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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
MAY 1 2025
JOHN D. HADDEN
CLERK

IN THE MARRAGE OF:

KIMBERLY R. DEACON,

Petitioner/Appellee,

vs.

ROYCE JETT DEACON

Respondent/Appellant.

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Case No. 121,966

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE JENNIFER S. MONTAGNA, SPECIAL JUDGE

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Jon L. Hester
HESTER SCHEM LAW FIRM
Edmond, Oklahoma — For Petitioner/Appellee

Drew Campo
Edmond, Oklahoma — For Respondent/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Royce Jett Deacon, the father of the minor child at issue here, appeals a modification of child support by the court. Kimberly R. Deacon, the child's mother, appeals a subsequent award of attorneys' fees. On review, we find no record sufficient to allow meaningful review of the fee award but find no error in

the court's other decisions. As such, we vacate the fee award to Ms. Deacon and remand for a more detailed order. All other decisions appealed are affirmed.

I.

The involved couple were divorced in June 2018. They had one minor child. The decree ordered shared custody with Ms. Deacon as primary custodian. Over the next two years, the custody arrangement gradually deteriorated. In February 2019, the court found this to be a "high conflict case" and ordered the appointment of a parenting coordinator. The co-parenting relationship between the parties evidently did not improve and, in May 2019, Ms. Deacon moved to terminate the joint custody plan, modify physical custody, and modify child support. In October 2019, a GAL was appointed for the child. On January 10, 2020, the court terminated joint custody, named Ms. Deacon as sole custodial parent, and granted visitation to Mr. Deacon. At that time, the court determined Mr. Deacon's income to be $3,880 per month, and Ms. Deacon's income to be $3,898 per month for the year 2019. The court set Mr. Deacon's base child support at $442.13 per month and Ms. Deacon's base support at $440.97. The child support calculation assumed 144 overnights with Mr. Deacon and 221 with Ms. Deacon, adjusted the base support obligations to reflect this, and found Mr. Deacon's base obligation to Ms. Deacon to be $140.65. The court assigned $174.06 in medical insurance costs to Mr. Deacon for a total obligation of $314.71 per month.

The situation did not improve, however. There was conflict over Mr. Deacon's purported insistence that the minor child should not speak with or text

her mother during his periods of visitation, and the GAL expressed concerns over Mr. Deacon's parenting skills and his alleged involvement of the child in the legal disputes between the parties. At some point, the child expressed a desire not to visit further with Mr. Deacon. The child was placed in therapy with Dr. Swallow and the parties litigated over a substantial period as to the appropriate steps in therapy and family reunification. In June 2020, the court reduced Mr. Deacon's visitation to four hours during the day on alternating weekends.

In January 2022, Ms. Deacon filed a motion to modify child support arguing that the prior calculation was based on Mr. Deacon having a substantial number of overnights with the child, while actual visitation with Mr. Deacon had declined to nothing for over two years, primarily because the child, who was thirteen or fourteen years old, did not wish to have contact with her father. The motion also alleged that Mr. Deacon's income had either changed or had previously been improperly reported.

The modification question was finally tried in July 2023. On September 5, 2023, the court issued a letter ruling setting Mr. Deacon's income at an imputed $7,161 per month and ordered child support based on this figure. It also ordered that Ms. Deacon could claim the child as a dependent on tax returns for the remainder of the child's minority. Mr. Deacon appeals these decisions.

In October 2023, Ms. Deacon filed a fee request seeking $25,378.39 in fees and costs. On January 4, 2024, a hearing was held on this fee request, a transcript of which appears in the record. The same day, the court issued an order stating that "Petitioner's application for attorney's fees and costs is granted

in part. Petitioner is awarded a judgment of $456.25 payable by respondent within 30 days." Ms. Deacon counter-appeals this fee award as inadequate or not supported by sufficient findings. Mr. Deacon moved to dismiss the fee appeal, and that motion remains pending before this Court.

II.

Child support proceedings are matters of equitable cognizance. *State ex rel. DHS v. Baggett*, 1999 OK 68, ¶ 3, 990 P.2d 235, 238. On appeal from an order relating to child support, this Court will review the entire record, weigh the evidence, and will affirm the trial court's judgment where it is just and equitable. *Id.* Should this inquiry raise purely legal issues, a different standard of review applies. "Legal questions are reviewed *de novo* and an appellate court has plenary, independent, and non-deferential authority to reexamine a trial court's legal rulings." *Id.* ¶ 4, 990 P.2d at 238.

"The reasonableness of attorney fees depends on the facts and circumstances of each individual case and is a question for the trier of fact." *Parsons v. Volkswagen of America, Inc.*, 2014 OK 111, ¶ 9, 341 P.3d 662. "The standard of review for considering the trial court's award of an attorney fee is abuse of discretion." *Id.* "Reversal for an abuse of discretion occurs where the lower court ruling is without rational basis in the evidence or where it is based upon erroneous legal conclusions." *Id.*

III.

A.

Mr. Deacon's appeal raises, in effect, two propositions: (1) that the court erred in imputing his income to be $7,161 per month;[1] and (2) that the court erred in allowing Ms. Deacon to take the tax exemption for the child in the remaining years up to majority.[2] Mr. Deacon raised other issues in his petition in error but did not brief them. We considered those claims as waived. Sup.Ct.R. 1.11(k)(1).

1.

Mr. Deacon works as mechanic in his own shop adjacent to his home. All money received from customers, whether for parts, labor, or any other reason, was apparently deposited into a single personal checking account. At trial, this caused some difficulty in ascertaining Mr. Deacon's income for child support purposes.[3]

Mr. Deacon claimed at trial to earn an hourly rate of $50 and stated that he often worked in his shop seven days a week. However, his tax returns for 2020 showed an adjusted gross income (AGI) of $11,717. Of this, $4,536 was

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[1] Included in this are Mr. Deacon's propositions of error one and two, as labeled in his brief.

[2] This constitutes Mr. Deacon's proposition of error three, as labeled in his brief.

[3] We initially note that in cases of imputed income, the trial is required to determine income but has no independent way to do so. It is dependent on the quality of the information the parties provide. Parties that, for whatever reason, fail to provide accurate and persuasive evidence of their actual income bear a responsibility for the question of "imputed income" arising and run the risk that an imputed income may not be entirely accurate.

interest income, making his AGI from employment some $7,101 that year.[4] His 2021 return showed no income, purportedly because he was injured and unable to work. His 2022 return showed, $5,908 in interest received, and a loss of $2,373 for an AGI of $3,535.[5] His 2022 Schedule C showed $37,730 in gross revenue, but a net income of only $385 because his expenses were $37,345.[6]

Determining anything from Mr. Deacon's bank account and credit card transactions was also difficult. As much as $19,000 would be deposited in the in the account in one month, but Mr. Deacon argued that substantial incoming payments were the result of customers paying for parts or parts and labor combined, and the parts costs were often substantially greater that the labor he charged. Mr. Deacon did testify that he received a $2,000 a month payment from a couple named the Freemans because he sold them a house and the Freemans were paying him in monthly installments, although Mr. Deacon disputed that this constituted "income" for the purposes of calculating child support. Ms. Deacon provided a counter analysis arguing that an examination of seven

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[4] At $50 per hour, this equates to Mr. Deacon working approximately 140 hours for the entire year.

[5] The Schedule C shows $37,730 in gross business income, and $37,345 in expenses and deductions, for a business income of $385, but the Schedule 1 shows a "net operating loss" of $2,777 which was offset against the $385 income.

[6] Some $18,000 of this was depreciation claimed on the basis that Mr. Deacon had previously obtained over $100,000 worth of new equipment for the shop, which he put into service in 2022. AGI for tax purposes is not the same as AGI for child support purposes when taxable AGI is reduced by claiming depreciation as a business expense.

> 2. *A determination of business income for tax purposes shall not control for purposes of determining a child support obligation.* Amounts allowed by the Internal Revenue Service for accelerated depreciation or investment tax credits shall not be considered reasonable expenses.

43 O.S. § 118B (emphasis supplied).

months of Mr. Deacon's bank account and credit card statements between June 2022 and January 2023 showed an income of $87,705.78 over that period, which she extrapolated to an AGI of some $150,000 per year.

These extremes, with Mr. Deacon claiming he earned less than $11,000 *in three years* and Ms. Deacon claiming he earned over $87,000 *in seven months* illustrate the difficulty the trial court was faced with here. As to specific objections, Mr. Deacon raises two. The first is that the $2,000 a month he receives in payments from the Freemans is not income for the purposes of calculating child support. Mr. Deacon cites *In re Children of Knight v. Lincoln*, 2014 OK CIV APP 2, 317 P.3d 210, as holding that money gained from the sale of real property is not income for the purposes of calculating child support. The result of *Knight* is more nuanced than Mr. Deacon argues, however. Relying on United States Supreme Court precedent, *Knight* held that the portion of money *above the original basis* that is derived from the sale of real property constitutes income. *Id.* ¶¶ 13-14. If Mr. Deacon had sold the property outright, that "above basis" portion of the payment would constitute income for child support purposes. Hence, *Knight* gives no implicit guidance as to the situation here because Mr. Deacon purportedly sold the property but did not obtain a lump-sum payment. Instead, the Freemans appear to be making monthly payments to Mr. Deacon of $1,750 principle and $250 interest, and Mr. Deacon accounted for only the interest part of these payments as income.[7]

[7] At trial, Mr. Deacon testified that the loan balance was still over $150,000, but the yearly interest was only $3,000 (two percent) of this amount.

We cannot apply *Knight* here because no evidence as to Mr. Deacon's basis in the property was introduced at trial. If Mr. Deacon wishes to provide proper financial data on this transaction and move for a modification of child support on the grounds that some part of the monthly $1,750 principal payment he receives is from his original basis in the property, he may do so. However, we find no record sufficient to order a different income calculation based on this claim of error.

Mr. Deacon next argues that $5,875 of the income attributed to him by the court was actually money held in trust for a customer to buy parts. Assuming Mr. Deacon is correct—that $5,875 of the $87,705 that Ms. Deacon's accounting concluded was business income over a period of seven months—this would reduce Ms. Deacon's estimate of Mr. Deacon's yearly income from $150,352 per year to $144,477. The court did not impute income of $150,352 per year, however. It imputed income of $85,932. Even if $5,875 in parts *and* the $21,000 yearly principal payment from the house sale are removed from the income estimates produced by Ms. Deacon, this still leaves a potential income of $123,477. The court found that Mr. Deacon's tax returns were not a reliable indicator of his income and, using the same bank and credit card statements relied on by Ms. Deacon, found Mr. Deacon's income to be $85,932. Based on this record, the court's conclusion is not clearly against the weight of the evidence.

2.

The court ordered that Ms. Deacon could claim the child as a dependent on tax returns for the remainder of the child's minority. Mr. Deacon argues that this distribution constituted an abuse of discretion because he is providing the majority of the child's support. Mr. Deacon admits that the tax rule that the party who is paying the majority of the child's support should receive the exemption, derived from an older version of 26 U.S.C. § 152, was superseded in 1984, and the exemption goes to the custodial parent for tax purposes, unless that parent signs a waiver. He argues, however, that the purpose of this change was not to govern how exceptions are allocated, but merely to "relieve the IRS of the task of reviewing returns and determining which parent should receive the exemption." *Wilson v. Wilson*, 1991 OK CIV APP 79, ¶ 8, 831 P.2d 1, 2.

Mr. Deacon is correct that 26 U.S.C. § 152 does not mandate that the custodial parent receive the tax exemption. Nor does it mandate that the parent paying the most support receive the exemption. As *White v. Polson*, 2001 OK CIV APP 88, 27 P.3d 488, later reiterated, "state trial courts retain their equitable power to award the dependent exemption to either parent regardless of § 152(e)." *Id.* ¶ 12. Mr. Deacon argues, however, that the public purpose of "providing assistance to parents supporting minor children" renders it an abuse of discretion for tax exemptions not to be shared with or given to the party paying the most child support.[8] Although Mr. Deacon cites *Wilson* as authority, *Wilson*

[8] We note that, as discussed above, Mr. Deacon's federal tax returns for 2021 and 2022 showed him paying no federal income tax.

does not reach this conclusion, holding instead that "the trial court has the power to allocate the exemptions." *Id.* ¶ 7.

The only case we find that may support Mr. Deacon's argument, although he does not cite it, is *Decker v. Davis*, 2007 OK CIV APP 46, 162 P.3d 956. *Decker* did find that permanently awarding the exemption to one party was an abuse of discretion. It did so however, based on the following facts:

> The evidence indicates a great disparity in the parties' respective incomes, and Father, who had the substantially greater income, has been paying child support for several years in an amount far less than the Child Support Guidelines would have required. There was no evidence that the ordered increase in child support would result in financial hardship to Father, or that Father otherwise had a compelling need for the tax exemptions.

Id. ¶ 17. We find none of these factors present here, however, and no error in the award of the tax exemption.

B.

Ms. Deacon argues that the court's fee award is either invalid because of a complete lack of findings, or an abuse of discretion. Mr. Deacon filed motions to dismiss all or part of this appeal, which we shall address first.

1.

Mr. Deacon first argues that Ms. Deacon's appeal should be dismissed because, pursuant to *Hamm v. Hamm,* 2015 OK 27, 350 P.3d 124, Ms. Deacon waived her appeal by accepting a check for the amount of fees ordered. 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. Since *Hamm*, some practitioners have interpreted the case as holding

that any party that "accepts" property or financial benefits ordered by a domestic court waives the right to appeal those awards. Mr. Deacon also attempts to apply it to fees ordered in a domestic case here.

On further examination, the roots of *Hamm* lie in established common law as developed in tort and contract cases. 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, which cites *Hamm.* In *Hill,* the jury awarded the plaintiff Category I punitive damages against US Bank, but the court refused to instruct on Category II punitive damages. The Supreme Court found that plaintiff had subsequently 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 benefits accruing under a judgment from an adversary cannot question the validity of such judgment in this court on appeal, applied. *Hill,* at ¶ 15, 540 P.3d 1, 8, (citing *Hamm,* 2015 OK 27, ¶ 5). 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 domestic cases such as *Hamm,* is the *voluntary offer and acceptance of a benefit not ordered by the court.* 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 compel immediate satisfaction. It neither requires the prevailing party to seek enforcement, nor orders the losing party to proffer payment within a particular time. 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.

We find it clear that when a domestic court *orders* a payment or transfer of property, this is not an inherently "voluntary" act or proffer on the part of the payor or 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 up by the threat of contempt, not as a voluntary proffer. In this case, the fee order stated that the fee was to be paid in thirty days. such, this was not a voluntary proffer and acceptance of some benefit not ordered by the court that would trigger the rule of *Hamm.*

For these reasons, Mr. Deacon's motion to dismiss the counter-appeal is denied.

2.

Mr. Deacon next argues that a fee award on one of the issues—his motion to compel family counseling—was improper because the fee request was not timely. Mr. Deacon argues that the question of his motion to compel counseling was a separate question from the child support issues and was finally decided by the court in a July 18, 2023, order, while the fee request was not filed until after the final child support decision was rendered, on October 19, 2023. Ms. Deacon argues that the decision on the motion to compel reunification counseling was an interlocutory order made as part of a continuing proceeding, and the time to seek fees did not begin to run until the final decision on child

support.[9] Although the court's fee order does not specifically address the question, the court did state at the fee hearing of January 4, 2024, that "I don't think its untimely. I think in light of the fact the way this was set ... the application is timely." Tr. (January 4, 2024), 16.

The question is whether the court's July 18, 2023, order denying immediate reunification counseling should be regarded as a stand-alone order unrelated to the other proceedings, or a partial or interlocutory order made as part of a continuous proceeding involving several issues. The court clearly found it to be the latter and treated the two matters as one continuing contest for the purposes of trial.

The lengthy procedural history is as follows. Mr. Deacon's first motion to require the parties and the minor child to participate in family counseling, which is later sometimes referred to in the pleadings as "reunification counseling" was filed in May 2020. In July 2020, the court ordered that no family counseling would take place until Mr. Deacon completed individual counseling. In August 2021, Mr. Deacon filed an amendment to his motion seeking to require the parties and the minor child to participate in family counseling and again requested an order for reunification counseling. In November 2021, the court ordered that one Pam Wright would serve as a reunification counselor, and that

[9] As we note in the next section of this opinion, the record is currently insufficient to tell if the court *actually awarded* any fees for the "reunification" motion proceedings. The court did, however, render a decision on the timeliness of the motion, and we will review it here.

Wright and the child's counselor, Dr. Swallow, should decide when any reunification was appropriate.

In January 2022, Mr. Deacon filed another motion to compel family counseling complaining that, in the two months since the court's last order, he had not met with the child as part of any reunification process. The same month, Ms. Deacon filed her motion to modify child support and for ancillary orders relating to the minor child. At a hearing, on May 3, 2022, the court declared the issues for trial to be "a motion for status conference," a "motion to modify," and a "motion to set child support and ancillary visitation." Tr. (May 3, 2022), 4. The "status conference" was clarified on the same page as being devoted to the question of reunification, and the remainder of the May 3 hearing was devoted to that question.

Trial continued on May 25, 2022, again on the issue of reunification. At the end of trial, the court issued a ruling stating that counseling and reunification efforts were ongoing, and the court would "wait until I see this furthering evidence before we make decisions about what to do with [the minor child] ...." The court then declined to "reset the matter" because "I don't know how long this is going to take." Tr. (Ruling of May 25), 4-5.

In July 2022, the court issued a journal entry stating the motion to enforce counseling was still under consideration, and the decision was deferred. In September 2022, Mr. Deacon filed another motion for status conference raising the same reunification issues. Ms. Deacon filed a response noting that her January application to modify child support and for ancillary orders was also

still pending. Another trial was held on May 3, 2023, which was intended again to encompass both the reunification issues and the support issues, but never got further than the reunification questions. On May 5, the court issued a letter ruling denying the motion to order reunification meetings. The court then "reconvened" on July 3 to try the remaining support issues. On July 18, 2023, the court issued a formal order denying the reunification motion and, on September 28, it issued a journal entry on the support modification.

The court clearly regarded this as a single proceeding between the parties, albeit split over a series of hearings, and regarded its first order as interlocutory until the time of the final journal entry. The two issues were also interlinked and could constitute a claim and counterclaim. Ms. Deacon sought to change support based, in part, on the fact that no visitation was occurring, but the support order still assumed 144 overnights with Mr. Deacon. Mr. Deacon sought to re-establish the same visitation. Hence, the reunification and support issues were interlinked, and the reunification issue evidently had to be decided first.

In cases when "one complete claim (or more) has been fully decided, but other claims stand unresolved" in the absence of a "certification for advancement, the order is subject to revision any time before all of the claims of all of the parties have been finally adjudicated, and it is not appealable prior to adjudication of all of the remaining claims." *Oklahoma City Urban Renewal Auth. v. City of Oklahoma City,* 2005 OK 2, ¶ 10, 110 P.3d 550, 557, as corrected on denial of reh'g (Mar. 28, 2005). "[T]he trial court is permitted to determine the appropriate time when each final decision upon which one or more, but less than

all of the claims in a multiple claims action is ready for appeal." *Id.* We will defer to the trial court's direct knowledge of the proceedings and its own statement of intent. We agree that the fee application was timely.

3.

As to the merits of Ms. Deacon's counterappeal, she first argues that the fee award does not contain sufficient findings pursuant to *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659 and *Fleig v. Landmark Constr. Grp.*, 2024 OK 25, 549 P.3d 1208, to allow meaningful review. We agree.

Ms. Deacon requested $25,243.75 in attorneys' fees and $134.64 in costs. The fee order simply grants the motion in part and awards a judgment of $456.25. It contains no findings or calculations of any kind. The majority of the January 4, 2024, fee hearing was devoted to the question of whether Ms. Deacon's fee request was timely. At page seventeen of the transcript, the court states, "I don't think, after judicial balancing of the equities, Ms. Deacon is entitled to all of these fees." The court then acknowledged that Ms. Deacon had been forced to conduct a time-consuming forensic financial inquiry to estimate Mr. Deacon's income and that there had been some discovery difficulties. No further analysis of the application or calculation of the award is contained in the record or in the order.

The Supreme Court has recently held: "A trial court order awarding attorney fees must set forth with specificity the facts and computation to support the award." *Fleig v. Landmark Constr. Grp.*, 2024 OK 25, ¶ 23, 549 P.3d 1208, 1212. While the full contours of *Fleig* are yet to be determined, where (as here)

we have no explanation from the court's order or the record on appeal as to why the trial court reduced a request of attorneys' fees and costs from some $25,000 to $456.25, we find that the trial court's order is insufficient under *Fleig*.

We note that all the fees sought after here were only under 43 O.S. § 110, which permits fees to be awarded only after a judicial balancing of the equities. As this Court has noted, the Supreme Court has not required district courts to follow *Burk* in such proceedings. *See Walters v. Walters*, 2025 OK CIV APP 3, ¶ 38, 564 P.3d 914, 926 ("In equitable proceedings, 'consideration of relevant *Burk* criteria to determine reasonableness of ... attorney fees is discretionary.'" (quoting *In re Adoption of Baby Boy A*, 2010 OK 39, n.13, 236 P.3d at 126, n.13)). In such a case, a district court's decision to decide the attorney fee issue without considering the *Burk* criteria to determine the attorney fee issue "would not, without more, constitute an abuse of discretion ...." *Baby Boy A*, 2010 OK 39, n.13. Likewise, *Fleig* has not been made mandatory in proceedings governed by a judicial balancing of the equities. Nonetheless, *Burk* and *Fleig* provide meaningful guidance which should be followed by the district court in such cases in the absence of compelling counter-factors disclosed in the record.

Here, we detect no such compelling counter-factors and have no information as to how approximately $25,000 in claimed attorney time became a $456.25 fee award. Neither the hearing transcript nor the fee order itself are illuminating. As such, we vacate the fee award with instructions for the court to

reconsider the matter and make an award with sufficient findings and calculations to allow for meaningful review.[10]

CONCLUSION

Mr. Deacon chose to rely on tax returns to demonstrate his income. The court found the returns not credible. He further argued that the court may have improperly accounted for the $2,000 a month payment he was receiving from the Freemans but failed to provide the information pursuant to *In re Children of Knight*, 2014 OK CIV APP 2, 317 P.3d 210, that would have enabled a more accurate computation. In all, the court was given very little concrete information that would have allowed more precise calculation. We find no error in the court's income finding based on this record. We find no error in the award of the tax exemption to Ms. Deacon.

We express no opinion on whether the $456.25 fee award was within the court's discretion because we have no record sufficient to evaluate the award. As such, we vacate that order and remand for a new order on fees and costs consistent with this opinion. On all other issues presented on appeal, the trial court's orders are affirmed.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

WISEMAN, P.J., and FISCHER, J., concur.

May 1, 2025

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[10] Because we vacate the fee award, we have no occasion to consider Ms. Deacon's argument that "a proper balancing of the equities demonstrates that the trial court should have granted mother substantially more attorneys' fees than she was awarded." *Answer Brief*, pg. 15 (capitalization modified). The trial court is free to reconsider the evidence on remand and make the award it thinks is proper.