RECENT DEVELOPMENTS IN FAMILY LAW
2016-2017

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FEDERAL DEVELOPMENTS

MILITARY DISABILITY BENEFITS

Howell v. Howell, 2017 WL 2039158 (U.S. 2017)
Senate Bill 653

The United States Supreme Court decided an issue with regard to military disability benefits and, in the process, reversed Oklahoma law. The case presented a familiar pattern. The divorce decree of John and Sandra Howell awarded Sandra 50% of John's future Air Force retirement pay, which she began to receive when John retired the following year. About 13 years later, the Department of Veterans Affairs found that John was partially disabled due to an earlier service-related injury. To receive disability pay, federal law required John to give up an equivalent amount of retirement pay. 38 U. S. C. §5305. By his election, John waived about $250 of his retirement pay, which also reduced the value of Sandra's 50% share. Sandra petitioned the Arizona family court to enforce the original divorce decree and restore the value of her share of John's total retirement pay. The court held that the original divorce decree had given Sandra a vested interest in the pre-waiver amount of John's retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court's order.

The Supreme Court unanimously reversed the Arizona Supreme Court and held that a state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits. The court found that its prior decision in *Mansell v. Mansell*, 490 U. S. 581 (1989) determined the result. In that case the court held that federal law completely pre-empts the States from treating waived military retirement pay as divisible. The Arizona Supreme Court attempted to distinguish Mansell by emphasizing the fact that the veteran's waiver in that case took place before the divorce proceeding while the waiver in this case took place several years after the divorce. The Supreme Court noted that: [t]his temporal difference highlights only that John's military pay at the time it came to Sandra was subject to a future contingency, meaning that the value of Sandra's share of military retirement pay was possibly worth less at the time of the divorce. Nothing in this circumstance makes the Arizona courts' reimbursement award any the less an award of the portion of military pay that John waived in order to obtain disability benefits.

The Arizona courts referred to her interest in the waivable portion as having "vested" However, said the Supreme Court, state courts cannot "vest" that which they

lack the authority to give. Neither, the court said, can the state avoid *Mansell* by describing the family court order as an order requiring John to "reimburse" or to"indemnify" Sandra. This is only a semantic difference. Regardless of their form, such orders displace the federal rule and prevent the purposes and objectives of Congress.

However, the court did say state family courts remain free to take account of the contingency that some military retirement pay might be waived or take account of reductions in value when calculating or recalculating the need for spousal support. That has long been the interpretation of the Uniform Services Former Spouses Protection Act. The court distinguishes between dividing the disability benefits as property and using the disability benefits as income to determine alimony and child support. See Rose v. Rose, 481 U.S. 619 (1987).

However, the possibility that the disability benefits may be taken into account for spousal support is now no longer allowed in Oklahoma. In 2017, Senate Bill 653 added to 43 O.S. §134(F) subsection (k) which provides that notwithstanding any other provision of §134 military disability benefits cannot be considered for any purpose.

Both the *Howell* case and the statutory amendment raise a couple of issues. The first issue is whether the parties can contract around the prohibition on dividing disability benefits and have the provision incorporated in the decree, and enforced as such, will probably not be allowed. The Supreme Court noted that in *Mansell* the parties had agreed to divide the retirement and disability benefits which was not allowed in that case. Whether the parties could agree to the contrary and keep the agreement out of the decree to be sued on as a separate contract is a completely undecided issue. See e.g., *Dickson v. Dickson*, 1981 OK 142, 637 P.2d 110; *Grimshaw v. Grimshaw*, 1978 OK CIV APP 32, 581 P.2d 1329.

Second, it should be noted that the provision only effect calculation of income for support alimony. Child support is not affected by the amendment.

Third, there is a real question as to whether the prohibition on the use of disability benefits for alimony purposes solely with regard to military member is constitutionally viable or whether it is prohibited as special legislation. If the class consists of all disability benefits why are military disability benefits treated different from disability benefits resulting for fire, police or other activities? The provisions of this bill go into effect on November 1, 2017.

OKLAHOMA DEVELOPMENTS

A. MARRIAGE

1. ESTATES; COMMON LAW MARRIAGE; ESTOPPEL

Estate of Brown, 2016 OK 112, 384 P.3d 496

This case concerns which of two women will be the surviving spouse of the deceased, Bobby Joe Brown. The trial court determined that his surviving spouse for the purposes of administrating his estate was Ami Alley. Rhonda Brown and Bobby Joe Brown, Jr. were married on December 12, 1995. Rhonda testified that after a few years of marriage, she told Bobby she could no longer stay with him if he did not cease his extra-marital affairs. He did not comply with this condition, and Rhonda moved out of the marital home. They were never divorced. She moved frequently and had two children by different fathers. Rhonda testified that after they separated, she and Bobby Joe met numerous times for the purpose of being intimate. She stated Bobby Joe referred to her as his wife to everyone they met.

After Bobby and Rhonda separated, he began living with Ami Alley on or about July 23, 2004. Two children were born to the couple. Ami testified she and Bobby Joe held themselves out as husband and wife to everyone and established a home together in Perry, Oklahoma. Ami also testified that Bobby came home to her and their children every night.

Rhonda testified she was aware of the relationship between Ami and Bobby Joe and that he was living with her and their two children. Rhonda testified that Bobby Joe referred to Ami as his girlfriend.

Rhonda and Bobby were never divorced. Rhonda testified that, a short time before Bobby's death, she participated in a ceremonial marriage with Jimmy Shawn Treece. She did so at Jimmy’s request. Jimmy told her that if he was married his grandparents would help support him. Rhonda referred to the marriage as a "sham" because she never intended to be married to Treece. On August 31, 2012, Rhonda and Jimmy went to his grandparents' home in Checotah, Oklahoma, to tell them she and Jimmy were getting married. His grandparents immediately contacted a minister who performed the ceremony the same day at a church in Checotah. Rhonda signed the marriage license as "Rhonda Ann Treece." After the ceremony, Jimmy took her home. She testified she removed the wedding ring. She placed it and the papers they received in the glove compartment of Treece's car. She stated she spoke to him on two occasions, but she never saw him again. She testified she never changed her name and did not "recognize that name as a legal marriage." She testified she never filed divorce papers but was "under the impression" the marriage was annulled.

The trial court found that Bobby and Ami had a common law marriage. The court based its decision to deny Rhonda's motion to revoke the letters of administration on the issue of estoppel, rather than the legal classification of her marriage to Bobby. In particular the trial court relied on the case of *Estate of Allen*, 1987 OK 45, 738 P.2d 142. The Court of Civil Appeals affirmed the trial court.

The Supreme Court granted certiorari and affirmed the trial court. It noted that

Oklahoma does not recognize plural marriages, nor does it recognize common law divorce. It determined that the issue in this case is whether the doctrine of estoppel precludes Rhonda from being declared Bobby Joe's surviving spouse and the Administrator/Personal Representative of his estate, and held that it does.

The Supreme Court found that the *Estate of Allen* case was directly on point with this case. In that case the wife cohabited with another man ("Garland Gould"), and four children were born to the couple. Garland Gould filed for divorce and sought custody of the children. The wife admitted a common law marriage. The court found a common law marriage existed and entered a divorce decree. Meanwhile, first husband married another woman who later died and then the first husband died. Wife petitioned for letters of administration and appointment as personal representative as surviving spouse. She argued she was still married to first husband because there was no divorce. The Supreme Court held, in a plurality opinion, that she was estopped from claiming the status of surviving spouse to her first husband because she had an opportunity for 13 years to assert a marital relationship with her first husband, but she never did.

In this case, the testimony of Rhonda and Ami with regard to Rhonda's relationship with Bobby Joe following Rhonda and Bobby's separation was directly contradictory. The trial court decided to believe Ami and not Rhonda. The effect of Ami's testimony is that Rhonda did not have a relationship with Bobby Joe after the separation. Further evidence of the notion that Rhonda considered her relationship with Bobby to be over is her marriage to Jimmy. Based on that notion, the court concluded that if Rhonda believed her relationship with Bobby was over she should be estopped for asserting it in this proceeding.

Justices Combs, Kauger and Taylor dissented. (Justice Kauger also dissented in *Estate of Allen*). They argued that the elements of equitable estoppel had not been met in this case. Ami was not an innocent spouse since she was well aware of Rhonda and Bobby's marriage when she was named personal representative. The dissent found that the *Allen* case was clearly distinguishable from this case. In *Allen*, the application of the doctrine of equitable estoppel to bar a wife's claim for a share of her deceased husband's estate was primarily based on the wife's assertion of a later common law marriage in a divorce proceeding, resulting in a nonappealable divorce decree even though the common law marriage was void ab initio. As the *Allen* court stated:

> The predicate facts in this case constitute affirmative acts which give rise to a legal change in appellee's marital relationship with decedent. In particular, appellee's cohabitation with Gould and her affirmative recognition of her subsequent common law marriage to Gould. We therefore find appellee's prior assertion of legal status and judicial finding and decree from which there was no appeal operates as a bar to her later inconsistent claim.

In *Allen*, the application of equitable estoppel rested on the wife's assertion in a court of law that she was married to someone else, before trying to assert a claim on her real husband's estate, rather than the act of attempting a void ab initio marriage in and of itself.

In addition the dissent attacked the *Allen* case as wrongfully decided. That case, like this one, did not overrule, let alone discuss the Oklahoma cases in point: *Cox v. Cox*, 1923 OK 397, 95 Okl. 14, 217 P. 493; *Brokeshoulder v. Brokeshoulder*, 1921 OK 412, 84 Okl. 249, 204 P. 284; *Copeland v. Copeland*, 1918 OK 597, 73 Okla. 252, 175 P. 764 (1918).

In *Cox*, Gilbert and Catherine Cox were married on July 11, 1918. Two months later, the couple separated, and on May 28, 1920, Catherine married Kelsie. An examination of the court records in the counties in which Gilbert and Catherine had lived reflected that although Catherine had filed for divorce, the proceedings had been dismissed without a divorce ever having been granted. After Gilbert died, Catherine sought to assert that she was an heir at law of Gilbert's estate. This Court recognized that Catherine had deserted Gilbert, and that she had entered into a second marriage. However, the Court decided that she was not estopped from asserting and receiving her spousal interest in Gilbert's estate.

In *Brokeshoulder,* Cammack and Josephine Brokeshoulder were married on September 29, 1908, in Mississippi. Sometime in November, 1912, Cammack left his wife and child there and moved to Oklahoma. Less than two years later, on July 18, 1914, Cammack married Ruby. Three years later on November 13, 1915, Josephine married Edgar. When Cammack died in March of 1920, Josephine claimed that as his wife she was entitled to recover her share of the estate. She submitted evidence which revealed that she and Cammack had not obtained a divorce in any county in which they had resided since their marriage in 1912. Under those facts, this Court found that Josephine was Cammack's surviving spouse.

In *Copeland*, Joe and Samantha Copeland were married on May 13, 1877. In 1879, Joe deserted her, and in 1881, Samantha remarried. In 1899, Joe married for the second time. Again, the evidence produced indicated that no divorce had been granted in any of the counties in which they had resided, either individually or as a couple. This Court found that because Samantha was living at the time Joe consummated his second marriage, and because no divorce had been granted, his second marriage was void. Therefore, it determined that Samantha was his legal wife and that she was entitled to share in his estate.

The dissent characterized the majority's decision, and reliance on *Allen*, as effectively a determination that Rhonda’s void attempted ceremonial marriage to Treece somehow altered her legal relationship as Bobby Joe’s wife at the time of his death. It did not, as Oklahoma law clearly shows. The case is bound to create difficulties by blurring the clear lines between being married and not being married since it is unclear in this case exactly what facts required the application of an estoppel.

2. ADULT ADOPTIONS; MUTUAL TERMINATION

In the Matter of the Termination of Parental Rights of Bruce Dean Schultz to Jared Bruce, 2017 OK 5, 389 P.3d 322

In June 2005, a decree of adoption between Bruce Dean Schultz and Jared Bruce, both adults at the time of the adoption, was entered. In July, 2015 the two decided that it would be in their best interest if the adoption decree was vacated. The Oklahoma Adoption Code does not address the issue of whether an adult adoption can be vacated and therefore the trial court ruled that it lacked the authority to vacate the decree. The parties appealed and, in this appellant's only brief-case, the Supreme Court reversed the trial court.

The Oklahoma Adoption Code addresses adult adoptions only in 10 O.S. § 7507-1.1. That statute provides that:

> An adult person may be adopted by any other adult person, with the consent of the person to be adopted or his guardian, if the court shall approve, and with the consent of the spouse, if any, of an adoptive parent, filed in writing with the court. The provisions of Sections [7503-2.1 through 7505-6.4] of this act shall not apply to the adoption of a competent adult person. A petition therefor shall be filed with the district court in the county where the adoptive parents reside. After a hearing on the petition and after such investigation as the court deems advisable, if the court finds that it is to the best interests of the people involved, a decree of adoption may be entered which shall have the legal consequences stated in Section [7505-6.5] of this act.

The Supreme Court noted that this statute provides three issues that a trial court must decide in an adult adoption case. The court must determine whether the parties consented, whether they are competent, and whether the adoption is in the best interests of the parties. The consent from the adoptee and the adoptor assure the informed, written consent of all parties involved. By exempting several sections of the Adoption Code where the adoptee is a competent adult the statute clearly recognizes the inapplicability of these statutory safeguards meant to protect minor children and adults with diminished capacity.

The court found that based on the low-threshold requirements and exemptions in the statute, a best interest determination inherently requires less of a court when considering the interests of competent, consenting adults fully able understand the implications of the adoption. The court then determined that there is no reason to conclude that the legislature "intended by its silence to prohibit wholesale the vacation of adult adoptions nor to require additional considerations beyond those found in §7507-1.1. Instead, the Legislature likely found no value in providing such guidance, as it does with adoptions of minor children."

Given the statutory requirements to establish an adult adoption, the court decided that those requirements provide a guide that what the legislature might require if it addressed the issue of the termination of adult adoptions. Therefore, the court held where competent adults mutually consent in writing to the vacation of a previously granted adult adoption, the district court's reasonable determination of the best interests of the parties should dictate the outcome. “Allowing a contrary result would preclude competent adults from a legal remedy to dissolve a previously granted adoption, even when it would serve their best interests.” The court stressed that nothing in this opinion affects the adoption of children which are meant to continue indefinitely and to provide "a permanent family." 10 O.S. § 7501-1.2.

Applying that standard to this case the court found that there was nothing in the record to suggest that vacating the adoption was not in the best interests of the couple. The court reversed the trial court’s determination and remanded the case to the trial court to grant the couple petition to dissolve the adoption. All the justices concurred.

I don’t know whether this is the case here, but prior to the decisions authorizing same-sex marriages, many same-sex couples entered into adult adoptions as a way of having a status relationship between the couple. Now that same-sex marriage is authorized, the adoptions need to be set aside so the couple can marry.

B. CUSTODY

1. DEPLOYED PARENTS

HB 1825

This bill expands the scope of the Uniform Service Members Custody and Visitation Act to include "Civilian personnel" which means direct-hire, permanent civilian employees of the Department of Defense. When these people are deployed temporarily to a combat zone they are covered by the provisions of the Act to same extent as a military member. The Act becomes effective November 1, 2017.

2. GUARDIANS AD LITEM

SB 50

This bill amends 43 O.S. §107.3(A)(2)(d) as follows:

2. The guardian ad litem may be appointed to objectively advocate on behalf of the child and act as an officer of the court to investigate all matters concerning the best interests of the child. In addition to other duties required by the court and as specified by the court, a guardian ad litem shall have the following responsibilities: .. .

(d). present written <u>factual</u> reports to the parties and court prior to trial or at any other time as specified by the court on the best interests of the child ~~that include conclusions~~

~~and recommendations and the facts upon which they are based~~, which determination is solely the decision of the court, ...

The effect of this Act is to restrict the role of the guardian ad litem. The guardian is responsible for presenting a factual report to the court. The guardian may no longer may make recommendations to the trial court concerning the placement of the child, or any other matter. The Act becomes effective on November 1.

3. RELOCATION; PRIMARY RESIDENTIAL PARENT; GOOD FAITH; ATTORNEY FEES

Boatman v. Boatman, 2017 OK 27, ___ P.3d ___

The parties divorced in 2007 and equally shared time with their daughter under a joint custody plan. Neither party was named the primary residential parent. In 2013, Mother's job as Director of Franchise Training at a national restaurant chain in Tulsa, Oklahoma, was eliminated, and she was offered an executive position with the chain in Atlanta, Georgia. The new position included an annual salary increase of $25,000, and an additional $17,250 in discretionary annual bonuses.

The mother's motion to relocate was opposed by the father and denied by the trial court. It concluded that the motion to relocate was not made in good faith, not in the best interests of the child and required each party to pay their own attorney fees. The Court of Civil Appeals affirmed in *Boatman v. Boatman,* #113,197 (OKC 2016). The Supreme Court granted certiorari and affirmed in part, reversed in part and remanded the case to the trial court.

The court noted that the panels of the Court of Civil Appeals had issued conflicting opinions on whether a parent with joint custody of a child could invoke the relocation provisions. Compare *King v. King*, 2016 OK CIV APP 31, 371P.3d1139 (either parent can petition to move) with *Caber v. Dahl*, 2012 OK CIV APP 19, 272 P.3d 733 (only a parent with sole custody can petition to move).

The court resolved the conflict by concluding that, given the posture of the case neither parent had a right to petition the court to relocate with the child. That is because the statute, 43 O.S. §112.3(G)(l) provides: "**The person** entitled to custody of a child may relocate" (Emphasis in the opinion). The bolded language indicates that the legislature intended that only a single individual has the ability relocate the principal residence of a child. Otherwise, according to the court the legislature would have used language like "a person entitled to custody" or another similar phrase. Therefore before a joint custodian can invoke the relocation provisions, the trial court must make a determination regarding who is the primary physical custodian.

Further the court noted that 43 O.S. §112.3(B)(l) provides that "Except as otherwise provided by this section, **a person who has the right to establish the principal residence of the child** shall notify every other person. . . . "(Emphasis in the

opinion). In this case the primary residence was not designated and the child resided equally with both parents. Therefore neither had the right to establish the principal residence of the child.

The court therefore remanded the case to the trial court for it to hold a hearing within thirty days to modify the joint custody plan and appoint a primary physical custodian for the child. After a joint custody plan has been issued, the trial court may modify or terminate joint custody if it determines that the plan is not in the best interest of the child. After so deciding it can then entertain the mother's motion to relocate if it determines that she should be the primary residential parent. It the father is determined to be the primary residential parent then the issue becomes moot.

The court could have ended the opinion at this point. However, because it found that many trial courts have misconstrued the concept of "good faith," it decided to address that issue for future cases. "Good faith," the court noted, is "an honest intention to abstain from taking any unconscientious advantage of another." See 25 O.S. §9. In this case the mother's motivation for relocating was due entirely to her employment situation which was beyond her control due to the elimination of her position in Tulsa. She was left with the option of being promoted to an executive position with a sizeable and significant salary increase, or being forced to leave the company. Nothing in record indicated that the mother was taking advantage of the father, and the court had previously held that employment opportunities and financial considerations are legitimate reasons to relocate. See *Scocos v Scocos*, 2016 OK 36, 369 P.3d 1068. In *Scocos*, the court also held that moving for a love interest is also a move made in good faith.

The court noted that in deciding otherwise, the Court of Civil Appeals focused on the facts that the mother had not previously told the father that she was applying for jobs that would require relocation, and that she accepted the position only days after the father was aware of the interview. The mother, however, had no duty to inform the father that she was applying for other jobs, and the fact that she informed him of the interview, according to the Supreme Court, demonstrated her good faith attempts at communication that were not required. The court noted that in *Scocos*, the father was not informed of the plan to relocate until after the position had already been accepted. Furthermore, the mother in that case did not inform the father that "a move might be imminent" during negotiations of the joint custody agreement. If that does not constitute bad faith, then, according to the court, accepting the position days after the father was aware of the interview does not does not constitute bad faith.

The mother also appealed the summary denial of attorney fees without holding a hearing. The Supreme Court affirmed the trial court. It noted that in matrimonial litigation, a party should be awarded attorney fees only if that party qualifies for the benefit through a judicial balancing of the equities considering the means and property of each party. In this case the mother earns $115,000 plus bonuses which is twice what the father earns. Given this disparity in income the mother cannot qualify for an

attorney fee award when the equities are balanced.

4. MISC CHILDREN STATUTES, 2017

SB 322; HB 2284; HB 2247; SB 1121; All effective November 1.,

(1) SB 322 amends 20 O.S. §40.4, our Indian Child Welfare Act, to provide that in review hearings under the Children's Code notice to the tribe shall be sent to the via regular first class mail, unless the tribe is present when the hearing is set and agrees to the date. The tribes right to notice of the review hearing is not dependent on intervention into the case. The notice shall be shown by filing a certificate of mailing prior to the review hearing.

(2) HB2284 requires that public defenders must have continuing legal education regarding behavioral health and treatment of defendants with substance abuse or mental health issues. Districts attorneys and their lawyers shall have training in problems of domestic violence and substance abuse. For judges, the Administrative office shall provide annual training in domestic violence, substance abuse, addiction and mental health. The same is true for lawyers working for the Indigent Defense System. All of these education programs are subject to money being available.

(3) HB 2247 amends 30 O.S. to add §3-102.1. This bill provides for the transition from a custodial arrangement under Title 43 to an adult guardianship under Title 30. It allows the guardianship petition to be filed as early as six months before the alleged incapacitated individual reaches 18.

5. GRANDPARENT VISITATION; ADOPTION

Birtciel v. Jones, 2016 OK 103, 382 P.3d 1041

Following the death of the child's mother, Birtciel, the maternal grandmother, petitioned in Oklahoma County for visitation with her granddaughter. Prior to resolution of this petition, the father, Jones, and his new wife adopted the child in Canadian County. The father then moved to dismiss the grandmother's petition on the grounds that the adoption created a new, intact, nuclear family unit. The Oklahoma County family court, on its own motion, found that, because she received notice, the grandmother's failure to appear at the adoption hearing divested her of the right to seek visitation, despite the fact that her petition was filed prior to the adoption and remained pending. The Court of Civil Appeals affirmed. The Supreme Court granted certiorari, reversed both the Court of Civil Appeals and the trial court and remanded the case.

The grandmother raised three arguments on appeal. First she argued that her nonappearance at the adoption proceeding did not divest her of a right to seek visitation. Although she received notice, she argued that she had no standing to appear at the proceeding. Second, she argued her right to seek visitation vested at the time of disruption in the original intact nuclear family and was not lost by the subsequent adoption. Finally, she contends the trial court's ruling on a new argument raised at trial violated her due process rights.

The court noted that the grandmother's standing extended only to purposes of resolving her visitation issues and not to the resolution of the stepmother's adoption. Because her consent was not necessary to the stepparent adoption, it followed that she was not actually entitled to notice in the adoption proceeding. In disagreeing with the trial court, the court held that the Adoption Code did not grant standing to the grandmother to appear in the adoption proceeding to preserve her right to seek visitation. Therefore the decision of the father and the stepmother to send a courtesy notice----which the grandmother was never statutorily entitled----has no effect on her standing in either proceeding. It neither conferred additional standing to her at the adoption, nor diminished her existent standing at the visitation proceeding.

Further the court found that while the Adoption Code prohibits a court from granting a new visitation right after adoption, it does not terminate a previously granted visitation right. 43 O.S. §109.4 (D)(3)(a). Additionally, the Adoption Code contemplates pending visitation petitions in the required disclosures for adoption, stating that the adoption petitioner shall specify "[a] description of any previous court order, litigation or pending proceeding known to the petitioner concerning custody of or visitation with the minor." 10 O.S. §7505-3.1 (A)(11). The impact of the required disclosure provision indicates that the grandmother's visitation proceeding should have been heard prior to any decision regarding the stepmother's subsequent request to adopt the child. The grandmother, the court held, should not be penalized for another court's decision to resolve the separate and subsequently-filed action of adoption without reference to the impact of that ruling on her pending petition.

The court further held that the grandmother's right to seek visitation vested at the disruption of the intact nuclear family, first by the parent's divorce and then by the death of the child's mother. See 43 O.S. §109.4(A)(1)(c)(1), (3). The trial court, unfortunately focused on 43 O.S. §109.4 (D)(3)(a), which provides that adoption prohibits the grant of new grandparental visitation rights but does not terminate previously granted visitation rights. However, by deciding the adoption prior to resolution of the visitation petition the court disposed of the grandmother's opportunity to ever obtain any "previously granted" visitation right.

Had the court resolved the visitation proceeding in the grandmother's favor prior to the adoption proceeding, the child's subsequent adoption would not have precluded her visitation rights. To the contrary, she would have been statutorily entitled to an evidentiary hearing before any court could terminate any previously granted right. 43 O.S.§109.4(F)(2).

The case was remanded to the trial court hear and determine the grandmother’s right to visitation under 43 O.S §109.4.

6. NAME CHANGE

Reed v. Remmert, 2016 OK CIV APP 65, 382 P.3d 509

In this paternity proceeding the trial court changed the child's last name from that of the mother to the father. The first question the appellate court had to confront was the appropriate procedural vehicle for the father to request a change of the child's name. The court first rejected the mother's argument that a name change was foreclosed by Oklahoma's adoption of the Uniform Parentage Act. 10 O.S. §770-636(E) provides that, if the parties agree, the court can change the child's surname to that of the father. However, it does not prohibit the court from changing the child's name if the parents do not agree.

The court then noted that 10 O.S. §90.4 provides that, in the context of a paternity proceeding, after paternity has been determined, either the mother or father may file a motion requesting the court to order the surname of the child changed to the surname of the father if it is in the child's best interest. However, 12 O.S. §§1631-1637 provides a separate procedure, with specific notice and publication requirements, for a name change. Section 1637 specifically states that "[a]fter May 19, 1953, no natural person in this state may change his or her name except as provided" by this procedure.

However, regardless of the existence of the change of name statutes, all Oklahoma courts addressing a change of name in a parentage proceeding have utilized §90.4. See e.g., *In re M.J. T*., 2008 OK CIV APP 56, 189 P.3d 745; *James v. Hopmann*, 1995 OK CIV APP 105, 907 P.2d 1098. The panel then held that because of the consistent use of that statute in parentage case, the court properly did not use the "change of name" procedure. This meant that the father had to file a separate motion following the determination of paternity for the name change.

In so far as the merits of the case are concerned the record reflected that the trial court considered the following factors.

1. Identification of the child as a part of a family unit;
2. The effect on the child's relationship with each parent;
3. The motivation of the parties;
4. The effect the failure to change the name will have in furthering the estrangement of the child from a father exhibiting a desire to preserve the parental relationship;
5. The age of the child and how long the child has had the current name;
6. The effect of the change of the child's surname on the preservation and the development of the child's relationship with each parent, and, the degree of community respect associated with the present and proposed surname;
7. The possibility that a different name may cause insecurity or lack of identity;
8. The use of a particular surname for a substantial period of time without objection
9. The preference of the child;
10. Difficulty the child may experience with the proposed surname;
11. Embarrassment or inconvenience that may result if the child's surname differs from that of the custodial parent.

The trial court also issued written opinion specifically addressing each of the

eleven factors and concluded that changing the child's name was in the child's best interests. In reviewing the trial court findings the appellate panel noted particularly that the trial court considered that both parents wanted the minor child to share his or her respective last name for purposes of identifying with extended family. It particularly noted that the mother had married and her husband's last name was not hers and that the mother had another child whose father was not her husband or the father in this case and that child had a different last name than hers.

Having considered all of the above factors the panel concluded that the trial court had not abused its discretion. It noted in a final footnote that the above factors are not mandatory, but rather "guidelines" for the court to consider in determining whether to change the child's name.

D. CHILD SUPPORT AND PARENTAGE:

No Cases This Year

E. PROPERTY

1. VALUATION; DIVISION

Childers v. Childers, 2016 OK 95, 382 P.3d 1020

In this case the wife is a doctor. During the marriage the parties started a number of businesses related to her practice. The husband ran these businesses from their home. Beginning in 2001, the husband's management of the businesses was his only job. The wife filed for divorce in 2011. At the temporary order hearing the husband asked for a receiver to be appointed. The court appointed a retired public accountant, who knew the parties very well, to run the companies.

A trial was held in December 2012. The only witnesses were the husband, the wife and the receiver. The receiver testified that he conducted an extensive investigation into all of the businesses. He determined the outstanding accounts payable and receivable. He prepared profit and loss statements for the major entities, and determined their total assets, liabilities, and equity. The profit and loss statements, as well as the assets and liabilities statements, were created using the "accrual basis" method of accounting which takes account of debts and credits when they arise, rather than when they are received, or paid. The husband did not object to any of this testimony, nor did he call his own experts.

The trial court awarded the wife assets with equity in the amount of $519,020 and the husband assets with equity in the amount of $177,942. The husband received a $150,000 property division judgment to arrive at an equitable division of the marital estate. Both parties were ordered to pay their own attorney fees. The husband appealed, contesting the valuation of the businesses, the division of property and the failure of the court to order the payment of his fees. The Court of Civil Appeals

determined that the valuation of the companies was against the weight of the evidence. and remanded the case for reevaluation using evidence of "market value" and therefore a new division of the property was required. It also reversed the trial court's failure to allow fees. The Supreme Court granted certiorari, reversed the Court of Civil Appeals and reinstated the trial court's determinations.

The husband's argument on valuation was that the receiver should not have utilized an "accrual" method of valuation because it does not reflect the market value of the businesses. The wife argued that the use of an accrual method is standard for valuing the businesses and that the husband waived the point by failing to put on evidence of any other valuation method. The court agreed with the wife. It first noted that in *Johnson v. Johnson*, 1983 OK 117,, 674 P.2d 539, the court said that the trial could have selected any one of several methods to value the stock in that case, including an accrual basis. Similarly in *Carpenter v. Carpenter*, 1983 OK 2, 657 P.2d 646, and *Ford v. Ford*, 1988 OK 103, 766 P.2d 950, the court affirmed the method of valuation used by the trial court.

In this case the court found that the testimony of the receiver that the accrual method was an appropriate method for valuing the property. It also pointed out the husband failed to cross-examine the expert on this point and did not introduce any other evidence concerning the appropriate way of valuing the businesses.

"For whatever reason, the husband chose not to call another expert and chose not to object to the evidence presented by the receiver. This does not mean that the trial court erred in its determination", the court said. The trial court's valuation was affirmed and the Court of Civil Appeals was reversed.

The husband also argued that the trial court's distribution of the marital estate was unjust because it left the wife with a substantial majority of the overall marital estate. According to the husband's calculations, he received 38.72% of the marital estate, while the wife received 61.28%. The wife's response is that the husband's numbers did not take account of the marital debt, most of which was assigned to her. The husband's numbers also did not take into account the $150,000 property division pay out. Once that is figured into the division the husband received 47.05% of the marital estate, and the wife received 52.95%.

Given that most of the properties awarded to the wife were necessary for her medical practice, and given that the trial court's original valuation was affirmed, the division of property was found to be equitable. The trial court was affirmed and the appellate panel was reversed.

The trial court's failure to award the husband attorney fees was also affirmed the court noted that fees are awarded based on a balancing of the equities. In this both parties received substantial property awards. The both were allowed to use $40,000 each from a savings account to pay their attorneys. The fact that the wife makes much more money than the husband is not determinative, especially when he testified that he has high-level managerial and entrepreneurial skills. He also has a life insurance

license, long term health care license, and a securities license. The husband admits to being employable, but has voluntarily chosen not to pursue gainful employment and instead does charity work. Therefore, the trial court was affirmed and the opinion of the Court of Civil Appeals was vacated.

The opinion does not create new law. It does not involve novel facts. It is one of several opinions in recent years where the Supreme Court has granted certiorari simply to correct errors of Court of Civil Appeals. It is likely to spawn a swarm of certiorari petitions from attorneys hoping that their case will be the next one the court will select simply to correct errors.

2. FIREFIGHTERS PENSION

Marriage of Baggs, 2016 OK 117, 385 P.3d 68

The couple married in 1995 and filed for divorce in 2011. The husband had been employed with the Oklahoma City Fire Department for approximately five years prior to the marriage, and he continued to work there throughout the marriage. Among the assets of the marriage is the husband's pension through the fire department. In addition to his deferred compensation plan in which the parties had reached a settlement, the husband, when he retires, will have the option to make an election between a traditional pension retirement and what is known as a Plan B or Deferred Retirement Option Plan (DROP/Plan B). The wife sought any portion of the Plan B which might be attributable to the marital years, in the event the husband later decided to chose this retirement option after the divorce is granted.

The trial court declined to award any interest in a DROP/Plan B option stating:

> The Court herein declines to order Respondent to change the current form of the fund since this Court believes that it should not make investment decisions for the Parties, but it is empowered to equitably divide the marital assets as they currently exist.

The Court of Civil Appeals affirmed the trial court in so far as the Plan B issue was concerned and modified the trial court's property division. Regarding the Plan B, the appellate court relied on *Ballinger v. Ballinger*, 2014 OK CIV APP 92, 340 P.3d 644 where it indicated that the Plan B retirement option available to a spouse post divorce is not divisible. The Supreme Court granted certiorari and reversed both the Court of Civil Appeals and the trial court.

The firefighter pension fund is governed by statute, 11 O.S. 2011 §§49-100.l - 143.6. The eligible retirement date for a member of the System is the date in which the member completes 20 years of credited service or 22 years of credited service plus attainment of the age 50. A firefighter who reaches the retirement date, and retires is paid a monthly pension equal to their accrued retirement benefit. Or, as an alternative a member may elect to participate in what is known as the DROP or Plan B. Under the DROP plan, in lieu of terminating employment, and accepting the

traditional retirement pension, an eligible member may elect to defer the receipts of benefits under the plan and continue working, but not continue to increase their years of credible service. Eligibility under this plan is also 20 years of credible service. The duration of participation may not exceed five years and, at the conclusion of participation, employment terminates.

When the member participates in the DROP, the contributions of the member cease, but the employer contributions continue, and interest is credited to the DROP account. The monthly traditional retirement benefits that would have been payable had the firefighter chosen to retire on the date they join the DROP plan are deposited into the DROP account. This is the first time the DROP account is funded. At the end of the DROP period the participant then receives a lump-sum payment from the account equal to the payments which were made into the account. Therefore a firefighter is vested in the pension system, he or she will also be eligible to elect the DROP plan when the firefighter retires. The day the firefighter does elect the DROP plan, their pension payments would be calculated and deposited monthly into the DROP account as long as the firefighter continues to work for up to 60 months. Employer contributions and interest are also credited to the account. Upon leaving employment, the firefighter would then receive both a lump-sum payment, and a monthly pension payment calculated as if they had retired on the day they elected to participate in the DROP plan.

The Oklahoma Firefighter Pension and Retirement System, 11 O.S. 2011 §49-126 expressly deals with dividing firefighter pensions as marital property. It provides for qualified domestic relations orders, and recognizes former spouses as alternative payees to pension benefits which have been determined to be marital property. Included within its provisions is the express recognition that the DROP/Plan B retirement option is divisible marital property to the extent any benefits which are deposited into it were accumulated during the marriage.

The court noted that the Plan B retirement option is clearly marital property because, when it is chosen, it is then partially funded with a portion of retirement funds which are attributable to the marital years. The problem is that it cannot be divided until some point in the future when that option is chosen. It also noted that the almost unanimous line of authority from other states which have similar DROP provisions to Oklahoma that a spouse is entitled to a portion of that part of their ex-spouse's retirement benefits which are attributable to the marital estate, even if the ex-spouse elects the retirement option deferred plan after the divorce. See e.g., *Pulliam v. Pulliam*, 114 A.3d 242 (Md. Ct App. 2015); *Pullo v. Pullo*, 926 So.2d 448 (Fla. Ct. App. 2006); *Killingsworth v. Killingsworth*, 925 So.2d 977, (Ala. Ct. Civ. App. 2005); *Stavinoha v. Stavinoha*, 126 S.W.3d 604 (Tex. Ct. App. 2004); *Smith v. Smith*, 839 So.2d 1255 (La. Ct. App. 2003). The only case that did not find the DROP program to be marital property is the *Ballinger* case. The court then decided that to the extent *Ballinger* is inconsistent with the *Boggs* opinion it is overruled.

The court concluded that firefighter pension rights are vested when a firefighter

retires or could retire because the firefighter is eligible for pension benefits. In this cause, the firefighter husband had worked as a firefighter for five years prior to the marriage and an additional sixteen years during the marriage giving him the minimal twenty years necessary, by the time the divorce was filed, to vest in his pension benefits and to vest in his ability to select the Plan B option upon retirement. The court concluded that although the Plan B is not immediately divisible because it has not yet been funded, or selected, if it is chosen upon his retirement, the former wife is entitled to any portions which were accrued during the marriage. While this calculation, the court said may not be easy to make, it is not impossible, nor is its difficulty a reason to deny to the wife what is fair, just and reasonable.

The case was reversed and remanded to the trial court for action not inconsistent with the opinion. All the justices concurred.

3. JURISDICTION TO DIVIDE MILITARY PENSION

Marriage of Johnson, 2016 OK CIV APP 74, 386 P.3d 1049 cert. denied, Kauger, Rief and Gurich dissent.

This case concerns the question of whether Oklahoma had jurisdiction to divide husband's military pension. The husband agreed that Oklahoma has jurisdiction to dissolve the marriage under 43 O.S. § 102(b) which provides that "[a]ny person who has been a resident of any United States army post or military reservation within the State of Oklahoma, for six (6) months immediately preceding the filing of the petition, may ... be sued for divorce" However, he argued, Congress has provided in 10 U.S.C. § 1408(c)(4), (Uniformed Services Former Spouses Protection Act (USFSPA)).that a military pension can only be divided by a state court when the court has jurisdiction by reason of (1) the service member's residence, "other than because of military assignment, in the territorial jurisdiction of the court," (2) the service member's domicile in the territorial jurisdiction of the court, or (3) the service member's consent to the jurisdiction of the court. The husband contended that none of the three conditions are applicable here and therefore while the court could grant the divorce, it could not divide the property.

The parties stipulated that this is the third dissolution proceeding between the parties, one of which was brought by the husband. No decree of divorce was ever validly entered in the previous proceedings.

The trial court disagreed with husband and divided the military pension, as well as divorcing the couple. It determined that the husband became domiciled in the state when he filed one of the earlier divorce proceedings. The husband appealed and the Court of Civil Appeals reversed.

The panel noted that Congress specifically limited the number of forums that could acquire the authority to divide a military pension. The statute is jurisdictional, according to the panel. Here there is no question as to whether the husband did or did not voluntarily give his consent. Other states have struggled with the issue of whether

the military member can be found to have consented when the military member did not raise the issue.

The wife's argument that the husband consented to the jurisdiction of the court when he brought the prior divorce proceeding was rejected. The court noted that even though he brought the action, he never voluntarily consented to the court dividing the pension. This finding aligns Oklahoma with those states that require the military member to expressly consent to jurisdiction to divide the pension.

The panel also rejected the argument that the husband became domiciled in Oklahoma when he filed the prior proceeding. It noted that a person's domicile under the federal act is "that place where he has his true, fixed and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom." Here the parties were constantly on the move during their marriage, depending on where the military assigned the husband. The family only moved to Oklahoma a couple of years ago and only because the military assigned him here. He testified that his domicile was the state where he enlisted in the military: Washington.

Accordingly, because the trial court did not have jurisdiction over the husband's military retirement by reason of (I) Husband's residence, other than because of military assignment, (2) Husband's domicile, or (3) Husband's consent to the jurisdiction of the court to divide his military retirement, the trial court lacked authority under § 1408(c)(4) to do so. That portion of the divorce decree was, therefore, vacated.

E. ALIMONY

No Cases This Year

F. DIVORCE PROCEDURE AND OTHER ISSUES

1. INTEGRATED DOMESTIC VIOLENCE COURT

HB 1121

This bill allows a district or municipal court of record to establish an integrated domestic violence court which would handle all cases both civil and criminal thatarise out of the same family or domestic circumstances. This would include criminal matters, matrimonial, protective orders, guardianship and adoptions and any other matters between the same parties.

This is very interesting and could be the predecessor to an integrated family court.

2. PROTECTIVE ORDER; FACEBOOK PICTURES

Thomas v. Cash, 2017 OK CIV APP 11, ___ P.3d ___

The plaintiffs in this protective order case are the adoptive parents of the minor child. The defendants are the birth mother and her relatives. The plaintiff's evidence showed that the child does not know that she is adopted nor does she know the identity of her biological parents. The plaintiffs accuse the defendants of stalking because the birth mother sent a "friend" request to the adoptive mother; the defendants have posted pictures of the child on their home pages, which were copied from plaintiff's page; defendants refused to remove the pictures after a request from plaintiffs. There were substantial on line altercations between the plaintiffs and the defendants following this request and denial.

At trial the plaintiffs argued that because the adoption was a "closed adoption", the defendants could not post the pictures of the child. Plaintiffs did admit that the pictures were taken from their Facebook pages which could be accessed by anyone. They also admitted that they did not feel threatened by the defendant's actions. No messages were ever sent to the child. The trial court entered the protective order finding that he saw ""no valid purpose" for Defendants to "post [Child's] photos on social media other than for the purpose of harassment," that "all three Defendants are harassing by doing that as to the Plaintiff parents," and that Defendants' conduct "seriously alarms the Plaintiffs and it serves no legitimate purposes.""

The appellate panel reversed. The defendants argued that the record did not support the determination that they engaged in "harassment" as defined by the statute. Among other things, they noted that there was no evidence that any defendant caused any plaintiff to actually suffer substantial emotional distress or to feel threatened by the defendants' conduct. They only posted pictures of the child that were publically available from plaintiff's Facebook pages.

In this case the plaintiffs did not filed an answer brief and the case proceeded on the appellants brief alone. Therefore the panel found that the evidence in this case shows that while the child's adoptive parents may be "annoyed" by the defendants' conduct, the only basis for that annoyance, per their own testimony, is their feeling that the defendant "invaded their privacy" and had "no right" to post the child's pictures or attempt to contact them about the child because of the "closed adoption." Neither of the adult plaintiffs claimed to be fearful or to have experienced threats of physical harm or substantial emotional upset.

Given the lack of any evidence that the defendants posed a threat of harm or caused any plaintiff to suffer substantial emotional distress, the panel found that the trial court abused its discretion in entering protective orders against the defendants for harassment based almost entirely on their Facebook postings of the child's pictures obtained from the child's adoptive parents' Facebook pages, and comments to other Facebook "friends" about the child. The trial court was reversed with directions to

vacate the orders.