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FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
DIVISION I

JOHN D. HADDEN
CLERK

IN RE THE MARRIAGE OF:)
)
[REDACTED])
)
Petitioner/Appellee,)
and)
)
[REDACTED])
)
Respondent/Appellant.)

Case No. [REDACTED]
Tulsa County District Court
Case No. [REDACTED]

Received: 2-20-18
Docketed: [REDACTED]
Marsnot: [REDACTED]
COA/OKC: [REDACTED]
COA/TUL: [REDACTED]

MOTION FOR APPEAL-RELATED ATTORNEY FEES

COMES NOW, the Petitioner/Appellee, [REDACTED] by and through her attorney of record, Patrick H. McCord of N. SCOTT JOHNSON & ASSOCIATES, P.L.L.C., and pursuant to OKLA. SUP. CT. R. 1.14(B), 12 O.S. § 696.4, 20 O.S. § 15.1, and 43 O.S. §§ 110 & 111.1, hereby moves the Court for an award of appeal-related attorney fees against the Respondent/Appellant. In support thereof, Appellee hereby alleges and states as follows:

I.

Motions for appeal-related attorney fees are specifically authorized by the Rules of this Court and "must be made by a separately filed and labeled motion . . . prior to issuance of mandate." OKLA. SUP. CT. R. 1.14(B). Such fees "are recoverable if statutory authority exists for their award in the trial court." *Crutchfield v. Marine Power Engine Co.*, 2009 OK 27, ¶ 32, 209 P.3d 295.

II.

In this appeal from a child-support enforcement action, an award of attorney fees is mandated by 43 O.S. § 111.1, which specifically provides that

[v]iolation of an order providing for the payment of child support . . . may be prosecuted as indirect civil contempt pursuant to Section 566 of Title

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21 of the Oklahoma Statutes or as otherwise deemed appropriate by the court.

...
Unless good cause is shown for the noncompliance, the prevailing party **shall** be entitled to recover court costs and attorney fees expended in enforcing the Order and any other reasonable costs and expenses incurred in connection with the denied child support.

43 O.S. § 111.1(C)(3) (emphasis supplied). The word “shall” is “interpreted as implying a command or mandate.” *Sneed v. Sneed*, 1978 OK 138, 585 P.2d 1363. It constitutes a legislatively mandated imperative which the Court has no discretion to avoid. See *McDonald's v. Groves*, 1982 OK 111, 652 P.2d 281.

III.

In addition to the mandatory language of § 111.1, Oklahoma law generally authorizes awards of attorney fees and costs in litigation stemming from divorce actions. 43 O.S. § 110(D & E). When proceeding pursuant to those sections, Oklahoma Courts require a totality of the circumstances analysis to determine whether a litigant qualifies for a fee award “through the process of a judicial balancing of the equities.” *King v. King*, 2005 OK 4, ¶ 30, 107 P.3d 570; see also *Thielenhaus v. Thielenhaus*, 1995 OK 5, 890 P.2d 925. Fee awards based upon a balancing of the equities are left to the sole discretion of the Court.

IV.

Consideration of a balancing of the equities should take into account what is just and proper under the circumstances. These circumstances have been determined to

include, but not be limited to: the outcome of the action for modification; whether the subsequent action was brought because one of the parties had endangered or compromised the health, safety, or welfare of the child or children; whether one party's behavior demonstrated the most interest in the child or children's physical, material, moral, and spiritual welfare; whether one party's behavior demonstrated a priority of self-interest over

the best interests of the child or children; 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, 923 P.2d 1195, 1197.

V.

Litigant behavior is an essential part of a balancing of the equities analysis. The Court of Civil Appeals succinctly explained the rationale behind addressing litigant behavior in attorney fee cases in *Gardner v. Gardner*. There, the Court opined that

where both parties reasonably litigate their problems in a divorce case and reasonably expend money and time to efficiently prepare their case, that each party should be required to pay their own attorney's fee and expenses of litigation. Further, we believe that this will encourage each party to conduct his side of the case in a more reasonable and fair manner. If each party knows that he is potentially responsible for his expenses where he has acted arbitrarily, capriciously, or where he has unduly protracted or "churned" the litigation, he will be far less likely to behave in such a manner.

Gardner v. Gardner, 1981 OK CIV APP 9, ¶ 27, 629 P.2d 1283. The Court went on to hold that

where . . . there are sufficient funds and property to pay attorney's fees, then each side should pay their own attorney's fees and expenses of litigation. Judicial discretion would only come into play where there is no substantial marital estate or where the property awarded to one party is of a nonliquidable nature or where there is a finding by the court that any part of the expenses of litigation was caused by arbitrary and capricious conduct on the part of the other and that this conduct has unduly increased the overall cost of litigation. In that event, the offending party should be surcharged to the extent that this has occurred.

Id at ¶¶ 31 & 32 (emphasis added).

VI.

Additional appeal-related attorney fees may be awarded where "the Supreme Court or its designee finds that the appeal is without merit." 20 O.S. § 15.1.

VII.

Here, Appellee prevailed at both the trial court and appellate level, thus, the clear language of 43 O.S. § 111.1(C) mandates an appeal-related attorney fee award in Appellee's favor. Moreover, a consideration of the totality of the circumstances reveals that Appellee should be awarded her appeal-related attorney fees upon grounds that Appellant's appeal was without merit and that her fees and costs were unnecessarily exacerbated by Appellant's litigation conduct.

VIII.

This Court's *Opinion*, filed February 9, 2018, demonstrates that Appellant's appeal was wholly without merit. Oklahoma law is clear that questions of fact are not subject to appellate review in actions sounding in contempt. *Kerr v. Clary*, 2001 OK 90, ¶18, 37 P.3d 841, 845. Appellant and his counsel have an affirmative duty to refrain from asserting claims, defenses, and other legal contentions that are not warranted by existing law. *See*, 12 O.S. § 2011(B)(2). Here, they disregarded this duty, and their malfeasance caused Appellee to incur additional attorney fees and costs in defending Appellant's appeal. Had Appellant and/or his counsel exercised a mere scintilla of due diligence in researching the basis of the appeal, they would have quickly discovered that the relief sought was unavailable per the Court's decision in *Kerr*. Their utter lack of due diligence unnecessarily exacerbated Appellee's attorney fees and is tantamount to a churning of litigation which, pursuant to *Gardner*, should be addressed with a shifting of fees.

IX.

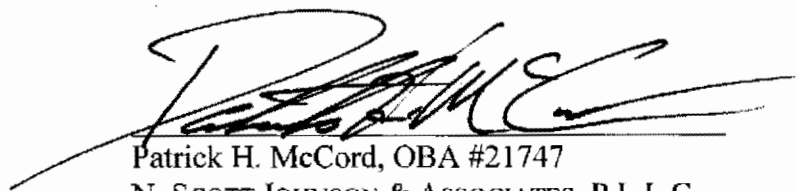
Additionally, Appellee was compelled to address certain procedural infirmities in Appellant's presentation to this Court. With his Brief-in-Chief, Appellant filed an Appendix. Such filing is expressly prohibited by Oklahoma law unless certain narrow exceptions apply.

None of said exceptions applied to this case. Nevertheless, in addressing Appellant's prohibited filing, Appellee was forced to incur additional, otherwise-unnecessary attorney fees. Furthermore, Appellant's prohibited filing overly complicated the proceedings and required Appellee's counsel to conduct otherwise-unnecessary work in developing her *Answer Brief*. At the dispositional stage of the appeal, this Court agreed with Appellee's position and granted her *Motion to Strike*. Appellee should recover appeal-related attorney fees on this basis as well.

X.

Based upon the foregoing, the Appellee is entitled to judgment against the Appellant for her appeal-related attorney fees. This Court should render such an Order and remand the cause to the trial court for a determination of the amount of said fees. 12 O.S. § 696.4.

WHEREFORE, premises considered, Appellee prays for an Order awarding her the entirety of her appeal-related attorney fees against Appellant; for an Order remanding this cause to the trial court for a determination of the amount of Appellee's appeal-related attorney fees; for all other relief requested herein; and for all further relief the Court deems just and equitable




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CERTIFICATE OF MAILING TO PARTIES

I certify that a true and correct copy of the foregoing *Motion for Appeal-Related Attorney Fees* was mailed this 15th day of Feb, 2018, to:

Brian R. Swenson, Esq.
SWENSON & SWENSON, PLLC
1719 East 71st Street
Tulsa, OK 74136
Attorney for Respondent/Appellant

by depositing same in the U.S. Mail, postage prepaid.


Patrick H. McCord