IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[redacted]

Petitioner/Appellee,

vs.

[redacted]

Respondent/Appellant.

) Appeal Case No. [redacted]
) Formerly Case No. [redacted]
) Washington County

RESPONSE TO MOTION TO DISMISS APPEAL

Appellant/Respondent, [redacted] by and through her counsel of record, Richard A. Wagner, II and Bryan J. Nowlin of the law firm, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., for her response to Appellee's Motion to Dismiss Appeal filed August 30, 2017, would show this Court as follows:

1. The Motion to Dismiss Appeal is based entirely upon the doctrine of acceptance of the benefits suggesting that the Appellant accepted the benefits of the underlying Decree of Dissolution and therefore is estopped from her appeal herein.

2. The Motion itself, however, recognizes that Appellant has not accepted the benefits of the entire judgment and alternatively requests that briefing be disallowed on certain of the numbered assignments of error contained with the Petition in Error.[1]

3. The Motion to Dismiss should be denied for two reasons. First, Appellant has not accepted the benefits of the entire judgment. Second, Appellant's appeal cannot result in a lower property division or alimony than is sought. The payments received for

[1] The Motion to Dismiss Appeal's request for alternative relief to limit the appeal does not acknowledge that the Petition in Error may not constitute a complete list of all reversible errors which may be contained within the eventual Brief in Chief. Supreme Court Rule 1.26(b); *Cable v. State ex rel. Oklahoma Police Pension and Retirement Bd.*, 2001 OK CIV APP 99, n.3, 31 P.3d 392, n.3.

property division have solely been on items which were stipulated to by the parties during trial and which cannot be altered by the appeal.

4. The Trial Court accepted the stipulations of the parties made during the trial on the merits. The Trial Court's Findings of Fact and Conclusions of Law states in paragraph 8, "The Court accepts the stipulations announced at trial." (Exhibit "A," Court's Findings of Facts and Conclusions of Law 4/27/17).

5. The Trial Court specifically found in paragraph 32, "The parties **stipulated** that the 'Call Pay' ($158,700) and Chairman of the Board payments ($29,000) to Petitioner were not included in the Prenuptial Agreement. It was further stipulated by the Petitioner that Respondent should be awarded her equal share of these funds as her share of the marital property." (Exhibit "A," Court's Findings of Facts and Conclusions of Law 4/27/17) (emphasis added).

6. The Petitioner/Appellee also acknowledges that the Morgan Stanley account, from which the second check of $24,300.65 is derived is undisputedly joint property. The Petitioner/Appellee's Closing Arguments and Proposed Findings and Conclusions of Law states on page 15, "That the parties are each awarded one-half of the present balance of the Smith Barney account number 226-01625 in the amount of approximately $85,000.00, **as it was undisputed that this was joint property**." (Exhibit "B," Petitioner/Appellee's Closing Arguments and Proposed Findings 4/17/17) (emphasis added).[2]

---

[2] The Respondent's Proposed Findings filed April 17, 2017 also acknowledge the stipulation, but references the account as Morgan Stanley ending in 285 in the amount of $85,262.00. Smith Barney was acquired by Morgan Stanley in 2009, and now operates as Morgan Stanley Wealth Management. http://www.morganstanley.com/pub/content/msdotcom/en/press-releases/morgan-stanley-smith-barney-is-now-morgan-stanley-wealth-management_7a78aa1d-036a-4fbf-9df7-1e73387a1c8a.html last visited September 19, 2017.

ARGUMENT AND AUTHORITY

The Brief in Chief for the present appeal will contain propositions of error involving the improper enforcement of prenuptial agreement, the refusal of the Trial Court to properly categorize marital property, the Trial Court's refusal to properly credit tax savings, an improper support alimony award, the improper finding of entitlement to attorney's fees, and the Trial Court's refusal to deviate from the Child Support Guidelines. The Motion to Dismiss Appeal alleges only that Appellant accepted certain funds for property division and alimony.

1. The appeal should proceed because the appeal cannot result in a lower judgment for Appellant.

The husband in *Hamm v. Hamm* paid the entirety of the approximately $2 billion property division award, which wife voluntarily accepted instead of pursuing a hearing on alimony pendente lite. 2015 OK 27, 350 P.3d 124. In this case, the Appellant cashed checks in the exact amount of the stipulated property division minus attorney's fees which she contests. Appellant has not been paid the entirety of the judgment (except through offset of the attorney's fees which she appeals) and it is impossible on remand for the property division to be less than what she has received, because (i) the amount of property division was stipulated, and (ii) the amount of attorney's fees was also stipulated. The total amount owed to the Appellant may increase as a result of the appeal, but it cannot and will not under any circumstances decrease. Furthermore, Appellee has not filed a cross-appeal, meaning that the property division judgment cannot under any circumstance increase to his benefit.

The Oklahoma Supreme Court in the *Hamm* decision relied upon *United Engines v. McConnell Const., Inc.* to discuss the exception for appeals which cannot decrease the

amount of the judgment owed. The Court therein ruled, "If the reversal of the judgment appealed from cannot possibly affect the appellant's rights to the benefits secured or vested under the part of the judgment which was allowed to become final,' a party has not waived his or her right to appeal by accepting the benefits of the judgment." *Hamm v. Hamm*, 2015 OK 27, 350 P.3d 124, 125 quoting *United Engines v. McConnell Const. Inc.*, 1980 OK 139, ¶ 15, 641 P.2d 1101, 1105 quoting *Marshall v. Marshall,* 1961 OK 86, ¶ 23, 364 P.2d 891, 895. The *United Engines* decision was a contract claim in which United did not contest the award of payment for unrelated services, but instead appealed the Trial Court's failure to award the entire amount of the work due on a specific contract. *Id.* The Supreme Court summarized, "United does not argue that the amount awarded is not due and owed to them; rather, United argues that that amount and an additional amount should have been awarded." *Id.*

Five years later, the Supreme Court again applied the exception to the acceptance of the benefits doctrine and using the term "no risk." The Court held:

> The general rule is that a party who voluntarily accepts benefits of a judgment waives the right to appeal. An exception is made if, on appeal, it is possible to obtain a more favorable judgment without the risk of a less favorable judgment. Acceptance of the benefits of the judgment is not inconsistent with an appeal if it is lodged solely to obtain a more advantageous judgment—i.e., a no-risk appeal. It is undisputed that at a minimum **Teel was entitled to the money in escrow. Teel does not argue that the amount awarded is not due but that amount and an additional amount should be awarded.** Teel has not waived his right to appeal because the actions taken by him are not inconsistent with his position on appeal.

Teel v. Pub. Serv. Co. of Oklahoma, 1985 OK 112, 767 P.2d 391, 395–96 (emphasis added) (partially abrogated by statute on other grounds) citing *United Engines, Inc. v. McConnell Const., Inc.*, 641 P.2d 1101, 1105 (Okla. 1980). Similarly, in this appeal it is

undisputed, because it was stipulated to by both parties, the Appellant is owed the "call pay" and "cob pay" in the amount of $93,850.00. The parties also stipulated to division of the Morgan Stanley account as set forth above.

The parties stipulated to the amounts paid for property division thus far and the Appellee did not file a cross-appeal. The stipulations alone render it impossible for the amount of the judgment to lower in the amounts received by Respondent/Appellant. The appeal is "no risk." As noted by a sister state,

> An acceptance of substantial benefits under a judgment does not waive the right to appeal from that judgment if (1) the benefits were fixed by consent, are undisputed, or could not be changed or reversed by the appeal; (2) the acceptance of the benefit was conditional, involuntary, or unconscious. In this case all the benefits, with the exception of the child support payments, fit within the exceptions mentioned.

Piper v. Piper, 234 N.W.2d 621, 622 (N.D. 1975). The absence of a cross-appeal further renders the appeal no risk for the Appellant. *See, e.g., Marshall v Marshall*, 1961 OK 86, 364 P2d 891, (judgment could not increase or decrease on royalty interest because of absence of cross appeal, wife accepted only that to which she was entitled under any theory); *Hofer v. Hofer*, 415 P.2d 753 (Ore. 1966) (denying motion to dismiss appeal where wife accepted three alimony payments noting husband failed to cross-appeal and as such the judgment could not be made more favorable to husband); *Cohen v Cohen*, 228 P2d 54 (Cal.Ct.App. 1951) (absence of cross appeal rendered it self-evident that wife's appeal could not take away any of the property awarded to her).

Furthermore, it was stipulated that Appellant was to receive ½ of the Morgan Stanley account. However, the Appellee elected to pay only $24,300.65 rather than the amount of $42,631 as is plainly set forth in the Decree of Dissolution. The Appellee paid

less than the amount owed, presumably by conducting an off-set of the attorney fee judgment owed by Appellant and subject of this appeal. The Appellant has not voluntarily paid the attorney fee judgment. The Appellant has not agreed to accept less than $42,631 for her marital interest in the Morgan Stanley Account. As a result, the Appellee has not fully paid the judgment for property division owed to the Appellant.[3]

2. The Appellee has not fully paid the judgment.

The Appellee has not paid the entire alimony award. The Appellee has not even paid the entire undisputed property division award, because he utilized self-offset to reimburse himself for attorney's fees which are subject of this appeal. The Appellee has not paid the judgment which is subject of this appeal.

The Motion to Dismiss, suggests, without authority that the acceptance of partial support alimony constitutes acceptance of the benefits of the entire alimony award. The Motion's reasoning is that, in theory, by the time this appeal reaches decisional stage that the support alimony award will be paid in full. The Motion, of course, ignores two undeniable facts. First, the Appellee cannot predict the future and it is entirely possible and perhaps likely that Appellant will not accept the final alimony payments due under the Decree of Dissolution subject of this appeal. It would be inappropriate for this Court to dismiss an appeal based upon actions which have not yet occurred. Second, the alimony award cannot be lowered as a result of the appeal. The Appellee has not filed a cross-appeal, and is now out of time in which to do so. The alimony award may be unchanged by the appeal if the Trial Court is affirmed, but it will not be lowered because Appellee neglected to preserve any of his own alleged errors by not filing a counter petition in error.

[3] The Appellant has not conceded and does not concede by depositing a partial payment check that she owes the amount which Appellee claims as offset for the attorney fee award.

In a similar context, the Supreme Court of North Dakota refused to dismiss an appeal noting, "A spousal support recipient's acceptance of spousal support payments is not a waiver of the right to appeal a judgment and is not inconsistent with a claim on appeal that he or she should have been awarded more support." *Lizakowski v. Lizakowski*, 893 N.W.2d 508, 513 (N.D. 2017) quoting *Sommers v. Sommers*, 660 N.W.2d 586 (N.D. 2003); *see also, McIlroy v McIlroy*, 83 SW2d 550 (Ark. 1935) (wife's acceptance of alimony payments due pending appeal was not inconsistent with her appeal where husband did not cross appeal and alimony could not decrease). Appellant has not received all of the permanent support alimony award. Appellant's appeal cannot result in a lowering of this amount due to the lack of a cross-appeal by the Appellee. The appeal as to alimony, along with all other issues, should be allowed to proceed.

3. **In the alternative to complete or partial dismissal, this Court should defer ruling on the motion to dismiss until the decisional stage of this appeal.**

Appellant bases this response to the Motion to Dismiss appeal largely upon stipulations which will be found in the record on appeal. The record is not complete, and as a result will not be subject to proper review until transmittal by the District Court Clerk. This Court, absent a complete record of the appeal, should defer consideration of the Motion to Dismiss to the decisional stage once the record of the stipulations is fully before the appellate court. *See, e.g., McDonald v. Rogers Galvanizing*, 1996 OK CIV APP 117, 914 P.2d 1079, 1080 (resolving motion to dismiss appeal based upon acceptance of the benefits at decisional stage). The Motion's request to dismiss certain assignments of error or otherwise limit the appeal in this matter does not contemplate the operation of Supreme Court Rule 1.26(b) which allows the Petition in Error to be deemed amended to include all assignments of error properly raised within the Brief in Chief.

CONCLUSION:

The Appellant deposited two checks containing some funds for property division. The checks are not complete. One check contained a disputed reduction for attorney's fees. The other check was solely the result of a stipulation at trial which is undisputed and not contested by either party. In addition, Appellant has not received all of the alimony awarded to her and this Court should not dismiss an appeal based upon the mere assumption that Appellant will accept that alimony voluntarily.

The appeal cannot be dismissed because Appellant has not even received full payment of the property division judgment. Appellee paid stipulated amounts for the on call, chairman of the board pay and for the Morgan Stanley account. However, Appellee elected to offset, without permission, the amount he claimed is owed to him for attorney's fees. Fees which are subject of this appeal and which are clearly contested by Appellant. As a result, Appellant has not voluntarily accepted the entire property division owed to her under the judgment, and she has not even been offered the entire property division judgment. Finally, it is undisputed that Appellant has not received the entire permanent support alimony award, and the same was again not tendered by Appellee.

Decisively, this Court should not dismiss the appeal because the property division and alimony judgments cannot be reduced through the appeal. Appellee neglected to file a counter-appeal, removing any possibility for a reduction in alimony. Similarly, the property division judgment cannot be any lower because the amounts allegedly paid are the result of undisputed stipulations by the parties at trial.

property division judgment cannot be any lower because the amounts allegedly paid are the result of undisputed stipulations by the parties at trial.

WHEREFORE this Court should deny the Motion to Dismiss Appeal, award Appellant her costs and attorney's fees for responding to the same, and enter any other relief to which the Appellant is entitled.

Respectfully submitted this 19th day of September, 2017.

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

Bryan J. Nowlin, OBA No. 21310
Richard A. Wagner, II, OBA No. 9268
320 South Boston Ave., Ste. 200
Tulsa, Oklahoma 74103-3706
918-594-0400; fax 918-594-0505
bnowlin@hallestill.com

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the above and foregoing via U.S. Mail, postage pre-paid, this 19 day of September, 2017, to:

N. Scott Johnson, OBA No. 15268
Patrick H. McCord, OBA No. 21747
N. Scott Johnston & Associates
302 East 10th Street
Tulsa, Oklahoma 74120
Attorney for Appellee/Petitioner

_____
Bryan J. Nowlin

3247497.2:232683:00350

IN THE DISTRICT COURT OF WASHINGTON COUNTY
STATE OF OKLAHOMA

IN RE THE MARRIAGE OF:)
[redacted])
Petitioner,)
vs.) Case No. [redacted]
[redacted])
Respondent.)

THE COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Now on this 27 day of April, 2017, the Court hereby enters its Findings Of Facts And Conclusions Of Law from the trial on the merits after two days of trial on March 28 and March 29, 2017. The Court has also reviewed the Proposed Findings Of Facts And Conclusions of Law submitted by both parties. Based upon said information, the Court FINDS AND ORDERS as follows:

1. Counsel for Petitioner shall prepare a Journal Entry and Decree Of Dissolution of Marriage based upon the findings and orders herein and submit the same to the Court for signature within 21 days from the date of this order.
2. The Court has jurisdiction over the parties and issues in this case.
3. The Parties marriage shall be dissolved as of March 29, 2017.
4. The Court finds that the parties entered into a binding Prenuptial Agreement, with both parties having the benefit of legal representation prior to entering into the agreement.
5. The Prenuptial Agreement is clear and unambiguous.
6. For purposes of making an award herein, the Court will rely upon the date of marriage, February 2, 2007, and the date the Petition For Dissolution Of Marriage was filed, March 10, 2014. Said dates are controlling for all awards herein.
7. The Respondent's request to change her name to Amiee Nimmo-Chochran is granted.
8. The Court accepts the stipulations announced at trial.

EXHIBIT
A

9. The Court accepts and adopts the recommendation of Dr. Laura Fisher as it pertains to the issues of custody and custodial periods of visitation.
10. The Court awards the parties joint custody and the parties are to submit their joint custody plan within 21 days of this order. Said order shall provide for the use of a parenting coordinator for any situation wherein the parties cannot reach agreement, including, if necessary, for where the child will attend school.
11. The father shall have the child every Wednesday after school and return the child on Thursday morning, or a similar schedule if there is no school that day.
12. The father shall have the child every first, third and fifth weekend from Friday after school and return the child on Monday morning, or a similar schedule if there is no school on any of those days. Weekends will be determined on the first Friday of the month. The father will have those weekends where the first, third and fifth Fridays appear on a calendar. For example, if the month begins on a Saturday, father will have the child the following weekend.
13. The Court adopts Dr. Laura Fisher's schedule for holidays and birthdays.
14. Each party shall have the right to have the child for fourteen (14) continuous days for summer visitation during the summer break. If a parent wishes to have the child for this period of time, they are to notify the other parent no later than April 30th of that year. However, this summer visitation is for the expressed purpose of taking the child on an extended vacation to a particular location, not to have the child in the parent's home during that time.
15. Due to the award of custodial periods of visitation stated herein, the parties will have shared parenting. Counsel are to determine the proper number of overnight visits, with no less than 130 overnights awarded to the father. 130 overnights representing every mid-week visit and an "every other weekend" schedule. Said 130 overnight visits does not include holidays, the 5th weekend of the month, or the summer vacation visitation.
16. There will be no right of first refusal for either parent. Each parent should make safe and reasonable decisions as it pertains to who may care for the child during his/her custodial periods when that parent cannot be present for any given reason. Furthermore, any such absence would be a welcomed time for extended family to spend time with, and care for the minor child.
17. Child Support shall be paid pursuant to the child support guidelines beginning May 1, 2017.
18. Because father's income varies, his income should be calculated based on the average of the last three years using his, and/or their, 2013-2015 taxes. However, if his 2016 taxes have been filed as of the date of this order the years 2014-2016 incomes will be applied.

19. The mother's income appears to be reasonably fixed and ascertainable based upon her employment with the University of Tulsa. If necessary, she is to provide Petitioner with her last three pay stubs to verify her income.
20. The Court will not deviate from the child support guidelines. In lieu of a deviation, the father has paid the child's private school tuition and will continue to pay for so long as the parties decide to have the child attend a private school.
21. Any other expenses should be shared by the parties pursuant to their percentages of contribution as shown in the child support computation.
22. Father shall provide for the health insurance for the minor child and the mother shall reimburse him at her percentage of contribution rate as found in their child support computation. However, the parties are free to seek out other insurance through the mother's employer if her insurance is more efficient. Said issue should be decided pursuant to their joint custody plan.
23. The parties joint custody plan shall prescribe a method for payment and reimbursement of medical expenses.
24. Any extracurricular activities of the child shall be shared by the parties in accordance with the percentage of contribution found in the child support calculation.
25. The mother shall be designated primary residential custodial parent for the child.
26. The parties shall share the tax benefit of claiming the child as a dependent on their taxes. Petitioner shall claim the child in all odd numbered years and Respondent shall claim the child in all even numbered years.
27. The Petitioner's separate property, identified and attached to the parties Prenuptial Agreement in Petitioner's Exhibit 1, and said property identified in Petitioner's Exhibit 8, remained his separate property throughout the marriage and never lost its identity as separate property. The same shall remain his separate property, free and clear of any claim made by Respondent.
28. The marital property of the parties shall be divided equally as further set forth herein.
29. Respondent shall be entitled to receive all the property identified in Petitioner's Exhibit 7, except for the Prudential Term Life Policy and the "Two-gether" Manta Ray Statue, which shall be awarded to the Petitioner.
30. Both parties requested the statue, but the Court knows very little about it. The value as of the date of trial was not presented to the Court. The Court takes into consideration that almost all of the household items purchased during the marriage are being awarded to the Respondent.
31. The parties shall share equally all of the photographs acquired or taken during the marriage. To the extent they can be digitally copied, the parties

shall work together to provide to the other party a digital copy of all photographs. Any photographs not digitally transferable will be shared equally by the parties. Where possible, the parties will obtain copies, or scanned images of any photos not digitally transferrable. The parties shall share equally in any expense for this purpose.

32. The parties stipulated that the "Call Pay" ($158,700) and Chairman of the Board payments ($29,000) to the Petitioner were not included in the Prenuptial Agreement. It was further stipulated by Petitioner that Respondent should be awarded her equal share of these funds as her share of the marital property. Therefore, Petitioner shall pay to the Respondent the sum of $93,850 for her equal share, pursuant to the stipulation.
33. Respondent shall retain as her separate property any retirement accounts earned from her employment.
34. The parties stipulated that the paragraph 6.5 of the parties Prenuptial Agreement is no longer applicable because the Petitioner placed $15,000 for each year of the marriage into an Individual Retirement Account. Said account being awarded to Respondent.
35. The Court finds that the Prenuptial Agreement gives Respondent the "right to ask the court for alimony." The agreement then provides for a formula wherein alimony "shall not exceed" a certain calculated amount. However, the Prenuptial Agreement does not obligate the Court to make an alimony award.
36. Awarding alimony is in the discretion of the Court (see Thompson v. Thompson, 2005 OK CIV APP 2.) In this case, the Respondent may request alimony but the Prenuptial Agreement does not entitle her to any award. It only places a maximum amount and a maximum duration for any award made.
37. In making an award for alimony, the Court must consider various factors. (See Lemons v. Lemons, 2006 OK CIV APP 5). Alimony is based upon the demonstrated need, the financial ability of an obligor to pay, the parties' age and station in life, the length of marriage, style of living and the time needed to make the post-divorce transition.
38. Petitioner clearly has the financial ability to pay alimony. The need of the Respondent is relative and subjective. She is gainfully employed and has a new job with benefits.
39. The parties are not on their first marriage and each came into marriage with the career in which they currently work. The marriage lasted approximately seven (7) years from its beginning to the filing of the divorce. It has been approximately three (3) years from the date of the filing of the divorce to the

trial on the merits. Respondent has had time to transition from being married to being single.

40. However, no temporary orders were entered awarding her temporary alimony and the Court takes that into consideration in making this award.
41. Based upon his financial ability, her need for alimony, with due consideration given to her full employment in her chosen career, the parties level of income during the marriage, the fact that they came into the marriage later in life, and the relatively short length of marriage (7 years), the Court awards Respondent $36,000 in alimony, paid in full or at the rate of $3,000 per month for 12 months. The first payment is to be made on May 1, 2017.
42. Each party shall pay for their respective attorney fees. However, Respondent shall have the right to recover his attorney fees related to the enforcement of the Prenuptial Agreement.
43. The Court finds the agreement was created to avoid conflict and litigation in a dissolution of marriage action. The Respondent attempted to invalidate the agreement. She signed the agreement with the benefit of having legal counsel advise her prior thereto. The Court finds it equitable that Respondent recover the cost of enforcing the agreement. If there is no stipulation as to what that amount is, the Court will hold a hearing on the same to make a determination. Said hearing will be set upon application.

APPLICABLE LAW RELIED UPON:
43 O.S. §109
43 O.S. §110
43 O.S. §121
Loftis v. Collins, 1966 OK 94
Neundorf v. Neundorf, 2006 OK CIV APP
Ray v. Ray, 2006 OK 30
Boatman v. Boatman, 2017 OK 27
Thielenhaus v. Thielenhaus, 1995 OK 5
Gray v. Gray, 1996 OK 84
Thompson v. Thompson, 2005 OK CIV APP 2
Lemons v. Lemons, 2006 OK CIV APP 5

It is so ordered.

Judge of the District Court

IN THE DISTRICT COURT IN AND FOR WASHINGTON COUNTY
STATE OF OKLAHOMA

[redacted])
)
Petitioner,)
)
and)
)
[redacted])
)
Respondent.)

Case No. [redacted]
Judge Vaclaw

PETITIONER'S CLOSING ARGUMENTS AND
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW the Petitioner, [redacted] by and through her attorney of record N. Scott Johnson of the firm N. SCOTT JOHNSON & ASSOCIATES, P.L.L.C., and hereby offers the following argument and authority in support of his closing argument:

I.

SUMMARY OF ISSUES BEFORE THE COURT

Legal and Physical Custody

Child Support

Division of Joint Property/Comingling

Support Alimony

Attorney Fees

II.

BRIEF HISTORY

The parties executed a Prenuptial Agreement on February 1, 2017.

The parties married on February 2, 2007.

The Petitioner filed for Divorce March 10, 2014 and Respondent moved out of Petitioner's

EXHIBIT
B

residence end of May, 2014.

That after hearing on the 21st day of January, 2016, this Court entered an order that the Prenuptial Agreement executed on February 1, 2007 was enforceable.

III.

STIPULATIONS

1) That the parties agree that Respondent will be awarded no additional alimony as provided for in paragraph 6.5 of the Prenuptial Agreement dated February 1, 2007 as the contributions to the retirement account as set forth therein were made during the marriage. *See also*, Petitioner's Exhibit 10;

2) That the Prudential Term Life Policy on the life of [redacted] will be awarded to Petitioner at no value;

3) The Engagement ring of Respondent is to be awarded to Respondent;

4) The parties joint Truity Credit Union Account ending in XXX942 was closed and each party shall receive and maintain any and all funds received or withdrawn from said account without offset;

5) That Respondent shall be awarded all items of personal property set forth on Exhibit 65(a), save and except the Manta Ray statue.

(NOTE: Petitioner suggests further, To the extent the items are in the possession of Petitioner, he is to make all items available for Respondent to pick up from his residence within thirty (30) days of the entry of the Court's decision);

6) That Petitioner will assist Respondent with obtaining insurance utilizing her

COBRA rights to the current plan in the event that Respondent makes the decision to exercise said rights.

IV.

CUSTODY AND VISITATION

That very early on in this matter, Respondent retained the services of Dr. Laura Fisher, a long time recognized expert in the area of child custody, to address the issues of custody and visitation in this matter. That on the 1st day of April, 2015, Dr. Laura Fisher issued her initial report titled CHILD CUSTODY EVALUATION. *See.* Petitioner's Exhibit 12. Thereafter on August 1, 2016, Dr. Laura Fisher issued a supplemental report titled CHILD CUSTODY EVALUATION UPDATE. *Id.*

That pursuant to the recommendation of Dr. Laura Fisher, this Honorable Court should consider designating both parties as joint legal custodians. In support of this recommendation, Dr. Fisher noted that it did not appear that the appointment of a Parenting Coordinator was necessary as the parties ability to communicate in the best interest of the child did not necessitate such assistance. Further, at trial, Dr. Fisher indicated that research indicates that the award of joint custody to the parents is best for the minor child and keeps both parents involved in the minor child's life and daily decision making issues.

At the time of trial, Petitioner testified that he desired that the Court award the parties joint legal custody. Also, this Court will recall that on cross examination, Respondent also suggested to this Court that she desired that joint legal custody be awarded to the parties. While this testimony conflicted with that which Respondent suggested at the time of her direct examination, subsequent

to the testimony on cross examination, Respondent did not change her testimony and stood with her final position that the parties should be awarded joint custody in the instant matter.

Respondent offered little true concern about Petitioner's parenting. Although she testified that Petitioner had never exercised the time recommended by Dr. Fisher in the physical custody schedule, Respondent admitted that she had never allowed such time to be exercised by Petitioner. Dr. Fisher noted that although "Aimee has numerous criticisms of Scott's parenting decisions", based upon Dr. Fisher's current assessment, "he [redacted] is insightful and thoughtful of Landon's emotions needs. He [redacted] is making adjustments as needed to adopt a more structured and disciplined approach to parenting Landon". *See*, Petitioner's Exhibit No. 12 – *Child Custody Evaluation Update.*

A significant area of disagreement was Petitioner's exercise of physical custody when he is on call. Dr. Fisher recommended that Petitioner be allowed to exercise his time when on call as he had the assistance of his parents in the event he had to take call. Respondent's testimony regarding Petitioner's parents was a grasp at trying to find fault. The only things she indicated was that she noticed that Petitioner's mother walked with a limp and Petitioner's father had one incident where he was unaware that a book bag/backpack had been left in his automobile. Otherwise, even Respondent indicated that Petitioner's mother was excellent with the minor child and provides appropriate care for the minor child. Most important, Dr. Fisher indicated that in the event the "right of first refusal" as to call periods is not allowed and the child can stay in the physical custody of Petitioner, "it would provide more consistency for Landon as far as knowing when he will be with which parent and eliminate Scott and Aimee from having to negotiate make-up parenting

time". *See,* Petitioner's Exhibit No. 12 – *Child Custody Evaluation Update.*

Petitioner testified that his mother had a hip replacement surgery approximately a year ago but was progressing in recovery. Petitioner indicated that his mother did not walk with a limp but it is not unusual for this to occur based upon the habit developed prior to the hip replacement. Petitioner is the orthopedic surgeon that performed his mother's hip replacement. Petitioner also testified that he had not noticed any memory problems with his father and that the book bag/backpack issue was just an oversight. Petitioner further indicated that his parents have always been involved in the care of the minor child and are physically and mentally able and willing to continue in such role as needed.

Another issue addressed at trial was the minor child's school attendance in Tulsa as opposed to Bartlesville. The minor child has attended the same school throughout his education term. It should be noted that the minor child attends a private school that is paid for totally by Petitioner. Respondent makes no contribution to the minor child's private school tuition. Petitioner testified that he desired the minor child remain at his historical school of enrollment in Bartlesville as opposed to attending a school in Tulsa while living in Bartlesville. Petitioner testified that he was concerned about the additional travel time to and from school as well as the minor child attending a school in Tulsa and developing friends while living in Bartlesville. Petitioner believed that it was in the best interest of the minor child to stay at his current school.

Respondent, on the other hand, upon going to work in Tulsa has recently decided that she would like for the minor child to attend school in Tulsa. Respondent appeared to show no concern about the increased travel and the minor child attending a school approximately one (1) hour from

where he resides. Respondent's emphasis was that the school in Tulsa offered much more in activities and clubs in which the minor child could be enrolled. Petitioner suggests that this does not outweigh the negative factors relative to attending the school in Tulsa.

FINDINGS OF FACT AND CONCLUSIONS OF LAW: That the parties are both fit and proper persons to be awarded joint legal custody of the minor child pursuant to 43 O.S. Subsection 109. Further, this Court finds that the award of joint legal custody is in the minor child's best interest.

Further, this Court adopts the recommendations of Dr. Laura Fisher as set forth in the Child Custody Evaluation dated April 1, 2015 and the Child Custody Evaluation Update, dated Agusut 1, 2016.

That this Court adopts and makes an order of the Court the proposed Joint Custody Plan submitted by Petitioner as it accurately reflects the recommendations of Dr. Laura Fisher as to legal and physical custody. *See*, Proposed Joint Child Custody Plan, attached hereto and incorporated herein as Exhibit "A".

CHILD SUPPORT

That Petitioner's 2015 income tax return was admitted into evidence. *See*, Petitioner's Exhibit 23. In accordance with the tax return, Petitioner's income for child support purposes is in the amount of $ 440,365.00 or $ 36,697.00 per month. Petitioner testified that he was unaware of what his actual income would be for 2016 but that it would likely be comparable to the year 2015. Thus, for child support purposes, Petitioner's monthly income should be determined to be the amount of $ 36,697.00 per month.

At the time of trial, Respondent had recently begun new employment for the University of Tulsa. That Respondent's paystubs show that she makes $ 1,000.00 per week or $ 52,000.00 per year. This computes to a monthly income of $ 4,333.00. Thus, for child support purposes, Respondent's income should be determined to be $ 4,333.00 per month. *See*, Petitioner's Exhibit 6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW: That child support should be calculated in accordance with the Oklahoma Child Support Guidelines utilizing the above incomes as determined by this Honorable Court. Therefore, beginning on the 1st day of April, 2017 and continuing on the 1st day of each month thereafter so long as the minor child has not obtained the age of eighteen years and graduated high school, Petitioner shall pay to Respondent child support in the amount of $ 1,187.51 per month pursuant to the Child Support Computation attached hereto and incorporated herein as Exhibit "B".

Further, that Petitioner should be required to provide medical health insurance coverage for the minor child so long as same is available through the current plan at a cost of $ 375.00 per month. Said insurance amount is included in the Child Support Computation attached hereto as Exhibit "B". In the event of a rate increase, Petitioner is required to provide Respondent with written notice and documentation of the new insurance premium cost for the minor child. Thereafter, Respondent is to pay eleven percent (11%) of the increased cost of insurance beginning with the 1st day of the 1st month following receipt of notice.

That Petitioner shall pay eight-nine percent (89%) and Respondent eleven percent (11%) of all reasonable and necessary medical, dental, psychological, orthodontia or other healthcare expenses incurred for the benefit of the minor child which are not covered by insurance as well as

all employment, employment search or education related (to advance employment) daycare expenses incurred for the benefit of the minor child.

That pursuant to testimony, Petitioner has historically paid all private school tuition for the minor child and shall continue to do so as long as the minor child is enrolled in an agreed private school.

Also, Petitioner shall pay eighty-nine percent (89%) and Respondent eleven percent (11%) of all agreed extra-curricular activities in which the minor child is enrolled and participates. In the event either parent enrolls the child in an activity that is not agreed upon by the parties, said parent shall be responsible for 100% of said costs. Such agreement of the parents must be in writing, (e.g. email, text or other form of correspondence/communication).

That the parties shall alternate claiming the minor child as a dependent for income tax purposes. That the testimony at trial was that Respondent had claimed the minor child as a dependent for income tax purpose for the years 2014, 2015 and 2016. Thus, Petitioner shall claim the minor child as a dependent for income tax purposes in the years 2017, 2018 and 2019. Thereafter, the parties shall alternate with Petitioner claiming the minor child in odd years and Respondent in even. Each party is ordered to execute any forms necessary to allow the other to claim the dependency exemptions as awarded herein.

That although Petitioner's income exceeds the child support guidelines, Respondent did not assert at trial that she desired child support in excess of the child support guidelines. Further, she failed to establish that the child has a need for support over and above that provided for in the Oklahoma Child Support Guidelines, *see* 43 O.S. Subsections 118 et. seq., taking into consideration

that Petitioner is paying one-hundred percent (100%) of the child's private school tuition and eighty-nine percent (89%) of his medical needs, daycare and extra-curricular activities. This Court cannot conclude that an upward deviation from the Child Support Guidelines is justified.

Finally, the undisputed testimony was that Petitioner has paid $ 1,200.00 per month in child support since March, 2014. Therefore, no child support arrearages exist as of the time of trial or March, 2017.

PROPERTY DIVISION/PRENUPTIAL

In the instant matter, the issue of property division and comingling/tracing was the primary source of contention. As this Court recalls, each party called an expert witness to testify in regard to the issue(s) of comingling/tracing. The credibility of witnesses and weight to be given conflicting testimony are questions of fact for the trier of fact *See*, Loftis v. Collins, 1966 OK 94, 415 P.2d 927. In this matter the credibility of the respective expert witnesses is pivotal.

Mr. Hinkle testified on behalf of the Petitioner in this matter and indicated that in his opinion joint funds had not been comingled with separate assets such that they could not be traced and a determination made as to the value of each respective asset whether joint or separate. This testimony was consistent with that which was given by Mr. Hinkle at his deposition taken shortly prior to the court proceedings beginning. In fact, Mr. Hinkle indicated that the account at issue had the funds to pay to Ms. [redacted] her one-half of the call pay and chairman of the board pay at all times except for a short period of approximately five (5) days, The most telling part of the tracing testimony is that in fact both experts agreed that the exact amounts of the monies at issue could be traced and specific amounts determined for division purposes. Also, this Court will recall that

Petitioner indicated that he would agree that Respondent was entitled to one-half of the total call pay received in the amount of $ 156,637.50 and chairman of the board stipend in the total amount of $ 30,500.00. *See*, Respondent's Exhibit 66 for Mr. Hinkle's complete work papers.

On the other hand, Ms. McCaslin presented a scenario that Petitioner's counsel has not frequently, or in fact ever, encountered. Ms. McCaslin was deposed as late as the Friday evening (beginning at 5:00 p.m.) prior to the trial beginning the following Tuesday. Ms. McCaslin was present during the entire course of the trial in this matter. At the time of her last deposition she admitted that she was asked what items are you indicating have been comingled. At that time, Ms. McCaslin admitted that she testified to four items, as follows:

1) 2007 distribution from [redacted] PC - $ 217,000.00 (of which she admitted at trial that $ 85,000.00 was paid in federal tax and $ 16,500.00 in state tax or 46.7% in tax for spending balance of $ 115,500.00. Ms. McCaslin indicated that the $ 210,000.00 distribution would be taxed similarly at 46.7%, leaving a spendable balance of $ 111,930.00)

2) Call pay - $ 158,700.00 (*See Petitioner's Exhibits 18 & 20)*

3) Chairman of the Board – stipend $ 30,500.00

4) Merrill Lynch deposit $ 100,000.00

At trial, only four (4) short days later, this Court will recall that Ms. McCaslin significantly changed her testimony. Initially, upon cross examination when asked if she believed her testimony was consistent with her deposition testimony, she replied "yes". Upon further cross examination

and being impeached with her deposition testimony, this Court will recall that Ms. McCaslin admitted that she had changed her testimony significantly. In fact, she admitted that she was asked multiple times during multiple depositions if she was advising Petitioner's counsel of her complete opinion and on every issue which she will address at trial and she responded, "yes". Subsequently, she admitted that she had "changed her mind" over the course of the weekend and decided to testify to further "comingling". At that time she was impeached with her deposition taken March 24, 2017 at which time she was asked,"Okay, Any other things ma'am, that you believe was a comingling" [after having testified only to the four items listed above] and she replied "No". *See,* Petitioner's Exhibit 24. Ms. McCaslin although present each day of trial testified that she never thought to mention to Petitioner's counsel that she had in large part changed her testimony of just a few days prior. In further support of the complete bias and lack of credibility of Ms. McCaslin, she was asked why she included the $ 210,000.00 amount from Dr. [redacted] 2014 distribution when she had said at her deposition on March 24, 2017 the item was irrelevant since it occurred post separation. At that time, Ms. McCaslin indicated that she had once again changed her mind. This time, the change in Ms. McCaslin's opinion had occurred the day prior while sitting in the courtroom according to her testimony. She went further to indicate that she had thought to mention the change in her testimony to Respondent's counsel and discuss same with him but just "hadn't thought about" advising Petitioner's counsel of the significant change in her testimony. Ms. McCaslin is clearly bought and paid for and will even place her own credibility and professionalism at issue for pay. Likely most telling about the complete bias of Ms. McCaslin was her testimony that in tracing she desires to see money in and money out. She indicated that Petitioner had made a

$ 40,000.00 transfer from his Bank of Oklahoma checking account into the Seibert account (*See* Petitioner's Exhibit 19(d)(1) and reconciliation of [redacted] Bank of Oklahoma account, Respondent's Exhibit 42(c)) and therefore it was a comingling of funds. Upon cross Ms. McCaslin agreed that Dr. [redacted] had received $ 40,127.00 from his BSC distributions and IBA dividends ($ 17,060.00 on 4.26/07; $ 22,747.00 on 11/26/07 and two IBM dividends in the amount of $ 160.00 each on 6/26/07 and 9/26/07) which were Petitioner's separate property. In some of the least credibly testimony given she indicated she couldn't trace that because it wasn't the same amount and was off by $ 127.00 that comprised Petitioner's separate monies which he left in the joint account. This court will recall that Petitioner testified that at the time he was initially receiving separate monies he had not established a separate account for the deposit of the funds. Petitioner further testified that he had received an amount in excess of $ 40,000.00 (as set forth hereinabove and reflected on Ms. McCaslin's own exhibit) and transferred these funds into the Seibert account. As this Court will note, this is the only deposit made into the Seibert account during the entire course of the marriage.

This Court will also recall that Ms. McCaslin testified that she had decided to ignore the plain language of the Prenuptial Agreement as to the distributions from [redacted] P.C. In paragraph 3.1, the agreement states in defining separate property that it includes "any property received as distributions from an entity which is separate property. Ms. McCaslin admitted that [redacted], P.C. is Petitioner's separate property. Further, Petitioner testified that he had made distributions from [redacted] P.C. since the 90(s) and had not adjusted his salary downward to increase the distributions. Ms. McCaslin and Respondent's counsel argue that since the word

"distributions" does not appear following [redacted] P.C. that they were not included. This Court cannot ignore the plain and clear language of the Prenuptial Agreement as set forth in paragraph 3.1. The Court of Civil Appeals had indicated that "as in other contract cases, the object is to follow the intent of the parties". *See*, Neundorf v. Neundorf, 2006 OK CIV APP 10, 131 P.3d 142. Clearly, the written intent of the agreement makes the distributions Petitioner's separate property. In an effort to include them as joint property, Ms. McCaslin testified that she would re-characterize the monies. This would be inconsistent with the written document and how Petitioner had conducted business for more than ten (10) years.

Most telling about the document is that is provides in paragraph four (4), that "However, the separate property of one party **shall not be deemed to become marital property** unless the party owning the separate property makes an express transfer of title to that separate property to the other party or to the parties jointly or in common". [Emphasis added]. This is once again a clear indication that simply comingling would not create a joint asset. The agreement also states in paragraph five (5) that "in the event of the divorce or other dissolution of marriage or legal separation of the parties, then **each party shall be entitled to sole possession of that party's separate property".** [Emphasis added]. Further, the Court of Civil Appeals has also held that according to the separate property laws of our state, a party is entitled to trace separate funds. In this matter both experts agreed to the value of the only items that are joint and deposited into Petitioner's separate accounts, the call pay and chairman of the board stipend in the total amount of $ 189,200.00.

Ms. McCaslin also initially indicated that why she determined that $ 100,000.00 to be joint

is that the source funds came from Petitioner's Bank of Oklahoma account. In fact, Ms. McCaslin later testified that she was in error and that the funds actually came from Shelby 93 checking. Again, these were from the separate monies of Dr. [redacted] and as testified to by Jim Hinkle the account of Shelby 93 could have paid to Ms. [redacted] the monies due for the joint funds deposited all but for a five (5) day period of the entire marriage. Therefore, these sums would be considered the separate property of Petitioner as they did not constitute any of the joint monies.

As to the Honda automobile and tax refunds/tax savings, Petitioner suggests that the automobile be valued in accordance with that set forth on Petitioner's Exhibit 7 in the amount of $ 7,325.00. It is likely important to note that when talking about bought and paid for, Ms. McCaslin (obviously at the request of Respondent's counsel) was prepared to and attempted to testify to the value of the automobile without any basis or background somehow utilizing a 2013 Honda and making adjustments. While this Court rightfully did not allow the testimony it only goes to further support the extent to which Ms. McCaslin will go when paid to testify.

Ms. McCaslin also testified that by the parties filing a joint income tax return, the marital unit saved nearly $ 75,000.00 in taxes. Ms. McCaslin also testified that Ms. [redacted] has received one-half of multiple tax refunds to place in her separate account in an amount in excess of $ 41,000.00. This amount is nearly double that which Ms. McCaslin indicated Respondent would have received if she would have filed a separate return (less than $ 20,000.00) and more than one-half of the total tax savings to the marital unit. Thus, it would appear that this issue is of no consequence and this Court should find that both parties have received their fair share of any tax proceeds either directly or as a benefit to the marital unit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

That the testimony of Ms. McCaslin was not credible. Ms. McCaslin's last minute changing of her testimony impacted the believability of the substance of her testimony.

That the testimony of Jim Hinkle was credible as to the issues before this Court.

That the call pay in the amount of $ 158,700.00 is determined to be joint property and Respondent is awarded judgement against Petitioner for one-half of this amount.

That the Chairman of the Board stipend in the amount of $ 30,500.00 is determined to be joint property and Respondent is awarded judgment against Petitioner for one-half of this amount.

That the parties are each awarded one-half of the present balance of the Smith Barney account number 226-01625 in the amount of approximately $ 85,000.00, as it was undisputed that this was joint property.

That the distributions from [redacted] P.C,. are determined to be the separate property of Petitioner in accordance with the parties' intent as set forth in the Prenuptial Agreement signed February 1, 2007. *See*, Nuendorf v. Neuddorf, 2006 OK CIV APP 10, 131 P.3d 142.

That the Merrill Lynch deposit of $ 100,000.00 from the Shelby 93 Bank of Oklahoma account is determined to be the separate property of Petitioner;

That neither party shall receive any offset or judgment for income tax filing savings or refunds.

That Respondent is awarded all the personal property on Respondent's exhibit 65(a) as to value and Petitioner is awarded the Manta Ray statue.

That the automobile in the possession of Respondent is valued at $ 7325.00 and Petitioner shall receive an offset against the judgments owed to Respondent in an amount of one-half of this value.

That this Court finds that Petitioner testified that he paid to Respondent the amount of $ 2,000.00 per month to Respondent for the first twelve (12) months following separation. That child support should have been in the approximate amount of $ 1,200.00 per month. Therefore, Petitioner shall receive a further offset for the $ 800.00 per month he paid in excess of the child support amount for the first year of separation in the total amount of $ 9.600.00 against any sums due and owing Respondent as set forth herein.

That Petitioner shall be restored to all of his separate property in accordance with the Prenuptial Agreement dated February 1. 2007.

That this Court does not determine that the depositing of the monies into Shelby 93 account made the account balance joint or the assets purchased with the funds in said account joint as the total amount of joint monies was sufficiently traced such that Respondent is made whole and the prenuptial is followed awarding each party their separate property.

That other than the division set forth herein, each party is awarded all retirement, checking, savings or other financial accounts in their respective names as well as any business interests owned by the respective party.

That Petitioner shall pay to Respondent an additional five percent (5%) of the net judgment awarded after offset(s) awarded herein as an equitable return on joint monies.

for support alimony in the instant matter. In that regard, Respondent failed to provide a living expense exhibit or even discuss her ongoing monthly expenses such that the Court could even determine if the expenses asserted by Respondent were reasonable and actually created a need. In fact, Respondent failed to provide any exhibit or testimony which would support a need for support alimony irrespective of Petitioner's ability to pay same. The agreement entered into between the parties indicates that Respondent may ask the court to award alimony but did not set forth that Respondent was specifically to be awarded any amount of alimony. In fact, Respondent would have the burden of proof of the issue of support alimony and the agreement simply set parameters within which the Court's award, if any, must fall.

There was no stipulation or evidence that suggested that Respondent has a need for support alimony. The Supreme Court of Oklahoma has indicated that the party seeking alimony has the burden of affirmatively demonstrating the need for a support alimony award. *See*, Ray v. Ray, 2006 OK 30, 136 P.3d 634. In the *Ray* case the Supreme Court affirmed the COCA opinion which reversed the trial court's award of support alimony and found that the record did not contain sufficient evidence to award support alimony as the record was devoid of information relating to the requesting party's need. *Id* at paragraphs 13-15.

In the instant matter, it appears that Respondent takes the position that she was to be awarded support alimony without any justification or evidence to support said claim. That position is simply not supported by Oklahoma law. *See*, Ray v. Ray, 2006 OK 30, 136 P.3d 634.

Not only does respondent presume an award of support alimony, she argues that the calculation of support alimony should be extended based upon the substantial delay in getting this

matter to trial caused by Respondent's own conduct in initially contesting the enforceability of the Prenuptial Agreement. Petitioner asserts that it was neither anticipated by the agreement nor equitable to extend the term of the support alimony award based upon the conduct of the party which is receive the alimony in significantly delaying the proceedings. In the event this Court were to determine that any evidence was presented in support of Respondent's needs, Petitioner suggests that the term of the support alimony award should be calculated utilizing the parties separation date (the date on which marital efforts ended) as the ending date for the terms of the marital relationship. Clearly, the Court must determine a reasonable amount of support alimony before the Court can set a term for the support alimony to be paid. Thus, once again, Respondent's failure to provide any evidence in support of her need for support alimony makes moot this secondary argument. Respondent and her counsel spent time attempting to convince the Court to unreasonably extend the calculation term for alimony while failing to provide the Court with any evidence such that the Court could event determine the amount of support alimony to be awarded, if any.

FINDING OF FACT AND CONCLUSIONS OF LAW That in accordance with the holdings of the Supreme Court of Oklahoma, support alimony is not a matter of right. That the requesting party has the burden of proving their need for support alimony.

That the Prenuptial Agreement dated February 1, 2007, allowed Respondent the right to request this Court award support alimony, it is necessary for the Court to have evidence as to Respondent's need before a support alimony award can be determined. The Prenuptial Agreement did not state that Respondent was to be awarded alimony as a matter of right but simply put parameters as to the maximum amount and term of alimony based upon the evidence presented by

Respondent in support of her request.

That the record in this matter is devoid of any evidence which would allow this Court to determine the need, if any, of Respondent. This court was not made aware of Respondent's reasonable monthly expenses and no testimony was offered that she could not meet her monthly living expenses without the assistance of Petitioner in the form of support alimony.

Therefore, Respondent's request for support alimony must be denied.

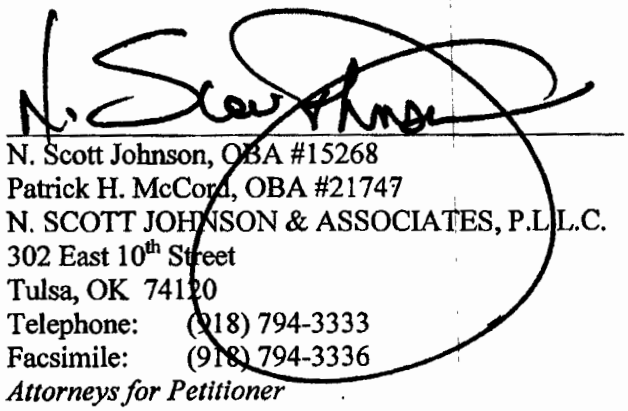
ATTORNEY FEES

That this Court should reserve the issue of attorney fees in this matter. The Petitioner filed an Application for Attorney Fees on the 22nd day of February, 2016, related to Respondent's failed attempt to have this Court find that the Prenuptial Agreement executed by the parties was unenforceable. Said application is currently pending before this Court.

That the Prenuptial Agreement provides in paragraph 6.4 that "In the event the parties have a surviving child born of their marriage, then Aimee [Respondent] **may** seek the recovery of reasonable attorney fees not to exceed $ 5,000.00. Thus it is anticipated that Respondent will file, post-trial, an Application for Attorney Fees and Costs which will need to be addressed by this Court in conjunction with the pending Application filed by Petitioner. Further, Petitioner continues to have a right to file an Application for Attorney Fees related to the continued attorney fees incurred following this Court's ruling on the enforcement of the Prenuptial Agreement. *See,* 43 O.S. Subsection 110.

FINDING OF FACT AND CONCLUSIONS OF LAW That the issue of attorney fees and costs is reserved for further hearing in this matter. The Court will hear the issue

of attorney fees requested pursuant to timely filed Applications for Attorney Fees at a date and time certain following this court's decision on all pending issues.



N. Scott Johnson, OBA #15268
Patrick H. McCord, OBA #21747
N. SCOTT JOHNSON & ASSOCIATES, P.L.L.C.
302 East 10th Street
Tulsa, OK 74120
Telephone: (918) 794-3333
Facsimile: (918) 794-3336
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 17 day of April, 2017, a true and correct copy of this instrument was:

✓ mailed with postage prepaid thereon;

___ mailed by certified mail,
Return Receipt No. _____;

___ transmitted via facsimile; or

___ hand-delivered;

to: Richard A. Wagner, II, Esq.
HALL ESTILL HARDWICK GABLE
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, Oklahoma 74103
Attorney for Respondent

N. Scott Johnson