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THE LAW OF ATTORNEY FEES IN FAMILY LAW CASES

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The American Rule states that, unless specifically allowed, attorney fees are not recoverable.¹ It is, therefore, necessary for an attorney seeking fees in a family law case to identify specifically the basis for the award of fees.² In Oklahoma, there are seventeen separate statutes that authorize a court to award attorney fees in particular circumstances.³ Failure to identify the specific basis for the award may result in the attorney fee award being reversed.⁴

Part I of this article surveys each possible basis for a fee award and details the information necessary for a court to make an award. It also discusses the information a court needs to calculate an appropriate award. Part II of this article discusses the procedure in obtaining attorney fees in certain family law situations. Part III analyzes a lawyer's interest in attorney fees, particularly when payable directly to the attorney. Finally,

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1. *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 2000 OK 55, ¶ 46, 11 P.3d 162, 178-79.

2. *Id.* This article is concerned only with the recovery of attorney fees from the other party in a family law case. It does not cover entitlement to costs, appellate attorney fees, or other expenses. Whether and under what circumstances costs and expenses can be recovered depends on the wording of the statute. For example, the prevailing party in an enforcement proceeding under the Uniform Child Custody Jurisdiction and Enforcement Act can recover “necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney’s fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings.” 43 OKLA. STAT. § 551-312 (2011).

3. The following statutes and their pertinent, accompanying subsections are discussed in Part I of this article: 10 OKLA. STAT. § 7700-636(c) (2011); 22 OKLA. STAT. § 60.2(c)(1) (Supp. 2013); 43 OKLA. STAT. §§ 107.3(A)(3), (D) (2011); 43 OKLA. STAT. §§ 109.2, 109.4(f)(6), 109.4(I) (Supp. 2016); 43 OKLA. STAT. §§ 110(d)–(e) (2011); 43 OKLA. STAT. § 111.1(C)(3) (2011); 43 OKLA. STAT. § 111.2 (2011); 43 OKLA. STAT. § 111.3(E) (Supp. 2014); 43 OKLA. STAT. §§ 112(D), 112.3(F)(1), 112.6 (2011); 43 OKLA. STAT. §§ 150.10, 551-208(C), 551-312.

4. This is because, according to the Oklahoma Court of Civil Appeals, all attorney fee award statutes must be strictly construed. *See Gruenwald v. Gruenwald*, 2014 OK CIV APP 43, ¶ 8, 324 P.3d 1267, 1269 (citing *Eagle Bluff, L.L.C. v. Taylor*, 2010 OK 47, ¶ 16, 237 P.3d 173).

Part IV of this article considers longstanding ethical considerations in obtaining contingency fees in family law cases.

I. Basis for an Attorney Fee Award

This Part I of the article illustrates the interplay of a court's common-law authority to award attorney fees with Oklahoma statutory authority in certain types of family law cases. This statutory authority is categorized into two distinct groups: statutes utilizing the balancing-of-equities standard and statutes pertaining to which party prevails in the case.

A. The Inherent Power of the Court

A court has inherent, common-law authority to award fees where one party's conduct during the case has been oppressive, abusive, or has otherwise unduly prolonged and exacerbated the litigation.⁵ For example, in *Briggeman v. Hargrove*,⁶ the mother, an Ohio resident, incurred attorney fees, costs, and expenses while defending against an emergency custody application and a modification of custody application filed by the father in Tulsa County.⁷ The Oklahoma Supreme Court granted the mother a writ of prohibition because the trial court did not have jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act to entertain the proceeding.⁸

The mother then filed an application in the Tulsa County proceeding requesting attorney fees, costs, and expenses.⁹ The case was submitted without appellate briefs, and the appellate panel reversed the trial court's determination that it had no jurisdiction to entertain the proceeding or award fees.¹⁰ The panel summarily held that notwithstanding the entry of the writ of prohibition, the trial court had the inherent equitable power to award the mother attorney fees in the event it found the father's conduct was oppressive or abusive.¹¹

5. *Winters ex rel Winters v. City of Okla. City*, 1987 OK 63, ¶ 12, 740 P.2d 724, 727.

6. 2014 OK CIV APP 13, 318 P.3d 1130.

7. *Id.* ¶ 2, 318 P.3d at 1131.

8. *Id.*

9. *Id.* ¶ 3, 318 P.3d at 1131. She sought fees pursuant to title 10, section 7700-636 of the Oklahoma Statutes, which permits the trial court to assess fees and costs in a proceeding to adjudicate parentage. 10 OKLA. STAT. § 7700-636(C) (2011).

10. *Briggeman*, ¶¶ 5-6, 318 P.3d at 1131-32.

11. *Id.* ¶ 6, 318 P.3d at 1132 (citing *Winters ex rel Winters v. City of Okla. City*, 1987 OK 63, ¶¶ 6-10, 740 P.2d 724, 725-26).

It has long been the position of Oklahoma courts that attorney fees may be awarded when one party takes unreasonable positions at trial and unreasonably prolongs the litigation.¹² However, the failure to make reasonable settlement offers is not the same as vexatious litigation.¹³

B. Statutes: The Balancing of Equities

This section of the article discusses four types of family law cases where courts rely upon the balancing-of-equities standard in awarding attorney fees.

1. The Divorce Statute Section 110

The major Oklahoma statutory provisions authorizing fees in divorce cases are title 43, subsections 110(D)¹⁴ and 110(E).¹⁵ The decision to award

12. *Casey v. Casey*, 1993 OK CIV APP 129, ¶ 8, 860 P.2d 807, 810 (“The court specifically found Appellant (a) delayed and thwarted the division of personal property when she refused to participate in the silent auction, (b) unreasonably refused to list the residence for sale, (c) demanded excessive support alimony, child support and cash settlement, (d) cited Appellee for contempt on three different occasions, (e) required Appellant to incur expense of \$1,000.00 to pay a bondsman, (f) unreasonably withheld records from Appellee, and (g) required Appellee to file a 1990 separate income tax return. There is no abuse of discretion in requiring Appellant to pay the attorney fees she actively participated in creating.”); *Wood v. Wood*, 1990 OK CIV APP 49, ¶ 18, 793 P.2d 1372, 1376-77 (“[T]he record shows that the Appellant exacerbated the litigation and that his conduct throughout the trial served to increase the resulting fees. Appellee was required to initiate seven contempt proceedings against Appellant in order to enforce court orders. The extensive record in this case shows that nearly every journal entry of the trial court’s orders required Appellee to file a motion to settle. Appellee was forced to complete substantial discovery in order to uncover the secret bank account which Appellant concealed and to ascertain Appellant’s actual commission income.”); *Morey v. Morey*, ¶ 14, 1981 OK CIV APP 46, 632 P.2d 773, 775 (“In this instance, Husband secretly obtained a divorce and actively deceived Wife for almost two years before she learned, through her attorney, that she was already divorced. This is a prime example of one party to a divorce deliberately delaying and frustrating the other party with almost mindless disregard for the other’s rights. . . . Under these circumstances we find she was entitled to be reimbursed for her costs of litigation. These included her attorney fees . . .”).

See also *Gardner v. Gardner*, 1981 OK CIV APP 9, 629 P.2d 1283, where the court describes potential liability for attorney fees when a party acts “arbitrarily, capriciously, or where [it] has unduly protracted or ‘churned’ the litigation.” *Id.* ¶ 27, 629 P.2d at 1287.

13. *See Shirley v. Shirley*, 2004 OK CIV APP 100, ¶ 7, 104 P.3d 1142, 1144 (“Because it appears the trial court used the award in this case as a penalty for failing to settle, we will modify the award by reducing it to \$10,000.”).

14. This subsection reads: “Upon granting a decree of dissolution of marriage, annulment of a marriage, or legal separation, the court may require either party to pay such

fees under these subsections depends on a judicial balancing of the equities.¹⁶ In addition to the trial court's inherent authority to award fees based on vexatious litigation, the court may also take into account the parties' conduct during the litigation that may not, in and of itself, justify fees under the court's inherent power.¹⁷ Although the court cannot use attorney fees as a penalty for failure to settle an issue, no case prohibits its use when one party continues to reject reasonable settlement offers and ultimately ends up worse off than the settlement proposals.¹⁸ In balancing the equities the court may also consider the relative financial positions of

reasonable expenses of the other as may be just and proper under the circumstances." 43 OKLA. STAT. § 110(D) (2011).

15. This subsection reads:

The court may in its discretion make additional orders relative to the expenses of any such subsequent actions, including but not limited to writs of habeas corpus, brought by the parties or their attorneys, for the enforcement or modification of any interlocutory or final orders in the dissolution of marriage action made for the benefit of either party or their respective attorneys.

Id. § 110(E).

16. *Kerby v. Kerby*, 2007 OK 36, ¶ 7, 164 P.3d 1053, 1055; *Thielenhaus v. Thielenhaus*, 1995 OK 5, ¶ 19, 890 P.2d 925, 935. Formerly, the statute simply required the trial court to consider the means and property of the respective parties. *See Walker v. Walker*, 1976 OK 169, 559 P.2d 1233 (examining the requirements to award attorney fees under 12 OKLA. STAT. § 1276 (amended 1976), which was renumbered as 43 OKLA. STAT. § 110 in 1989). Cases decided prior to the amendment that ordered attorney fee awards simply on the basis of economic disparity should no longer be considered good law.

Although the attorney fee provisions in subsections 110(D) and 110(E) seem to refer only to an award of attorney fees covering the merits hearing and post-decree issues, at least one appellate panel has held that attorney fees can also be awarded in a case to enforce temporary orders under section 110(B). *Buckingham v. Buckingham*, 2012 OK CIV APP 34, ¶ 6, 274 P.3d 855, 856 ("Holding that attorney fees are allowed at every stage of a divorce, except the enforcement of a temporary order, would create an absurd result. As a result, we read 'subsequent actions' in § 110(E) as referring to actions subsequent to the filing of the petition for dissolution of marriage, including actions to enforce temporary orders.").

17. *See Bartlett v. Bartlett*, 2006 OK CIV APP 112, ¶ 35, 144 P.3d 173, 186 (noting that "Wife failed to comply with the trial court's order to attach time sheets, affidavits, and copies of settlement offers to her application" when affirming the trial court's decision to strike the Wife's attorney fee application).

18. In *Finger v. Finger*, discussed *infra* note 36, one of the factors is "whether either party unnecessarily complicated or delayed the proceedings." 1996 OK CIV APP 91, ¶ 14, 923 P.2d 1195, 1198. That appears to be a lesser burden to justify fees than the burden under the court's inherent power to order attorney fees. For a case that seems to qualify as an example, see *Mullendore v. Mullendore*, 2012 OK CIV APP 100, ¶ 15, 288 P.3d 948, 955.

the parties.¹⁹ Recently, the Oklahoma Supreme Court summarily affirmed two attorney fee awards. In doing so, it may have elevated the means and property of the parties to a primary position in balancing the equities under title 43, subsections 110(D)–(E) of the Oklahoma Statutes.

First, in *Childers v. Childers*,²⁰ the Oklahoma Supreme Court rejected the husband’s appeal concerning the valuation of marital property.²¹ It also affirmed the trial court’s denial of the husband’s request for attorney fees.²² The court noted that fees are awarded based on a balancing of the equities.²³ In this case, both parties received substantial property awards.²⁴ They each were allowed to use \$40,000 from a savings account to pay their attorneys.²⁵ The husband had a life insurance license, a long-term health care license, and a securities license.²⁶ The husband admitted to being employable, but voluntarily chose not to pursue gainful employment and instead does charity work.²⁷ The fact that the wife made much more money than the husband was not determinative, especially when he testified that he has high-level managerial and entrepreneurial skills.²⁸ Therefore, the trial court’s decision not to allow fees was affirmed.²⁹

However, in *Boatman v. Boatman*,³⁰ the trial court summarily denied attorney fees without holding a hearing.³¹ The Oklahoma Supreme Court affirmed the trial court.³² It noted that, “[i]n matrimonial litigation, a party should be awarded attorney fees only if they qualify for the benefit through a judicial balancing of the equities considering the means and property of each party.”³³ In this case, the mother earned \$115,000 plus bonuses, which

19. *Abbott v. Abbott*, 2001 OK 31, ¶ 12, 25 P.3d 291, 294. If the court awards a sufficient amount of income-producing property to both spouses, it is not uncommon to require each party to bear their own fees. *See, e.g.*, *Casey v. Casey*, 1993 OK CIV APP 129, ¶ 16, 860 P.2d 807, 809; *Gardner v. Gardner*, 1981 OK CIV APP 9, ¶ 31, 629 P.2d 1283, 1299.

20. 2016 OK 95, 382 P.3d 1020.

21. *Id.* ¶ 18, 382 P.3d at 1024.

22. *Id.* ¶ 32, 382 P.3d at 1027–28.

23. *Id.*

24. *Id.*

25. *Id.* ¶ 30, 382 P.3d at 1027.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* ¶ 32, 382 P.3d at 1027–28.

30. 2017 OK 27.

31. *Id.* ¶ 15.

32. *Id.* ¶ 20.

33. *Id.* ¶ 17.

was twice what the father earned.³⁴ Given this disparity in income, the court found that the mother could not qualify for an attorney fee award when the equities were balanced.³⁵ There are very few cases where the litigant with greater financial means seeks attorney fees. *Boatman* suggests that under those circumstances it will be very difficult, if not impossible, for that party to prevail under a balancing of the equities.

The Oklahoma Court of Civil Appeals has attempted to indicate factors the trial court should consider when deciding whether an attorney fee is appropriate in post-decretal cases under subsection 110(E). In *Finger v. Finger*,³⁶ the panel said the trial court should consider

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.³⁷

Some of the considerations mentioned in *Finger* are common in attorney fee hearings under section 110, i.e., the means and property of the individuals and whether either party unnecessarily complicated or delayed the proceedings. Other mentioned factors are particularly appropriate when considering post-decree motions concerning children and seem to be primarily used in those cases.³⁸ However, the *Finger* factors have been used in cases arising under subsection 110(D) that are not post-decretal cases. For example, in *Husband v. Husband*, the panel cited *Finger* as justification for an attorney fee award in an appeal from a separate maintenance action.³⁹ The court seemed to broaden the *Finger* standard by declaring that “[i]n

34. *Id.*

35. *Id.*

36. 1996 OK CIV APP 91, 923 P.2d 1195.

37. *Id.* ¶ 14, 923 P.2d at 1198.

38. *See, e.g.*, *Chacon v. Chacon*, 2012 OK CIV APP 27, ¶ 60, 275 P.3d 943, 958; *Guyton v. Guyton*, 2011 OK CIV APP 92, ¶ 17, 262 P.3d 1145, 1152; *Guymer v. Guymer*, 2011 OK CIV APP 4, ¶ 9, 245 P.3d 638, 640-41.

39. 2010 OK CIV APP 42, ¶¶ 35-36, 233 P.3d 383, 389-90.

considering what is just and proper under the circumstances, the court in the exercise of its discretion should consider the totality of circumstances leading up to, and including, the subsequent action for which expenses and fees are being sought.”⁴⁰

The result appears to be that, in considering whether an attorney fee award is appropriate under section 110, there are no bounds to the court’s discretion in the scope of information it can consider. The court’s determination of the fee amount is reviewable only for an abuse of discretion.⁴¹ However, the issue of whether a litigant is entitled to an attorney fee is a question of law that is reviewed de novo.⁴²

There are several cases where the attorney fee provisions of section 110 are inapplicable. There is no authority, for example, to award attorney fees under section 110 either to or from third parties since the statute supposes that there are only two parties to a divorce.⁴³ Therefore, when grandparents intervene in a divorce proceeding to seek custody and are ultimately dismissed, there is no authority to award fees against the grandparents.⁴⁴ The provisions of subsections 110(D) and 110(E) also only apply in divorce cases.⁴⁵ The parties, therefore, must find other authority if attorney fees are to be awarded in non-divorce situations.

2. Parentage Proceedings

Parentage proceedings are governed by the Uniform Parentage Act.⁴⁶ In *McKiddy v. Alarkon*, the court required a different basis to award attorney fees because the court found that title 43, section 110 was inapplicable to parentage cases.⁴⁷ Instead, authority to award fees in a parentage case is provided by title 43, section 109.2 and title 10, section 7700-636.⁴⁸ Since

40. *Id.* ¶ 35, 233 P.3d at 389-90.

41. *State ex rel. Burk v. City of Okla. City*, 1979 OK 115, ¶ 22, 598 P.2d 659, 663.

42. *Finnell v. Seismic*, 2003 OK 35, ¶ 7, 67 P.3d 339, 342.

43. *Rogers v. Rogers*, 1999 OK CIV APP 123, ¶ 10, 994 P.2d 102, 105 (“It is apparent §§ 110(C) and (D) contemplate but two parties, the divorcing husband and wife, and do not provide for an award of attorney fees and costs for an intervening party.”).

44. *Fulsom v. Fulsom*, 2003 OK 96, ¶ 16, 81 P.3d 652, 658-59.

45. *Id.* ¶ 12, 81 P.3d at 657.

46. 10 OKLA. STAT. § 7700-101 to -902 (2011).

47. 2011 OK CIV APP 63, ¶¶ 15, 22-25, 254 P.3d 141, 146, 147-48.

48. Title 43, section 109.2(B) provides that “[i]f the parties to the action are the parents of the children, the court may determine which party should have custody of said children, may award child support to the parent to whom it awards custody, and may make an appropriate order for payment of costs and attorney fees.” 43 OKLA. STAT. § 109.2(B) (Supp. 2016).

there is no mention of a prevailing party, the attorney fee award under these sections should also be governed by the balancing-of-equities standard.

3. Grandparent Visitation

The grandparent visitation statute, title 43, section 109.4(I), provides that “in any action for grandparental visitation pursuant to this section, the court may award attorney fees and costs, as the court deems equitable.”⁴⁹ Although there is no case law detailing the factors the court should take into account in determining eligibility for fees under this section, it is likely that the same considerations in the balancing-of-equities standard that courts use under section 110 are applicable here as well. There is at least one case where the trial court’s assessment of attorney fees against the grandparents was affirmed.⁵⁰

4. The Guardian ad Litem Statute

Another statute that appears to qualify for balancing of equities is title 43, section 107.3, which allows a court to appoint an attorney as a guardian ad litem for children.⁵¹ Subsection 107.3(A)(3) provides that “[e]xpenses, costs, and attorney fees for the guardian ad litem may be allocated between the parties as determined by the court.”⁵² In this statute, the term “attorney fees” is not used in the same sense as in section 110. Since the statute provides in subsection 107.3(A)(1) that an attorney may be appointed as guardian ad litem, the fee described in that provision is not for representing a party, but rather reflects the cost of using guardian ad litem services. By common tradition, this language is not treated as a representation cost subject to a balancing-of-equities standard. Instead, the court divides the

Title 10, section 7700-636 is part of the Oklahoma enactment of the Uniform Parentage Act. It provides that a court “may assess filing fees, reasonable attorney fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this Article.” 10 OKLA. STAT. § 7700-636(c) (2011). The provision in this statute allows for a broader recovery than the comparable provision in Title 43 and should, therefore, be used as the basis of recovery.

49. 43 OKLA. STAT. § 109.4(I) (Supp. 2016).

50. *Vance v. Loy*, 2007 OK CIV APP 34, ¶ 12, 158 P.3d 503, 506. Because the court had no transcript of attorney fee proceedings, however, it was impossible for the appellate panel to determine how the trial court decided the merits of the mother’s request for fees. *Id.* When this happens, the appellate panel may, and did in this case, presume the trial court was correct. *Id.*

51. 43 OKLA. STAT. § 107.3 (2011).

52. *Id.* § 107.3(A)(3).

cost of the guardian ad litem fee in the same proportion as child support amounts allocated to each party.⁵³

C. Statutes: Prevailing Party

While the previously discussed family law statutes award attorney fees using the balancing-of-equities standard, there are several family law statutes that award attorney fees based on which party prevails.⁵⁴

1. False Allegations of Child Abuse

Title 43, section 107.3 provides that if a party intentionally makes

a false or frivolous accusation to the court of child abuse or neglect against the other party, the court shall proceed with any or all of [the listed sanctions, including] . . . [a]ward[ing] the obligation to pay all court costs and legal expenses encumbered by both parties arising from the allegations of the accusing party.⁵⁵

Although the section does not refer to a “prevailing party,” the term is implied by the language that requires a false report as a threshold matter before considering any remedy.⁵⁶ The term “legal expenses” conceivably includes attorney fees, though currently there are too few cases applying the statute to know for certain. The elements that must be proved to obtain these legal expenses under this section are

53. For the statutes governing the calculation of child support, see *id.* § 118D.

54. The standard definition of prevailing party is one in whose favor judgment is rendered. See *Assocs. Fin. Serv. v. Millsap*, 1977 OK 157, ¶ 8, 570 P.2d 323, 326. The definition of a prevailing party is not confined to one who obtains judgment after a trial on the merits. *Prof'l Credit Collections, Inc. v. Smith*, 1997 OK 19, ¶ 12, 933 P.2d 307, 311. Nor is it necessary that a party obtain all of the relief requested in order to be the prevailing party. *McKiddy v. Alarkon*, 2011 OK CIV APP 63, ¶ 22, 254 P.3d 141, 147. In *McKiddy*, the parties settled the father's modification of custody motion by providing that the mother would retain custody and the father would have increased visitation. *Id.* ¶ 5, 254 P.3d at 143. The court found that the mother was the prevailing party because the father filed a motion to modify custody and, in the end, the mother retained custody. *Id.* ¶ 22, 254 P.3d at 147. In many family law cases with multiple issues, the determination of prevailing party can be very murky. Most prevailing-party statutes, however, refer to a particular issue, thereby alleviating some of the murkiness.

55. 43 OKLA. STAT. § 107.3(D).

56. *Id.*

1. context of a child-custody proceeding;
2. an allegation concerning child abuse or neglect;
3. intent to make the allegation; and
4. falsity or frivolousness of the allegation.⁵⁷

The terms of the statute seem to authorize an award only for the amount of legal expenses arising from defense against the false allegations. In a custody trial, for example, the fees incurred in rebutting false allegations of child abuse or neglect would be recoverable under this section, but fees covering the entire case would not. Attorneys planning to seek fees under this section should keep clear records indicating what part of the fees incurred were used to rebut the false allegations.⁵⁸ The trial court's assessment of fees or other remedies under this section should also include specific findings as to each of the four requirements.⁵⁹

2. Relocation Cases

In relocation cases, title 43, section 112.3 of the Oklahoma Statutes requires that the relocating parent send notice of the proposed relocation to the other parent.⁶⁰ The court may consider the failure to give notice to be "sufficient cause to order the person seeking to relocate the child to pay

57. *Id.*

58. *See* *Sisney v. Smalley*, 1984 OK 70, ¶¶ 22-23, 690 P.2d 1048, 1051-52 (authorizing the trial court to apportion the legal fees between those areas where fees can be recovered and those where it cannot be recovered).

59. *See In re Marriage of Slate*, 2010 OK CIV APP 38, ¶ 14, 232 P.3d 916, 919. In *Slate*, the court noted:

[T]he trial court not only made the required § 107.3(D) determination but also listed five reasons in its final decree supporting that determination. As summarized, the trial court found that: (1) Mother made her first allegation of physical abuse almost immediately after the court placed primary custody with Father because the child was eligible for pre-kindergarten enrollment; (2) Mother failed to meet the burden of proof in her first application for emergency custody and her second application had strikingly similar allegations; (3) DHS investigated Mother's second application and could not confirm any of her allegations; (4) Mother asked her stepmother to write a letter about previous alleged abuse by Father that was primarily based on Mother's assertions, i.e., the stepmother had no personal knowledge about the assertions; and (5) testimony indicated that Mother had made frivolous allegations of improper child restraint in Father's vehicle at one of the visitation exchanges.

Id.

60. 43 OKLA. STAT. § 112.3(F)(1) (2011).

reasonable expenses and attorney fees incurred by the person objecting to the relocation.”⁶¹

This relocation statute does not use the term “prevailing party.” It is only triggered, however, when one party commits a fault—the failure to give notice—against the other party. Therefore, this statute is more properly classified with the prevailing-party category.

In addition to the provision on failure to give notice, the relocation statute also provides that the court may

impose a sanction on a person proposing a relocation of the child or objecting to a proposed relocation of a child if it determines that the proposal was made or the objection was filed:

- a. to harass a person or to cause unnecessary delay or needless increase in the cost of litigation,
- b. without being warranted by existing law or was based on frivolous argument, or
- c. based on allegations and other factual contentions which had no evidentiary support or, if specifically so identified, could not have been reasonably believed to be likely to have evidentiary support after further investigation.⁶²

This sanction is “limited to what is sufficient to deter repetition of such conduct” and may include “some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.”⁶³

This part of the relocation statute clearly is a prevailing-party statute. It requires proof of the listed factors and is similar in many ways to the statute on false allegations of child abuse. Again, it will be necessary to distinguish between those fees expended on the relocation issue as opposed to any other issue pertaining to the children.

3. Visitation and Child Support Enforcement

Visitation and child support enforcement involve several statutes.

a) Section 111.1

Title 43, section 111.1(B) provides:

61. *Id.*

62. *Id.* § 112.3(L)(1).

63. *Id.* § 112.3(L)(2).

1. Except for good cause shown, when a noncustodial parent who is ordered to pay child support and who is awarded visitation rights fails to pay child support, the custodial parent shall not refuse to honor the visitation rights of the noncustodial parent.

2. When a custodial parent refuses to honor the visitation rights of the noncustodial parent, the noncustodial parent shall not fail to pay any ordered child support or alimony.⁶⁴

These provisions require that visitation can be withheld from a noncustodial parent for good cause unrelated to the noncustodial parent's failure to pay support. However, there is no good-cause option for the obligor when visitation is withheld. Child support must continue to be paid.

Interestingly, the attorney fee provision of this statute in subsection (C)(3) provides that “[u]nless 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 or denied visitation as authorized by the court.”⁶⁵

This “prevailing party” language means that fees can be assessed against the person who initiates the proceeding or the person against whom the proceeding was commenced. However, this means there is some contradiction in the statute. A custodial parent can defend a proceeding to enforce visitation by showing that there was good cause for not allowing the visitation. A child support obligor, on the other hand, must continue to pay child support even if visitation is withheld without good cause. At the attorney fee hearing, however, the noncustodial parent may defend the award of fees on the basis that there was good cause for failure to pay the child support, which was not supposed to be withheld in the first place.

b) Section 111.3(E)

Title 43, section 111.3 is also concerned with enforcement of visitation. Subsection E provides that “[t]he prevailing party shall be granted reasonable attorney fees, mediation costs, and court costs.”⁶⁶

64. *Id.* § 111.1(B).

65. *Id.* § 111.1(c)(3).

66. 43 OKLA. STAT. § 111.3(E) (Supp. 2014). The award of attorney fees under these statutes is mandatory. For a recent example, see *Morie v. Morie (In re Marriage of Morie)*, No. 113,710 (Okla. Civ. App. Oct. 15, 2015).

Section 111.3(E) requires the payment of fees to the party who initiates the visitation enforcement action only if the criteria of subsection D are met.⁶⁷ Subsection D requires that the custodial parent has unreasonably denied, or otherwise interfered with, the noncustodial parent's visitation rights.⁶⁸ If the movant does not sustain the burden of showing that the visitation has been unreasonably denied or otherwise interfered with, attorney fees are not due to the movant.⁶⁹

c) Section 112(D)

Title 43, section 112(D) also pertains to visitation denial. It provides that "a pattern of failure to allow court-ordered visitation may be determined to be contrary to the best interests of the child" and may be the basis of a change of custody.⁷⁰ If a proceeding is brought under this provision, "the prevailing party shall be entitled to recover court costs, attorney fees, and any other reasonable costs and expenses incurred with the action."⁷¹

To trigger the attorney fee provision of section 112(D) for the petitioner, it must be shown that there is a pattern of visitation denial that is contrary to the best interests of the child.⁷² This contrasts with section 111.3(E), which requires that the visitation be unreasonably denied or otherwise interfered with.⁷³ Section 112(D) was invoked in *King v. King*, where the court found that the mother had good cause to deny visitation when there was evidence that the child had been abused while visiting the father in accordance with a visitation order.⁷⁴ In those circumstances, not only was the mother entitled to attorney fees for the trial, but she was also entitled to appellate attorney fees.⁷⁵ The court held that, at least under this statute, an award of attorney fees to the prevailing party includes an award of appellate attorney fees.⁷⁶

67. See 43 OKLA. STAT. § 111.3(D).

68. *Id.*

69. *Abbott v. Abbott*, 2002 OK CIV APP 6, ¶ 14, 38 P.3d 937, 940-41.

70. 43 OKLA. STAT. § 112(D) (2011).

71. *Id.*

72. *Id.*

73. See discussion *supra* Section I.C.3.b.

74. 2005 OK 4, ¶ 17, 107 P.3d 570, 578.

75. *Id.* ¶¶ 30, 32, 107 P.3d at 581.

76. *Id.* In an unpublished case, an appellate panel held that this attorney fee provision refers only to denial of visitation in subsection (D) and not to all issues covered under section 112. *Janes v. Janes*, No. 113,171 (Okla. Civ. App. Mar. 22, 2016).

d) Section 109.4

Title 43, section 109.4, which applies to grandparent visitation, provides that

[i]f the court finds that visitation rights of the grandparent have been unreasonably denied or otherwise unreasonably interfered with by the parent, the court shall enter an order providing for one or more of the following:

. . . .

- d. assessment of reasonable attorney fees, mediation costs, and court costs to enforce visitation rights against the parent.⁷⁷

However, the statute also provides that “[i]f the court finds that the motion for enforcement of visitation rights has been unreasonably filed or pursued by the grandparent, the court may assess reasonable attorney fees, mediation costs, and court costs against the grandparent.”⁷⁸

These grandparent visitation enforcement provisions are the same as those enforcement provisions in title 43, section 111.3.⁷⁹ There are no cases interpreting the attorney fee provisions of the grandparent visitation statutes, but it will undoubtedly be interpreted in the same manner as section 111.3.

4. Miscellaneous Attorney Fee Provisions

A fourth category of prevailing-party statutes is also important for courts and attorneys to consider. This section of the article details five miscellaneous attorney fee provisions that fall within this category.

a) Tortious Interference With Custody or Visitation

Third parties who remove or assist another in removing a child with the intent to deny a parent custody or visitation can be liable for damages under title 43, section 111.2.⁸⁰ The prevailing party in an action under this section is awarded attorney fees.⁸¹ There are no cases applying this statute.

77. 43 OKLA. STAT. § 109.4(F)(6) (Supp. 2016).

78. *Id.* 109.4(F)(7).

79. 43 OKLA. STAT. § 111.3 (Supp. 2014).

80. 43 OKLA. STAT. § 111.2 (2011).

81. *Id.*

b) Victims of Domestic Violence

One of the more interesting attorney fee provisions is title 43, section 112.6. It provides that

[i]n a dissolution of marriage or separate maintenance or custody proceeding, a victim of domestic violence or stalking shall be entitled to reasonable attorney fees and costs after the filing of a petition, upon application and a showing by a preponderance of evidence that the party is currently being stalked or has been stalked or is the victim of domestic abuse. The court shall order that the attorney fees and costs of the victimized party for the proceeding be substantially paid for by the abusing party prior to and after the entry of a final order.⁸²

There are no cases interpreting this statute. Its mention of dissolution or separate maintenance⁸³ indicates that it only applies prior to a divorce decree. To show an entitlement to attorney fees, a party must prove that she is a victim of stalking or domestic abuse.⁸⁴ The statute seems to contemplate that this determination be made soon after the petition is filed, perhaps in conjunction with the temporary order.⁸⁵ The fees must be paid “prior to and after the entry of a final order.”⁸⁶

c) Deployed Parents Custody and Visitation Act

Title 43, section 150.10 provides that

[i]f the court finds that a party to a proceeding under the Deployed Parents Custody and Visitation Act has acted in bad faith or otherwise deliberately failed to comply with the terms of the Deployed Parents Custody and Visitation Act or a court order issued under the Deployed Parents Custody and Visitation Act, the court may assess attorney fees and costs against the opposing party and order any other appropriate sanctions.⁸⁷

The statute does not mention a “prevailing party.” It does seem, however, to assume that only the prevailing party can be awarded attorney fees, since it requires bad faith or deliberate failure to comply with the terms of the act.

82. *Id.* § 112.6.

83. But not annulment, apparently.

84. 43 OKLA. STAT. § 112.6.

85. *See id.*

86. *Id.*

87. *Id.* § 150.10.

d) The Uniform Child Custody Jurisdiction and Enforcement Act

The Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) has two provisions that provide for attorney fees. First, title 43, section 551-208 allows a court to decline jurisdiction if the person invoking the court’s jurisdiction has engaged in unjustifiable conduct.⁸⁸ If the court does decline jurisdiction, it must assess attorney fees and other costs against the party seeking to invoke the jurisdiction.⁸⁹ This attorney fee provision—like section 551-312 below—is based on a comparable statute under the International Child Abduction Remedies Act.⁹⁰ The statute includes a defense that the imposition of fees would be clearly inappropriate.⁹¹

The second provision of the UCCJEA providing for fees is section 551-312, which entitles the prevailing party to enforcement proceedings under article 3 of the UCCJEA to obtain attorney fees as well as other costs.⁹² It is also subject to a “clearly inappropriate” defense.⁹³

e) Protective Orders

The statute dealing with protective orders, title 22, section 60.2, provides that a court “may assess court costs, service of process fees, attorney fees, other fees and filing fees against the defendant at the hearing on the petition, if a protective order is granted.”⁹⁴ The court does have authority, however, to waive the costs and fees if the court finds that the party does not have the ability to pay them.⁹⁵ If the “petition for a protective order has been filed frivolously and no victim exists, the court may assess attorney fees and court costs against the plaintiff.”⁹⁶

88. *Id.* § 551-208(A).

89. *Id.* § 551-208(C).

90. *See* 22 U.S.C. §§ 9000-11 (Supp. III 2015).

91. *Id.* § 9007(b)(3). There is considerable amount of interpretation of this language as used in the International Child Abduction Remedies Act. A discussion of this provision lies well beyond the scope of this article.

92. 43 OKLA. STAT. § 551-312.

93. *Id.*

94. 22 OKLA. STAT. § 60.2(c)(1) (Supp. 2013).

95. *Id.*

96. *Id.* § 60.2(C)(2). In *Murlin v. Pearman*, the court found that a protective order filed against the defendant—which was filed so that a friend of the plaintiff could gain an advantage in a custody case—was falsely and frivolously filed. 2016 OK 47, ¶¶ 26-27, 371 P.3d 1094, 1099. Therefore, the court found that awarding attorney fees against the plaintiff was proper. *Id.*

II. Procedure and the Role of the Burk Decision in Evidentiary Hearings

A. General Procedure in Obtaining Attorney Fees

A motion for attorney fees must be filed within thirty days after the filing of a judgment, decree, or other appealable order.⁹⁷ An appealable order is a judgment, decree, or order that is final.⁹⁸ Therefore, a litigant has thirty days from the denial of a motion for a new trial to file an application for attorney fees.⁹⁹ The trial court may set a deadline for receipt of the time sheets, affidavits, and other materials that must be included in the application for attorney fees.¹⁰⁰ Failure to comply with the trial court's deadline may result in a dismissal of the application for fees.¹⁰¹

B. Evidentiary Hearings and the Effect of Burk

Recurring issues in deciding an application for attorney fees include (1) whether a trial court must hold an evidentiary hearing before awarding fees and (2) the scope of such a hearing.

State ex rel Burk v. City of Oklahoma City seemed to require that all trial courts, before awarding a fee, hold an evidentiary hearing and apply certain factors in determining the fee.¹⁰² *Burk* directs a trial court to consider the following criteria:

1. The time and labor required
2. The novelty and difficulty of the questions
3. The skill requisite to perform the legal service properly
4. The preclusion of other employment by the attorney due to acceptance of the case
5. The customary fee
6. Whether the fee is fixed or contingent
7. Time limitations imposed by the client or the circumstances
8. The amount involved and the results obtained

97. 12 OKLA. STAT. § 696.4(B) (Supp. 2012); OKLA. SUP. CT. R. 1.22(c)(2).

98. *Haggard v. Haggard*, 1998 OK 124, ¶ 13, 975 P.2d 439, 442.

99. *See id.* ¶ 7, 975 P.2d at 441.

100. *See Bartlett v. Bartlett*, 2006 OK CIV APP 112, ¶ 34-35, 144 P.3d 173, 185-86.

101. *Id.* ¶ 35, 144 P.3d at 186.

102. 1979 OK 115, ¶ 4, 598 P.2d 659, 660.

9. The experience, reputation and ability of the attorneys
10. The “undesirability” of the case
11. The nature and length of the professional relationship with the client
12. Awards in similar cases¹⁰³

The relationship between these factors and the factors set out in the *Finger* decision is unclear. The Oklahoma Supreme Court has never held that the *Burk* factors are applicable to domestic relations cases.¹⁰⁴ One panel of the Oklahoma Court of Civil Appeals attempted to reconcile the two cases in *Smith v. Smith*.¹⁰⁵ In this case regarding child support collection, the obligee was the prevailing party.¹⁰⁶ Neither party requested an evidentiary hearing and, ultimately, the court issued an order awarding the obligee over \$10,000 in attorney fees.¹⁰⁷ The obligor appealed, arguing that the trial court had an obligation to hold an evidentiary hearing and apply the *Burk* factors to determine whether an attorney fee award was appropriate.¹⁰⁸ The appellate panel noted that, in the absence of a contract or statute fixing the amount, the factors courts consider in domestic relations cases for determining a reasonable attorney fee and possible lodestar incentive fee or bonus fee are comparable to those factors set out in *Burk*.¹⁰⁹ The panel then concluded that an evidentiary hearing is required when issues are raised as to the amount of time spent and the complexity of the case or trial in opposition to a domestic relations fee request.¹¹⁰ Thus, the trial court is not required to hold a *Burk* hearing but is required to hold an evidentiary hearing.

More recently, another panel of the court of civil appeals took a much closer look at the relationship between *Burk* and *Finger*. In two well-reasoned—albeit unpublished—opinions,¹¹¹ the panel noted that the only

103. *Id.* ¶ 8, 598 P.2d at 661 (quoting *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 187-88 (D.C. Cir. 1974)).

104. *See State ex rel. Okla. Bar Ass’n v. Fagin*, 1992 OK 118, ¶ 20, 848 P.2d 11, 15.

105. 2013 OK CIV APP 54, 305 P.3d 1054.

106. *Id.* ¶¶ 9-10, 305 P.3d at 1057.

107. *Id.* ¶ 3, 305 P.3d at 1055.

108. *Id.* ¶ 4, 305 P.3d at 1056.

109. *Id.* ¶ 5, 305 P.3d at 1056.

110. *Id.* ¶ 9, 305 P.3d at 1057.

111. *Kannard v. Kannard (In re Marriage of Kannard)*, No. 112,760 (Okla. Civ. App. Feb. 22, 2016), *cert. denied*, Order, *Kannard*, No. 112,760 (Okla. June 27, 2016); *Hall v. Hall*, No. 112,350 (Okla. Civ. App. Jan. 27, 2016).

overlap between the two lists of factors is that one of the *Finger* criteria, “the results obtained,” is close to the *Burk* factor “the outcome of the action.”¹¹² Otherwise, the *Burk* factors mostly address the “lodestar” issue of fee rate and other factors determining the amount of the attorney fees.¹¹³ *Finger* primarily addresses the factors that should be considered in balancing the equities to determine if an attorney fee is proper at all, not the amount of the fee.¹¹⁴ As the panel noted, although it is difficult to see how the *Burk* analysis helps to determine whether a fee is appropriate under equitable-balancing statutes, the analysis is helpful in deciding how the fee should be calculated after such a determination is made.¹¹⁵ The panel then concluded that the attorney fee analysis undertaken pursuant to title 43, section 110 should be reviewed primarily by the *Finger* criteria.¹¹⁶ As the panel noted,

[b]ecause of the continuing jurisdiction of the courts in domestic cases, it is possible for a party to essentially “never give up” and engage in continued post-decree motions for many years. Section 110 allows a trial court to set and award varying fees based on the relative equities and means of the parties in such cases, protect parties from the cost of repeated litigation brought with little chance of success, and discourage behavior that is wasteful of the court’s time and the parties’ money. This structure and purpose is fundamentally different from that of mandatory prevailing party fees, where the *Burk* criteria control. It is our view that *Finger* primarily controls in these cases, and *Burk* is useful only as far as setting the reasonable hourly rate for the services performed. It is also our view that *Burk* findings are not required in these cases.¹¹⁷

It follows from this analysis that the *Burk* criteria are primarily to be used under the prevailing-party attorney fee statutes to determine how the fee is to be calculated. Under those statutes, equitable criteria are not to be considered. The appellate panel, in its next case, found that “[t]he *Burk* process takes no account of the parties’ equities in setting a fee, and essentially requires all hours properly billed to a fee-bearing matter to be

112. *Hall*, No. 112,350, at *11.

113. *Id.* at *11-12.

114. *Kannard*, No. 112,760, at *7-8.

115. *Hall*, No. 112,350 at *12-14.

116. *Id.* at *14.

117. *Id.* at *13-14.

compensated at an established lodestar rate, irrespective of the parties' relative equities or degree of malfeasance."¹¹⁸ But the determination of the amount of the fee that can be recovered under non-prevailing-party statutes is subject to equitable considerations and the court may award some or all of the requested fees.¹¹⁹

This analysis from the court of civil appeals is quite valuable. It accommodates both cases by applying *Finger* to the equitable-balancing cases and *Burk* primarily to prevailing-party cases. As the panel noted, if this approach is incorrect, specific supreme court guidance on the proper procedure would be helpful.¹²⁰

III. The Lawyer's Interest in the Fee

A. Attorney Fees Payable Directly to the Attorney

An attorney fee can be made payable directly to the attorney.¹²¹ If a trial court orders payment of attorney fees directly to the wife's attorney so the wife can prosecute an appeal, it has jurisdiction to order the attorney to refund part of the amount so paid.¹²² The court of civil appeals, however, cannot order *sua sponte* that the attorney pay fees back to the court without notice of the issue.¹²³ The issue of attorney fees is not abated when one party dies following the pronouncement of the divorce.¹²⁴ As long as the divorce matter is still pending at the time the attorney seeks, in his own right, fees to which he may be entitled, the attorney has a personal interest in those fees sufficient to give him standing.¹²⁵

If the attorney fee award is to be paid directly to the attorney, the parties cannot circumvent the order by one party paying the amount directly to the

118. *Kannard*, No. 112,760, at *7 (emphasis omitted).

119. *Id.* at *8.

120. *Id.* at *11. With these two cases, it seems clear that this approach is going to be applied by the Tulsa panels of the court of civil appeals and should be taken into account in planning for attorney fee hearings.

121. *Tilley v. Price*, 1954 OK 76, ¶ 11, 267 P.2d 996, 997-98; *Owens v. Owens*, 1953 OK 310, ¶ 9, 264 P.2d 341, 342. If a temporary order requires payment of fees to an attorney, the attorney fee award will survive a dismissal of the case. *Groenewold v. Groenewold*, 1943 OK 391, ¶ 14, 144 P.2d 965, 966-67; *Kelly v. Maupin*, 1936 OK 344, ¶ 16, 58 P.2d 116, 119.

122. *Musser v. Musser*, 1998 OK CIV APP 13, ¶ 12, 955 P.2d 744, 747.

123. *Ford v. Ford*, 1988 OK 103, ¶ 10, 766 P.2d 950, 954.

124. *Swick v. Swick*, 1993 OK 151, ¶ 9, 864 P.2d 819, 822.

125. *Id.* ¶ 12, 864 P.2d at 822-23.

other party.¹²⁶ The supreme court ruled in *Nichols v. Nichols* that an attorney fee award owed to a divorcing spouse—along with any money received in payment of that award—attaches, by operation of law, a constructive trust for the benefit of the attorney who represented the spouse.¹²⁷ The spouse is the trustee of the trust and the lawyer who represented the spouse is the beneficiary.¹²⁸ The continuing nature of the attorney fee award that comprises the corpus of the trust militates against the running of the statute of limitations unless there has been a repudiation of the trust by the trustee.¹²⁹

The court of civil appeals in *Nichols* had previously ruled that the statute of limitations barred the lawyer from enforcing a charging lien against the funds the wife received.¹³⁰ The wife filed for bankruptcy and, four years later, sued her ex-husband to collect the award.¹³¹ In the bankruptcy, she listed the law firm as an unsecured creditor.¹³² Upon review, the supreme court determined that the court of civil appeals should have analyzed the case as one involving a constructive trust.¹³³ The wife's bankruptcy, therefore, had no effect on the lawyer's interest in the fee award because the award remained viable post-discharge and could be enforced.¹³⁴ In addition, the bankruptcy trustee had abandoned any claim the wife might have to the award and the award was not for her benefit, but for the benefit of the lawyer.¹³⁵

B. How Sandel Distinguished Attorney Fees Payable Directly to Attorneys

The court of civil appeals distinguished cases that allow a fee to be paid directly to the attorney in *Sandel v. Sandel (In re Marriage of Sandel)*.¹³⁶ Following the couple's divorce, the wife sought attorney fees but filed for bankruptcy just prior to the determination of the fee issue.¹³⁷ In her bankruptcy petition, she listed her divorce law firm as an unsecured

126. *Nichols v. Nichols*, 2009 OK 43, ¶ 11, 222 P.3d 1049, 1054-55.

127. *Id.*

128. *Id.*

129. *Id.* ¶ 14, 222 P.3d at 1055.

130. *Id.* ¶ 6, 222 P.3d at 1053.

131. *Id.* ¶¶ 3-4, 222 P.3d at 1052.

132. *Id.* ¶ 3, 222 P.3d at 1052.

133. *Id.* ¶¶ 11-13, 222 P.3d at 1054-55.

134. *Id.* ¶ 16, 222 P.3d at 1056.

135. *Id.*

136. 2009 OK CIV APP 7, ¶ 12, 217 P.3d 141, 144.

137. *Id.* ¶¶ 2-3, 217 P.3d at 142.

creditor.¹³⁸ She also indicated, however, that the husband was co-debtor.¹³⁹ The bankruptcy court granted the law firm relief from the automatic stay in order to prosecute the fee application, but ultimately discharged the wife of all her debts, including the debt owed to the firm.¹⁴⁰ The trial court then denied the law firm's request for fees, finding that the wife had no standing to seek them after the discharge.¹⁴¹

The law firm relied on *Swick v. Swick*¹⁴² to contend at trial and on appeal that it had the authority to seek fees on its own behalf, independent of the wife. The appellate panel found the firm's reading of *Swick* far too broad.¹⁴³ The panel noted that an attorney representing a deceased party in a divorce proceeding—the context in *Swick*—clearly has a claim for attorney fees in the client's probate proceeding.¹⁴⁴ Additionally, the claim in *Swick* fell under a different part of the statute than the claim in *Sandel*.¹⁴⁵ In *Swick*, the court relied on the current title 43, section 110(E) of the Oklahoma Statutes, which provides for “additional orders . . . made for the benefit of either party or their respective attorneys.”¹⁴⁶ *Sandel*, however, involved section 111(D), which does not contain a provision for “their respective attorneys.”¹⁴⁷ In the absence of that phrase, the court of civil appeals could not find “any authority for the proposition that an attorney for one party to a divorce has a claim for attorney fees independent of the contractual relationship between the attorney and that party or the court's authority to require the other party to the proceeding to pay those fees.”¹⁴⁸

The panel then found that the wife's claim for fees was a part of the bankruptcy estate.¹⁴⁹

If . . . the claim against Husband for attorney fees belonged to the Law Firm, the Law Firm would not have needed permission

138. *Id.* ¶ 3, 217 P.3d at 142.

139. *Id.*

140. *Id.*

141. *Id.* ¶ 4, 217 P.3d at 142.

142. 1993 OK 151, ¶ 12, 864 P.2d 819, 823 (“[I]t is quite clear that *as long as the divorce matter is still pending* . . . at the time the attorney seeks in his own right fees to which he may be entitled, the attorney has a personal interest in those fees sufficient to give him standing to pursue recovery of them in his own right.”).

143. *Sandel*, ¶ 10, 215 P.3d at 143.

144. *Id.* ¶ 13, 217 P.3d at 143-44.

145. *Id.* ¶ 13, 217 P.3d at 144.

146. *Id.*; 43 OKLA. STAT. § 110(E) (2011).

147. *Sandel*, ¶ 14, 217 P.3d at 144; 43 OKLA. STAT. § 110(D).

148. *Sandel*, ¶ 14, 217 P.3d at 144.

149. *Id.* ¶ 16, 217 P.3d at 145.

from the bankruptcy court to pursue that claim. Although any attempt to enforce the Law Firm's contractual rights against Wife for the fees . . . would have been stayed by Wife's bankruptcy filing, the Law Firm's application did not seek to recover against Wife. Rather, the Law Firm's application asked the district court to require Husband to pay Wife's reasonable expenses incurred in the divorce proceeding pursuant to 43 O.S. Supp. § 110(D). . . . Consequently, no bankruptcy proceeding filed by Husband prevented the prosecution of the application against him. Nonetheless, the Law Firm sought relief from the bankruptcy court in Wife's proceeding, as it was required to do, because the claim for attorney fees asserted in the application was an asset of Wife's bankruptcy estate.

By granting the Law Firm's motion and lifting the automatic stay, the bankruptcy court allowed the Law Firm to pursue Wife's claim on behalf of the bankrupt's estate. That relief, however, did not constitute an abandonment of Wife's claim for attorney fees. . . . The Law Firm was specifically authorized by the bankruptcy court to pursue that claim on behalf of the estate. Any recovery will be property of the estate. Whether the Law Firm may recover those fees, if awarded, is a matter for the bankruptcy court.¹⁵⁰

IV. Ethical Considerations

Attorneys who practice family law are uniquely subject to ethical considerations affecting how fees are charged; such considerations do not bind attorneys who practice in other areas.¹⁵¹ Oklahoma attorneys, like

150. *Id.* ¶¶ 16-17, 217 P.3d at 145 (citations omitted).

151. Another area that affects family law, as well as some other areas of practice, is the problem of the non-refundable retainer. A family law attorney may not provide for a non-refundable retainer in an hourly rate contract, even if the written fee agreement clearly and specifically states that the original retainer amount is non-refundable. *Wright v. Arnold*, 1994 OK CIV APP 26, ¶ 10, 877 P.2d 616, 618. This issue was addressed by the court of civil appeals in *Wright v. Arnold. Id.* In finding a non-refundable retainer clause unenforceable in an hourly rate fee contract, the court said:

[A non-refundable retainer provision] is an impermissible restraint on the right of a client to freely discharge her attorney. This provision also contravenes the Code of Professional Conduct, which requires an attorney, upon the termination of the attorney-client relationship, to protect his client's interest by refunding any advanced payment which has not been earned. We hold that the attorney

those in other states, may not charge a fee that is contingent upon, or enhanced because of, the result in a divorce case.¹⁵²

A. Prohibition on Contingency Fees in Domestic Relations Matters

The governing rule is Rule 1.5 of the Oklahoma Rules of Professional Conduct, which provides that a lawyer may not charge “any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.”¹⁵³

under such circumstances is entitled to only such fees as the attorney can show are reasonable for the services actually performed.

Id. ¶ 10, 877 P.2d at 618-19. The court noted that other jurisdictions that had considered the issue reasoned that non-refundable retainer clauses have a “chilling effect” on a client’s right to freely discharge his or her attorney. *Id.* ¶ 12, 877 P.2d at 619 (quoting *Estate of Forrester v. Dawalt*, 562 N.E.2d 1315, 1317 (Ind. Ct. App. 1990)). Hence, the court found the provisions to be unethical and unenforceable. *Id.* ¶ 15, 877 P.2d at 619.

152. 5 OKLA. STAT. app. 3-A, r. 1.5 (2011).

153. *Id.* The full version of Rule 1.5 provides that:

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses

This rule is long-standing and well-known to all family law attorneys.¹⁵⁴ In Oklahoma, it was first announced in *Opperud v. Bussey*.¹⁵⁵ In that case, an attorney and his client had an agreement that the attorney “should receive 12½ per cent. of whatever amount was awarded her by the judgment of [the] court [in the divorce] together with whatever fees might be allowed by the court.”¹⁵⁶ In a suit to collect the fee, the Oklahoma Supreme Court found the contract violated public policy.¹⁵⁷ In language used by almost every court since, the supreme court said:

A contract between an attorney and client, providing for the payment of a fee to the attorney contingent upon the procurement of a divorce for the client, is against public policy and illegal and void. Such a situation involves the personal interest of the attorney in preventing a reconciliation between the parties, a thing which the law favors and public policy encourages.¹⁵⁸

to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and, if there is a recovery, showing the remittance to the client and the method of determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Id.

154. The rule has been around at least since the end of the 19th century. *See* *Jordan v. Westerman*, 28 N.W. 826 (Mich. 1886).

155. 1935 OK 221, 46 P.2d 319.

156. *Id.* ¶ 2, 46 P.2d at 320.

157. *Id.* ¶ 33, 46 P.2d at 325.

158. *Id.* ¶ 21, 46 P.2d at 322; *see also* *Newman v. Freitas*, 61 P. 907 (Cal. 1900).

This language was echoed by the Oklahoma Bar Association in Legal Ethics Opinion No. 299,¹⁵⁹ finding that (1) the law favors marriage and discourages divorce and a contingent fee contract gives the attorney an interest in securing the divorce, thus preventing reconciliation, and (2) a suit for divorce is not a cause of action “ex contractu” or “ex delicto” within the meaning of title 5, section 7 of the Oklahoma Statutes, as the property rights are “merely incidental to the dissolution of the status.”¹⁶⁰

Given this rationale, one would suspect that, if the granting of the divorce was not at issue in the case,¹⁶¹ the rule would be inapplicable. After all, the supreme court in *Smith v. Armstrong & Murphy* limited the expansion of the *Opperud* rule.¹⁶² *Smith* was a fee collection case where the

[p]laintiff employed defendants, as attorneys, to represent her in an action against her husband wherein she sought a divorce and also sought recovery of certain monies previously advanced to her husband and certain stock in a corporation acquired as a result of a joint venture of plaintiff and her husband in an oil enterprise. The contract provided for payment of a fixed sum for representing plaintiff in the divorce action and further provided that in the event of a recovery of money or property, defendants should receive a percentage thereof.”¹⁶³

Upholding the contract, the court said that “[t]he rule announced in *Opperud v. Bussey* . . . being in derogation of rights granted by [title 5, section 7 of the Oklahoma Statutes] should not be extended further than the necessities of the case require.”¹⁶⁴

159. *Legal Ethics Opinion No. 299*, 52 OKLA. BAR J. 2101, 2101-02 (1981).

160. *Id.*; see also *Longmire v. Hall*, 1975 OK CIV APP 36, ¶ 12, 541 P.2d 276, 278 (holding that contingent-fee contracts encourage divorce and, since the court can award a dependent spouse attorney fees, there is no need for contingent fees). The Oklahoma Bar Association’s view that a divorce action is not covered under title 5, section 7 of the Oklahoma Statutes contradicts the reasoning of the *Smith* case and probably should not be relied upon. See *infra* text accompanying notes 162-164.

161. Given the universal adoption of no-fault divorce, the granting of the divorce itself is rarely, if ever, a contested issue in a divorce case. New York was one of the last states to adopt no-fault divorce. *Patterson Signs No-Fault Divorce Bill*, N.Y. TIMES (Aug. 15, 2010), <http://www.nytimes.com/2010/08/16/nyregion/16divorce.html>.

162. 1937 OK 472, ¶ 8, 73 P.2d 140, 142.

163. *Id.* ¶ 0, 73 P.2d at 141.

164. *Id.* ¶ 8, 73 P.2d at 142. It is fascinating that the *Smith* case has never been cited by any other Oklahoma case concerned with attorney fees.

Unfortunately, the language of Rule 1.5 goes well beyond this rationale and prohibits, in a domestic-relations case, a fee contract that is “contingent upon the . . . amount of alimony or support, or property settlement in lieu thereof.”¹⁶⁵ If a client files a post-decree motion to increase or decrease alimony or child support, there is no divorce at issue in the case. Nothing the attorney does can prevent the granting of the divorce; it has already happened. Nonetheless, a fee arrangement providing for a percentage of the amount recovered is still deemed unethical.¹⁶⁶

The Oklahoma Supreme Court agreed in *McCrory v. McCrory*.¹⁶⁷ In that divorce case, the trial court awarded the house to the wife.¹⁶⁸ The wife engaged an attorney to handle the appeal.¹⁶⁹ If the attorney won the appeal,

165. 5 OKLA. STAT. app. 3-A, r. 1.5(d)(1) (2011). Interestingly, the prior version of Rule 1.5 prohibited any fee contract in a domestic-relations matter that was dependent upon the result obtained, regardless of the issue. 5 OKLA. STAT. app. 3-A, r. 1.5 (d)(1) (amended 2008). Now it only prohibits fee arrangements that depend upon the amount of money recovered. *See* 5 OKLA. STAT. app. 3-A, r. 1.5 (d)(1) (2011). Technically, therefore, an attorney could enter into a fee arrangement which would provide for an enhanced recovery contingent upon the results obtained on custody and visitation issues. We know, however, of no attorney who has attempted to do so.

One wonders who drafted the Oklahoma version of the Model Rules. Oklahoma law provides for alimony in lieu of property division (property-division alimony), a form of judgment authorized by title 43, section 121, to achieve a fair and just division of property. 43 OKLA. STAT. § 121 (2011). Property in lieu of alimony, however, is something unknown to Oklahoma law. No doubt the drafters meant property-division alimony, but they clearly did not say that.

166. Fee agreements to collect back-due child support and other monies due under a divorce decree can be funded based on a percentage of the amount collected. *Benson v. State*, 1962 OK 182, ¶ 11, 375 P.2d 958, 960; *State v. Cosby*, 1955 OK 173, ¶ 8, 285 P.2d 210, 213. Since collection and modification are often both at issue in a post-decree motion, the fee contract must clearly segregate the fee for modification (which must be charged on an hourly basis) from the collection fee (which can be a percentage of the amount collected). The attorneys in the *Smith* case did so and the court found the practice acceptable there. *Smith*, ¶ 8, 73 P.2d at 142.

Other states have also approved of such divided contracts. *See, e.g., Ballesteros v. Jones*, 985 S.W.2d 485 (Tex. Civ. App. 1998). In that case involving an action to establish a common-law marriage and divorce, a Texas court held that payment of \$90,000 under a contingent-fee contract for one-third of the settlement recovery was acceptable. *Id.* at 497. While contingent fees are “rarely justified in divorce actions,” the court said, if a common-law marriage was not established in this case, the client would recover nothing. *Id.* This case was quite different, then, from a divorce suit involving a ceremonial marriage in which each party would obtain a recovery of some sort.

167. 1988 OK 122, 764 P.2d 522.

168. *Id.* ¶ 3, 764 P.2d at 523.

169. *Id.* ¶ 4, 764 P.2d at 524.

he would be entitled to keep the house.¹⁷⁰ Even though the divorce was not part of the appeal (and was therefore final),¹⁷¹ the court found that the house was a contingency fee in a domestic-relations action and the arrangement was therefore illegal.¹⁷²

The court extended the prohibition of contingency fee contracts in domestic-relations cases to encompass a results-obtained fee contract—a fee contract under which an attorney charges an additional amount if he obtains an exceptional result.¹⁷³ In *Oklahoma Bar Association v. Fagin*, the court disciplined an attorney based on such a provision in his fee contract.¹⁷⁴ The attorney billed the client for the amount due based on his hourly rate, plus an additional \$4,000 in fees for an

[a]dditional attorney fee based upon “results obtained” for client as prescribed in written attorney fee contract, because of extremely beneficial court decision for client on alimony in lieu of property, and support alimony together totaling \$114,000 plus interest on the \$60,000 alimony in lieu of property award, and with former husband also being required to pay all of the extensive marital debts.¹⁷⁵

The written fee agreement clearly provided for such an enhanced fee.¹⁷⁶ Nonetheless, the court found the portion of the fee based on the results obtained for the client to be a violation of Rule 1.5(d).¹⁷⁷ The court said that such a fee arrangement, in which the attorney will receive an enhanced fee

170. *Id.*

171. *Id.* ¶ 1, 764 P.2d at 523. *See* title 43, section 127, which provides:

Every decree of divorce shall recite the day and date when the judgment was rendered. If an appeal be taken from a judgment granting or denying a divorce, that part of the judgment does not become final and take effect until the appeal is determined. If an appeal be taken from any part of a judgment in a divorce action except the granting of the divorce, the divorce shall be final and take effect from the date the decree of divorce is rendered, provided neither party thereto may marry another person until six (6) months after the date the decree of divorce is rendered; that part of the judgment appealed shall not become final and take effect until the appeal be determined.

43 OKLA. STAT. § 127 (2011).

172. *McCrary*, ¶ 15, 764 P.2d at 525.

173. *Okl. Bar Ass’n v. Fagin*, 1992 OK 118, ¶ 30, 848 P.2d 11, 16.

174. *Id.*

175. *Id.* ¶ 3, 848 P.2d at 12.

176. *Id.*

177. *Id.* ¶ 30, 848 P.2d at 16.

based on results obtained, is prohibited.¹⁷⁸ The court also held that such a contract “involves a personal interest because the greater amount he obtains for his client, the greater he can charge as a fee,” and that such clauses give the attorney “a personal interest in assuring a divorce is granted, because without a divorce he will not be able to charge a fee based upon the alimony and property settlement.”¹⁷⁹

B. Should This Prohibition Cease to Exist?

Although fees that are contingent on a result in a domestic-relations case have been prohibited for almost 150 years,¹⁸⁰ it is difficult to see the rationale for the continuation of such a rule. The oft-cited reason to retain the rule is that contingent fees promote divorce and give the attorney an interest in preventing reconciliation.¹⁸¹ But this rationale is untenable. First, such reasoning comes dangerously close to placing on the attorney an affirmative duty to attempt to reconcile his client with his or her estranged spouse—a task to which the attorney is not professionally suited. Second, an attorney’s covert manipulations are unlikely to be very effective against a marriage that cannot be saved. The insinuation that most attorneys would discourage reconciliation of spouses contemplating divorce is also tenuous. One can just as easily argue that a contingent fee promotes reconciliation because clients would be tempted to reconcile to avoid paying the fee.¹⁸²

178. *Id.* Results obtained is a factor that can be considered in other attorney fee contracts in Rule 1.5(a). 5 OKLA. STAT. app. 3-A, r. 1.5 (a)(4) (2011).

179. *Fagin*, ¶ 16, 848 P.2d at 14. Rule 1.5 at the time of the *Fagin* case prohibited any fee in a domestic-relations matter, the payment or amount of which is contingent upon the result obtained. 5 OKLA. STAT. app. 3-A, Rule 1.5 (amended 1998). The current Rule 1.5 no longer uses the same language; it simply provides for a prohibition of a fee that is “contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.” 5 OKLA. STAT. app. 3-A, r. 1.5 (2011). One could argue that the current rule no longer prohibits a results-obtained fee but only prohibits fees that are contingent upon securing an amount of a monetary award. No one, however, appears to have made that argument.

A more appropriate basis for deciding the *Fagin* case could be that a fee contract that gives the attorney a right to negotiate a “bonus” is untenable because such a clause must be in plain language and explain how it will be triggered. Nothing in the contract at issue in the *Fagin* case indicated how it would be determined that the attorney had obtained such a result that an additional fee would be charged. *Fagin*, ¶ 12, 848 P.2d at 13. Nor did the agreement specify what the additional fee would be. *Id.*

180. *See* *Jordan v. Westerman*, 28 N.W. 826 (Mich. 1886).

181. *Id.* at 830.

182. In *Polis v. Briggs*, such reconciliation apparently happened. 70 Pa. D. & C.2d 792, 794 (Phila. Cty. 1975).

It would also seem that, under this rationale, any fee arrangement between an attorney and a client in a divorce case, including charging by the hour, could be thought to discourage reconciliation and give the attorney an interest in procuring a divorce. Even an agreement based on hourly fees can be thought of as discouraging reconciliation because every divorce case prosecuted to termination produces a higher fee than if the case had ended in reconciliation.

Setting aside Oklahoma's reconciliation-based rationale, other rationales not cited by Oklahoma courts also do not hold up. First, some argue that contingent fee arrangements tend to deprive a dependent spouse of an award intended for his or her living expenses, and that contingent fees tend to frustrate and defeat a court's efforts to make an equitable provision for the spouse since the fee is deducted from the amount awarded.¹⁸³ But contingent fee arrangements do not interfere with court-ordered schedules of alimony and support.¹⁸⁴ Chances are very good that the attorney fee would be paid from the alimony or child support once received by the client. The only difference appears to be whether the fee comes out before or after the client receives it.

If support issues are not a part of the case and this is to be the rationale, it should follow that the prohibition on contingent fees should not be applicable. That is the case in some states. The Tennessee Supreme Court approved a fee agreement that authorized the attorney to charge up to fifteen percent of the amount of property awarded to the client.¹⁸⁵ The fee was not contingent, the court said, because the attorney would be paid regardless of whether the client won the case.¹⁸⁶

Second, clients in divorce cases are not more vulnerable than other clients. Some courts express concern that, because of the client's personal situation, he or she is particularly vulnerable to attorney overreach.¹⁸⁷ These courts often conclude that the mere presence of a contingent fee contract

183. *Baskerville v. Baskerville*, 75 N.W.2d 762, 768 (Minn. 1956).

184. *See Marquis v. Eighth Judicial Dist. Court*, 146 P.3d 1130, 1138 (Nev. 2006) (suggesting that contingency fees interfere with support schedules).

185. *Alexander v. Inman*, 974 S.W.2d 689, 698 (Tenn. 1998) (approving a fee of \$500,000).

186. *Id.* at 693.

187. *See Barelli v. Levin*, 247 N.E.2d 847, 851 (Ind. Ct. App. 1969) (arguing that wives contemplating divorce are often distraught and without experience in negotiating contracts and distinguishing *Kreiger v. Bulpitt*, 251 P.2d 673 (Cal. 1953), which held that a contingent fee contract with a husband is valid when the contract concerned defending against a divorce instead of instituting an action).

evidences overreach.¹⁸⁸ It is difficult to imagine that family law clients are any more vulnerable than personal injury, wrongful death, or probate clients. Indeed, such a rationale is tantamount to saying members of the domestic-relations bar as a group are more disreputable and more susceptible to temptation than their fellow lawyers. This conclusion has no basis other than the long-standing, erroneous tendency to assume that “good” lawyers do not handle domestic-relations cases.

At some point, the question of how family law attorneys should charge clients needs full discussion. Considerations include questions of whether an attorney can charge a lump sum for a divorce, how that lump sum should be calculated, and whether an attorney should charge on a per-function basis. Unfortunately, the prohibition on contingent fees has inhibited such discussion.

V. Conclusion

Attorney fee awards may be the least understood of all monetary awards that arise in the context of divorce cases. Perhaps this is because most litigants do not concentrate on the issue until the case is over. Given the plethora of attorney fee statutes, attorneys and clients should focus on the attorney fee issue much earlier in the proceeding, not only to assess whether fees can be awarded, but also to determine how they are to be calculated.

188. *Id.*