ORIGINAL

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 28 2016
MICHAEL S. RICHIE
[redacted]

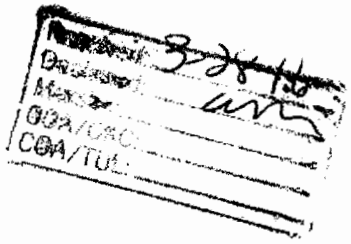
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE THE MARRIAGE OF:

[redacted]
**Petitioner/Appellant,**

**versus**

[redacted]
**Respondent/Appellee.**



**Case No.** [redacted]

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

# APPELLANT'S REPLY BRIEF

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IN RE THE MARRIAGE OF:

[redacted]

**Petitioner/Appellant,**

**versus**

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**Respondent/Appellee.**

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**Case No.** [redacted]

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**Appeal from the District Court in and for Muskogee County**
**District Court Case No. FD-2012-419**
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## REPLY BRIEF OF APPELLANT

The Appellant, [redacted] submits her Reply Brief. Okla.Sup.Ct.Rule 1.10(a)(k).

## RESPONSE TO APPELLEE'S INTRODUCTION

One of the primary issues raised in this appeal is whether or not certain real property partially purchased with money inherited by Appellee, [redacted] became marital property during the parties' marriage. Teresa presented clear and convincing evidence of the property being joint property, as well as why Damon should pay her spousal support and/or attorney's fees.

For reasons which are not readily apparent from the record, Judge Thygesen placed much reliance on Damon's unsupported and uncorroborated testimony in a way that is quite remarkable in these kinds of proceedings, contrary to law, and effectively found and ordered that that the real property was Damon's separate property without specific findings or conclusions. Also, contrary to the evidence, Judge Thygesen found and ordered that Teresa was not entitled to any spousal support and/or attorney's fees.

"A trial judge's decision comes to a court of review clothed with a presumption of correctness." *Willis v. Sequoyah House, Inc.*, 2008 OK 87, ¶ 15, 194 P.3d 1285. However, if that decision is without the support of competent evidence, or is clearly erroneous as a matter of law, the trial judge's findings of fact may not be accepted. *Weston v. Independent School Dist. No. 35 of Cherokee County*, 2007 OK 61, ¶ 16, 170 P.3d 539.

Each of these errors must be corrected on appeal.

## RESPONSE TO APPELLEE'S SUMMARY OF THE RECORD

The purpose of a brief is to present to the Court in concise form the points and questions in controversy, and by fair argument on the facts and the law of the case, to assist the court in

arriving at a just and proper conclusion. *Erwin v. Harris*, 1927 OK 66, ¶ 0, 254 P. 718. Consistent with that purpose, the Oklahoma Supreme Court has established rules to facilitate the briefing process including but not limited to Okla.Sup.Ct.R. 1.11. Damon's Answer Brief fails to comply with that rule.

Pursuant to Okla.Sup.Ct.R. 1.11(e), Damon is of course entitled to provide additional facts supported by the record which he believes were incorrectly stated or omitted by Teresa's four-page Summary of the Record. However, nowhere in his Answer Brief does Damon contend that Teresa's Summary of the Record is incorrect or incomplete in any way. Nonetheless, Damon devotes an additional ***fifteen pages*** to a recitation of his out-of-context contentions, so he could spin and twist the record in his favor.

Damon's contentions are not a summary of the record necessary to a full understanding of the questions presented to the Court for decision, nor are they an effort to correct any alleged inaccuracies with citation to the record as allowed by Okla.Sup.Ct.R. 1.11(e)(1). Damon conflates his unsubstantiated characterizations of the case before the trial court, and his legal argumentation, with a summary review of the record. The presentation is further set out as though none of the facts were contradicted or disputed at trial. On the contrary, as set forth in her opening brief and here, many significant facts were disputed by Teresa at trial.

Damon's right to offer additional facts does not grant the right to convert a statement of facts into argument. Examples of such argumentative statements offering/ inferring either a legal conclusion or an opinion about the value to be given to the evidence include but are not limited to:

- Constant statements that "he told the court" or "he specifically told the court;"

- Stating "[f]ollowing the evidence as to the inherited property..." as though said "evidence" was completely uncontroverted, when it was [Damon's Answer Brief at page 4];

- Asserting Teresa "worked as a broker for some seven years" but omitting to state he worked as a broker for seven years as well (8/18/14 Tr., Page 16, Lines 18-25; Page 17; Page 18, Lines 1-5);

- Omitting to state in his entire Summary of the Record that he 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, the same year the parties purchased the 130 acre tract) from his training as a real estate broker (10/30/14 Tr., Page 99; Page 100, Lines 1-9);

- Opining that Teresa "presently earned enough money to more than cover her living expenses," while failing to state that he testified he hadn't looked at her monthly expenses in two years (8/18/14 Tr., Page 135, Lines 2-20);

- Referring to the monthly expenses testified to by Teresa as her "latest version" of same [Damon's Answer Brief at page 6];

- Characterizing Teresa's testimony regarding the Bank of America CD and her thrift savings plan as "admissions" [Damon's Answer Brief at pages 7 and 8];

- Inserting facts in parentheticals which are not actually contained in the quote from the transcript [Damon's Answer Brief at page 8];

- Characterizing Teresa's testimony regarding the source of the money used to purchase the Warner property as an "admission" [Damon's Answer Brief at page 9];

- Stating Judge Thygesen "specifically found and ruled" that "based on the evidence," the court declined to award further support alimony when the trial court made no such finding in his original Decision [R. 86-87] and the record does not support same;

- Inserting *totals* for the marital personal property and debt awarded Teresa which are *not* actually contained in the Decree of Divorce and Dissolution of Marriage [Damon's Answer Brief at page 18; R. 210-2261];

- Inserting *totals* for the marital personal property and debt awarded Damon which are *not* actually contained in the Decree of Divorce and Dissolution of Marriage [Damon's Answer Brief at page 18; R. 210-226]; and

- Characterizing the "net distribution of marital property" awarded to each party in terms of *percentages*, which were *not* actually contained in the Judge Thygesen's original Decision or Decree of Divorce and Dissolution of Marriage [Damon's Answer Brief at page 18; R. 86-87; R. 210-226].

Aside from the impropriety of using a supposedly neutral section of the brief to begin his arguments, Damon's comments and conclusions about what he "told the court" and "stated" are unsworn statements of supposed fact, and as such not only can have no value in this appeal but may not be considered by this Court in making its ultimate determination. "'[u]nsworn statements' of an advocate do not constitute evidence." *State v. Torres*, 2004 OK 12, ¶ 29, 87 P.3d 572.

## RESPONSE TO APPELLEE'S STANDARDS OF REVIEW

The parties agree that the applicable standard of review in actions for divorce, alimony and division of property, is abuse of discretion or a finding clearly against the weight of the evidence. There is a strong presumption that property acquired during the marriage is presumed to have been jointly acquired. *Gray v. Gray*, 1996 OK 84, ¶ 11, 922 P.2d 615. However, in order to overcome a presumption, evidence must be introduced which is sufficient to support a finding or the nonexistence of the presumed fact. *Bartlett v. Bartlett*, 2006 OK CIV APP 112, 144 P.3d 173. The party asserting that property is separate property has the burden of proof. *Gray*, 1996 OK 84 at ¶ 11. 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.** *Bartlett v. Bartlett*, 2006 OK CIV APP 112, 144 P.3d 173; *Crocker v. Crocker*, 2003 OK CIV APP 58, 72 P.3d 65.

The standard before the court on appeal is whether there is any competent evidence to support the trial court's decision. *Weston v. Ind. Schl Dist. No. 35 of Cherokee County*, 2007 OK 61, ¶ 16, 170 P.3d 539 (citing *Robert L. Wheeler, Inc. v. Scott*, 1991 OK 95, 818 P.2d 475). Only

if that decision is without the support of competent evidence, or is clearly erroneous as a matter of law may the trial judge's findings of fact not be accepted. *Id.*

## RESPONSE TO APPELLEE'S "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" – WHICH APPEARS TO BE IN RESPONSE TO APPELLANT'S PROPOSITION II AND VI

It is respectfully pointed out that "Proposition in Answer I" of Damon's Answer Brief completely disregards two things: that Judge Thygesen made absolutely no findings of separate property in his original conclusions of law and findings of fact [R. 86-87] and Damon's bare testimony failed to rebut the presumption of joint property.

Damon *never, ever* told his wife Teresa that he claimed the two tracts of land in dispute as separate.

Q. (By Mr. Gotwals) ...Is it your contention that the – any of the property – any of the real estate you all own is separate?
A. (By Damon) Yes.
Q. Okay. And when did you first arrive at the position that it was separate?
A. When I purchased it.
Q. Okay. Did you ever tell your wife it was separate?
A. No.
Q. Sir?
A. No.
Q. Did you ever discuss with your wife that the property you placed in joint tenancy was separate?
A. No.

8/18/14 Tr., Page 53, Lines 20-25; Page 54, Lines 1-7. And:

Q. (By Mr. Gotwals) 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?
A. (By Damon) No.
Q. Have you had any conversations with anyone at all, prior to this divorce being filed, that these properties were claimed by you as separate?
A. Yes.
Q. Who?
A. Well, it would be hearsay. All my friends.
Q. All your friends" All – did you –

A. Breakfast buddies.
Q. Did you bring anybody here to testify to that?
A. 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.
**Q. (By Mr. Gotwals) Sir, is there any evidence other than your unilateral statement, that you intended for this property to be your separate property?**
**A. No.**

8/18/14 Tr., Page 80, Lines 17-25; Page 81, Lines 1-14 (emphasis added).

And:

Q. (By Mr. Gotwals) And did you share with anybody there [at the closing] that it wasn't going to be in joint name, like you put it in?
A. (By Damon) No, sir.
Q. Did you ever tell anybody that it wasn't going to be in joint name, like you put it?
A. No, sir.
Q. Did you ever tell that to anybody, until these proceedings started?
A. No, sir.
Q. Sir?
A. No, sir.

8/18/14 Tr., Page 65, Lines 24-25; Page 66, Lines 1-9.

When Damon closed on the 130 acre tract, he claims he was told by an employee of Muskogee Title that he had to put the property in joint name. 8/18/14 Tr., Page 59, Lines 4-19. Jenny Thunder's name was on the deed as the notary. Teresa's Trial Ex. 7. However Damon ultimately testified he did not know the name of the employee he spoke to. Page 61, Lines 4-25. The closing was February 20, 1998. 8/18/14 Tr., Page 62, Lines 1-3.

Judge Thygesen refused to admit Jenny Thunder's affidavit. This 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 Damon'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:

> Your Honor, with regard to counsel's first objection, we were served with a notice to present testimony as hearsay testimony, which we believed counsel must have thought was hearsay, although he's come away from that position in terms of what – whether he considers it hearsay or not, for the truth of the matter asserted. And we advised him of this witness and what her testimony was, actually, prior to the last trial. At that juncture, it was physically impossible, by any stretch of the imagination, to try to get her here. Then they named other witnesses that they tried to put on to bolster up this, in case Jenney Thunder did, you know, say what she said.
>
> But if we go back to his intent to offer the hearsay testimony, I told the Court at the time, when he presented that to us, that it was less than 48 hours prior to the trial. And we did everything in our power not only to contact Jenney Thunder, we found her, put counsel in communication with her, prior to commencing court, well in advance. And he talked to her.
>
> And in her affidavit, she specifically states that she spoke with counsel for the Respondent. "I was contacted and told him all of the above information." Which one of the things that Mr. Hayes notoriously leaves out of what's in this affidavit, is the affirmative statement that "At no time did I ever explain any documents to anyone or advise anyone on how to take title to property." That goes to the very essence of what this man's testimony was, that he heard from someone there.
>
> One of the premises for the elicitation of the admission of hearsay testimony, regardless of whether it's hearsay or not, is whether or not it is the best evidence or more reliable or the best that can be gotten. This witness doesn't live in this state. She's not available. You know, the policy of someone who wasn't at the closing, really doesn't have much to do with it unless she was at this particular closing. In this instance, this girl closed the transaction. She specifically says she never explained any documents to anyone or to – to advise anyone about how to take title to this property. I did inform him I was going to try to submit this to the Court for consideration, in terms of the – you know, the veracity of Mr. [redacted]
>
> We're left, unfortunately, in this case with basically trying to find out what was in Mr. [redacted] head at any particular point in time when he was doing things, and we're still apparently relying solely on his testimony for a lot of this. This is some evidence, probably as good evidence as what he testified to, because he testified to what I consider rank hearsay. I mean, I wasn't at the

> closing. I can't testify as to what was said. 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. 10/30/14 Tr., Page 119, Lines 19-25; Page 120; Page 121, Lines 1-22.

This is an adequate prima facie showing that Damon was never told he should put the properties into joint tenancy by Jenny Thunder, and it was error to preclude Ms. Thunder's affidavit.

Damon signed a contract to purchase the 130 acres on January 24, 1998, almost a month *before* the closing. 8/18/14 Tr., Page 62, Lines 10-17; Teresa's Trial Ex. 11. As the second page of the contract states Damon is taking title in his and Teresa's names, Damon knew a month before he spoke to any employee of Muskogee Title that he was putting the property in Teresa's name. 8/18/14 Tr., Page 62, Lines 18-25; Page 63, Lines 1-24; Teresa's Trial Ex. 11. Damon admits he never told the Realtor that he intended for the property to be separate. 8/18/14 Tr., Page 64, Lines 2-14.

Damon likewise failed to mention at the closing of the 80-acre tract that it wasn't going to be in joint name, like he put it in. 8/18/14 Tr., Page 65, Lines 15-25; Page 66, Lines 1-9. 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.

"'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.'" *Larman v. Larman*, 1999 OK 83, ¶ 8, 991 P.2d 536. 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**. *Bartlett v. Bartlett*, 2006 OK CIV APP

112, 144 P.3d 173; *Crocker v. Crocker*, 2003 OK CIV APP 58, 72 P.3d 65.

In this case, Damon presented *zero* evidence beyond his own uncorroborated testimony elicted on cross examination by his counsel, concerning the funds he allegedly received from his mother's estate when she passed away in 1997. Damon was a real estate broker for nearly 7 years and 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, the same year they acquired the 130-acre tract). 10/30/14 Tr., Page 99; Page 100, Lines 1-9. He testified, as previously described, that he never told Teresa he thought the two farm tracts were his separate property until his deposition taken after she filed for divorce.

Under the *Crocker* and *Larman* cases briefed in Teresa's Brief-in-Chief, 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. In this case, Damon's "self serving testimony" that he had no donative intent to make a gift clearly should not have been relied upon by the trial judge in making its decision. 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. Contrary to his assertions, Damon simply did not meet his burden to overcome the presumption of gift with only his "extensive testimony." Damon's Answer Brief at page 21. Also contrary to his assertions on the same page and continuing on the next page (without citation to the record), Teresa did not threaten him with "legal action" if he did not take title in the form of joint tenancy deeds.

Moreover, Judge Thygesen did *not* make any affirmative determination in his findings of fact and conclusions of law, as to whether Damon gifted the 130- and 80-acre Warner properties

held in joint tenancy with right of survivorship, 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 Bank of America 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.

Finally, Teresa's request to divide the marital estate fairly and equitably was not punitive in any sense, although evidence was presented at trial that Damon had cheated on Teresa, forged her name on their tax returns for years in order to hide his gambling losses/winnings from her, and never told her he claimed the two farm tracts as his separate property.

**RESPONSE TO APPELLEE'S "PROPOSITION IN ANSWER II: THE TRIAL COURT MADE ALL NECESSARY FINDINGS OF FACT AND CONCLUSIONS OF LAW." – WHICH APPEARS TO BE IN RESPONSE TO APPELLANT'S PROPOSITION I**

On August 18, 2014, Teresa timely filed a *Request for Findings of Fact and Conclusions of Law* triggering the trial court's duty to state its own findings of fact and conclusions of law. R. 30-31. The consistent theme running through Damon's Answer Brief is that Judge Thygesen thereafter made substantive findings of fact and conclusions of law in the case below. R. 86-87. In the parallel universe concocted by Damon to suit his purposes on 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 December 5, 2015." Damon's Answer Brief at page 25. While Damon's fictional rendition of the trial judge's findings of fact and conclusions of law may reflect what he wished would have occurred in the court below, it strains credulity for Damon to suggest that Judge Thygesen's informal, two-page letter written on letterhead (R. 86-87), constitutes the findings of fact and conclusions of law envisioned by 12 O.S. § 611.



[redacted]

Judge Thygesen's letter did not contain the essential facts for his "conclusions." It actually contained very little that could be denominated a finding. There were no conclusions of law whatsoever. As such, 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. A determination of joint versus separate property goes to the very essence of what is an equitable division in this case, but is glaringly absent from the letter.

Just generally stating that "[a]ny review of the records, as summarized above, demonstrates that Judge Thygesen had before him clear and competent evidence – which supports every exercise of his discretion" is not enough. Damon's Answer Brief at page 26. Judge Thygesen's letter simply did not adequately express the basis of the trial judge's decision, was not corrected by him after it was pointed out to him, and accordingly, it is "substantial error". *See, e.g., Messinger v. Messinger,* 1958 OK 296, 341 P.2d 601 (holding that judge's opinion which amounted to no more than a general finding in favor of defendant, was too general to meet the requirements of 12 O.S. § 611); *Gulf, C.&S.F.Ry.Co. v. Williams*, 1915 OK 803, 152 P. 395 ("Whilst the right of a party to have the trial court make separate findings of fact and conclusions of law is a substantial right, the rule is well settled that, where the court attempts to make special findings upon the request of a party, and inadvertently fails to make special findings upon some particular matter in controversy, or makes such findings in too general terms, the court does not thereby commit substantial error unless its attention is first called to the omission to find, or to the defective finding, and it then fails or refuses to correct the same.").

After Teresa called attention to the deficiencies in his findings of fact and conclusions of law, the trial court still failed to make any corrections.

**RESPONSE TO APPELLEE'S "PROPOSITION IN ERROR III: THE TRIAL COURT DID NOT ERR IN DECLINING TO AWARD TERESA DRAKE SUPPORT ALIMONY." – WHICH APPEARS TO BE IN RESPONSE TO APPELLANT'S PROPOSITION V**

Damon's position on support alimony is that because Teresa has "proven earning capacity" and received "a generous amount of marital property," she is not entitled to receive any support alimony. Such disregards that Teresa is of retirement age (08/18/14 Tr. Page 162, Lines 9-25; Page 163, Lines 1-3), and needs to transition to retirement. Teresa should not have to continue working forever in order to meet her financial needs. While the Court should consider income from income-producing property awarded to the spouse requesting support alimony in determining that spouse's need, the spouse is not required to liquidate property awarded to him or her. It is the role of support alimony, *not alimony in lieu of a property division*, to maintain and support a person. *Bond v. Bond*, 1996 OK CIV APP 3, 916 P.2d 272.

*Bond* and *Archer v. Archer*, 1991 OK CIV APP 28, ¶ 16, 813 P.2d 1059, both indicate that the amount of *income-producing* property awarded the spouse, rather than the total property award, should be considered. And, *Primrose v. Primrose*, 1983 OK CIV APP 22, ¶ 17, 663 P.2d 755, indicates that, when a property settlement is reduced to *cash alimony in lieu of property division*, this award can be considered in determining need. Teresa did not receive any *income-producing* property or *cash* alimony in this case.

Other factors courts are to consider in awarding support alimony further demonstrate that Judge Thygesen abused his discretion in his denial of support alimony to Teresa. This was a long term marriage (41 years when Teresa filed for divorce). At the time of trial, Teresa was 62 and Damon was 61. All of the parties' assets and liabilities were acquired and incurred after marriage. 08/18/14 Tr. Page 51, Lines 19-23. The parties progressively stepped up their lifestyle through the years. When they first married, Damon was a truck driver and Teresa was a

beautician. 08/18/14 Tr. Page 7, Lines 19-25. At the time of trial Damon was employed 20 years as a salesman with Cedar Creek Lumber Company, grossing (not including his gambling winnings, farm rents and cattle sales) $138,615.37. 08/18/14 Tr. Page 11, Lines 15-17; *see also* Petitioner's Trial Ex. 40, Bate Stamp 650. Teresa was employed 24 years as a rating service representative with the Department of Veterans Affairs, *grossing* approximately $85-87,000.00 (not including her overtime). 08/18/14 Tr. Page 18, Lines 21-22; Page 160, Lines 23-25; Page 162, Lines 1-9; and Page 162, Lines 3-8; *see also* Petitioner's Trial Ex. 39, Bate Stamp 649. The parties were able to graduate through the years to a comfortably high lifestyle, owning their own home, farmlands, numerous vehicles and other "toys".

While need and ability to pay are the primary factors for the Court to evaluate, the other factors courts look to – the length of the marriage, the ages of the spouses, the parties' station in life, and the parties' accustomed style of living – all clearly weigh in favor of an award of support alimony. Judge Thygesen's denial of support alimony beyond the "$49,000.00," received by Teresa (of which $22,400.00, was property division alimony in the form of the CD, and therefore he made Teresa pay half of her own support alimony), was grossly inadequate on the evidence before him, and therefore constipates an abuse of discretion.

**RESPONSE TO APPELLEE'S "PROPOSITION IN ANSWER IV: THERE IS NO ERROR IN THE COURT'S EVIDENTIARY RULINGS." – WHICH APPEARS TO BE IN RESPONSE TO APPELLANT'S PROPOSITION VII**

Damon contends in his Answer Brief that whether or not to admit Jenny Thunder's affidavit was entirely at Judge Thygesen's discretion and that Judge Thygesen correctly refused to admit the affidavit into evidence because it was hearsay and not the best evidence. To the contrary, an affidavit, attestation and counsel argument can carry the burden of proof. *Jlee Co., L.L.C. v. Reneau Seed Co.*, 2014 OK CIV APP 65, 332 P.3d 297. "An affidavit is one of the

methods by which witness testimony is taken." *Id.* at ¶ 7 (citing 12 O.S. § 421). The *Jlee* case goes on to hold that affidavits may be considered evidence:

> To that end, the court may consider, in addition to the pleadings, items such as depositions, *affidavits*, admissions, answers to interrogatories, *as well as other evidentiary materials* which are offered by the parties in acceptable form.
>
> *Residential Funding Real Estate Holdings, L.L.C., v. Adams*, 2012 OK 49, ¶ 17, 279 P.3d 788, 793 (emphasis added).
>
> Such a verified motion, "sworn under oath, as required by 12 O.S.2001 § 422," and including "declarations of the affiant's actions and observations" to which he would otherwise be competent to testify, "constitutes the equivalent of an affidavit." *See Smith v. Teel*, 2008 OK CIV APP 7, ¶ 8, 175 P. 3d 960, 964-965. *Inasmuch as Rule 13(c) specifically names an affidavit as "evidentiary material"* properly considered on motion for summary judgment, we conclude the trial court erred in holding Plaintiff failed to oppose Employer's motion for summary judgment with evidentiary support.
>
> *Kennedy v. Builders Warehouse, Inc.*, 2009 OK CIV APP 32, ¶ 14, 208 P.3d 474, 477. In another case, the appellate court found the paternity affidavit in question, signed before a notary, unequivocally acknowledging the child's paternity, was sufficient evidence to establish the child's legitimacy for purposes of intestate inheritance; and that the properly notarized and acknowledged document "'imports verity' that can only be overcome by clear and convincing evidence." *In re Estate of Gentry*, 2004 OK CIV APP 34, ¶¶ 5-9,90 P.3d 1015, 1017-18.

In sum, an affidavit *is* a form of evidentiary material (*see* 12 O.S. § 431). Jenny Thunder was an out of state witness disclosed by Damon's counsel just a few days before trial. R. 38-41. Her affidavit (Ex. 4) was an adequate prima facie showing that Damon was never told he should put the properties into joint tenancy by Jenny Thunder, and Judge Thygesen erred in not admitting the same.

In further demonstration that Judge Thygesen made erroneous evidentiary rulings, Judge Thygesen repeatedly allowed Damon to testify at to what "Jenny" told him at the closing, as non-hearsay, for the proof of the matter asserted. At the same time Damon allowed that he didn't know if it was Jenny Thunder that he spoke to. Page 61, Lines 4-25.

**RESPONSE TO APPELLEE'S "PROPOSITION IN ANSWER V: THERE WAS NO ERROR IN THE TRIAL COURT'S RULINGS ON FEES AND COSTS." – WHICH APPEARS TO BE IN RESPONSE TO APPELLANT'S PROPOSITIONS VIII AND IX**

Teresa's reliance upon the criteria set forth in *State ex rel. Burk v. Oklahoma City*, 1979 OK 115, 598 P.2d 659 ("*Burk*"), is neither strict nor misplaced. In *State ex rel. Oklahoma Bar Ass'n v. Fagin*, 1992 OK 118, 848 P.2d 11, the Oklahoma Supreme Court noted that our appellate courts have extended *Burk* to some degree in several domestic cases:

> The Oklahoma Court of Appeals has spoken on this question to some degree in several cases. In Longmire v. Hall, 541 P.2d 276 (Okla.Ct.App.1975), an action brought by an attorney against his former client in a divorce action, the court determined that a contingent fee arrangement of 25% of the property settlement and support alimony was void. In dicta, the court stated that the results obtained is one factor which enters into the reasonable value of an attorney's services when the court awards fees. In Gardner v. Gardner, 629 P.2d 1283 (Okla.Ct.App.1981), the Court of Appeals held that in the exercise of judicial discretion in awarding fees, a trial court may allow an "additional bonus" to the wife for work done by her attorney and experts. (Emphasis in original) In another case, the court concluded that the trial court erred in awarding attorney's fees without first taking evidence as to the time spent, and the reasonableness thereof, in accordance with Burk. Mastromonaco v. Mastromonaco, 751 P.2d 1106 (Okla.Ct. App.1988). Most recently, a Court of Appeals decision held that if a trial court determines that attorney's fees should be awarded, then the amount must be fixed in accordance with Burk. O'Connor v. O'Connor, 813 P.2d 544 (Okla.Ct.App.1991). We decline to rule at this time as to the correctness of these decisions, Because they do not appeal the issue of a contract between an attorney and his client.

Most recently, *in Smith v. Smith*, 2013 OK CIV APP 54, 305 P.3d 1054, the Court of Civil Appeals of the State of Oklahoma, Division III, (the "COCA"), squarely addressed the need for a *Burk* hearing in a domestic case. In *Smith*, the husband appealed from an order awarding his wife attorney fees following a hearing and a 2011 order favoring wife on her requests to set child support, determine arrearage, and set current support, among other things. Husband raised one proposition of error arguing the trial court erred when it awarded attorney fees to his wife without a "*Burk*" hearing and without required facts or computations to explain the award. The COCA reversed and remanded, holding:

> When, as here, issues are raised as to amount of time spent and complexity of the case or trial in opposition to a domestic relations attorney fee request, an evidentiary hearing is required. Guided by case law applying the *Burk* factors in domestic relations cases, we further find the trial court is required, in its judicial balancing of the equities, to consider the specific circumstances of each case, applying any criteria, including, but not limited to the *Burk* criteria, which in the trial court's discretion it deems relevant to a determination of allowable attorney fees.

*Smith v. Smith*, 2013 OK CIV APP 54 at ¶ 9.

As such Damon is wrong when he states that "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." Damon's Answer Brief at page 29.

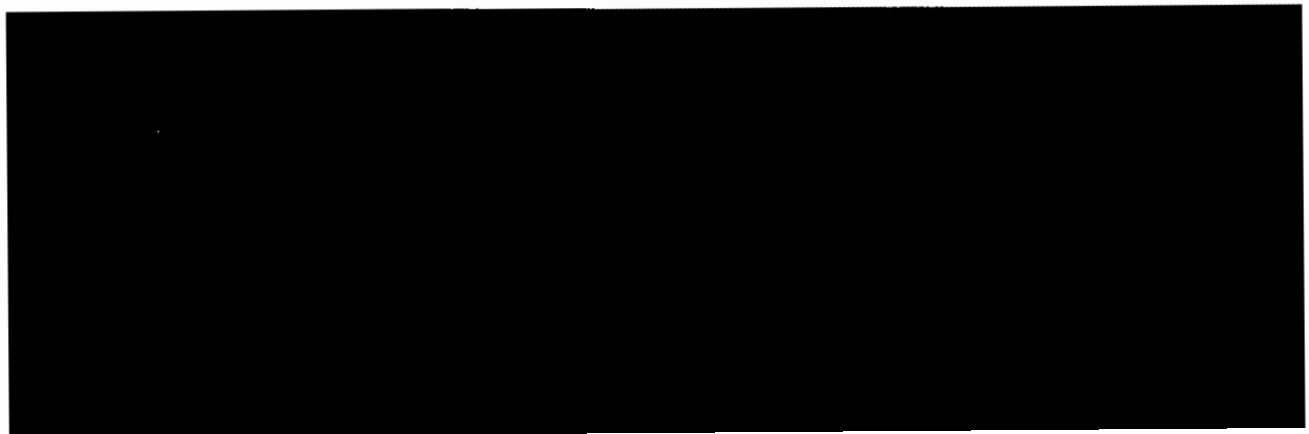
Payment of expenses, including an attorney's fee in dissolution actions, is covered by 43 O.S. 110 (D), which provides as follows:

> Upon 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.

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, & 14, 923 P.2d 1195. When balancing the equities, all the factors presented by the evidentiary materials in the record must be considered and no single factor is paramount. *Id.*

In balancing the equities, the trial court is thus not limited to simply considering the means of each party, but may consider whether a party acted in an arbitrary and capricious manner and exacerbated and prolonged the proceedings thereby inappropriately increasing the





opposing party's fees. *Sicking v. Sicking*, 2000 OK CIV APP 32, ¶ 24, 996 P.2d 471, *cert. denied, Dorwart v. Sicking*, 531 U.S. 876,121 S.Ct. 182,148 L.Ed.2d 126. In that event, the offending party may be surcharged to the, extent this has occurred. There is no abuse of discretion in requiring a party to pay the attorney fees he or she actively participated in creating. *Id.* at ¶ 25.

In this case, not only are Damon's income and earning potential superior to Teresa's, 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. Based on the evidence Teresa introduced into the record (cheating, gambling, forging her signature on tax returns, taking inconsistent positions on separate nature of real property, etc., as outlined in Proposition VIII, of her Brief-in-Chief), the trial court erred in not awarding Teresa some or all of her attorney's fees and costs.

**APPELLEE HAS WAIVED ARGUMENT TO APPELLANT'S PROPOSITIONS III AND IV**

Appellee failed to brief the issues contained in Appellant's Propositions III and IV. As such he has waived any opposition he may have with regard to these issues. *See, e.g., Peters v. Golden Oil Company*, 1979 OK 123, 600 P.2d 330, 331 ("Assignments of error which are not argued or supported in the brief with citations of authority will be considered and treated as waived by the court."). Failure to brief abandons an issue. *Jackson v. Jackson*, 1999 OK 99, ¶ 17, 995 P.2d 1109.

**CONCLUSION**

"A trial judge's decision comes to a court of review clothed with a presumption of correctness." *Willis v. Sequoyah House, Inc.*, 2008 OK 87, ¶ 15, 194 P.3d 1285. Where, as here, the record is void of the trial court's considerations, the presumption of correctness fails.

"'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.'" *Larman v. Larman*, 1999 OK 83, ¶ 8, 991 P.2d 536. In this case, Damon – the party bearing the burden – simply did not meet this burden.

Accordingly, Appellant [redacted] respectfully requests the Court reverse the trial court judgment in accordance with the arguments set forth in her Brief-in-Chief and above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of APPELLANT'S REPLY BRIEF will be mailed on the 25th day of March 2016, by depositing it in the U.S. Mail, postage prepaid, to:

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I further certify that a copy of APPELLANT'S REPLY BRIEF was mailed to or filed in the Office of the Court Clerk of Muskogee County on or about the 25th day of March 2016.

James R. Gotwals