 1985). 19

Wilson v. Wilson, 1999 OK 65; 987 P.2d 1210 (Okla. 1999) 19

ARGUMENTS AND AUTHORITIES 19

PROPOSITION IN ANSWER I: THE TRIAL COURT’S RULING ON SEPARATE PROPERTY IS SUPPORTED BY THE EVIDENCE AND IS WITHIN THE TRIAL COURT’S DISCRETION 19

Beale v. Beale, 2003 OK CIV APP 90; 78 P.3d 973 (Okla. Ct. App. 2003) 23

Carpenter v. Carpenter, 1982 OK 38; 645 P.2d 476 (Okl. 1982) 21

Colclasure v. Colclasure, 2012 OK 97; 295 P.3d 1123 (Okla. 2012) 20

Dixon v. Dixon, 1996 OK CIV APP 61; 919 P.2d 28 (Okla. Ct. App. 1996) 22

Forristall v. Forristall, 1992 OK CIV APP 64; 831 P.2d 1017 (Okl. Civ. App. 1992) 21

Hillcrest Med. Ctr. v. State ex rel. Dept. of Corrections, 1983 OK 101; 675 P.2d 432 (Okl. 1983) 21

King v. King, 2009 OK CIV APP 49; 212 P.3d 1232 (Okla. Ct. App. 2009) 22

Larman v. Larman, 1999 OK 83; 991 P.2d 536 (Okla. 1999) 22

Martin v. Martin, 1952 OK 52; 240 P.2d 1057 (Okl. 1952) 21

Mueggenborg v. Walling, 1992 OK 121; 836 P.2d 112 (Okl. 1992) 21

Seirafi-Pour v. Bagherinassab, 2008 OK CIV APP 98; 197 P.3d 1097 (Okla. Ct. App. 2008) . 21

Silverstein v. Silverstein, 1987 Okla. Civ. App. 87; 748 P.2d 1004 (Okla. Civ. App. 1987) . . . 20

Smith v. Villareal, 2012 OK 114; 298 P.3d 533 (Okla. 2012) 22

PROPOSITION IN ANSWER II: THE TRIAL COURT MADE ALL NECESSARY FINDINGS OF FACT AND CONCLUSIONS OF LAW 23

Fackrell v. Am. Nat’l Bank, 2005 OK CIV APP 37; 116 P.3d 201 (Okla. Civ. App. 2005) 26

First Fed. S&L Ass’n v. Rose, 1938 OK 405; 79 P.2d 796 (Okla. 1938) 25

Messinger v. Messinger, 1958 OK 296; 341 P.2d 601 (Okla. 1959) 25

Nichols v. Nichols, 2009 OK 43; 222 P.3d 1049 (Okla. 2009) 26

Thomas v. Owens, 1952 OK 64; 241 P.2d 1114 (Okla. 1952) 25

12 O.S. 2011 §611 24

Oklahoma Supreme Court Rules, 12 O.S. 2011, Ch. 15, App. 1, Rule 1.28(b) 24

PROPOSITION IN ERROR III: THE TRIAL COURT DID NOT ERR IN DECLINING TO AWARD TERESA ██████████ SUPPORT ALIMONY 26

Agent v. Agent, 1979 OK CIV APP 62; 604 P.2d 862 (Okla. Ct. App. 1979) 27

Carpenter v. Carpenter, 1983 OK 2; 657 P.2d 646 (Okla. 1983) 27

Ray v. Ray, 2006 OK 30; 136 P.3d 634 (Okla. 2006) 27

Thompson v. Thompson, 2005 OK CIV APP 2; 105 P.3d 346 (Okla. Ct. App. 2004) 27

Wilson v. Wilson, 1999 OK 65; 987 P.2d 1210 (Okla. 1999) 27

43 O.S. Supp. 2012 §121 27

PROPOSITION IN ANSWER IV: THERE IS NO ERROR IN THE COURT'S EVIDENTIARY RULINGS 27

Beale v. Beale, 2003 OK CIV APP 90; 78 P.3d 973 (Okla. Ct. App. 2003) 28

Jordan v. Cates, 1997 OK 9; 935 P.2d 289 (Okla. 1997) 28

PROPOSITION IN ANSWER V: THERE WAS NO ERROR IN THE TRIAL COURT'S RULINGS ON FEES AND COSTS 28

Chacon v. Chacon, 2012 OK CIV APP 27; 275 P.3d 943 (Okla. Ct. App. 2011) 28

Kerby v. Kerby, 2007 OK 35; 164 P.3d 1049 (Okla. 2007) 29

McCabe v. McCabe, 2003 OK 86; 78 P.3d 956 (Okla. 2003) 29

Merritt v. Merritt, 2003 OK 68; 73 P.3d 878 (Okla. 2003) 29

State ex rel. Burk v. Oklahoma City, 1979 OK 120; 598 P.2d 659 (Okla. 1979) 29

Thielenhaus v. Thielenhaus, 1995 OK 5; 890 P.2d 925 (Okla. 1995) 29

43 O.S. 2011 §110 29

CONCLUSION 29

CERTIFICATE OF MAILING 31

ANSWER BRIEF OF APPELLEE

The appellee, Damon [REDACTED] submits this answer to the Brief in Chief of the appellant, Teresa [REDACTED] Oklahoma Supreme Court Rules, 12 O. S. 2011, Ch. 15, App. 1, Rule 1.10(a)(1).

INTRODUCTION

The appellant's Brief in Chief alleges that the trial judge, the Hon. Norman Thygesen, committed reversible error in nine specific instances during the course of this routine divorce action. Each of these allegations are complaints that Judge Thygesen exercised his discretion wrongly, because he decided several issues favorably toward Damon, and in a way contrary to what Teresa [REDACTED] would have preferred.

The Brief in Chief complains of Judge Thygesen's actions in several broad categories, but it is clear that main complaint is the finding that certain real property was Damon's separate property, which he inherited during the marriage. When it is seen that Judge Thygesen's findings and holdings were proper, based on the evidence of record, then the division of property of which Teresa [REDACTED] complains results in an award to her of 82% of all marital assets, and an award to Damon of 18%.

Even though the division of marital property greatly favored Teresa [REDACTED] she nonetheless wants this Court to find error in the fact that she was denied her request for support alimony. The facts show that Judge Thygesen's decision was based on clear and competent evidence as to Damon's ability to pay, Teresa [REDACTED] need, and the value of marital property awarded to each.

All of Judge Thygesen's rulings on the admission of evidence, his rulings on the award of fees and costs, along with his division of marital property and debt are all well-within his discretion as a court sitting in equity, are all based on competent evidence, conform with long-standing rules of settled Oklahoma law, and are free from error.

APPELLEE'S SUMMARY OF THE RECORD

This appeal arises out of an action for dissolution of marriage in the District Court of Muskogee County, in which the appellant, Teresa [REDACTED] is the petitioner and the appellee, Damon [REDACTED] is the respondent.¹ Damon filed his response and cross-petition, in which he agreed that jurisdiction and venue were proper in Muskogee County, and in which he asked the court for an equitable division of marital property and debt.² An agreed "Consent Temporary Order" was filed on December 27, 2012. Among other things, that order provided:

8. That Respondent shall pay Petitioner \$350.00 every other Friday beginning December 14, 2014, with the characterization of said funds as support alimony or advance distributions of property division reserved until time of trial.³

Trial in the matter was begun on August 18, 2014,⁴ and at the same time, Teresa [REDACTED] filed her request for findings of fact and conclusions of law.⁵ At that time, Damon filed a trial brief in which counsel brought to the attention of the trial court several anticipated issues, including gifts of separate property during marriage, and the brief cited controlling Oklahoma law on each issue.⁶

When the first day of trial was begun, Damon was called as a witness by Teresa [REDACTED] and he told the court he was sixty-one years old and that the parties had been married since 1971.⁷ He

¹ Original Record (OR): 1, Petition.

² OR: 10, Response and Cross-Petition.

³ OR: 14, Consent Temporary Order, at pg. 2.

⁴ OR: Transcript of Trial on the Merits, August 18, 2014, Vol. I (TR-I).

⁵ OR: 30, Petitioner's Request for Written Findings of Fact and Conclusions of Law.

⁶ OR: 32, Trial Brief.

⁷ OR: Transcript of Trial, August 18, 2014, Vol. I (TR-I), pg. 7, ll. 1 - 6.

testified as to his income during the marriage and as to his current income.⁸ Here, he first told the court that "I've got a small farm down at Warner," an 80-acre tract he bought during the marriage.⁹

He testified that during the marriage Teresa ██████ had worked at various real estate agencies, and that after she became a broker the parties opened their own agency, where she worked as a broker for some seven years.¹⁰ After they closed the agency, Teresa ██████ worked in retail sales for a time and she was presently employed by the Department of Veterans Affairs.¹¹

Two joint tenancy warranty deeds were admitted as Teresa ██████ exhibits, one for a 130-acre tract, and the other for an 80-acre tract, both near Warner, Oklahoma.¹²

Then he was specifically questioned about property he inherited from his mother after her death on September 1, 1997. He told the court his mother had owned a café in Arkansas, and that the café was sold and he received the money realized by that sale, along with other of his mother's personal property.¹³ As to the two tracts at Warner, Damon noted that both tracts were taken by joint tenancy deeds, with Teresa ██████ as co-tenant, and the following exchange occurred:

Q. [By Mr. Gotwals] Did you ever tell anyone else that the property was separate, at all, prior to filing - - prior to being involved in this divorce case?

A. [By Damon ██████] Yes.

Q. Who?

⁸ TR-I: pg. 7, l. 16 - pg. 13, l. 5, and Petitioner's Exhibit 2.

⁹ TR-I: pg. 13, ll. 17 - 23.

¹⁰ TR-I: pg. 16, ll. 1 - 18.

¹¹ TR-I: pg. 18, ll. 2 - 24.

¹² TR-I: pg. 21, l. 8 - pg. 22, l. 17.

¹³ TR-I: pg. 48, l. 2, et seq.

A. When I went to closing, I told the Muskogee Title that I was buying this with inherited money and I would just rather have my name only on it.¹⁴

Damon freely admitted that Teresa [REDACTED] name was on the deed for the 130-acre tract – for which he paid cash¹⁵ – and that she co-executed the note and mortgage for the purchase of the 80-acre tract.¹⁶ However, he told the court that he had paid off the note on which she had co-signed by using the money he realized from the sale of his mother's café in Arkansas.¹⁷ As to the 130-acre tract, he specifically told the court that when he went to the closing at Muskogee Title, the employee of the title company who had prepared the sale documents told him that title to the property had to be taken in joint tenancy with Teresa [REDACTED].¹⁸ As to the 80-acre tract, he testified that he had taken the property in joint tenancy only in order to make a mortgage and obtain a loan to buy the property before he received his inheritance.¹⁹ Following the evidence as to the inherited property, Damon was asked questions as to other marital property and debt.²⁰

Teresa [REDACTED] then called Mr. Don Wilson, a real estate appraiser, and he testified as to the values his office had placed on three parcels of real property: the marital home in Muskogee, the 130-acre tract and the 80-acre tract, both at Warner. His office valued the marital residence at

¹⁴ TR-I: pg. 54, ll. 8 - 15.

¹⁵ TR-I: pg. 59, ll. 20 - 25.

¹⁶ TR-I: pg. 56, ll. 3 - 7.

¹⁷ TR-I: pg. 64, ll. 18 - 25. "A. [By Damon [REDACTED] because when the café sold, I paid for it (the 80-acre tract) with the proceeds from the sale of the restaurant that I inherited."

¹⁸ TR-I: pg. 54, l. 8 - pg. 56, l. 2; and pg. 59, l. 4 - pg. 61, l. 3.

¹⁹ TR-I: pg. 66, ll. 10 - 15.

²⁰ TR-I: pg. 67, l. 3 - pg. 89, l. 10.

\$208,000.00, the 130-acre tract at \$230,000.00, and the 80-acre tract at \$170,000.00.²¹

Counsel for Teresa ██████ then resumed direct examination of Damon.²² Among other things, the examination confirmed that Damon had been paying Teresa ██████ \$350.00 every two weeks in compliance with the temporary order entered on December 27, 2012, some 34 months prior to trial.²³ Damon offered his opinion that she presently earned enough money to more than cover her living expenses.²⁴ He told the court that he and Teresa ██████ each had retirement accounts and that the amount in each party's account was, "almost the same."²⁵ Damon then told the court that Teresa ██████ earned some \$93,000.00 in 2013, and said that she had earned about \$186,000.00 during the two years after her filing for divorce,²⁶ not counting the money he paid under the temporary order. Specifically, he referred to her exhibit to show she declared an income in 2013 which reflected her take-home income at \$5,300.00 per month, and testified that she claimed, during the pendency of the divorce, monthly expenses of \$4,495.00 per month.²⁷

Following Damon's testimony, Teresa ██████ offered testimony in her own behalf.²⁸ During her direct examination she testified to many of the facts asserted in the appellant's brief in chief. She further said at the time of trial she earned between \$85,000.00 and \$87,000.00 per year from her

²¹ TR-I: pg. 108, l. 3 - pg. 109, l. 2, and Petitioner's Exhibit 12.

²² TR-I: pg. 127, ll. 10, et seq..

²³ TR-I: pg. 133, l. 22 - pg. 134, l. 8.

²⁴ TR-I: pg. 135, ll. 15 - 24.

²⁵ TR-I: pg. 139, l. 14 - pg. 140, l. 2, and Petitioner's Exhibits 36 and 37.

²⁶ TR-I: pg. 140, l. 18 - pg. 141, l. 11, and Petitioner's Exhibit 39..

²⁷ TR-I: pg. 147, ll. 6 - 25.

²⁸ TR-I: pg. 153, ll. 20, et seq..

employment with the Department of Veteran's Affairs, and she was currently eligible for full retirement from the VA.²⁹ She then went through the "latest version" of her monthly expenses in great detail and concluded that she needed \$5,584.00 per month to live on.³⁰ She stated that all real property acquired during the marriage was titled in both parties' names as joint tenants.³¹ She also testified that the certificate of deposit at Bank of America, valued at \$22,000.00, was joint property.³²

As to the 130-acre tract at Warner, Teresa [REDACTED] said she considered it joint property, "regardless of the source of the funds" used to buy it.³³ As to the 80-acre tract, the following exchange occurred with her counsel:

Q. [By Mr. Gotwals] ... when you bought it, did you put a mortgage on it?

A. [By Teresa [REDACTED]] Initially, yes sir.

Q. And was that mortgage in effect and paid for three or four – three years, before it was paid off?

A. Yes

Q. Was that - - did you attend that closing?

A. I did.

Q. And in terms of that closing, were the payments made on that mortgage out of you all's joint funds, to the best of your knowledge?

A. It was like a - -

²⁹ TR-I: pg. 162, l. 3 - pg. 163, l. 3.

³⁰ TR-I: pg. 168, l. 1 - pg. 181, ll. 11, and Petitioner's Exhibit 3.

³¹ TR-I: pg. 181, l. 15 - pg. 182, l. 12, and Petitioner's Exhibits 7 and 8.

³² TR-I: pg. 183, l. 18 - pg. 184, l. 17, and Petitioner's Exhibit 20.

³³ TR-I: pg. 198, l. 4 - pg. 199, l. 3.

Q. Other than the final payment?

MR. HAYES: Could we have her answer the question?

THE WITNESS: It was a one year note, and it was renewed.

Q. [By Mr. Gotwals] Okay. And prior to it being paid off in full, were the payments made out of your joint funds?

* * *

Q. [By Mr. Gotwals] Do you know when the note was paid off, ma'am?

A. It would have been sometime in 2005.

Q. And was - - what was it paid off from?

A. Probably some of the proceeds from the sale of the café in Arkansas.³⁴

Following this testimony, the proceedings were adjourned and recommenced on August 19, 2014.³⁵ Teresa █████ resumed her testimony on direct examination and she presented Judge Thygesen with her estimates of the values of various items of personal property.³⁶ Among other things, she said she used the Bank of America certificate of deposit, in the amount of \$22,402.00 "to pay my attorney fees," but admitted she did not know whether the funds in the certificate came from Damon's inherited property.³⁷ When asked why she needed support alimony she said, "to pay my bills, I guess."³⁸ She said she would receive retirement payments from the VA, along with "bridge payments" until she was eligible for her Social Security benefit at age 62, but she did not know the

³⁴ TR-I: pg. 200, l. 16 - pg. 201, l. 18.

³⁵ OR: Transcript of Trial, August 19, 2014, Vol. II (TR-II).

³⁶ TR-II, pg. 10, et seq., and Petitioner's Exhibit 5.

³⁷ TR-II, pg. 15, l. 12 - pg. 17, l. 23.

³⁸ TR-II, pg. 20, ll. 8 - 14.

amount of any of those items of anticipated income.³⁹

On cross-examination, Teresa [REDACTED] admitted that in 2013 she had a thrift savings plan through her employment with the VA, which was separate from her retirement, and that as of January 1, 2011 it was worth \$148,000.00.⁴⁰ She testified that she was 61 years old, and that as of 2012 the amount of her anticipated retirement was \$1,429.00 per month.⁴¹ She then confirmed that the amount of her thrift savings plan was worth more than Damon's two retirement plans combined.⁴² In regard to the CD, when asked four specific questions about the source of those funds, she answered four times by saying, "I don't recall that, sir."⁴³ During an offer of proof by Damon's counsel the trial court was presented with documents which showed that Teresa [REDACTED] had asserted in November, 2013, that her living expenses were \$4,495.00 per month, while on direct examination in court she claimed monthly expenses of \$5,400.00.⁴⁴ After some questioning as to her actual monthly expenses, she confirmed that she had \$5,333.00 each month as after-tax, net income.⁴⁵

³⁹ TR-II, pg. 20, ll. 17 - 24.

⁴⁰ TR-II, pg. 29, ll. 8 - 14; pg. 31, ll. 7 - 14, and Respondent's Exhibits 13 and 14.

⁴¹ TR-II, pg. 30, ll. 5 - 18.

⁴² TR-II, pg. 33, ll. 10 - 21:

Q. [By Mr. Hayes] And so what you're asking the Court to do, is give him his two retirements added together, which is about [\$120,000.00], then give you your [\$148,000.00] thrift plan, and then give you all of your federal government retirement on top of that. Is that what you're asking the Court to do?

A. [By Teresa [REDACTED]] Yes, sir.

⁴³ TR-II, pg. 36, ll. 9 - 22.

⁴⁴ TR-II, pg. 47, l. 14 - pg. 51, l. 10, and Respondent's Exhibits 18 and 20.

⁴⁵ TR-II, pg. 72, ll. 1 - 11.

Teresa [REDACTED] was then questioned about the money used to purchase the property at Warner, and she confirmed that at the time of the purchases Damon [REDACTED] had no source of income other than his salary and she admitted "it could have come from some of his mother's inheritance."⁴⁶ She had no proof that any marital funds were used to pay for any of that real property.⁴⁷

Following her testimony, the petitioner rested.⁴⁸

As his first witness, Damon called Ms. Cindy Kennedy, the manager of Muskogee Abstract and Title Company, since 1986, and she was employed there in 1998, at the time of the real estate closing for Damon's purchase of the 130-acre tract near Warner.⁴⁹ Judge Thygesen sustained petitioner's objection to a question put to Ms. Kennedy which asked her to state "what the policy of the company was regarding what people – married people are told when they get ready to buy real property."⁵⁰ Following the sustaining of the objection, counsel for Damon made an offer of proof:

MR. HAYES: the offer of proof would be that if she were allowed to testify, that she would testify that the policy then and now is that when people who are married are going to acquire property, that the policy is to tell them that if they do not put it in joint tenancy with right of survivorship, it can create title problems in the future.⁵¹

Ms. Kennedy was asked who was the employee who handled the closing for the property in question, and she testified it was Ms. Jenny Thunder, but she said Ms. Thunder had not worked at

⁴⁶ TR-II, pg. 76, l. 16 - pg. 77, l. 12.

⁴⁷ TR-II, pg. 79, ll. 1 - 4.

⁴⁸ TR-II, pg. 103, ll. 12 - 13.

⁴⁹ TR-II, pg. 104, ll. 5 - 16.

⁵⁰ TR-II, pg. 109, ll. 4 - 8.

⁵¹ TR-II, pg. 109, l. 21 - pg. 110, l. 2.

Muskogee Title for years, and she told the court, "I don't even know where Jenny is."⁵² She was then asked whether to her knowledge Ms. Thunder followed company policy while she worked there, which question drew an objection and that objection was sustained.⁵³ Counsel for Damon then made another offer of proof:

MR. HAYES: And the offer of proof would be that if she [Ms. Kennedy] were allowed to testify she would testify that Jenny Thunder, in the performance of her duties, followed the policies of Muskogee Title Company.⁵⁴

Damon then called Mr. Gary Bishop, a licensed real estate appraiser with thirty years of experience in the Muskogee area.⁵⁵ He first testified that he valued the 80-acre tract near Warner at \$145,000.00,⁵⁶ then testified that he also appraised the 130-acre tract and found it to have a total value of \$209,000.00.⁵⁷ Mr. Bishop was closely and extensively cross-examined, but did not deviate from the valuations he had given on direct examination.⁵⁸

The trial was again adjourned and a final day was held on October 30, 2014.⁵⁹ Damon resumed the stand on his own behalf and began by presenting Judge Thygesen a list of assets and

⁵² TR-II, pg. 111, ll. 14 - 20.

⁵³ TR-II, pg. 112, l. 20 - pg. 113, l. 1.

⁵⁴ TR-II, pg. 113, l. 2 - 5.

⁵⁵ TR-II, pg. 114, ll. 2, et seq..

⁵⁶ TR-II, pg. 117, ll. 11 - 13, and Respondent's Exhibit 2.

⁵⁷ TR-II, pg. 118, ll. 15 - 23.

⁵⁸ TR-II, pg. 119, l. 19 - pg. 135, l. 2.

⁵⁹ OR: Transcript of Trial, October 30, 2014, Vol. III (TR-III).

liabilities and the value and amount of each.⁶⁰ He gave extensive testimony as to the nature and value of all the items of marital property to be considered and divided by the court.⁶¹ He went through each party's identical lists of property and showed the court those items which he considered to be his separate property and gave reasons for that classification.⁶² In particular, he showed the court that the Bank of America certificate of deposit, in the amount of \$22,402.00, was purchased solely with money he inherited from his mother's estate.⁶³ He then told Judge Thygesen that the CD was originally in his name only but that he had placed it, and several other items of property, in Teresa [REDACTED] name as co-owner because she threatened divorce if he did not.⁶⁴

Damon testified that the value of the marital residence in Muskogee was \$295,000.00, and had previously testified there was no debt on the property.⁶⁵ He noted Teresa [REDACTED] evidence showed an appraisal of \$280,000.00, that the house had been remodeled, and he proposed that the house and 23 acres be awarded to Teresa [REDACTED]⁶⁶

He testified that he had fully complied with the court's temporary order and had paid Teresa [REDACTED] \$17,500.00 during the course of the litigation.⁶⁷ He then talked about her living expenses, his

⁶⁰ TR-III, pg. 5, ll. 5, et seq., and Respondent's Exhibit 1.

⁶¹ Id., and TR-III, pg. 7, l. 18 - pg. 19, l. 7; and pg. 22, l. 19 - pg. 28, l. 22.

⁶² TR-III, pg. 30, l. 8 - pg. 35, l. 4, and Respondent's Exhibit 4/ Petitioner's Exhibit 1.

⁶³ TR-III, pg. 19, ll. 8 - 18, and Respondent's Exhibit 1, Item 22.

⁶⁴ TR-III, pg. 19, l. 19 - pg. 22, l. 18.

⁶⁵ TR-I: pg. 150, ll. 6 - 8.

⁶⁶ TR-III, pg. 6, ll. 10 - 28.

⁶⁷ TR-III, pg. 35, l. 9 - 24.

living expenses and his income, and gave the court evidence as to each item.⁶⁸ He requested the court to award Teresa [REDACTED] her entire retirement account of \$148,000.00, which was accumulated during the marriage, and also the entirety of her federal retirement benefit from the VA.⁶⁹ He noted his retirement 401(k) plan from Cedar Creek had a vested balance of \$15,569.06, and asked that be awarded to him.⁷⁰

He was then closely questioned about the two tracts of real estate near Warner. He testified that the 130 acre-tract was purchased with money from his mother's estate and that no marital funds were used.⁷¹ Asked about details of the purchase agreement, he showed the court that while Teresa [REDACTED] name appeared on the deed, she did not attend the closing, and that she did not sign any of the settlement documents.⁷²

He then affirmatively stated that when he purchased the property he did not intend to make a gift of any interest in it to Teresa [REDACTED].⁷³ Here, he noted that the settlement agent for Muskogee Title Company, was Jenny Thunder,⁷⁴ and he testified that she and he had a conversation about putting Teresa [REDACTED] name on the warranty deed.⁷⁵ This prompted objections and arguments about the nature of his testimony regarding his conversation with Jenny Thunder, and Judge Thygesen

⁶⁸ TR-III, pg. 42, l. 2 - pg. 46, l. 21, and Respondent's Exhibits 6, 7, 8, 9, and 12.

⁶⁹ TR-III, pg. 47, l. 2 - pg. 50, l. 15, and Respondent's Exhibits 13 and 14.

⁷⁰ TR-III, pg. 50, l. 18 - pg. 51, l. 19, and Respondent's Exhibits 15 and 16.

⁷¹ TR-III, pg. 55, ll. 2 - 12.

⁷² TR-III, pg. 54, l.- pg. 557, l. 7, and Respondent's Exhibit 11

⁷³ TR-III, pg. 58, ll. 9 - 11.

⁷⁴ TR-III, pg. 55, ll. 21 - 24.

⁷⁵ TR-III, pg. 58, ll. 15 - 25.

ruled that if "it's not offered for the truth, it's not hearsay."⁷⁶ Damon then testified that "[Teresa ██████ name was put on the title because that's the way they had to do it to avoid probate."⁷⁷

When Damon was asked about the 80-acre tract, he testified that the initial purchase money was borrowed from Armstrong Bank, paid in yearly installments, until he received the rest of the money from the settlement of his mother's estate.⁷⁸ At this point Judge Thygesen was presented with the following testimony:

Q. [By Mr. Hayes] So with regard to the 80 acres, to the best of your knowledge, the two - - the first two annual installments were paid with marital funds?

A. [By Damon ██████] Yes.

Q. The balance of it was paid with what?

A. Part of the proceeds I got from the sale of the [his mother's] café.

Q. Other than the two annual installments, was any part - - was any marital funds used to pay for the 80 acres?

A. No.

Q. Now, was Teresa's name put on that?

A. Absolutely.

Q. And why was her name put on that property?

A. To obtain financing.

Q. Okay. Now, did you intend to make a gift to anyone of the Warner 80 acres?

⁷⁶ TR-III, pg. 60, ll. 1 - 5.

⁷⁷ TR-III, pg. 62, ll. 11 - 12.

⁷⁸ TR-III, pg. 64, ll. 3 - 14.

A. No.

Q. Okay. Did you ever tell Teresa that you were gifting her an interest in the hundred and 30 acres or the 80 acres?

A. No.⁷⁹

He was also closely examined as to the source of funds for the CD in issue, and he reiterated that all the funds in the CD came from the sale of his mother's café.⁸⁰ He told the court that he put Teresa [REDACTED] name on the CD "after being constantly, let's say, nagged to do so,"⁸¹ and that she nagged him to do so "continuously and intermittently," during the final years of the marriage.⁸²

As to the Warner property, Damon paraphrased statements Teresa [REDACTED] had made when she said, "You've got the money. You inherited it. If you want to buy the farm, you buy it."⁸³

When specifically asked about the closing for his purchase of the 130-acre tract, Damon told the judge, again, that: "I was told, when I went to closing, that they put the wife's name on there to avoid future clouding probate title disputes."⁸⁴ He also said Teresa [REDACTED] name was placed on the warranty deed by someone else, and he didn't know who, and that "I didn't put it there."⁸⁵ He was asked more questions about acquiring the 80-acre tract and said both properties at Warner were "paid

⁷⁹ TR-III, pg. 65, ll. 5 - 25.

⁸⁰ TR-III, pg. 73, l. 9 - pg. 79, l. 3.

⁸¹ TR-III, pg. 75, ll. 4 - 5.

⁸² TR-III, pg. 77, ll. 12 - 20.

⁸³ TR-III, pg. 79, ll. 16 - 18.

⁸⁴ TR-III, pg. 97, ll. 4 - 6.

⁸⁵ TR-III, pg. 100, ll. 10 - 14.

for with money I inherited from my mother, or property I inherited from my mother.”⁸⁶

Following questions and answers about his and Teresa [REDACTED] income and living expenses, her counsel sought to introduce an affidavit of Jenny Thunder into evidence.⁸⁷ To which Damon’s counsel objected and noted that Ms. Cindy Kennedy had not been allowed to testify as to the policies and practices of Muskogee Title, and that he had made an offer of proof which supported what Damon had testified to, and that it would be “fundamentally unfair” to allow any contradictory evidence on the same subject. Judge Thygesen did not admit the affidavit but allowed it as part of Teresa [REDACTED] counsel’s offer of proof.⁸⁸

Following brief re-direct examination, Damon rested and Teresa [REDACTED] was recalled to the stand, and she disputed whether some few items of personal property were marital or separate.⁸⁹

Judge Thygesen then ordered each party to submit proposed findings of fact and conclusions of law, simultaneously, and trial was concluded.⁹⁰

On December 1, 2014, each side filed proposed findings of fact and conclusions of law regarding the matters presented at trial.⁹¹ Thereafter, on December 5, Judge Thygesen issued his own findings and conclusions by letter,⁹² in which he specifically found and ruled:

⁸⁶ TR-III, pg. 107, ll. 4 - 11.

⁸⁷ TR-III, pg. 118, ll. 23, et seq..

⁸⁸ TR-III, pg. 122, ll. 1 - 17.

⁸⁹ TR-III, pg. 124, et seq..

⁹⁰ TR-III, pg. 129, ll. 1 - 21.

⁹¹ OR: 44, Respondent’s Proposed Findings of Fact and Conclusions of Law; and OR: 58, Petitioner’s Proposed Findings of Fact and Conclusions of law, etc.

⁹² OR: 86, Findings of Fact and Conclusions of Law.

- The parties agreed to the award of the marital home and other real and associated personal property, but they disagreed as to the values to be placed on the items.
- The parties disagreed as to whether Teresa [REDACTED] should be awarded alimony.
- The parties had stipulated to the values of all other items of personal property set out in "Bartholet's appraisal,"⁹³ and those values were the ones contained in Damon's proposed distribution.
- The court found that Teresa [REDACTED] had taken and used the funds in a certificate of deposit in the amount of \$22,400.00, and that Damon had paid her \$19,000.00 in alimony per the agreed temporary order, and so she had received "over \$40,000.00 in support"⁹⁴ already.
- Based on the evidence the court declined to award further support alimony.
- The court adopted Damon's proposed distribution of marital property even though it "awards a disproportionately higher amount to [Teresa [REDACTED] and a lesser amount to himself."⁹⁵
- The court ruled that each party would keep his or her respective retirement accounts.
- Both parties agreed that Teresa [REDACTED] should be awarded the marital residence.
- Both parties agreed that Damon should be awarded two tracts of real property, one of 80 acres and the other of 130 acres, along with the vehicles and other farm equipment used in the cattle operations.
- Each party was ordered to pay his or her own debts which were incurred following separation.

Upon receiving these findings and orders, Teresa [REDACTED] filed motions to clarify, to stay, to

⁹³ Id..

⁹⁴ Id., at OR: 87.

⁹⁵ Id..

reconsider the orders, and for new trial.⁹⁶ A new trial was sought as to the court's findings of fact and conclusions of law, and the motion asserted that the findings and conclusions were not supported by sufficient evidence and were contrary to law, disputed the court's finding that Teresa ██████ should be awarded no additional support alimony, said the trial court abused its discretion in its division and valuation of items of property, in its determination as to which property was separate and which marital, and in the court's reception of evidence at trial. All of these allegations were based on the premise that "the Petitioner was more credible than the Respondent."⁹⁷

On January 28, 2015, Damon filed his motion to settle the journal entry, along with his responses to Teresa ██████ pending motions,⁹⁸ and on February 2, 2015, a hearing was held on her motions.⁹⁹ During that hearing, Teresa ██████ relied on her counsel's position that Judge Thygesen's findings of fact and conclusions of law were insufficiently detailed, and her counsel stated that, there wasn't "a record that we can appeal on."¹⁰⁰

After hearing the parties, Judge Thygesen overruled Teresa ██████ motion for new trial and motion to reconsider, and ordered Damon's counsel to prepare a decree consistent to the court's prior findings of December 5, 2014.¹⁰¹ No agreement as to the decree could be reached and a further

⁹⁶ OR: 88, Petitioner's Motion for Clarification, etc.; and OR: 94, Petitioner's Motion for New Trial, etc..

⁹⁷ OR: 94, at pg. 9.

⁹⁸ OR: 111, Motion to Settle Journal Entry; OR: 129, Respondent's Response to Petitioner's Motion for Clarification; OR: 132, Respondent's Response to Petitioner's Motion for New Trial.

⁹⁹ OR: Transcript of Motion Hearing, February 2, 2015 (TR-IV).

¹⁰⁰ TR-IV, pg. 8, ll. 1 - 9.

¹⁰¹ OR: 139, Court Minute.

hearing was held on April 6, 2015.¹⁰² Each party was allowed to offer argument and evidence as to the proper wording of the decree and Judge Thygesen accepted a proposed decree from each party.¹⁰³

Thereafter, on April 13, 2015, the court entered its decree.¹⁰⁴ That decree held and ordered, among other things, that:

- Certain personal property was set aside to each party as his or her separate property.
- “Based on the evidence,”¹⁰⁵ the court determined that Damon owned as his separate property two parcels of real property, the 80-acre tract, and the 130-acre tract.

- The court awarded Teresa [REDACTED] the marital home and real property, valued at:
\$287,500.00.

- All marital personal property and debt was divided by awarding Teresa [REDACTED]
Property valued at: \$ 209,036.00
and marital debt in the amount of: 49,550.00
For a net award of: \$ 159,486.00
Making a total award to her of: \$ 446,986.00

- Damon was awarded no marital real property, and was awarded:
Property valued at \$ 176,807.00
and marital debt in the amount of: 81,785.00
Making a total award to him of: \$ 95,022.00

- The net distribution of marital property was 82% for Teresa [REDACTED] and 18% for Damon.
- The court denied Teresa [REDACTED] pursuit of support alimony, “beyond the \$49,000.00

previously paid.”¹⁰⁶

¹⁰² OR: Transcript of Motion to Settle Journal Entry, April 6, 2015 (TR-V).
¹⁰³ TR-V, pg. 13, l. 8 - pg. 14, l. 4.
¹⁰⁴ OR: 210, Decree of Divorce and Dissolution of Marriage.
¹⁰⁵ Id., ¶4.
¹⁰⁶ OR: 210, Decree at pg. 17, ¶8, and note OR: 86, Findings of Fact and Conclusions of Law, at OR: 87.

Following the entry of the Decree, Teresa [REDACTED] moved for an award of attorney fees, the matter was heard on June 25, 2105,¹⁰⁷ and Judge Thygesen denied an award on July 9, 2015.¹⁰⁸

This appeal follows.

STANDARDS OF REVIEW

An action for divorce, alimony and division of property, such as this one, is an action of equitable cognizance and in reviewing a case of equitable cognizance, the judgment of the trial court will not be disturbed unless the trial court abused its discretion or unless the court's finding was clearly against the weight of the evidence.¹⁰⁹ The trial court's findings are presumed to be correct and a judgment based on those findings will not be set aside unless against the clear weight of the evidence.¹¹⁰ And finally, The burden of showing the Court abused its discretion is upon the complaining spouse.¹¹¹

ARGUMENTS AND AUTHORITIES

PROPOSITION IN ANSWER I: THE TRIAL COURT'S RULING ON SEPARATE PROPERTY IS SUPPORTED BY THE EVIDENCE AND IS WITHIN THE TRIAL COURT'S DISCRETION.

Most of the allegations of error in the appellant's brief are based on a single faulty premise; that Damon was not entitled to have his separate property set aside to him. As is shown in the record, this premise is contrary to the facts of record and is not supported by, and is contrary to, settled law on the division of property.

¹⁰⁷ OR: Transcript of Motion for Attorney Fees and Costs, June 25, 2105 (TR-VI).

¹⁰⁸ OR: 345, Order Denying Motion for Attorney Fees.

¹⁰⁹ *Mothershed v. Mothershed*, 1985 OK 23; 701 P.2d 405, 408 (Okl. 1985).

¹¹⁰ *Wilson v. Wilson*, 1999 OK 65; 987 P.2d 1210, 1212 (Okla. 1999).

¹¹¹ See: *Kingery v. Kingery*, 2011 OK CIV APP 122, ¶4; 270 P.3d 192, 194 (Okla. Ct. App.2011), citing: *Kiddie v. Kiddie*, 1977 OK 69; 563 P.2d 139 (Okl. 1977).

Teresa █████ sought, and still seeks, a punitive division of property in order to punish Damon for his perceived bad acts during the marriage. She asked the trial court to award her half of certain property which indisputably was bequeathed to Damon by his mother, and in which Teresa █████ never had any personal, marital, or legal interest. The evidence of record shows that Teresa █████ received hundreds of thousands of dollars worth of marital property, including the marital home and 23 acres, and the division of *actual* marital property favors her by 82% to 18%.

The venerable rule controlling this appeal was most recently restated by the Supreme Court in its opinion in *Colclasure v. Colclasure*.¹¹²

A divorce suit is one of equitable cognizance in which the trial court has discretionary power to divide the marital estate. The trial court must follow the provisions of 43 O.S. Supp. 1992 § 121 which require a fair and equitable division of property acquired during the marriage by the joint industry of the husband and wife. The trial court has wide latitude in determining what part of jointly-acquired property shall be awarded to each party. However, 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. An appellate court will not disturb the trial court's property division absent a finding of abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence.¹¹³

The review of the record set out above demonstrates that every finding and order made by Judge Thygesen was well within his judicial discretion, conformed with the provisions of §121, was fully supported by competent evidence, and effects a fair, just, reasonable and equitable division of the marital estate.

As has been said many times, a trial court's division of marital property is of equitable

¹¹² *Colclasure v. Colclasure*, 2012 OK 97, ¶16; 295 P.3d 1123, 1128-1129 (Okla. 2012).

¹¹³ *Colclasure*, at ¶16; pg. 1128 - 1129. And see: *Silverstein v. Silverstein*, 1987 Okla. Civ. App. 87; 748 P.2d 1004 (Okla. Civ. App. 1987).

cognizance and will not be disturbed unless found to be clearly contrary to the weight of the evidence and thus an abuse of discretion.¹¹⁴ While an appellate court will review the record to determine if the findings of the trial court are supported by the evidence,¹¹⁵ the reviewing court will always indulge in the presumption the trial court's equity-based decision was correct and affirm the order.¹¹⁶ The trial court, being in the best position to evaluate the demeanor of the witnesses and to gauge the credibility of the evidence, will be given deference as to the conclusions it reaches concerning those witnesses and that evidence.¹¹⁷

Crucially, in an appeal from an order dividing marital property, the complaining party has the entire burden to show the trial court abused its discretion in dividing the marital estate.¹¹⁸

In this case Damon was required to overcome the presumption of gift created by the presence of Teresa ██████ name on the joint-tenancy warranty deeds, and he did so by giving evidence that her name was put on the title to the 80-acre tract solely to enable him to obtain financing for the initial loan, and he testified that he never intended to make a gift of any of the property to Teresa ██████ either of any interest in the 80-acre tract or the 130-acre tract.¹¹⁹ This, in addition to his extensive testimony, cited above, that he had other intentions and reasons for taking title in the form

¹¹⁴ *Carpenter v. Carpenter*, 1982 OK 38, ¶10; 645 P.2d 476, 480 (Okl. 1982).

¹¹⁵ *Forristall v. Forristall*, 1992 OK CIV APP 64, ¶4; 831 P.2d 1017, 1018 (Okl. Civ. App. 1992).

¹¹⁶ *Hillcrest Med. Ctr. v. State ex rel. Dept. of Corrections*, 1983 OK 101, ¶15; 675 P.2d 432, 435 (Okl. 1983).

¹¹⁷ *Mueggenborg v. Walling*, 1992 OK 121, ¶7; 836 P.2d 112, 114 (Okl. 1992); and see: *Seirafi-Pour v. Bagherinassab*, 2008 OK CIV APP 98, ¶20; 197 P.3d 1097, 1101 (Okla. Ct. App. 2008).

¹¹⁸ *Martin v. Martin*, 1952 OK 52, ¶8; 240 P.2d 1057, 1058 (Okl. 1952).

¹¹⁹ TR-III, pg. 65, ll. 15 - 25.

of joint tenancy deeds, including the undisputed fact that Teresa █████ threatened legal action – a divorce – if he did not.

The Supreme Court has held that the presumption of gift by joint tenancy deed is rebutted where, as here, “the record shows that title was passed without intent to invest the spousal grantee with an interest in the property, but rather for a purpose that is clearly collateral to any intended change in the existing ownership regime, the conveying marital partner will not be deemed to have made an unconditional, presently effective interspousal gift of separate property. The burden would then shift to the donee (grantee) spouse to prove the factum of a gift in praesenti.”¹²⁰ Among other facts which rebut the presumption of gift, the Court held that the need to obtain a mortgage loan, where the lender required title in both spouses, was a significant factor.¹²¹ In sum:

When a spouse conveys property to another, without consideration, the character of the property does not change unless the conveying spouse has the intent to gratuitously pass the title to the other spouse. Absent donative intent, the original ownership regime of the property remains intact.¹²²

The crucial factor of whether Damon did or did not have donative intent when he bought the parcels of property with money inherited from his mother, is an issue of fact to be decided by the trier of fact, the trial judge.¹²³ Judge Thygesen was presented with undisputed evidence that the two

¹²⁰ *Larman v. Larman*, 1999 OK 83, ¶10; 991 P.2d 536, 541 (Okla. 1999).

¹²¹ *Larman*, at ¶15, 542, and see: *Smith v. Villareal*, 2012 OK 114, ¶10; 298 P.3d 533 (Okla. 2012): “The presumption in favor of a gift can be overcome by clear and convincing evidence of contrary intent, including evidence of a purpose for placing the property in joint tenancy that is collateral to making a gift.”

¹²² See: *King v. King*, 2009 OK CIV APP 49, ¶13; 212 P.3d 1232, 1235 (Okla. Ct. App. 2009).

¹²³ See: *Dixon v. Dixon*, 1996 OK CIV APP 61, ¶3; 919 P.2d 28, 30 (Okla. Ct. App. 1996): “When faced with conflicting testimony, the trial court, who has the opportunity to view

parcels at Warner and the certificate of deposit were purchased solely with money Damon received from the estate of his mother. Damon testified as to the reasons why he did not have donative intent, the court assessed the relevance and credibility of his testimony and ruled accordingly.

The issue of donative intent, like all cases involving intent, is and must be an evaluation of the internal processes and motives of the individual, as revealed by the evidence, and in all such cases that evidence must be sufficient to sway the trier of fact. The evaluation of intent in a case in equity is made by the judge and where there is any competent evidence to support the trial court's discretionary holding, based on conflicting evidence, that holding will not be reversed on appeal.¹²⁴

There has been no showing by Teresa [REDACTED] that the division of *marital* property is in any way inequitable, and her entire argument depends on the reviewing court's acceptance of her argument that she was entitled to share in Damon's *separate*, inherited property. That separate property was correctly set aside to him, according to the controlling rules of law, and there is no error in the division of the actual, marital property.

PROPOSITION IN ANSWER II: THE TRIAL COURT MADE ALL NECESSARY FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The appellant misconstrues the purpose of the statutory provisions on findings of fact and conclusions of law. The statute is uncomplicated and its purpose is to provide a vehicle for either party to a lawsuit to ask the court to set out matters of fact and law which have been considered and

both the record ultimately transmitted on appeal and the behavior and demeanor of the witnesses, will be affirmed unless the record demonstrates an abuse of discretion or that its determination is against the clear weight of the evidence. It is not enough that the evidence will support an opposing viewpoint, and the trial court's judgment need not rest on uncontradicted evidence. The burden of showing that the trial court abused its discretion in adjusting the rights to marital property is upon the party complaining." (Citations omitted)

¹²⁴ See: *Beale v. Beale*, 2003 OK CIV APP 90; 78 P.3d 973 (Okla. Ct. App. 2003).

decided in the course of arriving at judgment. The statute itself is prefaced with the statement that such findings and conclusions are not necessary for the entry of a valid, binding judgment. The opinions and holdings of the appellate courts make it clear that findings of fact and conclusions of law, when they are made, are ancillary to the court's judgment and are not fundamental to the effect and validity of such judgment.

At one point, counsel for appellant expressed the view that the trial court's findings of fact and conclusions of law were synonymous with the record on appeal, and that an appeal could not be taken without them.¹²⁵ On the contrary, the record in any civil appeal consists of "any pertinent instruments filed in the case and of proceedings and evidence adduced...."¹²⁶ This Court may take notice of the fact that the records in most civil appeals do not include written findings of fact and conclusions of law and such documents have never been found necessary for taking an appeal.

The statute governing findings of fact and conclusions of law, 12 O.S. 2011 §611, states:

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, findings of fact found, separately from conclusions of law.

¹²⁵ TR-IV, pg. 8, ll. 1 - 9:

MR. GOTWALS: We've requested specific relief with regard to that motion, and we suggested that the Court needs to or has - - at some point, make some kind of findings of fact and conclusions of law that provides Miss (sic) [REDACTED] with a record, if she chooses to appeal the Court's Order, upon which she can lodge her appeal. Because the burdens on appeal are very specific, and if we don't have a record that we can appeal on, then, you know, I don't know how we're going to effectively do that.

¹²⁶ Oklahoma Supreme Court Rules, 12 O.S. 2011, Ch. 15, App. 1, Rule 1.28(b).

The Supreme Court has always interpreted this section as requiring a trial court to make written findings and conclusions, when asked to do so, “to enable parties to have placed on record facts upon which rights litigated depend, as well as conclusions of law which the court drew from the facts found.”¹²⁷ As is clear from the record in this appeal, all the necessary matters are fully set out and have been cited and referred to on appeal, including Judge Thygesen’s written findings which were filed on December 5, 2014. There is no doubt that Teresa ██████ was able to place in the record everything necessary for appeal. The Court has also clearly held that:

A party is not entitled to a specific finding of fact, or conclusion of law, upon every point which he may request. A trial court is not required to make specific findings of fact and conclusions of law in the form as submitted and requested by a party, but is merely required to state its findings of the material and controlling facts separately from the conclusions of law. If a court makes findings of fact and conclusions of law on the vital issues, sufficient to serve as a basis for the judgment rendered, a contention that the court refused to make findings of fact and conclusions of law, or a contention that the court refused to make adequate findings of fact and conclusions of law, is without merit. Considering the findings and conclusions of the court in this case, in proper relation to the evidence in the record, it would not appear that the court erred, or that any party suffered detriment or prejudice by and through the court’s brief findings and conclusions. The material points involved were passed upon, either directly or by inference, in the findings and conclusions.¹²⁸ (Citations omitted)

Other controlling decisions in this regard are equally clear: when “the cause is tried to the court, a general finding by the court is a finding of every specific thing necessary to be found sustaining the general judgment, and, there being no errors of law, the judgment will not be disturbed if there is any competent evidence reasonably tending to support the conclusion of the trial court.”¹²⁹

¹²⁷ *Messinger v. Messinger*, 1958 OK 296, ¶5; 341 P.2d 601, 604 (Okla. 1959).

¹²⁸ *Thomas v. Owens*, 1952 OK 64, ¶9; 241 P.2d 1114, 1118 (Okla. 1952).

¹²⁹ *First Fed. S&L Ass’n v. Rose*, 1938 OK 405, ¶9; 79 P.2d 796, 798 (Okla. 1938).

(Emphasis added) The standard of review in such cases was most recently restated by Division II:

In cases tried to the bench without a jury, we review the record to determine whether competent evidence supports the trial court's findings of fact, and if we find competent evidence to support the trial court's order, we must affirm. Furthermore, 'where a trial court reaches a correct result although based upon incorrect reasoning, its decision will not be reversed on appeal.'¹³⁰ (Citations omitted)

In short, the rule of law which applies to this case is straightforward: It is not the form and format of the trial court's Findings of Fact and Conclusions of Law that controls review on appeal, but rather the question of whether the court made an equitable division of property based on the evidence.¹³¹ Any review of the facts of record, as summarized above, demonstrates that Judge Thygesen had before him clear and competent evidence – albeit contested evidence – which supports every exercise of his discretion. There is no error in the division of property and the appellant cannot manufacture error by arguing about the manner in which the court pronounced that division.

PROPOSITION IN ERROR III: THE TRIAL COURT DID NOT ERR IN DECLINING TO AWARD TERESA ██████████ SUPPORT ALIMONY.

Any review of Judge Thygesen's order denying Teresa ██████████ support alimony must be made in light of the fact that in the decree she was awarded marital property, with a value of some \$446,986.00, including the entirety of her retirement benefits and savings. And, the order was made in light of the undisputed evidence that she is employed and earns between \$85,000.00 and \$87,000.00 per year.

The Oklahoma Statutes provide for an award of support alimony in an amount "as the court

¹³⁰ See: *Fackrell v. Am. Nat'l Bank*, 2005 OK CIV APP 37, ¶7; 116 P.3d 201, 204.

¹³¹ *Nichols v. Nichols*, 2009 OK 43, ¶10; 222 P.3d 1049, 1054 (Okla. 2009): "An appellate court will affirm a correct judgment on any applicable theory. If legally correct, a trial court's ruling will not be reversed because of its faulty reasoning, erroneous finding of fact or its consideration of an immaterial issue." (Citations omitted)

may deem just and equitable.”¹³² The determination of what amount, if any, is just and equitable, is itself an equitable decision and the trial courts are vested with a great deal of discretion in making those awards.¹³³ Where the amount awarded is not inequitable, the judgment will not be reversed.¹³⁴ Further, “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.”¹³⁵

As is shown in the summary of the record, above, Judge Thygesen was presented with competent evidence as to the important factors to be considered in awarding alimony and he found and ruled that an award to Teresa [REDACTED] was not justified. The judge took into account both her proven earning capacity, and the generous amount of marital property awarded to her. The court’s order is in full accord with settled Oklahoma law and no error has been demonstrated.

PROPOSITION IN ANSWER IV: THERE IS NO ERROR IN THE COURT’S EVIDENTIARY RULINGS.

This argument on appeal alleges error in Judge Thygesen’s denial of Teresa [REDACTED] purported evidence in the form of an affidavit from Ms. Jenny Thunder. The substance of that affidavit was that Ms. Thunder did not recall telling Damon that it was the policy of Muskogee Title to advise buyers of real property that they should take title with their spouses as joint tenants. Judge Thygesen did not admit the affidavit into evidence, but permitted counsel to make an offer of proof.

¹³² 43 O.S. Supp. 2012 §121(B).

¹³³ See: *Thompson v. Thompson*, 2005 OK CIV APP 2, ¶14; 105 P.3d 346 (Okla. Ct. App. 2004): “The award of support alimony is equitable in nature, and the court has a great deal of discretion.” Citing: *Wilson v. Wilson*, 1999 OK 65, ¶3; 987 P.2d 1210, 1212 (Okla. 1999).

¹³⁴ See: *Agent v. Agent*, 1979 OK CIV APP 62, ¶20; 604 P.2d 862, 866 (Okla. Ct. App. 1979). Cited with approval by the Supreme Court in *Carpenter v. Carpenter*, 1983 OK 2, ¶27; 657 P.2d 646, 651 (Okla. 1983).

¹³⁵ *Ray v. Ray*, 2006 OK 30, ¶10; 136 P.3d 634, 637, Note 9 (Okla. 2006).

The court's handling of the affidavit was exactly the same as his rulings on the testimony of Ms. Cindy Kennedy which was offered by Damon. Each of the decisions is within the broad discretion of a trial court in the reception of evidence.¹³⁶

When both rulings are viewed together in the context of the entire trial, the net result is that the court did not consider two pieces of evidence which apparently contradicted each other. Each party made an offer of proof and Judge Thygesen knew exactly what each party's witness would have said. If he had admitted both the testimony and the affidavit he would have then been confronted with a discretionary decision as to which to believe. Making such a decision as to the credibility of conflicting evidence is the duty and office of the trial court and every such decision is within the court's sound discretion.¹³⁷

PROPOSITION IN ANSWER V: THERE WAS NO ERROR IN THE TRIAL COURT'S RULINGS ON FEES AND COSTS.

As with the other propositions of error, the complaint that Teresa [REDACTED] was not awarded the attorney fees and costs she asked for is a matter within the sound discretion of the trial court.¹³⁸

¹³⁶ *Jordan v. Cates*, 1997 OK 9, ¶20; 935 P.2d 289, 293 (Okla. 1997): "A trial court possesses broad discretion in determining the relevance of proffered evidence and in balancing its probative value and unfair prejudice. The decision of the district judge will be accorded 'great deference' because his first-hand exposure to all the evidence and his familiarity with the course of the trial proceedings are the best qualifications for balancing the value of the evidence in its proper context."

¹³⁷ See: *Beale v. Beale*, 2003 OK CIV APP 90, ¶¶6 - 7; 78 P.3d 973, 975-976 (Okla. Ct. App. 2003).

¹³⁸ See: *Chacon v. Chacon*, 2012 OK CIV APP 27, ¶55; 275 P.3d 943, 957 (Okla. Ct. App. 2011): "Title 43 O.S.2011 § 110(D) provides that '[u]pon granting a decree of dissolution of marriage, annulment of a marriage, or legal separation, the court may require either party to pay such reasonable expenses of the other as may be just and proper under the circumstances.' 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, ¶¶

The appellant's reliance strictly on the criteria in *State ex rel. Burk v. Oklahoma City*,¹³⁹ is misplaced. The *Burk* standards are almost always applied in cases where one of the parties qualifies as a "prevailing party," in the litigation, while an award of attorney fees in a domestic case is governed by other considerations. The Oklahoma Supreme Court has consistently held that in domestic cases "counsel fees claimed pursuant to 43 O.S. 2011 §110 do not depend on one's status as the prevailing party. Rather, they are awarded to the litigant who qualifies through the balancing of judicial equities."¹⁴⁰ In making this determination, the Court has held that the trial courts should consider "what is just and equitable considering the means and property of the respective parties."¹⁴¹

An examination of the "means and property" allocated to each of the parties in this case by the Court's Decree shows that Teresa [REDACTED] was allocated more than ample assets to enable her to pay her own fees, and she does not qualify for an award based on the balancing of the equities.

CONCLUSION

Each ruling about which the appellant complains is a ruling within the sound discretion of a trial court, sitting in equity. Damon testified at length that the two parcels at Warner and the certificate of deposit were purchased with money he received from the sale of a café that he inherited. Teresa [REDACTED] did not offer any persuasive evidence that she ever contributed any

14-15, 917 P.2d 473, 477-478. Only if the trial court made a clearly erroneous conclusion and judgment against reason and evidence will the award be reversed. *Broadwater v. Courtney*, 1991 OK 39, ¶ 7, 809 P.2d 1310, 1312."

¹³⁹ *State ex rel. Burk v. Oklahoma City*, 598 P.2d 659; 1979 OK 120 (Okla. 1979).

¹⁴⁰ *Kerby v. Kerby*, 2007 OK 35; 164 P.3d 1049, 1052 -1053 (Okla. 2007); citing, *Thielenhaus v. Thielenhaus*, 1995 OK 5; 890 P.2d 925, 934-935; (Okla. 1995), and, *Merritt v. Merritt*, 2003 OK 68; 73 P.3d 878, 884 (Okla. 2003).

¹⁴¹ *McCabe v. McCabe*, 2003 OK 86; 78 P.3d 956, 960 (Okla. 2003).

meaningful amount to the acquisition of that property and by and large did not dispute that the source of the money was from Damon's mother. Damon presented competent evidence to overcome the presumption of gift created by the warranty deeds, and trial court was correct as a matter of law when he ruled that the property was Damon's separate property.

The allegations as to error in the form and format of the findings of fact and conclusions of law have no basis in Oklahoma law. The trial court here made such findings and conclusions, in writing, as required, and if any matter was not stated in wording preferred by the appellant, it was nonetheless resolved by the court, either specifically or by implication.

The proposition that Teresa [REDACTED] was entitled to an award of support alimony is contrary to the facts of record and controlling considerations as to alimony. The evidence of record shows she received the lion's share of property subject to division, and that she has made, and will continue to make, a comfortable living from her employment and from her retirement benefits.

Judge Thygesen did not accept Damon's evidence which would have established that the joint tenancy warranty deed was a product of the policies of the title company, and not his own wishes or intent. Likewise, the judge did not accept an affidavit of a former employee which would have simply placed some conflicting evidence in the record. Whether all the proffered evidence was accepted or all excluded, the result would be the same: Judge Thygesen would have made a ruling within the scope of the conflicting evidence and according to his sound discretion.

The trial court heard the application for fees and costs and all relevant argument and considered all relevant authority, and denied fees based on a balancing of the equities as required by law and supported by the facts of record.

No error has been demonstrated in the proceedings below and the reasoned judgment of the trial court should not be disturbed on appeal.

WHEREFORE, the appellee, Damon [REDACTED] prays that the judgment of the trial court be
AFFIRMED.

Respectfully submitted, February 16, 2016.



BARRY K. ROBERTS, OBA# 7627
111 N. Peters Ave. Suite 490
Norman, OK 73069-7200
(405) 329-1974
Attorney for Appellee

CERTIFICATE OF MAILING

I certify that a true and correct copy for the foregoing pleading was mailed to Benjamin Aycock, James R. Gotwals, and Mary Lou Gutierrez, James R. Gotwals & Assc., Inc., 525 S. Main St., Suite 1130, Tulsa, OK 74103, attorneys for the appellant by placing it in the U.S. Mail, postage prepaid.

February 16, 2016.


BARRY K. ROBERTS