2013 WL 7118927 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

Allen Wayne JENKINS, Petitioner/Appellant,
v.
Jennifer Lee JENKINS, Respondent/Appellee.

No. 111,549.
November 18, 2013.

Appeal from the District Court of Tulsa County, Oklahoma Case No. FD-2008-2113
The Honorable Martha Rupp Carter
Tulsa County Case No. FD-2008-2113

Respondent/Appellee's Answer Brief

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***1 Summary of the Record**

The parties hereto were married on November 11, 2000. Transcr. 10/24/12 at 27. They have one child together, namely Paxton Jenkins, born April of 2000. R. at 26. The Petitioner/Appellant (hereinafter: “Appellant”) is a home builder and owns Celebrity Homes in Tulsa, Oklahoma. Transcr. 05/23/12 at 5-6. Additionally, Appellant works as a superintendent for Silvercrest Homes. *Id.* During the marriage, the Respondent/Appellee (hereinafter: “Appellee”) was primarily responsible for care of the minor child and upkeep of the marital home. Transcr. 05/24/12 at 413, 427-429. Additionally, Appellee sold homes for Celebrity Homes at a reduced commission of one percent (1%) in order to help grow the business. *Id.* at 463. Appellee also assisted with decorating and cleaning of Celebrity's inventory. *Id.* at 413, 463.

The parties separated in April of 2008. After separation, Appellee moved out of the marital residence due to threats made by the Appellant. Id. at 435-436. Shortly thereafter, in approximately 2009, Appellant no longer permitted Appellee to work for Celebrity Homes. Id. at 373. After Appellant's termination of her historical employment with Celebrity Homes, Appellee worked odd-jobs for friends and part-time for World of Wrestling. Id. at 364-367, 409.

On December 2, 2008, a *Temporary Order Agreement* was entered. R. at 6-9. Said *Agreement* reserved the issue of legal custody and awarded the majority of parenting time to the Appellee with Appellant to have visitation with the minor child every other weekend from Friday evening until Sunday evening, and each week from Wednesday after school until Thursday morning. Id. Appellant was ordered to pay $1,000.00 per month in child support, all medical expenses for the minor child, the Appellee's

house payment, utilities associated ***2** therewith, and Appellee's car payment, car insurance, and gas expenses. *Id.* The record reflects that Appellee often did not incur rent or a house payments by living in multiple spec homes owned by Appellant's business. Transcr. 05/24/12 at 464. Appellant moved to modify the terms of the *Temporary Order Agreement* on June 9, 2011; however, the trial court declined to hear same prior to trial on the merits. R. at 21-24.

Appellee filed her *Application for Citation for Contempt* on February 28, 2011, four (4) months prior to Appellant's *Motion to Modify Temporary Order*. R. at 12-16, 21-24. Contrary to Appellant's contention that he continued to make payments pursuant to the *Temporary Order Agreement,* said *Application* alleged failures to pay certain items pursuant to the Temporary Order Agreement, particularly house payments, car payments, child support, medical expenses for the child, and certain utility bills. R. at 12-16. On May 20, 2011, by agreement, Appellant pled no contest to the contempt charges and the trial court ordered a purge fee of $6,863.37 be paid by 5:00 p.m. that day, which Appellant tendered. R. at 157.

Trial of this matter was held over the course of seven (7) days, spanning from May 23, 2012, to October 31, 2012. *Id.* Six (6) of those day were spent presenting testimony and evidence, with the seventh (7th) being an abbreviated setting for closing argument only. *Id.* The record reveals that of the six (6) days of the parties' respective cases-in-chief, Appellant consumed four (4) days asserting his various positions. *Id.* The trial court rendered its Decision on January 15, 2013. R. at 47-51. This Decision was memorialized into a *Decree of Dissolution of Marriage and Child Support Computation,* both entered and filed on February 6, 2013. R. at 52-72.

***3** The trial court determined that the parties' hereto exhibited a “history of conflict, hostility, and distrust... such that they cannot work together to make joint decisions for their child's best interests and well being.” Also, that “[t]he evidence establishes [Appellee] is more capable of making decisions for the child based on the child's best interests.” R. at 49. As such, the Court awarded sole legal custody to the Appellee. Id; R. at 53. Appellant was awarded an “expanded” standard visitation schedule, having the minor child every other weekend from Friday evening until Monday morning, every Wednesday overnight, alternating holidays, and two (2) weeks during the summer recess. R. at 54. Based upon Appellant's regular income, business income, draws from his business, and access to “unlimited funds from his grandmother to pay his own expenses,” the trial court imputed to Appellant monthly income of $10,000.00 and ordered child support pursuant to the Oklahoma Child Support Guidelines. R. at 50. Appellee was imputed minimum wage income. R. at 51.

The trial court also found, based upon each party's income level, earning potential, the work/jobs performed during the marriage, and the parties' respective conduct, that the Appellee had established both a need for support alimony and Appellant's ability to pay same. R. at 48. Therefore, the trial court awarded Appellee $120,000.00 in support alimony to be paid at the rate of $5,000.00 per month over a twenty-four (24) month period. Id.

As to the marital estate, the trial court awarded the Appellant property valued at $267,348.23, while the Appellee was awarded property valued at $213,572.00. R. at 49-50. To adjust for this imbalance, the trial court awarded the Appellee an offsetting property division judgment in the amount of $15,000.00. Id. As a partial basis for this division of property, the trial court specifically found that the “[t]estimony at trial that assets of the ***4** parties listed on the 2008 **financial** statement are not ‘real’ and were listed merely to enhance the parties' **financial** situation is not credible.” Id.

Post-trial, Appellee filed her *Application for Attorney Fees and Costs.* R. at 158-166. Appellant failed to file a timely response and did not object to Appellee's counsel's hourly rate or the reasonableness of the total fees incurred. R. at 167-169; Transcr. 02/22/13 at 5-6. Based upon this, the Appellant's trial positions related to custody and support, the parties' conduct during the pendency of the action, and the means of the parties, the trial court awarded Appellee $22,293.93 as and for her attorney fees and costs incurred. R. at 171-173.

Standard of Review

Matrimonial actions involving custody, visitation, child support, property division and support alimony are matters of equitable cognizance. The trial court is vested with wide discretion and its judgment will not be disturbed absent a determination that the trial court **abused** its discretion or unless the court's finding was clearly against the weight of the evidence. *Peyreavy v. Peyreavy,* 2003 OK 92,13, 84 P.3d 720; *Merritt v. Merritt,* 2003 OK 68, 17, 73 P.3d 878; Hedges v. Hedges, 2002 OK 92, 110, 66 P.3d 364. **Abuse** of discretion arises from a "manifestly unreasonable act, supported by untenable grounds or reasons" and "occurs when the ruling being reviewed is based on an erroneous legal conclusion or **there is no rational basis in the evidence for the decision."** *Lerma v. Wal-Mart Stores, Inc.,* 2006 OK 84, 116, 148 P.3d 880 (emphasis added); See also *Fent v. Oklahoma Natural Gas, Co.,* 2001 OK 35,¶12, 27 P.3d 477, 481; *In re BTW,* 2008 OK 80,1120, 195 P.3d 896. The burden of proof falls to the party filing the appeal to show that the trial court's findings and judgment are against the clear weight of the evidence. *Routh v. Routh,* 1942 OK 371, 116, 130 P.2d 1000; *Parnell v. Parnell,* 2010 OK CIV APP 74,¶1, 239 P.3d 216.

***5** Appellee disputes Appellant's contention that "most" of the issues to be addressed in this appeal are governed by the above-referenced "**abuse** of discretion" standard. In fact, all of the issues raised in Appellant's *Brief-in-Chief* are subject to this standard of review and the trial court's orders must remain intact absent a determination that the trial court has based its decision on an erroneous conclusion of law or that there is no rational basis in the evidence for said orders. *Lerma* at ¶6.

Argument and Authorities

Proposition I The Trial Court's Support Alimony Award is Supported by the Evidence

Trial courts are vested with wide discretion in determining support alimony. *Teel v. Teel,* 1988 OK 151, ¶7, 766 P.2d 994. Support alimony is aptly named - it is designed to provide for the support and maintenance of a former spouse upon the dissolution of his or her marriage. *Peyravy at 1 Greer v. Greer,* 1991 OK 26, ¶13, 807 P.2d 791. The paramount considerations in awarding support alimony to a former spouse are the need of the party requesting alimony and the other spouse's ability to pay. *Silverstein v. Silverstein,* 1987 OK CIV APP 87, ¶18, 748 P.2d 1004; *Wood v. Wood,* 1990 OK CIV APP 49, ¶14, 793 P.2d 1372; Parnell at ¶15. The party requesting alimony bears the burden of demonstrating their need and the other spouse's ability to pay. Ray v. Ray, 2006 OK 30, ¶1 1, 136 P.3d 634.

Considerations deemed to fall under this two-pronged analysis are numerous and varying, to wit:

> demonstrated need during the post-matrimonial economic readjustment period; the parties' station in life; length of the marriage and the ages of the parties; the earning capacity of each spouse; the parties' physical condition and **financial** means; the mode of living to which each spouse has become accustomed ***6** during the marriage; and evidence of a spouse's own income-producing capacity and the time necessary to make the transition for self-support.

McLaughlin v. McLaughlin, 1999 OK 34, ¶13, 979 P.2d 257 (internal citations omitted). Other considerations developed through case law but not specifically outlined by the Court in McLaughlin are: The paying spouse's future earning capacity and present ability to pay (*Jupe v. Jupe,* 1947 OK 2, ¶13, 175 P.2d 976); the receiving party's contribution to the other spouse's accumulation (*DeRoin v. DeRoin,* 1947 OK 123, 179 P.2d 685); the requesting party's condition, means, opportunities, and education (*Eisenreich v. Eisenrich,* 1958 OK 61, 323 P.2d 723; Fitzer v. Fitzer, 1969 OK 132, 460 P.2d 888; *Kirkland v. Kirkland,* 1971 OK 98, 488 P.2d 1222); the probability of the paying spouse's ability to progress **financially** (*Conrad v. Conrad,* 1970 OK 1, 471 P.2d 892); and the conduct of the parties (Kirkland at ¶25).

Here, Appellee met her burden of demonstrating her need for spousal support and the Appellant's ability to pay spousal support. When the parties married, Appellee owned her own home with approximately $40,000.00 in equity. Transcr. 05/24/12 at 457-458. Upon her marriage to Appellant, this home was sold and the entire amount of equity was used to pay off Appellant's credit cards and existing debt on his Rolex watch. Anything leftover was infused into the parties' marital residence. Id.

The parties lived a fairly affluent lifestyle, at one point residing in a 6,000 square foot home Appellant valued at $1,200,000.00. Transcr. 05/23/12 at 37-39. Appellant testified regarding the various pieces of jewelry purchased during the marriage. Transcr. 05/24/12 at 297-301. Appellant drove a luxury SUV and owned a $25,000.00 Harley Davidson. Transcr. 05/24/12 at 296; See also Respt. Ex. 22. In 2008, Appellant testified that his net worth was ***7** approximately $1,100,000.00, not taking into consideration the bountiful gifts he consistently received from his family. Transcr. 05/24/12 at 253-254.

During the marriage, Appellee was primarily responsible for the upkeep of the marital home and the rearing of the parties' minor child. Transcr. 05/24/12 at 280. Her unrefuted testimony portrayed Appellant as an overbearing, demanding, and domineering husband who required everything in the home to be neat, tidy, and in its proper place. Transcr. 10/24/12 at 30-31. All things related to their daily lives were required to be to his liking and kept in line with his schedule. Id. Departures from his arbitrary demands and schedules resulted in verbal thrashings in front of the parties' minor child and Appellee's children from her prior relationship. Transcr. 10/24/12 at 34-38.

Outside of the home, Appellant permitted Appellee to work for his company, Celebrity Homes, as a realtor, decorator, and occasional janitor. Transcr. 05/24/12 at 370-378. All commissions earned by Appellee on sales of Celebrity's homes during the marriage were rolled back into the company, save and except for one percent (1%) disbursed to Appellee. Id. at 463. Note that, per the testimony of Appellant's realtor, Cindy Minick, one percent is five percent (5%) below the industry standard and realtors rarely voluntarily decrease their commissions. Transcr. 09/12/12 at 54-55. As a decorator and house cleaner, Appellee was paid per job.

After the parties' separation and during the pendency of the action, Appellant ceased allowing Appellee to work for his company, essentially eviscerating the only means of income Appellee had known for the previous eight (8) years. Transcr. 05/24/12 at 373. Adding insult to injury, Appellant gave Appellee's faux-painting job to Appellee's estranged sister. Transcr. 09/12/12 at 74. Armed with nothing more than an 11th grade education, ***8** Appellee was essentially forced to start anew, all the while spending the majority of her time caring for the parties' minor child and being bounced around from different rental and/or spec homes at Appellant's behest so that he would be free from paying her rent/mortgage. Id. at 464, 478; Transcr. 10/24/12 at 71.

In his assertion of error as to the trial court's award of support alimony, Appellant sets forth five (5) sub-sections referencing specific reasons supporting his overall argument. He first argues that Appellee has already received enough alimony during pendency of the action and should receive no more. Appellant claims Appellee received nearly four-and-one-half (4 1/2) years of alimony pursuant to the *Temporary Order Agreement.* Interestingly, paragraph IV of said *Agreement* reserves the issue of “Temporary Alimony” until the time of the Temporary Order Hearing. R. at 7. This Court should note that a subsequent Temporary Order Hearing never occurred. Admittedly, the Agreement provides that Appellant was to pay various living expenses on behalf of the Appellee; however, in many instances certain expenses were avoided through Appellee's cooperation with alternative arrangements (e.g. living in spec homes owned by Appellant's company). Transcr. 05/24/12 at 455-457. Moreover, these were not payments made to the Appellee that she could then use to fund education, training, job searches, etc.; rather, they were payments made on behalf of the Appellee to other entities. He now desires that these payments be considered support alimony and factored into the Court's analysis of spousal support.

Appellant has failed to provide a sufficient record in support of his alleged error. In his *Brief-in-Chief,* Appellant relies on Petitioner's Exhibits 20a and 20b to support his position that he has paid Appellee nearly $60,000.00 between 2008 and 2010, and that this amount should be credited to him as spousal support payments. The fatal flaw with this ***9** argument is that Petitioner's Exhibits 20a and 20b were never admitted into evidence at trial. The appealing party bears the burden of presenting the appellate court with a record on appeal in support of the assignment of error. *Bailey v. Bailey,* 1994 OK 6, 967 P.2d 1267. Otherwise, the trial court's decision must be presumed correct. *Pfalzgraf v. Ward,* 1938 OK 412, 80 P.2d 634. Given the dearth of testimony and evidence regarding what, if anything, Appellant actually paid in spousal support to the Appellee during the pendency of this action, this Court cannot address Appellant's contention IV(A) and the trial court's decision regarding support alimony must be affirmed.

Appellant also contends that Appellee's conduct in failing to advance her education or otherwise rehabilitate herself should prohibit her from a support alimony award. Appellant's summation of the testimony at trial would suggest that Appellee merely sat around for four (4) years while her divorce proceeded. Actually, the testimony offered at trial portrays a situation where Appellee was working odd-jobs to make ends meet and simply did not have the time or the resources to advance her educational goals. She testified that much of her time was spent on child-related responsibilities and keeping up a household for the minor child, not to mention the inordinate amount of time spent moving from home to home either due to Appellant's failure to pay rent or to assist Appellant in not incurring rent by living in spec homes. Transcr. 05/24/12 at 455-457; Transcr. 10/24/12 at 70-71.

That being said, Appellee absolutely agrees with Appellant's position that the conduct of the parties should be considered in this Court's analysis of support alimony. *Thompson v. Thompson*, 2005 OK CIV APP 2, 1114, 105 P.3d 346. However, Appellee would ask the Court to give due weight to Appellant's conduct during the parties separation. It was Appellant who refused to allow Appellee to continue working for Celebrity Homes; the only ***10** significant employment she had known for the entire marriage. Transcr. 05/24/12 at 373, 464. It was Appellant who caused Appellee to move multiple times during the course of this case so he would not be responsible for rent/mortgage expenses. *Id.* at 455-457. It was Appellant who, on numerous occasions, would tell Appellee that she should get nothing out of this marriage, that he had an unending supply of monies from which to draw upon, and that he would drag this case out as long as he could so as to starve Appellee out. Id. It was Appellant who failed to pay certain expenses pursuant to the *Temporary Order Agreement*, causing Appellee to receive eviction notices at multiple residences. *Id.* And all the while, Appellant readily admits that he was essentially fully supporting his girlfriend and her children by living with her, paying her rent, her utilities, her expenses, her child support, and her attorney fees. Transer. 05/23/12 at 218-219; Transcr. 05/24/12 at 256.

Appellant next contends that the trial court's support alimony award is not related to the marriage. In support thereof, Appellant relies on the Court of Civil Appeals' decision in *Bowman v. Bowman* which holds that support alimony should have "some rational connection to the marriage itself's *Bowman v. Bowman*, 1981 OK CIV APP 71, ¶29, 639 P.2d 1257. Here, the connection to the marriage is revealed through the parties conduct before and after separation, the lifestyle Appellee had become accustomed to, Appellee's contributions to Appellant's ability to earn money, and Appellant's earning potential.

As stated previously, the parties enjoyed an affluent lifestyle. Appellee was essentially a stay-at-home mother who worked only for Appellant's business, and even then, the majority of the income she should have earned from her labors was rolled back into the business. Most importantly, due to Appellant's spiteful conduct, shortly after separation, Appellee was divested of the only method of earning a living she had engaged in prior to ***11** separation. Had Appellant been actually concerned with Appellee's ability to rehabilitate herself post-separation, he could have at least provided her sufficient funds to maintain her real estate license.

Appellant next argues that Appellee was awarded a substantial cash property settlement and, therefore, support alimony was unnecessary. Appellant relies on Johnson v. Johnson, 1983 OK 117, 674 P.2d 539. There, the Oklahoma Supreme Court declined to reverse a trial court's decision refusing to award wife any support alimony. The Court reasoned that wife had been awarded fifty-four percent (54%) of the net marital estate, which had a present value of $116,024.00 and included potentially income-producing property. *Id.* at ¶10. Importantly, the record did not support an **abuse** of discretion and the Court was unable to presume legal error from a silent record. *Id.* at ¶24.

Johnson is distinguishable from the case at bar inasmuch as Appellee was not awarded a greater portion of the net marital estate, she was not awarded what appear to be income-producing assets, and she preserved in the record evidence of a demonstrable need. Here, Appellee was awarded property valued at $213,572.00 while Appellant was awarded property valued at $267,348.23. R. at 49. An additional $15,000.00 cash payment was ordered made to Appellee to offset the imbalance, leaving Appellee receiving forty-seven and one-half percent (47 1/2%) of the net marital estate. R. at 49-50. If any of the property awarded to Appellee could be considered "income-producing," same would be nominal income. There is no evidence in the record to suggest that any of said property produces income. Moreover, only $30,000.00 of the total awarded to Appellee was liquid, i.e. available to use to pay for the necessities of life.

***12** Appellee provided evidence and testimony which demonstrated nearly $8,000.00 in average monthly living expenses. Transcr. 05/24/12 at 150-153, Respt. Ex. 21. This evidence was admitted without objection from Appellant and was never refuted. In fact, even under the pain of cross-examination, Appellee's testimony regarding her current monthly expenses was consistent. At no point was any testimony elicited that her expenses were not actually incurred or that same were artificially inflated for trial purposes. Transcr. 05/24/12 at 469-470, 474-478. Given the evidence and testimony offered at trial, the trial court's decision cannot be considered an **abuse** of discretion.

Appellant further challenges the trial court's support alimony award on the grounds that it represents an order requiring Appellant to support Appellee's children from her prior marriage. Appellant supports this novel claim with mischaracterizations of the record, alleging that Appellee testified that her Exhibit 21 was not accurate. In actuality, Appellee never testified that her Exhibit was inaccurate and, in fact, when reviewing said Exhibit in conjunction with her testimony, one could argue that her expenses were understated. For example, she testified that her last rent home cost 51,750.00 per month but that she identified $1,500.00 as projected rent because she was purposefully trying to help with costs by trying to find something less expensive. Transcr. 05/24/12 at 478. Admittedly, Appellee's overall food costs are naturally going to include food for the entire household and it is unreasonable to assert that Appellee should have somehow segregated out the cost of provisions for her prior-born children.

This Court should note that the trial court did not award the full amount of support necessary to balance Appellee's unrefuted monthly expenses after imputing to her minimum wage income. See Respt. Ex. 21. Had the court done so, Appellee should have been ***13** awarded $6,726.00 per month which would make her monthly need $0.00. Instead, the trial court only awarded Appellee a portion of the support necessary to balance her expenses. The record is silent as to the trial court's rationale; however, one could assume that the shortfall created by the trial court's alimony award was based upon a recognition that Appellee was supporting children of a prior relationship. In any event, the record certainly does not support Appellant's assertion that the support alimony award forces him to support Appellee's prior-born children. The trial court should be affirmed.

Finally, Appellant argues that the trial court erred in its determination that he has the ability to pay alimony to Appellee. In support thereof, Appellant relies on Parnell, asserting that Oklahoma courts may impute income for support alimony purposes, but that doing so "is only equitable when 'a spouse deliberately refuses to use his best efforts to obtain employment or intentionally becomes under-employed to thwart his spouse or former spouse's effort to obtain his **financial** assistance in transitioning to a separate life."' See Appellant's Brief-in-Chief p. 10 (emphasis added). If this is so, the notion that Appellant is deliberately underemployed is easily supported by the record.

During the marriage, the parties lived well and Appellant earned in excess of $10,000 per month. Transcr. 5/24/12 at 467. During separation and at the time of trial, Appellant was in the same line of work as he was during the marriage; however, he was working primarily for his father's company instead of his own. Transcr. 5/23/12 at 5-7. Appellant alleges he earned approximately $3,300 per month from his work for Silvercrest Homes, which comprised 70% of his work. *Id.* The other 30% was spent on Celebrity Homes. Also during this time, Appellant received over $500,000 from his father. Transcr. 09/12/12 at 13-16. Taken together, the evidence suggests that Appellant took a significant pay-cut despite ***14** performing the same work in the same industry, all while his income was supplemented by his family. A rational conclusion can be drawn that Appellant was voluntarily underemployed.

The foregoing argument notwithstanding, Appellant misreads Parnell. There, the Court of Civil appeals merely states that earning capacity, deliberate refusal to obtain employment, or intentional under-employment may be considered in imputing income for support alimony purposes. *Parnell* at ¶19. Moreover, the Court references a Florida Court of Appeals decision which allows consideration of a spouse's net income, net worth, past earnings, and value of capital assets, in determining whether to impute income. *Id.* at ¶18. In short, Parnell does not stand for the proposition that the only reason to impute income for support alimony purposes is where there is deliberate refusal to work or intentional under-employment. Parnell simply does not support Appellant's argument.

In *Parnell*, the parties lived well during the marriage with husband earning nearly $100,000.00 per year prior to the divorce being filed. Shortly before trial, husband quit his job and accepted a position earning less than $30,000.00 per year so that he could "see his children more consistently." *Id.* at ¶4. This presumably noble gesture was challenged by wife's testimony that husband deliberately took a lower-paying job to avoid alimony and child support; that his gesture was illusory in that he had failed to see his children consistently; and that he had previously indicated to wife that she "wasn't going to get a dime" from him. *Id.*

The Court of Civil Appeals affirmed the notion of imputing income over and above what husband actually earned at the time of trial, stating that "[w]hen the evidence, as here, is conflicting, we defer to the judgment of the trial court, which is in the best position to ***15** observe the behavior and demeanor of the witnesses and to judge their credibility." *Id.* at ¶11 citing *Mueggenborg v. Walling,* 1992 OK 121, 17, 836 P.2d 112, and *Brown v Brown,* 1993 OK CIV APP 142, ¶3, 867 P.2d 477.

Parnell is instructive but not entirely on-point for the purpose of this appeal. Here, we have unrefuted testimony that Appellant had access to an unlimited supply of funds from his family; claimed a net worth in excess of $1,000,000.00 during the marriage; and that the business Appellant participates in is highly lucrative. Transcr. 09/20/12 at 70-73; Transcr. 05/24/12 at 253-254; Transcr. 09/12/12 at 43. Appellee's testimony that Appellant historically brought home $10,000.00 per month during the marriage was not contradicted. Transcr. 05/24/12 at 467. Appellant testified that he essentially barely scraped by, but at this same time, was funding his girlfriend living expenses, utilities, child support payments, and attorney fee bills. The trial court is in the best position to weigh the evidence and the credibility and veracity of the witnesses. Here, there is ample evidence and testimony in the record to support the trial court's support alimony award and the underlying imputation of income. This Court should defer to the trial court's determination and affirm same.

In summary and from a fundamental perspective, Appellee need only prove (1) that she has a demonstrable need for spousal support and (2) that Appellant has the **financial** ability to pay spousal support. The other considerations discussed above are guideposts for the Court to follow in analyzing Appellee's need and Appellant's ability to pay. Clearly, the trial court weighed all of the evidence presented and based its decision on the greater weight of the evidence. There is an obvious, rational basis for the decision and, thus, the trial court must be affirmed.

***16 Proposition II**

The Trial Court's Award of Sole Custody to the Appellee is Supported by the Testimony and Evidence Presented at Trial

Appellee joins Appellant in his assertion that the trial court's custody determination may only be disturbed on appeal upon a showing that same is clearly against the weight of the evidence such that the court **abused** its discretion. *Daniel v. Daniel,* 2001 OK 117, ¶21, 42 P.3d 863. Here, Appellant bears the burden of demonstrating that an award of sole custody to the Appellee is erroneous and contrary to the child's best interests. The child's best interests "must be the paramount concern of the court." *Manhart v. Manhart,* 1986 OK 12,113, 725 P.2d 1234. The record in this matter clearly support the trial court's decision and, in fact, weighs heavily against the Appellant's position that an award of sole custody to him, or even joint custody, is in the child's best interests.

Regardless of whether the trial court believed that Appellant had "the child's best interests in mind," joint custody simply cannot be awarded where the parties cannot co-parent. Oklahoma law permits awards of joint custody only where the parties: "1) have an ability to communicate with each other even though they are no longer married; 2) are mature enough to put aside their own differences; and 3) who work together and engage in joint discussions with each other and make joint decisions regarding the best interest of their children." *Foshee v. Foshee,* 2010 OK 85, ¶16, 247 P.3d 1162. Other factors to consider in determining whether joint custody is appropriate are:
1) whether the parties agree to joint custody and whether there is a prior order of joint custody which has been of benefit to the child;

2) whether the parties are capable of reaching shared decisions regarding the child;

***17** 3) whether the logistics are such that there is no substantial disruption of the child's routine, schooling, friends, etc.;

4) whether the child's psychological and emotional needs and development wil suffer due to the custody arrangement;

5) the work hours of the parents; and

6) whether the child desires to participate in joint custody or has a strong opposition thereto.

Kilpatrick v. Kilpatrick, 2008 OK CIV APP 94, ¶14, 198 P.3d 406 citing *Rice v. Rice*, 1979 OK 161, 603 P.2d 1125. Appellee asserts that an application of the facts to the above-referenced factors leads to only one conclusion: that joint custody is not an appropriate option here.

Both parties' testimony supported the trial court's finding that they suffered from a history of conflict and hostility. Each also testified that they did not believe that the child's best interests were served by the other party being awarded custody and neither agreed to entering into a joint custody arrangement. Appellant showed a lack of maturity in his comportment with Appellee during parenting issues as is more fully discussed below. Thus, the trial court's only option was to award sole custody to either Appellee or Appellant.

When determining which parent is the more fit and proper party to have custody of a minor child, the court must consider a variety of factors, the most important of which is what custody arrangement will foster the best interests of the child. 43 O.S. § 112. A mandatory consideration is whether either party has shown a propensity to foster the other parent's relationship with the child or whether either party has thwarted the other's relationship. Id. The court must also make a determination as to which parent is better suited to make decisions on behalf of the minor child. This is frequently fleshed out via evidence of each party's historical conduct with regard to the child.

***18** Ideally, each parent will assist and participate in caregiving duties for a minor child during the marriage. Here, it is unrefuted that the Appellee was the primary caregiver throughout the marriage and throughout the parties' separation. Transcr. 05/24/12 at 280. Appellee attended nearly all athletic events and school functions. Id. at 445-447. Appellee also accompanied the child to each and every doctor and dentist appointment, save the one doctor's appointment Appellant testified he attended. Transcr. 05/23/12 at 171-173. In regard to that isolated event, the evidence showed that Appellant was unhappy about having to take time from his day to attend that appointment and even blamed the Appellee for interfering with his routine. Id. At trial, the Appellant could not even name the child's primary care physician. Id.

Appellant's participation in the child's school and education was equally lackluster. Although he was quick to assert that the minor child was struggling in his grades, he offered no evidence to suggest that he took any action to correct the perceived struggle. In fact, Appellant did not even know what grades his son had received during the past school year. *Id.* When Appellant suggested that he attempted to enroll the child in Sylvan Learning Center, he neglected to inform the court that it was actually his father who suggested Sylvan and arranged the appointment. Transcr. 09/12/12 at 23. Appellant was so concerned with his son's performance that he wholly failed to address it with anyone other than his father - no calls to the child's teachers, no attendance at parent-teacher conferences or open houses, and no conversations with any tutors.

In Appellant's *Brief-in-Chief* he suggests that “the evidence demonstrated significant issues with respect to the environment the minor child was exposed to at Respondent's home.” This is, at best, a mischaracterization of the evidence. There was absolutely no ***19** evidence or testimony presented that would suggest that the minor child was exposed to anything inappropriate while in Appellee's care during separation. Many of Appellant's witnesses speculated that Appellee's boyfriend, Mr. Roller, might have been around the minor child from time to time; however, no proof was offered that this occurred. The incident that Appellant

specifically pointed to as evidence of concerning behavior did not even involve the minor child. Transcr. 05/23/12 at 105. Moreover, no proof was offered that any such contact affected or influenced the minor child in any way. Unsupported beliefs and fears are not evidence of conduct contrary to a child's best interests.

If this Court is inclined to analyze the conduct of adults with whom the minor child had contact in relation to the trial court's custody order, it need look no further than the Appellant's own conduct. Appellant called the minor child a "mother fucker" (Transcr. 10/24/12 at 52); kicked the child out of his home during his designated summer visitation due to an argument (*Id.* at 51-52); admitted to cursing frequently in front of the minor child (Transcr. 05/23/12 at 186-188); admitted to cursing at Appellee and belittling her in front of the minor child *(Id.);* admitted to using cocaine and marijuana during the parties' separation (*Id.* at 176); admitted to receiving in-patient treatment at Laureate Psychiatric Clinic and Hospital *(Id.);* and admitted, at the time of trial, to continuing to drink alcohol while taking powerful anti-depressant medication against the recommendations of his treating physician (*Id.* at 216-217).

Appellant asserted that he should be the primary custodian because he could provide more stability. This was followed by his own admission that if he had primary physical custody, he would find someone else who could care for the child. Transcr. 09/20/12 at 84-87. Appellant's first suggestion for a third-party caregiver was his girlfriend, who he admits ***20** does not even have primary or legal custody of her own children. He freely admitted that he would rather have the child with a third party than with the Appellee. Id. This willingness to refuse to ensure frequent and continuing contact with Appellee is a mandatory consideration weighing against an award of custody in Appellant's favor. 43 O.S. § 112(C)(3).

Appellant's audacious claims that he is the more fit and proper parent to have custody of this child, or even that he is capable of existing in a co-parenting relationship with the Appellee, are completely unsupported by the record. The trial court's custody determination should be affirmed.

Proposition III

Appellant Failed to Satisfy His Burden of Proving the Separate Nature of the Washington Bond, the OSU Agriculture and Applied Science Bond, the Saint Francis Hospital Bond, and the Individual Retirement Account

Appellant complains that the trial court awarded certain items of allegedly separate property to the Appellee, namely: a Washington Bond, an OSU Agriculture and Applied Science Bond, a Saint Francis Hospital Bond, and an Individual Retirement Account. Oklahoma law is clear that property accumulated during the marriage is presumed to be marital unless the party claiming same as separate property can prove its separate nature. Standefer v. Standefer, 2001 OK 37, ¶15, 26 P.3d 103; Gray v. Gray, 1996 OK 84, ¶11, 922 P.2d 615. Appellant wholly failed to meet this burden. The only testimony offered to support his contention were his own self-serving statements that the accounts and bonds in question were initiated by his grandparents prior to marriage. Transcr. 05/24/12 286-288. He could not state the date of inception, nor did he offer any evidence supporting his testimony. Id. at 287, 355. The only facts proven during the course of trial regarding these items were that they existed during the marriage, Appellant received all statements at his office in his ***21** name, and that same were always included on **financial** statements in his various attempts to secure credit. Id. at 353.

Appellant specifically points out that the bonds and IRA account were listed on his **financial** statements as far back as 2002. *Id.* at 292. This fact does nothing more than lend support to the marital nature of this property - the parties married in 2000. Had Appellant wished to prove that these items were his separate property, he should have proffered evidence of their existence prior to marriage. He chose not to do so, thus, this Court is left no evidence to support Appellant's contention. Where the record is silent, this Court must presume that the trial court's determination is correct. "Legal error may not be presumed in an appellate court from a silent record. The opposite is true. Absent a record showing otherwise, this court presumes that the trial court did not err." *Hamid v. Sew Original,* 1982 OK 46, ¶6, 645 P.2d 496.

Appellant seems to rely on an argument that Appellee never proved that the items of property were marital in nature. This argument is flawed in that Appellee bears no burden here. As stated above, the only burden rests squarely on Appellant's shoulders and, as the record reflects, he failed to satisfy this burden. However, in the event this Court believes that Appellant's unsupported testimony is sufficient to shift the burden to Appellee to prove the marital nature of said property, this Court must consider the testimony conflicting inasmuch as Appellee testified that Appellant showed Appellee **financial** statements every year and indicated that the bonds and IRA were their investments. Transcr. 05/24/12 at 451-452. Where there is conflicting testimony, this Court must "defer to the judgment of the trial court, which is in the best position to observe the behavior and demeanor of the witnesses and to ***22** judge their credibility." Parnell at ¶11. Thus, the trial court's determination that these items of property were marital in nature and subject to division must be affirmed.

Proposition IV The Trial Court's Division of the Remainder of Personal Property is Supported by the Record

The parties agreed that all tangible personal property had been divided by agreement, prior to trial. It is well within the parties' authority to agree and/or contract regarding a disposition of their personal property. The values used by the trial court in balancing its property award were suggested by the Appellant. Whether it was a "guess" as to value or not, it was his testimony and same was unrefuted. Moreover, the value he assigned to this property was supported by **financial** statements Appellant had used in obtaining credit. Respt. Ex. 21. He cannot now assert error and ask that this Court disturb the trial court's findings regarding valuation. The trial court's valuation and distribution of personal property should be affirmed.

Proposition V

The Trial Court's Imputation of Income for Child Support Purposes is Supported by the Record and is in Accordance with Oklahoma Law

In Oklahoma, child support is based upon each parent's gross income, which is defined as "earned and passive income from any source." 43 O.S. § 118B(A). Passive income specifically include gifts received by the party. 43 O.S. § 118B(A)(3)(1). In computing the gross income of a party, the trial court may use actual income figures, an average of the party's gross income over a term of three (3) years, minimum wage income, or the court may impute income to a party. 43 O.S. § 118B(C). When imputing income to a party, the trial court may consider the following factors, to wit:

***23** a. whether a parent has been determined by the court to be willfully or voluntarily underemployed or unemployed...;

b. when there is no reliable evidence of income;

c. the past and present employment of the parent;

d. the education, training, and ability to work of the parent;

e. the lifestyle of the parent, including ownership of valuable assets and resources... that appears inappropriate or unreasonable for the income claimed by the parent;... or

g. any additional factors deemed relevant to the particular circumstances.

43 O.S. § 118B(D)(2). "The amount of child support set by a trial court will not be modified or set aside on appeal unless the award is clearly against the weight of the evidence or is somehow unjust or inequitable." *State of Oklahoma ex rel. Department of Human Services v. Baggett*, 1999 OK 68, ¶3, 990 P.2d 235.

Appellant attempts to relate the Court's decision in *Parnell* to the facts at hand. As is more fully discussed above, in *Parnell*, the appellate Court affirmed an imputation of income to husband, but reduced the amount imputed based upon a determination

that the trial court had used the wrong evidence to support the imputed number. *Parnell* at ¶13. The facts in the instant matter can be set apart from those in Parnell. There, the evidence supporting an imputation of income included husband's voluntary reduction in income and his statements to wife that she "wasn't going to get a dime" from him. *Id.* at ¶4.

Here, much more evidence supporting an imputation of income exists in the record. First, the evidence and testimony presented supports the notion that Appellant is well versed in the residential home building business and that he had done quite well in the past. For example, during the parties' separation, he tendered various **financial** statements indicating a personal net worth exceeding $1,000,000.00. Respt. Ex. 21. The testimony of the parties ***24** indicates that they lived well, at times residing in a 6,000 square-foot home with a mortgage payment in excess of $4,000.00 per month. Appellant does not dispute that he indicated to Appellee that he had an unlimited supply of funds and would drag out the litigation to ensure that Appellee did not receive anything. Transcr. 05/24/12 at 456-457; Transcr. 09/20/12 at 73-74; See also Transcr. 02/22/13 at 8-9, 11. And, via Appellant's own testimony, the trial court learned that in addition to being paid approximately $3,300.00 per month by one of his father's businesses, Appellant made deposits into his personal accounts in excess of $130,000.00 in 2008, $110,000.00 in 2009, and $800,000.00 in 2010. Transcr. 05/23/12 at 206-207.

Throughout trial, Appellant gave inaccurate and inconsistent testimony such that any testimony regarding his alleged decrease in earning capability cannot be relied upon. The most reliable indicators of Appellant's potential income are his historical deposits, his style of living, and his various comments to Appellee regarding his unending supply money.

Appellant also argues that any imputation of income should not take into account any monies given to his business by his father. Appellant asserts that these monies were business loans by his father. Appellee believes that the trial court is supported in its imputation without considering Appellant's father's benevolence. However, given that Appellant raised the issue, Appellee would point out that Appellant wholly failed to offer any reliable proof that any of the $500,000.00 he received from his father were anything but gifts. All that was offered were Appellant's self-serving testimony and the **elder** Mr. Jenkins' self-serving testimony that the monies given to Appellant were loans. One would think that Darrell Jenkins, an astute businessman who runs approximately thirty (30) different businesses would recognize the importance of promissory notes to evidence monies loaned. ***25** Conveniently, he testified that they did not exist. Transcr. 09/12/12 at 30-31 The unsupported testimony offered by Appellant in regard to the "loans" made by his father is suspect and should not be relied upon by this Court. The trial court's imputation of income for child support purposes should be affirmed.

Proposition VI

No Evidence or Testimony was Offered to the Trial Court to Challenge or Rebut Appellee's Request for Attorney Fees and, Therefore, the Award of Fees and Costs to Appellee Should Be Affirmed

Appellee filed her *Application for Attorney Fees and Costs* on January 17, 2013. R. at 158-166. No response or objection thereto was filed until February 21, 2013. R. at 167-169. Therefore, pursuant to Rule 4 of the Rules for District Courts of Oklahoma, Appellee's Application could have been deemed confessed by way of Appellant's failure to object and/or respond within fifteen (15) days. At the hearing on said *Application*, the trial court declined to deem the *Application* confessed. Transcr. 02/22/13 at 7.

At the aforementioned hearing, Appellant stipulated to the reasonableness of Appellee's attorney's hourly rate. *Id.* at 5. Appellant also stipulated that the total amount of fees were reasonable. *Id.* at 5-6. Appellee then offered testimony that she was unable to pay her attorney fees, did not have the funds or resources to pay her attorney fees, and that had her attorney's firm not carried her balance, she would not have been able to proceed in this litigation. *Id.* at 9-10. Appellee also testified regarding Appellant's failure to pay certain expenses pursuant to the *Temporary Order Agreement*, that said conduct increased her attorney fees, and that Appellant had indicated he would exacerbate the litigation via an appeal, no matter what the costs were. *Id.* at 10. The record itself reflects that it was Appellant who drew this matter out far longer than expected due to the length of his case-in- ***26** chief. The matter was originally set for a two (2) day trial. Appellant alone consumed four (4) days for trial in his case-in-chief. This protraction and "churning" of the litigation further exacerbated Appellee's attorney fees.

Significantly, no testimony or evidence whatsoever was offered by Appellant in support of his objection to Appellee's requested relief. The only testimony and evidence preserved in the record is that of Appellee. That record supports the trial court's award and, therefore, same must be affirmed.

Notwithstanding the foregoing argument regarding the lack of a record in support of Appellant's contention regarding attorney fees, trial courts in Oklahoma are empowered to award attorney fees and costs to a litigant in dissolution of marriage actions by way of Title 43, which provides, in pertinent part that:

> D. Upon granting a decree of dissolution of marriage, annulment of a marriage, or legal separation, the court may require either party to pay such reasonable expenses of the other as may be just and proper under the circumstances.

43 O.S. § 110(D). The Oklahoma Supreme Court has interpreted this statute to require a totality of the circumstances analysis to determine whether a litigant qualifies for a fee award "through the process of a judicial balancing of the equities." *King v. King*, 2005 OK 4, ¶30, 107 P.3d 570; *see also Thielenhaus v. Thielenhaus*, 1995 OK 5, 890 P.2d 925. Fee awards based upon a balancing of the equities are left to the sole discretion of the Court and should only be reversed where the trial court "made a clearly erroneous conclusion and judgment against reason and evidence." *Chacon v. Chacon*, 2012 OK CIV APP 27, ¶55, 275 P.3d 943.

In balancing the equities, the trial court should consider such things as the "outcome of the action... whether one party's behavior demonstrated the most interest in the child or ***27** 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 subsequent litigation more vexatious than it needed to be; and finally, the means and property of the respective parties." *Finger v. Finger*, 1996 OK CIV APP 91, ¶14, 923 P.2d 1195. Here, an application of the facts to the aforementioned factors paints a clear picture that the trial court did not err.

First, although there are no "prevailing parties" in matrimonial dissolutions, the results of the trial were indisputably in-line with the Appellee's requested relief. Thus, one can surmise that the trial court believed Appellee's position to be reasonable or, similarly, that Appellant's position was unreasonable. Second, the record is replete with testimony and evidence that Appellee was the child's primary caregiver and was the only one of the parties to show genuine interest in his daily routine and wellbeing. Any allegation to the contrary proffered by Appellant is as genuine as his testimony that he was concerned for his child's school performance but, remarkably, did nothing about it. Transcr. 09/20/12 at 75-77.

Certainly, between the two parties, only the Appellant's testimony demonstrated a priority of self-interest over the best interests of the child. As support for his argument that he was the appropriate custodial parent, he stated if he was awarded primary physical time, he would rather have a third-party watch the minor child than have Appellee care for him. Transcr. 09/20/12 at 84-87. There are numerous accounts in the record of Appellant's vulgar, demeaning conduct toward Appellee in front of the parties' son and Appellee's other minor children. See p. 19, supra. This conduct, coupled with Appellant's various comments to Appellee during the pendency of this action that he would ensure that she received nothing ***28** and that he would run her out of money, is unrefuted evidence of Appellant's vexatious conduct.

Finally, Appellant has the temerity to suggest that despite his endless supply of family money, despite his ability to fund his lifestyle and his girlfriend's child support, living expenses and attorney fees, and despite his stated net worth of over one (I) million dollars, the trial court's determination of his ability to meet his own needs is erroneous. This is disingenuous and intellectually dishonest. The weight of the evidence at testimony presented supports the trial court's award of fees and costs to the Appellee. Same should be affirmed.

Conclusion

A review of the entire record reveals that each of Appellee's trial positions were supported by unrefuted testimony and tangible evidence. Appellant's positions, on the other hand, were generally based upon unreliable, self-serving statements, unproven conjecture, and implausible and irrational conclusions. Appellant attempted to corroborate his testimony through third-party witnesses; however, when their testimony was vetted via cross-examination, each and every one of Appellant's witnesses was demonstrated to either lack veracity or support the fact that Appellant offered no evidence to support his various positions.

The trial court's rulings in this matter comport with the record. There are no instances where any ruling can be demonstrated as having no rational basis. The trial court did not **abuse** its wide discretion and its decisions as to each issue should be affirmed.

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