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See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN RE THE MARRIAGE OF:

CHRISTINA ANN STAAB,

Petitioner/Appellee/
Counter-Appellant,

vs.

JEREMY RYAN STAAB,

Respondent/Appellant/
Counter-Appellee.

Case No. 121,279

APPEAL FROM THE DISTRICT COURT OF
GARFIELD COUNTY, OKLAHOMA

HONORABLE TOM L. NEWBY, DISTRICT JUDGE

AFFIRMED

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For Petitioner/Appellee

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For Respondent/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Jeremy and Christina Staab each appeal different aspects of their divorce decree. On review, we find that the trial court committed no error and thereby affirm.

BACKGROUND

The Staabs were divorced in November 2022, and a decree was finalized in January 2023. The couple have two children, one of whom was a minor at the time of the divorce but has subsequently turned eighteen. The divorce was contentious on the issues of child custody and alimony, particularly on the issue of Jeremy's income from two businesses—CSI, which the couple operated during their marriage, and Flo Tech, which Jeremy operated as a continuation of CSI after their marriage. Christina was granted sole custody of the minor child with visitation to Jeremy. The court ordered Jeremy to pay child support pursuant to its findings of income and support alimony of $288,000, payable at $4,800 per month. Jeremy filed a motion for new trial or to vacate, which the court denied. Jeremy now appeals the custody, alimony, and child support decisions. Christina appeals the property division, specifically taking issue with the finding that Flo Tech has no marital component to distribute between the parties. Christina also filed a motion to dismiss much of Jeremy's appeal on mootness grounds.

STANDARD OF REVIEW

A dissolution of marriage action is one of equitable cognizance in which the trial court has discretionary power when dividing the marital estate. *Teel v. Teel*, 1988 OK 151, 766 P.2d 994. Our standard of review for the issues raised by both appeals requires us to review all of the evidence presented to the trial court and to sustain the trial court's judgment unless the trial court abused its

discretion or unless the court's findings were clearly against the weight of the evidence. *Hough v. Hough*, 2004 OK 45, 92 P.3d 695.

ANALYSIS

Mootness

The first section of Jeremy's brief concerns custody and visitation issues. Christina's still-pending motion to dismiss the appeal argues that these issues are moot because the minor child is now emancipated. Mootness is a state or condition which prevents the appellate court from rendering relief. *State ex rel. Oklahoma Firefighters Pension & Ret. Sys. v. City of Spencer*, 2009 OK 73, ¶ 4, 237 P.3d 125, 129 ("*Spencer*"). The concept of mootness arises in circumstances where a court's inability to grant effective relief would render an opinion hypothetical or advisory. *Westinghouse Elec. Corp. v. Grand River Damn Authority*, 1986 OK 20, ¶ 17, 720 P.2d 713. Absent special circumstances that are not present here, this Court has no appellate power to require that an emancipated child visit a parent or remain under the custody of either parent. Hence, we may offer no relief in the form of an ordered change in custody or visitation.

However, we may address otherwise moot issues if the appeal presents a question of broad public interest, or the challenged action is capable of repetition, yet likely to evade review. *Matter of I.T.S.*, 2021 OK 38, ¶ 26, 490 P.3d 127, 134. The application of these exceptions by this Court "depends on the facts presented and the policy considerations and we will only apply them where the

practical considerations indicate that doing so would avoid, rather than prolong confusion." *In re Guardianship of Doornbos*, 2006 OK 94, ¶ 4, 151 P.3d 126.

Spencer indicates that the "public interest" element requires more than a matter which the public may find "interesting." Instead, *Spencer* likens it to the public interest as expressed in public policy, *i.e.*, to legal questions that are of "substantial interest to the state." *Id.* ¶ 5.[1] This is also evident in a survey of other cases finding a public interest.[2] Each of these cases involve specific statutory provisions that embody some form of public policy and the public interest. Further, because the cases involved ambiguities in commonly applied statutes, the practical considerations indicate an exception to the mootness doctrine would "avoid, rather than prolong confusion." *Id.* ¶ 4.

Spencer also cited federal case law to the effect that there must be a reasonable expectation that "*the same complaining party* will be subject to the

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[1] *Spencer* was a case that considered the correct response after the city of Spencer hired a forty-nine-year-old fire chief who, because of age, was ineligible to join the firefighter's retirement system. All firefighters were, however, required to be members of the retirement system. The city fired the fire chief during the pendency of litigation concerning whether he could legally hold the position, hence the mootness inquiry. The court found the qualification of firefighters and the operation of the pensions system to be a matter of substantial public interest, and that the pension system would likely face the same issue again in the future, and therefore decided the question.

[2] *See Baby F. v. Oklahoma Cnty. Dist. Court*, 2015 OK 24, ¶ 13, 348 P.3d 1080, 1084 (examining the question of the withdrawal of life-sustaining treatment from a child taken into protective custody pursuant to 10A O.S. § 1-3-102—"quite literally, a matter of life or death for certain children in the State's custody"); *Matter of I.T.S.*, 2021 OK 38, ¶ 27, 490 P.3d 127, 134 (interpretation of the statutory requirements of ICWA is a matter of broad public interest, as it implicates the fundamental rights of all Indian parents and children); *Roberts v. Morgan, ex rel. Mun. Court of City of Oklahoma City,* 1998 OK CR 31, ¶ 5, 965 P.2d 382, 383 (question of whether a defendant who pleads guilty and then seeks to withdraw the plea is entitled to an appeal bond under 22 O.S.1991, § 1077); *Marquette v. Marquette*, 1984 OK CIV APP 25, ¶ 6, 686 P.2d 990, 993 (interpretation of the Protection from Domestic Abuse Act "can certainly be characterized as an issue of broad public interest").

same action again." *Id.* ¶ 5, n.18 (emphasis supplied) (citing *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350). Federal courts have found mootness where the "decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990).

The second exception is "when the challenged event is capable of repetition, yet evading review." *Scott v. Oklahoma Secondary Sch. Activities Ass'n*, 2013 OK 84, ¶ 14, 313 P.3d 891, 895. This "same party" requirement of *Spencer* does not, however, appear to be an exclusive element of the "capable of repetition, yet evading review" exception. Situations where "the short duration of any live controversy" allow an error to escape review also fall under this exception. *Baby F.*, 2015 OK 24, ¶ 13. *Baby F* applied the exception even though there was no chance that the same party, the deceased Baby F, would be subject to the same action again.[3]

Even having established the parameters of the mootness exception, it is still difficult to apply it to this case because these factors were not specifically briefed. We find no general likelihood of repetition here. Hence, Jeremy must

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[3] *See also, Scott*, 2013 OK 84, ¶ 15 (holding that, because of the short window between questions arising and the occurrence of the events in question, judicial review of the OSSAA's decisions regarding student eligibility to participate in sporting events is subject to a mootness exemption); *City of Norman v. Int'l Ass'n of Firefighters Local 2067*, 2013 OK CIV APP 57, ¶ 8, 307 P.3d 351, 356 (finding that, because of statutory timing, question of the legality of ballot used in special municipal elections to determine firefighter's contract may otherwise evade appellate review); *Dilbeck v. Dilbeck*, 2010 OK CIV APP 142, ¶ 18, 245 P.3d 630, 635 (holding that the question of whether district court could authorize a parenting coordinator to change custody on March 26 and then approve the order retroactively on May 15 would otherwise evade appellate review because of short duration).

raise some specific claim of a statutory or common law violation that meets the public interest exception. Although his brief states that his constitutional rights to "justice, a fair speedy trial, due process and equal protection" were violated, *Brief-in-chief*, pg. 20, he provides no substantive analysis of these claims. Instead, he broadly argues that because parental rights have a constitutional dimension, any and all questions involving a court's custodial decision are "constitutional" questions of public interest that are exempt from the mootness doctrine.

We disagree that generalized constitutional claims are inherently exempt from becoming moot.[4] We find no authority for the proposition that simple error by a court in a custody decision arises to this level. Almost any custody decision by a court can be generally linked to some fundamental constitutional interest in parenting, just as almost any error involving procedure can be characterized as a due process violation. To create a mootness exemption that any error which may be tenuously linked to a constitutional right in this way presents a "question of broad public interest" would allow the exemption to swallow the rule in most if not all domestic cases. We find no general exception simply because this matter involves child custody.

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[4] *See, e.g., Lewis v. Zmuda,* 23-3236-JWL, 2024 WL 2803090, at *4 (D. Kan. May 31, 2024) (claim of alleged constitutional violation moot because claim for damages was statutorily barred); *Wild Horse Educ. v. United States Dep't of Interior,* 3:23-CV-00372-LRH-CLB, 2024 WL 2060272, at *12 (D. Nev. May 8, 2024) (restriction of public access to wild horse gathering site was moot as it was an isolated occurrence and there was no further intention to conduct a gather at this site); *United States v. Askia,* 893 F.3d 1110, 1122 (8th Cir. 2018) (holding that the defendant's challenge to an alleged constitutional violation at the pretrial detention hearing was moot because the issue "will have no direct consequence on [the defendant] now" since "[h]is pretrial detention has concluded").

Jeremy next argues that the court's actions created parental alienation, which is "not subject to a mootness defense." *Reply Brief*, pg. 2 (citing Okla. Const. Art. II §§ 6-7, the first, fifth and fourteen amendments to the U.S. Constitution, two Oklahoma statutes (43 O.S. § 111.1A and §110.1), and eleven Oklahoma cases). We find no reference to alienation or specific mootness exemptions in the cited constitutional sections or statutes. As for the cases, no pinpoint cites were provided to show what rule of each case Jeremy relies on. Examining them, *In re K.W.*, 2000 OK CIV APP 84, ¶ 8, 10 P.3d 244, 245, holds that there is a strong public interest in emergency custody proceedings that mitigates against granting continuances. *Guyton v. Guyton*, 2011 OK CIV APP 92, ¶ 10, 262 P.3d 1145, 1150, holds that a decision to modify or change custody cannot be granted by default because the need to show a material change in circumstances. Neither *Hornbeck v. Hornbeck*, 1985 OK 48, 702 P.2d 42, nor *Marriage of Bilyeu v. Bilyeu*, 2015 OK CIV APP 58, 352 P.3d 56, nor *Guess v. Guess*, 1954 OK 227, 274 P.2d 369, have any discernable relevance to the mootness issue.[5] *Craig v. Craig*, 2011 OK 27, 253 P.3d 57, concerns parental rights only in terms of grandparental visitation. *Mullendore v. Mullendore*, 2012 OK CIV APP 100, ¶ 7, 288 P.3d 948, 952, concluded that a father's recognized efforts at becoming a better parent did not automatically entitle the father to a

[5] These cases generally involve custody matters and joint custody but make no comment on whether these are public interest or public policy matters pursuant to the mootness doctrine.

change in custody. In sum, none of the cases Jeremy cites have any apparent relevance to the mootness question here.

Examining Jeremy's briefs for statutory questions that are at least minimally briefed, we find two that may raise questions of law and public interest. Both are related to the trial court's interview of the child, then sixteen years old. The first is that the court failed to follow the rule of *Ynclan v. Woodward*, 2010 OK 29, 237 P.3d 145 and *Dunlap v. Dunlap*, 2019 OK CIV APP 75, 455 P.3d 1, when conducting its interview.[6] The second, related question, is whether 43 O.S. § 113(E) deprived Jeremy of due process because he was given no opportunity to respond to "statements/documents allegedly made/given to/by the GAL or his child in chambers." *Brief-in-chief*, 22. We find that these specific questions fit within the mootness exceptions noted above and will address them.[7]

Jeremy cites *Dunlap* as holding that a child should not be asked to express a preference as to custody during an interview, and that the court obliquely did so in this case. *Dunlap*, in fact, reaches the opposite conclusion.[8] The purported

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[6] Neither the Westlaw nor OSCN version of *Dunlap* have paragraph numbers assigned. As such, we reference only the Westlaw page numbers.

[7] Christina also argues in her motion to dismiss this appeal that the issue of child support is moot because the child has now "aged out" and there is no current support to modify. This does not moot an appeal of the original support decision, however. This Court reviews the original award of child support for abuse of discretion and, irrespective of whether it affirms, remands for a new calculation, or sets the amount in its order, that decision is effective as of the date of the original award. Any change ordered by this Court is not a "retroactive modification" forbidden by law, but an alteration of the original decision. As such, we will review the child support issues. *See* pgs. 12-17, *infra*.

[8] "We note that the statement that a child should not be directly asked where the child would rather live is not part of the guidelines stated in ¶ 19 [of *Ynclan*]. We conclude

rule that a child should not be directly asked to express a custody preference comes not from *Dunlap*, but from a statement in *Ynclan*, that *Dunlap* found to be dicta. *See* n.8, *supra*. *Dunlap* notes that 43 O.S. § 113 specifies that a court should first determine whether the best interest of the child will be served by allowing the child to express a preference. *Id.* at 5-6. If so, the court may then set a hearing for the purpose of the child expressing that preference. *Dunlap* noted the extreme difficulty, if not absurdity, of holding a hearing specifically to determine a child's preference but then prohibiting the judge from inquiring as to that preference. *Id. Dunlap* noted that, if the court wished to conclude a hearing successfully, this would

> require a trial court to engage in some form of specious general conversation during a § 113 interview while constantly attempting to "maneuver" the child into a "spontaneous" expression of a preference. The difficulty of this process cannot be underestimated because even an indirectly elicited expression of a child's preference will be subject to criticism by the non-prevailing parent depending upon how far the court "hinted" that it would like the child to express a preference.

Id. at 6.[9]

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that the absence of the 'don't ask' rule in the *Ynclan* court's final holding, and the context of ¶ 13 as a broad survey of general foreign law, does not promulgate a rule forbidding a trial judge from eliciting a statement of preference as suggested by Mother." *Dunlap v. Dunlap*, 2019 OK CIV APP 75, 455 P.3d 1, 5.

[9] The transcript of the in-camera hearing demonstrates the gymnastics trial judges must engage in if they are to follow the "inquire without inquiring" dicta of *Ynclan*. *See* Tr. (October 11, 2022), 169-199. Although the child was sixteen at the time of the interview, the court never directly asked her where she would prefer to live or why and at first somewhat danced around the issue. The court stated "[t]here are certainly situations where parents can't live together in the same household, but they can still be parents, and that's what I'm trying to figure out what my ruling is going to be today." *Id.* at 176. Later the court asked "[d]o you think you're ever going to be in a position where you would be willing to meet your father's girlfriend? A: No." *Id.* at 181. The closest exchange was: "so right now—do you want to change your where you live or your living options? A: No." *Id.* at 191. The court was

Examining *Ynclan*, we agree with *Dunlap* that any purported rule of *Ynclan* that asking a child to express a custody preference violates § 113 or any constitutional right is dicta. *Ynclan* states its holding explicitly:

> In order to provide a proper balance of parental due process rights with the child's right to be heard, we hereby adopt the following guidelines for trial courts to utilize when planning to conduct an in camera custodial or visitation child preference interview:
>
> 1) If the trial court or the parties consider the possibility of an in camera interview of the children, then the trial court, pursuant to 43 O.S.2001 § 113, must make and state on the record its preliminary determinations concerning whether the child's best interest is served by conducting such an in camera interview and whether the child is of a sufficient age to form an intelligent preference;
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> 2) If the parents consent to the interview being in chambers, or otherwise waive their own presence, the judge may proceed with an in camera interview.
>
> 3) If one or both parents object to being excluded, the trial court must consider whether the parents want counsel present. This consideration should include whether to allow counsel to be present, allow counsel to question the child, or allow counsel to submit questions to be asked. Whether the trial court allows the counsel to participate in the questioning or submit questions is within the trial court's discretion. If no objection is made regarding this issue, the parties waive objection to the issue on appeal. If the judge proceeds with an in camera interview without counsel present, pursuant to 43 O.S.2001 § 113, the reason for counsel's exclusion must be stated on the record.
>
> 4) The next issue to be considered on the record is whether either or both parents request that a court reporter be present. If a request for a court reporter is made, the court reporter must be present and the interview shall be recorded—otherwise the parties waive objection to the issue on appeal.

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eventually able to opine: "I think it's clear you want to stay with your mother." *Id.* The child agreed. *Id.*

Ynclan, 2010 OK 29, ¶ 20. These mandatory guidelines do not in any way restrict the judge's questioning of the minor child.

The implication that a child should also not be asked as to a custody preference comes from ¶ 13 of *Ynclan*, which cites four sources listed in its footnote 21. Three of the sources cited did not consider that specific question.[10] The fourth, *In re Marriage of Hefer*, 667 N.E.2d 1094, 1097 (Ill. 1996) does note that "[i]t is seldom in a child's interest to be asked to choose between his parents or to believe that his expression of preference will influence the judge's decision."[11] It then states that "[a] better way than an in camera hearing to get the child's preferences before the court may be through admission of the child's hearsay statements, through the testimony of a guardian ad litem, or through professional personnel." This statement reveals an Illinois regime quite different from Oklahoma's. The Oklahoma legislature has *specified* an in-camera hearing as a proper means to discover a child's preference, rather than requiring the court to rely on hearsay statements. Assessing the sources, we agree with *Dunlap* that ¶ 13 conducts a general survey of the law of some other states on this issue

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[10] *In re Custody of J.H.*, 752 P.2d 194, 195 (Mont. 1988) does not contain such a prohibition. *In re Marriage of Vrban*, 359 N.W.2d 420, 425 (Iowa 1984) and *Saintz v. Rinker*, 2006 Pa Super 129, 902 A.2d 509, 513 (2006), both concern with the potential unreliability of a child's expressed preference because it may be influenced by parental pressure.

[11] The *Hefer* opinion cites the book "Divorce & Your Child (1984)" by authors S. Goldstein & A. Solnit for this proposition. 667 N.E.2d 1094, 1097. This principle is clearly contrary to the legislative intent of § 113 that the child may, if appropriate, express a preference to the judge that the judge will consider in reaching a decision.

but does not state a rule prohibiting a judge from questioning a child as to preference in a § 113 hearing.[12]

As to constitutionality, *Ynclan* is clear that the procedures and guidelines it requires in ¶ 20 are sufficient to address any constitutional infirmity in § 113. Nonetheless, Jeremy argues that § 113(E) deprived him of due process by allowing an in-camera interview of the child by the judge in which he was given no opportunity to "respond" to "statements/documents allegedly made/given to/by the GAL or his child in chambers." *Brief-in-Chief*, 22. This sentence contains the entirety of the argument Jeremy provides on the subject, however. We find that *Ynclan* is clear that allowing "response" arguments by parents or counsel in a § 113 procedure is not a constitutional requirement.[13] Thus, although we find that Jeremy's arguments related to the in-camera hearing are not moot, they are without merit.

Child Support

Jeremy next argues that the court erred in setting child support. He first argues that the court deviated from the child support guidelines "without making specific findings of fact to support same." *Brief-in-chief*, 23. This argument is inexplicable. The court found the couple had a total adjusted gross income (AGI)

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[12] Jeremy also appears to allege that the interview violated some principle of *Guyton v. Guyton*, 2011 OK CIV APP 92, ¶ 5, 262 P.3d 1145. No § 113 interview is mentioned in *Guyton*, however.

[13] The evident purpose of § 113 is to allow the child to express a preference directly to the fact finder without the trappings of a formal examination at trial. Allowing counsel to "respond" to a child's testimony in such a hearing would likely develop into a hostile cross-examination of the child or place intolerable pressure on a child to retract their expression of preference. This would severely undermine this function of § 113.

of $11,570 per month and determined that total support should be $1,233 a month. This is the guideline amount pursuant to 43 O.S. § 119. The court then prorated that amount by the income of each party, as the guidelines require. There was no "deviation from the guidelines." Jeremy's actual argument is that the court's determination of his income was too high, and its determination of Christina's was too low.

The court set Christina's income at her current income of $18,800 per year working for the Chisholm Public Schools. Jeremy argues that she is voluntarily under-employed because her prior job working for CSI paid approximately $48,000 a year. This was, however, an unusual situation. CSI was a business owned on paper by Christina. [*Id.*].[14] This was clearly an unusual employment situation in which Christina or Christina and Jeremy had the power to decide how much she was paid. CSI collapsed after the separation, and Jeremy provided no evidence that Christina could simply get another bookkeeping job paying $4,000 per month. We find no error in the court's determination of Christina's income.

Jeremy also argues that the court overestimated his income. The court estimated Jeremy's AGI from his current ventures at $10,000 per month. In his written closing arguments, Jeremy states that his AGI for 2022 was $8,402 per month. He argued however, that the court should have attributed to him a three-

[14] The business was apparently held in Christina's name with Jeremey as its field representative in an effort to avoid potential problems with a non-compete agreement between Jeremy and a prior employer.

year average AGI of only $5,454 a month, or $65,448 a year. The relevant statute, however, no longer lists this three-year aggregation as a preferred method of calculating AGI, and we find no error in the court's decision not to use a three-year average.[15]

The evidence of Jeremy's current income was fragmentary and inconclusive. In 2020, the couple's tax return showed a combined wage income from CSI of $132,975 and $167,681 for other sources, which appears to be almost entirely composed of distributions from CSI as an S corporation. The couple's gross income for 2020 was therefore $303,776. *See* Petitioner's Exhibits 4-5. Christina testified that she paid herself $48,000 a year as bookkeeper, implying that Jeremy's wage from CSI for that year was $84,975. The other $167,681 in distributions from CSI were not segregated.

By comparison, Jeremy submitted a 2021 individual tax return showing no wages and only $55,343 in other income coming from Flo Tech. *See* Respondent's Exhibit 12B.[16] The return from Flo Tech showed that Flo Tech has

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[15] Although 43 O.S. Supp. 2009, § 118B previously provided "the average of the gross monthly income for the time actually employed during the previous three (3) years" as one method of calculating AGI, section (C)(1)(b) was revised in November 2021. It now states:

> 1. For purposes of computing gross income of the parents, gross income shall include for each parent whichever is the most equitable of:
>
> a. all current monthly gross income described in this section, plus such overtime and supplemental income as the court deems appropriate,
>
> b. the average of the gross monthly income for the time actually employed during the previous year, or
>
> c. gross monthly income imputed as set forth in paragraph 3 of this subsection.

[16] There is some question as to the accuracy of this return, which had not been filed at the time of trial. Tr. (November 22, 2022) pg. 77.

grossed only $345,575 in 2021 (whereas CSI had grossed $812,661 in 2020) and had generated only $55,343 in income. Although Flo Tech is essentially a continuation of the defunct CSI business, its income purportedly dropped dramatically compared to that of CSI.

At trial, however, Jeremy admitted also receiving income from an unincorporated business he owns separately, Mid-Con Automation, that was not readily apparent on his tax returns and of which Christina apparently had no knowledge. Mid-Con was evidently operating concurrently with CSI and/or Flo Tech and produced "fifty grand a year." Tr. (November 22, 2022) 55. Jeremy also stated that, in the first six-and-a-half months of 2023, Flo Tech had grossed $462,000, as opposed to $345,575 in the whole of 2021. He also stated that he had been paying himself a "$4,000 a month draw" from Flo Tech profits since January 2022, and paying another $4,000 to a girlfriend to keep the books. This all stands in some contrast with Jeremy's 2021 tax return showing no wages and only $55,343 in other income coming from Flo Tech. Even if Flo Tech underperformed in 2021, it grossed more in six months of 2022 than it grossed in the whole of 2021 and appeared able to support a $4,000 a month bookkeeper salary in 2022 (paid to Jeremy's girlfriend), in addition to Jeremy's $4,000 "draw." Christina further argued that Jeremy's various enterprises have stepped into the place of CSI and are likely performing at the level CSI was in 2020, when it provided the couple with a gross income of $303,776. Subtracting Christina's $48,000 salary leaves Jeremy a gross income of $255,776.

There is a gap of $1,598 between Jeremy's admitted 2022 AGI of $8,402 a month and the courts finding of $10,000 per month. Given, however, the wide range of plausible possibilities for Jeremy's earnings presented by the record, we cannot find the court's imputation of income to be clearly against the weight of the evidence.

Adjustment for Self-employment Tax

Jeremy next argues that the court erred in not subtracting self-employment tax from his AGI pursuant to 43 O.S. § 118B. The court did not do so in section A ("Base Monthly Obligation") of its child support calculation. Social Security tax and Medicare tax, commonly referred to as FICA tax, applies to both employees and employers, each paying 7.65% of wages.[17] Hence, Jeremy argues, 7.65% ($765), should have been subtracted from his imputed monthly AGI of $10,000.[18]

The immediate problem is that the record is severely lacking in details of how income from Flo Tech is currently distributed to Jeremy. In 2021, CSI issued a W-2 to Jeremy showing wages of $19,280. On his 2021 tax return, however, Jeremy showed $55,343 in total income, none of it from wages.[19] We have no equivalent records for 2022. At trial, Jeremy testified that Flo Tech was now issuing him a W-2. In briefing before the trial court, his counsel, however, argued

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[17] *See Social Security and Medicare Taxes (Federal Insurance Contributions Act – FICA)* https://www.irs.gov/taxtopics/tc756.

[18] For reference, we calculate that this would have reduced Jeremy's monthly child support obligation of $1,065.69 by approximately $58 per month.

[19] There was discussion at that trial that this return, exhibit 12B, was not actually filed, and may not be accurate. *See* n.16, *supra.*

that all Jeremy's income was business income, not wages. In short, the record is devoid of any probative evidence that would allow us to determine what deduction, if any, from gross income for self-employment tax would have been appropriate. As such, we cannot conclude the trial court erred on this issue.

Alimony

The trial court awarded Christina transitional alimony of $288,000 to be paid as $4,800 per month for 60 months. Jeremy argues that he has no ability to pay this amount. His brief states that "even if he can make $10K/month gross like the court says, that's 7K/month after taxes. If he has to pay Petitioner $6,200/month, how is he going to live, eat survive? (sic)" *Brief-in-Chief*, 24. In his statement of facts however, he somewhat confusingly uses different numbers, stating that he has to pay $5,965.69 a month. *Brief-in-Chief*, 2. Adding together $4,800 in alimony, $1,065 in child support, and cash medical support of $99, we arrive at an obligation of $5,964 and we will assume the figure stated at page 24 is a scrivener's error.

As we noted previously, child support and medical obligations terminated before briefing of this appeal was complete, leaving $4,800 per month in alimony. According to Jeremy's argument, this still leaves him with only $2,200 a month to live on; hence, he claims he still has no ability to pay the set alimony. Jeremy argues that his true net income is in the region of $5,500 a month. Christina argues that it is the region of $16,000 a month, similar to the amount that CSI was generating. Both bring *some* evidence to that effect. The court was required to consider "ability to pay" but was given little concrete information to assist in

the decision. And yet, the decision must be made, and a court can only work within the evidence the parties choose to give it. The evidence regarding ability to pay was all over the map. Accordingly, we cannot fault the trial court for the conclusion it arrived at on this question.

Additionally, we note ample evidence in the record supporting a finding that the couple lived a financially comfortable life prior to the divorce, and that that life was possible due to Jeremy's work for CSI. Post-divorce, all of this potential earning power—one-hundred percent—shifted to Flo Tech. And all the profits of Flo Tech, as further discussed below, go to Jeremy and none to Christina. Significant transitional alimony under the circumstances is completely justified.

Given the quality of the evidence here, and that the vast bulk of the earning power the couple had previously enjoyed together shifted to Jeremy alone, we find the trial court's alimony decision to be within its discretion.

Property Division

Jeremy also contests the court's property division. Christina argues that that issue is moot because Jeremy has "accepted the benefits" of the property division, and is barred by *Hamm v. Hamm*, 2015 OK 27, 350 P.3d 124, from contesting it. In *Hamm,* the wife voluntarily accepted an offered lump sum of $995,481,842 in satisfaction of court-ordered monthly payments of $7,000,000 as property division. *Id.* ¶ 1. Since *Hamm*, some practitioners have interpreted the case as holding that any party that "accepts" property distributed in a decree waives the right to appeal the property distribution.

If so, we would expect a substantial number of reported dismissals on the basis of *Hamm*. However, a survey of case law shows that, in the ensuing nine years, *Hamm* has not been cited in a published or unpublished case as the basis to moot or dismiss a divorce appeal.[20] This appears most unlikely if *Hamm* applies whenever court-distributed property is transferred prior to an appeal.

On further examination, the roots of *Hamm* lie in established common law developed outside of the context of marital property distribution. This more general application was recently confirmed by *U.S. Bank Nat'l Ass'n as trustee for Sasco Mortgage Loan Tr. 2004-GEL2 Mortgage-Backed Notes, Series 2004-GEL2 v. Hill*, 2023 OK 86, 540 P.3d 1 ("*Hill*"), which cites *Hamm*. In *Hill*, a jury awarded the plaintiff Category I punitive damages against U.S. Bank, but the court refused to instruct on Category II punitive damages. The Supreme Court found that plaintiff had accepted a proffered payment of the underlying judgment, which included the Category I punitive damages award, and the general rule that a party to an action who voluntarily accepts, from an adversary, benefits accruing under a judgment cannot question the validity of such judgment on appeal, applied. *Id.*, ¶ 15. Hence, plaintiff was barred from appealing the refusal to instruct on Category II damages.

The key to both the general rule, and its application in divorce cases such as *Hamm*, is the *voluntary offer and acceptance* of the benefits of the full

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[20] A party did move to dismiss a divorce appeal in *Bills v. Bills*, 2022 OK CIV APP 27, 514 P.3d 485, arguing that accepting a court-ordered distribution from an Edward Jones account barred an appeal of property division. The Supreme Court denied this motion without comment.

judgment. While a generic judgment creates both a legal right on behalf of the prevailing party and an obligation on the part of the losing party, the journal entry of judgment does not necessarily compel immediate satisfaction. Without rather specific language, it neither requires the prevailing party to seek enforcement nor orders the losing party to immediately proffer payment. It is when a proffer that is *not compelled* by the court's order is voluntarily made, and voluntarily accepted, that the rule of *Hamm* comes into force.[21]

It is clear that the acceptance of a voluntary offer to pay the entire judgment invokes the rule of *Hamm*. We find, however, that it is also clear that a transfer of marital assets on the order of a court is not an inherently "voluntary" act or proffer on the part of the transferor. If a decree orders a party to deliver deeds, change names on accounts, pay money, or physically transfer property, the ordered party does so under legal compulsion, backed by the threat of contempt, not as a voluntary proffer. Likewise, if a court orders a name on an account to be changed or a bank transfer be made, it is difficult to conceive how the recipient can refuse these court-ordered transfers, which are often accomplished via the decree itself.

As such, we find a fundamental difference between receiving a court-ordered transfer of marital property in a divorce case and voluntarily accepting a proffer that is not compelled by a court's order. Only the latter is a voluntary

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[21] Although the Court in *Hamm* has ordered property division in monthly payments of $7,000,000 per month, wife voluntary accepted an offered lump sum of the full judgment—$995,481,842—that the court had not ordered to be immediately paid. *Hamm v. Hamm*, 2015 OK 27, ¶ 1, 350 P.3d 124, 125.

acceptance from an adversary of the benefits accruing under a judgment. As such, we find no applicability of *Hamm* in the current case, and no mooting of the appeal under its precepts.

As to the merits, Jeremy's property argument is stated only in general terms. He argues:

> The marital estate was worth between $1M and $1.2M on the date the petition was filed. Each party should equitably receive 500K to 600K. However, the court gave Petitioner over 3/4 of the pie and Jeremy less than 1/4 of it. When you subtract the $288K alimony judgment, he gets NOTHING!

Brief-in-Chief, 26.

The claim that "the court gave Petitioner over 3/4 of the pie and Jeremy less than 1/4 of it" cannot be reconciled with the distribution made by the decree. Although the cash value of the court's distribution was not totaled in the decree, Christina's brief does contain a calculation based on the decree showing approximately $544,000 to Christina and $497,000 to Jeremy. Jeremy's reply brief does not dispute these figures, which show an actual distribution ratio of 53/47 percent.

Jeremy's reply brief clarifies that his claim of a three-to-one imbalance is not based on the figures used by the court, but on an alleged failure to surcharge Christina for her use of marital funds during the pendency of the divorce. His actual argument is that Christina testified she had spent some $100,000 to $145,000 of marital funds, which Jeremy estimated to be closer to $200,000, for living expenses and attorney fees during the divorce. He argues that $200,000

should therefore have been added to Christina's side of the property division as a surcharge.[22]

Puzzlingly, Jeremy did not make a request that this amount be assigned to Christina as part of his requested property distribution. The only mention of the matter occurs in a section of his written closing titled "Litigation Conduct," and this section does not ask the court to surcharge Christina, or otherwise declare that an amount between $100,000 and $200,000 be added to Christina's side of the ledger. The same written closing has a section entitled "Property Division," but it makes no mention of a surcharge, nor does the itemized property distribution attached to the same written closing.

Nonetheless, the court appears to have considered the issue in its decree, finding that Christina "used assets (money) generated from CSI during the marriage for living expenses during the pendency of the proceeding." It also found that Jeremy "used assets of the marital estate during the pendency of the proceeding for his Flo Tech LLC and his dba Midcon Automation." The court found the two balanced out and required no further action. Given the limited amount of solid financial information the parties made available, and the contested nature of what was available, we find the court's decision to be within its discretion.

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[22] This would lead to a distribution of $744,000 to Christina and $497,000 to Jeremy. Even this calculation leads to slightly less than a 60/40 percent split. How Jeremy arrived at the claimed 75/25 split remains mathematically unknown, although it may also involve classifying support alimony as a "property distribution." We further note that Jeremy's *requested* distribution of approximately $495,000 to Christina and $478,000 to himself (51/49 percent) is not markedly different from the court-ordered $544,000 to Christina and $497,000 to Jeremy (53/47 percent).

The Denial of Jeremy's Motion to Vacate, or to Reconsider, or for a New Trial

Jeremy states that he sought a new trial pursuant to 12 O.S. § 651 (1), (2), (3, (6), (7), (8), and (9) and 12 O.S. § 1031(1) and § 1031(2). Beyond identifying these generic grounds and stating that the court erred in not granting any relief, Jeremy's brief contains no specific recitation of how the court erred. "[A] request for relief without supporting argumentation ... alters the nature of the appellate process by imposing upon the court the burden of researching and testing unsupported legal propositions sought to be pressed for victory." *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 23, 163 P.3d 512, 525. An appellate court cannot construct wholesale legal arguments for a "party whose failure to brief or argue has produced a total intellectual vacuum for that party's asserted position." *Id.* We find no supported allegation of error is raised here.

CHRISTINA'S COUNTER APPEAL

Flo Tech as Marital Property

The court found that Flo Tech was not a marital asset, noting that the evidence presented did not conclusively determine any business was undertaken by Flo Tech, other than the formation of the LLC, until after the petition for dissolution was filed by the petitioner. Christina argues that some part of the value of Flo Tech should still have been distributed as marital property because it was formed before the divorce action was filed.

Even assuming for the moment that Flo Tech should have been considered marital property, we must inquire whether it had any value that should have been distributed as marital property. At the date of the filing of the decree, Flo

Tech's value was minimal, and there was no marital value to distribute. Christina argues, however, that it should have been valued and distributed as a marital asset at the time of the final decree, by which time it was generating significant revenue.

The evidence showed that Flo Tech was essentially a continuation of the prior CSI business. The Flo Tech/CSI relationship was unusual. The record demonstrates that, Christina's ownership of CSI notwithstanding, both CSI and Flo Tech were entirely dependent on Jeremy's skills, personal services, and reputation. Because of this, the court found that CSI was no longer a viable business after separation, and only its physical assets could be distributed. The fact that almost the entire customer base of CSI transferred its business to Flo Tech after it was formed further shows that, outside of equipment, the value of both entities lay in personal goodwill attributable to Jeremy. Pursuant to *Travis v. Travis,* 1990 OK 57, ¶ 10, 795 P.2d 96, 100, and *In re Marriage of Dorsey,* 2016 OK CIV APP 33, ¶ 13, 373 P.3d 1084, 1087, personal goodwill is not a marketable and divisible marital asset. Aside from these personal skills, reputation and goodwill, we find no significant marital value in Flo Tech. As such, any error in its distribution as martial property has no effect on the equitable balance of the property distribution sufficient to require action by this Court.

The Refusal to Require a Child Support Bond

Christina also appeals the court's refusal to require Jeremy to post a bond pursuant to 43 O.S. § 116 to ensure the payment of child support. Examining the district court docket sheet for case FD-2021-18-03, it appears in retrospect

that Christina's concern was justified. In March 2023, three months after the decree, Christina filed an application for contempt citation alleging that Jeremy was already over $2,000 in arrears on child support and had paid no support alimony at all. Jeremy's reply brief notes, however, that after a DHS enforcement action he was current on child support at the time of briefing. The child has now aged out, and we have no information on whether any back support is due. As such, we find no basis to order a bond.

CONCLUSION

As the trial court noted in its decree, "the testimony and evidence pertaining to the assets of the marital estate contained inconsistencies, lack of specificity as to values, amounts and certainty as to the income and expenses incurred or paid from the income producing activities of the parties." As we previously noted, a trial court must reach a decision based on the evidence the parties put forward, regardless of its quality or probative value. On review, for the reasons set forth above, we find no error in the court's decisions.

AFFIRMED.

HUBER, P.J., and HIXON, J., concur.

December 6, 2024