

# OKLAHOMA DIVORCE TEMPORARY ORDERS LAW & PRACTICE

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Objects at rest tend to remain at rest and objects in motion tend to remain in motion, until either are met by an equally compelling force.

Paraphrasing *Sir Isaac Newton, 1643-1727.*

**Navigation:** click a main title or the page header to return here; within a Section, click a subtitle to return to the top of the same section. All hyperlinks are this color.

## INTRODUCTION

Even though trial courts give assurances that divorce temporary orders are “just temporary” and will not influence the final decisions in divorce litigation, experience and reason sometime suggest to the contrary. If child custody is at issue, a temporary child custody order will vest the temporary custodian with months of time to “fix” whatever it is that is alleged to be broken, regardless of parenting facts which may be extant at the time of the temporary order hearing. More, the historicity resulting from an order of pendente lite support, alimony or child, can often be retrospectively seen to have had a power of its own when final resolution of support issues occurs. *Inertia* is not only a principle of physics, it is a practical truth in family law litigation. An interlocutory order determining child custody and/or child or spousal support sets the litigation history in motion, producing a rolling ball not influenced by the force of gravity. It can radically impact the final resolution of these issues in either the contexts of settlement or trial and can be overcome with only a greater force than that of its own inertia.

This paper attributes Newton’s principle to divorce litigation, more particularly, to the premise that temporary orders may have significant practical impact upon the final orders which will be entered in any given case. Human nature is, after all, human nature, and it easier to go with the flow than it is to change it. The temporary order sets that flow in motion.

This paper does not consider child custody or support jurisdictional issues as may be present in particular situations and is intended to be utilized in circumstances that such jurisdiction is present. Topics are organized as follows:

1. **Statutory Development**
2. **Personal Jurisdiction**
3. **The Parties’ Relationship & Litigation Status**
4. **Modifiability**
5. **Award & Duration**
6. **Other Temporary Orders**
7. **Appeals**
8. **Practice Suggestions & Conclusion**
9. **Appendix: Using Spreadsheet Software and A Model Spreadsheet**  
Open TempOrdersAppendix.pdf

## 1. STATUTORY DEVELOPMENT

**Early Statutory Law.** The principal differences between original Oklahoma law and that now in place are two: (1) Early law made no provision for a hearing on temporary orders and (2) it was based on societal notions about spousal/gender roles much different than today's. By 1909, the forerunner to 43 O.S. §110 was Comp.Laws 1909, §6177:<sup>1</sup>

**Attachment.** – After a petition has been filed in an action for divorce and alimony, or for alimony alone, the court, or a judge thereof in vacation, may make and enforce by attachment such order to restrain the disposition of the property of the parties or of either of them, and for the use, management and control thereof, or for the control of the children and support of the wife during the pendency of the action, as may be right and proper; and may also make such order relative to the expenses of the suit as will insure to the wife an efficient preparation of her case; and on granting a divorce in favor of the wife or refusing one on the application of the husband, the court may require the husband to pay such reasonable expenses of the wife in the prosecution or defense of the action as may be just and proper, considering the respective parties and the means and property of each.

Consequently, when clients (more often, wives) query, “Don’t wives always get attorney fees in divorce cases,” although never completely historically accurate, the expected affirmative answer was not always without some basis in the law. Over time, the above statute was modified to reach the form it had as of 1992 which was gender neutral and provided for a hearing:

After a petition has been filed in an action for divorce and alimony, or for alimony alone, the court, or a judge thereof in vacation, may make and enforce by attachment such order to restrain the disposition of the property of the parties or of either of them, and for the use, management, and control thereof, or for the control of the children and support of the wife or husband during pendency of the action, as may be right and proper; and may also make such order relative to the expenses of the suit as will insure an efficient preparation of the case; and, on granting a divorce in favor of the wife or the husband, or both, the court may require the husband or wife to pay such reasonable expenses of the other in the prosecution or defense of the action as may be just and proper considering the respective parties and the means and property of each; provided further, that the court may in its discretion make additional orders relative to the expenses of any such subsequent actions, including but not limited to writs of habeas corpus, brought by the parties or their attorneys, for the enforcement or modification

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<sup>1</sup> This statute's origin was Gen.St.Kan.1889, ¶4754. In Oklahoma, it is traced as follows: St.1893, §4548; St.1903, §4837; Comp.Laws 1909, §6177; Comp.St.1921, §506; St.1931, §670; 12 O.S. § 1276; 43 O.S. §110. Amendments resulting in its present form occurred in 1965 (adding provisions relating to enforcement/modification actions), 1976 (modifying provisions to neutralize fault and gender bias and adding the requirement that ex parte orders required provision for hearing), and 1991 (making attorney fees available in habeas corpus enforcement proceedings).

of any interlocutory or final orders in the divorce action made for the benefit of either party or their respective attorneys. Provided, no ex parte orders shall be issued until the opposing party is granted an opportunity to be heard, unless such ex parte order provides that instead of performing thereunder the opposing party may appear on a date certain, not more than twenty (20) days thereafter, and show good cause as to why he should not comply with said order. <sup>2</sup>

**Present Statutory Law.** A rewritten 43 O.S. §110 became effective November 1, 1992, and it has been modified only once since that time. The present statute reads:

A. After a petition has been filed in an action for divorce or separate maintenance either party may request the court to issue:

1. A temporary order:

- a. regarding child custody, support or visitation,
- b. regarding spousal maintenance,
- c. regarding payment of debt,
- d. regarding possession of property,
- e. regarding attorney fees,
- f. restraining any person from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities of life, and, if so restrained, requiring such person to notify the other party reasonably in advance of any proposed extraordinary expenditures made after the order is issued,
- g. enjoining a party from molesting or disturbing the peace of the other party or of any child,
- h. excluding a party from the family home or from the home of the other party,
- i. enjoining a party from removing a child from the jurisdiction of the court, and
- j. providing other injunctive relief proper in the circumstances.

All applications for temporary orders shall set forth the factual basis for the application and shall be verified by the party seeking relief. The application and a notice of hearing shall be served on the other party in any manner provided for in the Rules of Civil Procedure.

The court shall not issue a temporary order until at least five (5) days' notice of hearing is given to the other party.

After notice and hearing, a court may issue a temporary order granting the relief as provided by this paragraph; and/or

2. A temporary restraining order. If the court finds on the basis of a verified application and testimony of witnesses that irreparable harm will

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<sup>2</sup> The last sentence, having no prior statutory counterpart, was added in 1976. This version of the statute was substantially modified effective November 1, 1992.

result to the moving party, or a child of a party if no order is issued before the adverse party or attorney for the adverse party can be heard in opposition, the court may issue a temporary restraining order which shall become immediately effective and enforceable without requiring notice and opportunity to be heard to the other party. If a temporary restraining order is issued pursuant to this paragraph, the motion for a temporary order shall be set within ten (10) days.

B. Any temporary orders may be vacated or modified prior to or in conjunction with a final decree on a showing by either party of facts necessary for vacation or modification. Temporary orders terminate when the final judgment on all issues, except attorney fees and costs, is rendered or when the action is dismissed. The court may reserve jurisdiction to rule on an application for a contempt citation for a violation of a temporary order which is filed any time prior to the time the temporary order terminates.

C. Upon granting a decree of divorce or separate maintenance, the court may require either party to pay such reasonable expenses of the other as may be just and proper under the circumstances.

D. The court may in its discretion make additional orders relative to the expenses of any such subsequent actions, including but not limited to writs of habeas corpus, brought by the parties or their attorneys, for the enforcement or modification of any interlocutory or final orders in the divorce action made for the benefit of either party or their respective attorneys.<sup>3</sup>

Under the current statute, if a verified pleading and the “testimony of witnesses” indicate that “irreparable harm” would result to a party or child, Oklahoma courts are able to enter immediately effective *ex parte* temporary restraining orders to deal with that circumstance. Otherwise, *ex parte* temporary orders may not issue at all, but temporary orders would issue at the hearing on the moving party’s application.

Trial courts tend to extend considerable latitude to the term “restraining order”, and it is not uncommon in Oklahoma practice for a judge to enter an order which goes well beyond an order of “restraint”, e.g., the entry of an actual award of temporary custody. But, strictly speaking, the statute makes no provision for such orders in its literal text. Since the Oklahoma Supreme Court persists in its position that temporary orders are not appealable, both trial judges and lawyers appear to have considerable flexibility in such regards.<sup>4</sup>

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<sup>3</sup> The only modification since 1992 is 1997’s slight modification of this language in paragraph B: “Any temporary orders may be vacated or modified ~~before~~ prior to or in conjunction with a final decree...”. Compare the divorce temporary restraining order statute with its regular civil procedure counterpart, 12 O.S. §1384.1. Paragraph E of §1384.1 expressly provides that the civil procedure statute “shall not apply to temporary restraining orders in actions for a divorce, alimony without a divorce, separate maintenance, an annulment, custody, or similar matters...”.

<sup>4</sup> See §7, Appeals, below.

**Compliance with Court Rules.** No statute provides for a response to an application for a temporary order. However, under the authority of Rule 4, Motions, Rules of the Supreme Court for the District Courts of Oklahoma, some district judges either require or prefer that the opposing party file a response.<sup>5</sup> And, particular judicial districts may have particular local rules which require compliance. For example, an affidavit is required in Oklahoma and Canadian Counties for ex parte applications for temporary restraining orders.<sup>6</sup> As to Tulsa County's ambitious "Families In Transition" procedures, see <http://www.familiesintransition.com/>. Other counties will have their own local rules and practice, the knowledge of which is obviously important.

## 2. PERSONAL JURISDICTION

Like other personal orders, a temporary order is ineffective against a party unless *in personam* jurisdiction over the party be acquired by process being served or by a voluntary appearance in the case.<sup>7</sup> Fatally defective service upon a defendant prevents

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<sup>5</sup> A portion of 12 O.S., App., Rule 4, Rules for the District Courts of Oklahoma, provides: "d. If the motion does not comply with the requirements of b and c above, the motion shall be denied without a hearing, and if a responsive pleading is required, the moving party shall serve his responsible pleading within twenty (20) days after notice of the court's action. e. Any party opposing a motion, except those enumerated in Section c above, shall serve and file a brief or a list of authorities in opposition within fifteen (15) days of the service of the motion, or the motion shall be deemed confessed."

<sup>6</sup> Rule No. 13 - Temporary Restraining Orders  
A. When a Temporary Restraining Order is sought in a suit for injunctive relief, after the petition has been filed and the case assigned to a judge, the application for the TRO may be taken to the assigned judge to be heard or set for hearing as may be ordered.  
**B. No ex-parte restraining order will be issued against any person, firm or corporation unless counsel has attached a verified statement that either the opposition is not represented by counsel or that counsel for the opposition has been contacted and given adequate notice of the presentation of the application at a date and time certain.**  
C. No ex-parte temporary restraining order will be issued against the State or political subdivision thereof.

Other Oklahoma and Canadian County Rules may be viewed at:  
[http://www.oklahomacounty.org/departments/lawlibrary/2000rules\\_files/2000rules.htm](http://www.oklahomacounty.org/departments/lawlibrary/2000rules_files/2000rules.htm)

<sup>7</sup> A letter to the judge does not constitute an appearance. In *LeClair v. Powers*, 1981 OK 11, 632 P.2d 370, divorce litigation was filed by the wife in Lincoln County. The husband, a Ponca Indian, was served at his work in Pawnee at the Pawnee Indian Hospital. He made no response other than a letter to the judge in which he acknowledged receipt of service, said he lacked time to seek advice of counsel before the show cause hearing (2 days later), was without transportation, and that he considered the wife's \$500 per month request for temporary support to be exorbitant. Temporary order hearing was conducted in his absence. Contempt proceedings followed, defendant did not appear and a bench warrant issued. Divorce trial occurred later in absence of defendant, after which defendant was arrested. He moved to dismiss, maintaining service upon him was invalid since it was in "Indian Country". A significant portion of the opinion discusses the "Indian" issues, resulting in the court's affirmance of procedure involved. Of more importance to this discussion is the court's determination, in footnote 2, page 272, that the letter written by the husband failed to constitute a general appearance by him.

enforcement of the temporary order.<sup>8</sup> Generally, constructive (publication) service upon a nonresident defendant, by itself, will not support the entry of personal orders against the nonresident<sup>9</sup> and actual service outside Oklahoma must be supported by traditional tests concerning the Oklahoma's exercise of jurisdiction in a due process context.<sup>10</sup>

However, 43 O.S. §104 authorizes a court to exercise personal jurisdiction over a person, whether or not a resident, who lived here in a marital or parental relationship as to all obligations for alimony and child support, where the plaintiff continues to reside here, and, if the defendant has left the state, he may be served outside the state by any method authorized by state law, and 43 O.S. §105 specifically authorizes publication service.

Oklahoma's publication notice case law is addressed to nonresident defendant situations and have not dealt with whether publication notice may serve as the basis for the entry of personal orders against the party so served. Even so, substantial authority exists elsewhere to support the entry of personal orders under those circumstances.<sup>11</sup> Moreover, even though the defendant be a nonresident, where his property is located within Oklahoma which can serve as the basis for satisfying an alimony judgment, Oklahoma has consistently held that the plaintiff may make any person having possession of the property a party to the divorce action, to serve as trustees for the satisfaction of possible alimony awards to be granted in the action, and enforce such judgment against that property.<sup>12</sup>

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<sup>8</sup> In *Redcorn v. District Court of Eighth Judicial Dist.*, 1930 OK 79, 284 P. 1113, 141 Okla. 237, process served on defendant was fatally defective, and the process included an ex parte temporary alimony, fee and property restraint order. Defendant's challenging motions falling in the trial court, he sought prohibition, which was granted because personal jurisdiction had not been obtained over him.

<sup>9</sup> Concerning a non-resident defendant, unless he or she enter a voluntary appearance, the general rule is that publication notice will not support the entry of a personal judgment against the non-resident. *Continental Gin Co. v. Arnold.*, 1916 OK 214, 167 P. 613, 66 Okla. 132; *Southard v. Oil Equipment Corporation*, 1956 OK 74, 296 P.2d 780; *Pettis v. Johnston*, 1920 OK 224, 190 P. 681, 78 Okla. 277.

<sup>10</sup> If a defendant lacks sufficient contacts with Oklahoma sufficient to permit the exercise of *in personam* jurisdiction, the court may not enter effective monetary orders against the non-resident even if personally served outside the state. *Taylor v. Taylor*, 1985 OK CIV APP 26, 709 P.2d 707; *Dunn v. Dunn*, 1976 OK CIV APP 7, 550 P.2d 1369; *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978). Cf. *Yery v. Yery*, 1981 OK 46, 629 P.2d 357.

<sup>11</sup> *Milliken v. Meyer*, 311 U.S. 457, 85 L.Ed. 278, 61 S.Ct. 339, 132 A.L.R. 1357 (1940), reh.den. 312 U.S. 712, 85 L.Ed. 1143, 61 S.Ct. 548, distinguishing *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877). According to 24 Am.Jur.2d, Divorce and Separation, §551, most courts have supported the view that a personal judgment may be rendered against a resident defendant based upon publication notice.

<sup>12</sup> *Hamil v. Hamil*, 1924 OK 982, 232 P. 823, 106 Okla. 14. However, the case notes the importance of describing the property properly in the publication notice against the defendant. See, also, *Haddad et al. v. Haddad.*, 1931 OK 647, 4 P.2d 110, 152 Okla. 264; *Commons v. Bragg*, 1938 OK 355, 80 P.2d 287, 183 Okla. 122; and *Daniel v. Daniel*, 1959 OK 234, 348 P.2d 185. See 10 A.L.R.3d 212, *Jurisdiction on constructive or substituted service, in divorce or alimony action, to reach property within state.*

### 3. THE PARTIES' RELATIONSHIP & LITIGATION STATUS

**Legality of Marriage at Issue.** Recalling that all versions of Oklahoma's temporary order statutes have begun, "After a petition has been filed in an action for divorce and alimony, or for alimony alone," or words to that effect, it is ordinarily <sup>13</sup> required that a marital relationship exist from which legal duties flow. <sup>14</sup> If temporary orders be predicated upon a marriage considered at law to be "void *ab initio*" and that marriage be challenged by the defendant, the issue must first be resolved. <sup>15</sup> But, if a marriage be merely "voidable," temporary orders are proper. <sup>16</sup>

**Fact of Marriage at Issue.** To the extent that a marital relation is a necessary fact for relief sought in a temporary order, <sup>17</sup> if the factual basis for the existence of defendant's legal duty be challenged, the issue must first be resolved. A party who alleges the existence of familial status has the burden to prove it if the responding party disputes that status. <sup>18</sup> More particularly to this discussion, a person who asserts the existence of a "common law" marriage has the burden to prove its existence, if challenged, before effective temporary

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<sup>13</sup> But, not always. In *West v. West*, 1926 OK 204, 246 P. 599, 114 Okla. 279, the wife obtained a publication divorce elsewhere but maintained an action for alimony in Oklahoma, where the ex-husband lived. Under those circumstances, marital status was not indispensable to her action.

<sup>14</sup> *Allgood v. Allgood*, 1981 OK 21, 626 P.2d 1323, presumed, by dicta, that a paramour relationship would not establish a basis for spousal related obligations.

<sup>15</sup> In *Baker v. Carter*, 1937 OK 286, 68 P.2d 85, 180 Okla. 71, the alleged husband filed a motion to dissolve the *ex parte* support, fee and restraint order, alleging the marriage to be "void" as a prohibited marriage under [former?] 43 O.S. §12 between persons of African descent and full-blood Indians. The trial court struck his motion since he was not in compliance with the temporary order. Prohibition was granted to prevent enforcement until hearing occurred to determine the marital status issue, since temporary orders were not appealable. Concerning bigamous marriages, Oklahoma courts have held that although the support (unless child) and fee provisions applicable to divorce are not applicable, the parties' acquisition of property and debt may be divided upon quasi-partnership equitable principles. *Whitney v. Whitney*, 1942 OK 268, 134 P.2d 357, 192 Okla. 174; and *Duvall v. Duvall*, 1975 OK CIV APP 65, 543 P.2d 766. Had the mother in *Duvall* amended her claim to include conform with paternity pleading requirements, the child related issues would also have been determinable in the action. See also *Kirk v. Kirk*, 1951 OK 361, 238 P.2d 808, 205 Okla. 482.

<sup>16</sup> *Baker v. Carter*, *supra*, took care to distinguish between "void" and "voidable" marriages, in which temporary orders are available. *Whitebird v. Luckey*, 1937 OK 242, 67 P.2d 775, 180 Okla. 1, an annulment action, allowed temporary support and fees, but no final award of alimony where the parties had married within six months of one party's divorce. Similarly, see *Hunt v. Hunt*, 1909 OK 72, 100 P. 541, 23 Okla. 490, *Greenwood v. Greenwood*, 1963 OK 280, 387 P.2d 615, and *Hess v. Hess*, 1947 OK 16, 176 P.2d 804, 198 Okla. 130. The same rules apply to annulment of an "under age" marriage. *Stone v. Stone*, 1944 OK 28, 145 P.2d 212, 193 Okla. 458.

<sup>17</sup> A paramour relationship does not establish a basis for spousal related obligations. *Allgood v. Allgood*, 1981 OK 21, 626 P.2d 1323.

<sup>18</sup> *Reed v. Reed*, 1969 OK 95, 456 P.2d 529.

orders may be entered.<sup>19</sup>

**No Res Judicata Effect.** Generally, it is established that temporary orders, being interlocutory, do not have *res judicata* effect at a trial on the merits. Thus, in *Brown v. Brown*, the court's initial temporary order had no *res judicata* when, upon a later challenge to the existence of the common law marriage, the marriage was found not to exist.<sup>20</sup> Even after a failed challenge to marital status in a temporary order context, the marital status issue remains a live issue which may again be presented at the merits trial.<sup>21</sup>

**Different Litigation Pending.** In the odd circumstance where a separate maintenance action was first pending in one county and a divorce action was later filed in another, the temporary separate maintenance order entered in the first court was not abrogated by the latter litigation.<sup>22</sup>

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<sup>19</sup> *Utle v. Rowe*, 1943 OK 224, 138 P.2d 71, 192 Okla. 546. The alleged husband moved to vacate the wife's *ex parte* temporary order, denying wife's allegation of a common law marriage. While his motion was pending, an additional support and fee order was entered, although the differences between the two *ex parte* orders were not made clear in the decision. Prohibition was granted to prevent enforcement of these orders until the marital status issue was resolved. See *Maxfield v. Maxfield*, 1953 OK 390, 258 P.2d 915, generally.

<sup>20</sup> *Brown v. Brown*, 1931 OK 402, 1 P.2d 167, 150 Okla. 217: On the day the wife filed her divorce action, the court entered its *ex parte* temporary order granting alimony, suit money and attorney fees. Husband's motion to modify the same denied a marriage to Wife. Upon hearing of Husband's motion, the court found the parties were not married and the monetary orders were vacated. Wife's motion for new trial failed and appeal was taken. In the appeal, neither the validity nor appropriateness of the 1st temporary order was at issue and it was regarded as valid. Consequently, in that context, the case may stand for authority that a valid initial temporary order ordering support may later be disputed, with the 1st order having no *res judicata* effect. " \* \* \* The application of alimony cannot be considered a separate suit, but is a proceeding for separate judgment which when granted has nothing to do with the final judgment in the case and will not be affected by it."

<sup>21</sup> *Elliott v. Elliott*, 1954 OK 356, 279 P.2d 328. In a separate maintenance action, two temporary orders were issued. In the 1st, the husband was ordered to pay spousal support and fees, to which the husband filed his motion to vacate. The opinion does not make clear what if anything occurred on that motion or the 1st order. Nearly two years later, the wife obtained another upon her application that in the interim a child was born. Upon hearing (husband was present but did not testify), the court directed him to pay temporary attorney fees and alimony. Apparently, the court determined the existence of marriage and ordered support. Husband appealed. Wife's dismissal motion succeeded. "The motion to dismiss must be sustained. This court has held that it is the duty of the trial court to hear and determine the issue as to the marriage relationship where such relationship is denied. \* \* \*. We have also held, however, that such determination is not a final determination, but is interlocutory only, and is not *res judicata* as to the question of the existence of the marriage relationship in the trial of the case on the merits. *Powell v. Powell*, 191 Okl. 581, 131 P.2d 1019 [*Powell v. Powell*, 1942 OK 417, 131 P.2d 1019, 191 Okla. 581]. \* \* \*. We are of the opinion and hold that the order made by the trial court after having determined the issue of the marriage relationship is interlocutory and the appeal does not lie to this court from such order prior to the final order and judgment of the trial court." *Renbarger v. Renbarger*, 1994 OK 140, 889 P.2d 1250, resolved any doubt in this regard.

<sup>22</sup> *Autry v. District Court of Muskogee County*, 1969 OK 159, 459 P.2d 865. Wife filed a separate maintenance action in Oklahoma County and obtained temporary support orders (whether the same were issued *ex parte* is not clear). A week later, the husband filed a divorce action in Muskogee County and that court entered an order enjoining the wife from proceeding further with the Oklahoma County litigation. The

#### 4. MODIFIABILITY

Not being “final” but rather being “interlocutory” orders, Oklahoma cases have consistently held that temporary orders are not considered *res judicata* and are both prospectively and retrospectively modifiable.<sup>23</sup> However, according to statute, the rule is not applicable to temporary child support orders.<sup>24</sup> See *Ward v. Ward* so holding but for other reasons.<sup>25</sup> However, if an order is entered which is not specific as to what is support for children and support for the spouse, such as an order which reads, “Support for the wife and minor children of this marriage is set at \$1,000 per month”, modifiability of the general support order may be seen differently.<sup>26</sup> Even if a court grants a temporary spousal support award, it has the authority to modify, even extinguish, that order retroactively. As stated in *Gray v. Gray*:<sup>27</sup>

¶20 At the outset of litigation in this case, the trial court entered an order awarding temporary support to the plaintiff. After considering the extensive evidence produced at trial, including evidence of plaintiff's lengthy career and annual earnings, the court determined that plaintiff had been monetarily able to support herself during the pendency of trial. The court held that plaintiff should not have been awarded temporary support and, consistent with §110, retroactively modified the temporary order accordingly. We find no abuse of discretion. See *Brown v. Brown*, 150 Okla. 217, 1 P.2d 167, 168 (1931).

The same effect, see *Dorn v. Heritage Trust Co.*<sup>28</sup>

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wife's prohibition action was partially, but not wholly, successful. Considering the actions to be dissimilar, the wife's separate maintenance action was allowed to proceed, at least insofar as accruals of support were concerned and until “new and superseding orders covering the same subject matter, prospective only in effect, are entered by the court which now has jurisdiction of the entire controversy. Her right to the past due payments is now vested in the same sense that the right to arrearages in child support payments is vested right.” Note, however, that the “vesting” language may be in conflict with *Johnson v. Johnson*, 1983 OK 117, 674 P.2d 539, holding that temporary orders, being interlocutory, may be retroactively modified or extinguished. See *Modifiability*, following.

<sup>23</sup> See §3, above.

<sup>24</sup> 43 O.S. §118.E.b.(1) provides, “A child support order shall not be modified retroactively regardless of whether support was ordered in a temporary order, a decree of divorce, an order establishing paternity, modification of an order of support, or other action to establish or to enforce support.” Also, see, 43 O.S. §137 which provides that accrued and unpaid child support becomes a judgment “by operation of law”.

<sup>25</sup> *Ward v. Ward*, 1995 OK CIV APP 51, 895 P.2d 749.

<sup>26</sup> As to income tax treatment of such blended support orders, see Note 45, *infra*.

<sup>27</sup> *Gray v. Gray*, 1996 OK 84, 922 P.2d 615.

<sup>28</sup> *Dorn v. Heritage Trust Co.*, 2001 OK CIV APP 64, ¶s 26-30, 24 P.3d 886.

Justice Opala's comments in *Johnson v. Johnson*,<sup>29</sup> ¶s 7 and 8, provide the most comprehensive statement we have concerning the modifiability issue [emphasized portions in the following are in the original]:

¶7 The wife contends the trial court erred in refusing to commute to judgment the arrearage due her under a pendente lite support order issued in the case. Since the divorce decree did not allow her any relief for these delinquent temporary support installments, the wife attempted, by a post-decree motion, to have the arrearage reduced to judgment.

¶8 Obligations created by interlocutory orders pendente lite do not survive, but are merged in, the final judgment.<sup>7</sup> Unlike accrued unpaid installments under a decree or some final order, an arrearage due under the terms of an interlocutory order may be modified or extinguished retroactively.<sup>8</sup> Because the decree conclusively forecloses relitigation of liability under *any* pendente lite order, there can be no error in the trial judge's refusal to entertain a post-decree motion to commute unpaid temporary installments. In short, the divorce decree operated effectively to extinguish all pre-existing rights of the parties arising out of their former marital status.<sup>9</sup> In the absence of a valid contract preventing this legal consequence from attaching, rights between former spouses are governed exclusively by the terms of the divorce decree. All of the wife's matrimonial claims merged in the decree which thereafter operated as a bar to judicial re-examination of pendente lite obligations."

[Opinion Footnotes:]

<sup>7</sup> The trial judge retains full control over all temporary orders and the manner of their enforcement. None is accorded res judicata effect. *Interlocutory orders made in the course of an action or proceeding are not binding on the trial court when fashioning the final adjudication of the controversy.* *Reynolds v. Reynolds*, 192 Okl. 564, 137 P.2d 914, 916 [1943]; *Lee v. Epperson*, 168 Okl. 220, 32 P.2d 309, 312 [1934]; *Ft. Dearborn Trust & Savings Bank v. Skelly Oil Co.*, 146 Okl. 179, 293 P. 557, 562 [1930]; *Wells v. Shriver*, 81 Okl. 108, 197 P. 460, 472 [1921]; *Kuchler v. Weaver*, 23 Okl. 420, 100 P. 915, 918 [1909].

<sup>8</sup> *Reynolds v. Reynolds*, supra note 7; *Wells v. Shriver*, supra note 7; *Powell v. Powell*, 191 Okl. 581, 131 P.2d 1019, 1021 [1942].

<sup>9</sup> 12 O.S.1981 § 1279; *Shipp v. Shipp*, Okl. 383 P.2d 30, 33 [1963]; *Deweese v. Fisher*, Okl. 658 P.2d 1153, 1154 [1983].

## 5. AWARD & DURATION

**Entry and Survivability.** Generally, after temporary orders are issued,<sup>30</sup> as noted in

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<sup>29</sup> *Johnson v. Johnson*, 1983 OK 117, 674 P.2d 539.

<sup>30</sup> In *Frankovich v. Frankovich*, 1969 OK 151, 459 P.2d 583, wife's petition requested various temporary support orders but there was nothing in the record indicating she had ever presented her request for hearing. Her appeal on the issue that the trial court erred in not awarding temporary support relief failed because her request was never presented to the trial court for hearing.

*Johnson*,<sup>31</sup> temporary orders do not ordinarily survive the final judgment but are merged into it. Temporary orders which have not been complied with may apparently be reduced to judgment before<sup>32</sup> or as part of the final judgment in the case.<sup>33</sup> But, temporary orders may not be entered retroactively.<sup>34</sup> It is apparently possible that extended temporary orders be entered concerning temporary custody or visitation.<sup>35</sup> Generally, temporary orders are extinguished by an action's proper dismissal and orders thereafter entered are invalid and unenforceable.<sup>36</sup>

**Custody & Visitation.** Assuming a proper jurisdictional basis,<sup>37</sup> a court is obligated upon the filing of a divorce or separate maintenance action to enter appropriate interparental<sup>38</sup> orders concerning the temporary custody and visitation of the parties' minor children,<sup>39</sup>

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<sup>31</sup> Note 29, *supra*.

<sup>32</sup> *Garrett v. Garrett*, 1981 OK CIV APP 4, 625 P.2d 1286, tacitly approved the reduction of a temporary order arrearage to judgment, but holding that doing so eliminated the availability of contempt to enforce the order (the latter viewpoint having been dispatched in *Sommer v. Sommer*, 1997 OK 123, 947 P.2d 512, followed in *Grimes v. Grimes*, 1997 OK CIV APP 80, 0 0, 951 P.2d 123). And, note that temporary child support orders are treated differently. See Note, 24, *infra*.

<sup>33</sup> 43 O.S. §110.B. provides: "B. Any temporary orders may be vacated or modified prior to or in conjunction with a final decree on a showing by either party of facts necessary for vacation or modification. Temporary orders terminate when the final judgment on all issues, except attorney fees and costs, is rendered or when the action is dismissed. The court may reserve jurisdiction to rule on an application for a contempt citation for a violation of a temporary order which is filed any time prior to the time the temporary order terminates."

<sup>34</sup> *Bowman v. Bowman*, 1981 OK CIV APP 71, 639 P.2d 1257. At trial, the trial court awarded \$5,000 as "permanent alimony as support which said support has accrued," as retroactive support *pendente lite*. It had not been requested and the award was reversed.

<sup>35</sup> *Freeman v. Freeman*, 1941 OK 361, 120 P.2d 627, 190 Okla. 74. The mother was awarded temporary custody for one year and was directed to return to court with child at end of year. The father moved to modify the order, alleging her intention to violate order. His motion was denied upon the mother's showing she intended to comply. And, see *Carter v. Carter*, 1982 OK 123, 653 P.2d 207, concerning the effect of agreed post-decree temporary custody orders where the mother was temporarily unable to properly care for the child.

<sup>36</sup> *Sherry v. Rowe*, 1937 OK 616, 73 P.2d 134, 181 Okla. 119, and *French v. French*, 1940 OK 423, 110 P.2d 286, 188 Okla. 430. But, see *Attorney Fees*, *infra*.

<sup>37</sup> This discussion assumes and does not further discuss that a court has and validly exercises child custody and visitation jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (43 O.S. §551-101, et seq.) and the Parental Kidnapping Prevention Act (28 U.S.C. §1738A).

<sup>38</sup> Third party custody and/or visitation is beyond the scope of this paper.

<sup>39</sup> A trial court is expressly required to "make provision for guardianship, custody, medical care, support and education" of the parties' minor children under 43 O.S. § 112.A.1. Visitation orders must be entered "unless not in the best interests of" the children under 43 O.S. §112.A.2. §112 provisions are expressly applicable to all orders entered "before or after final judgment" under §112.A.3. Additional statutes

which orders may be modified before or after final judgment.<sup>40</sup>

**Shared Parenting Policy.** In a 1999 statute, the Legislature expressed the state's policy concerning temporary order visitation, using the term "shared parenting". As modified in 2001, the present statute reads:

**§110.1. Policy for equal access to the minor children by parents**

It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage. **To effectuate this policy, if requested by a parent, the court shall provide substantially equal access to the minor children to both parents at a temporary order hearing, unless the court finds that such shared parenting would be detrimental to such child.** The burden of proof that such shared parenting would be detrimental to such child shall be upon the parent requesting sole custody and the reason for such determination shall be documented in the court record.

[Emphasis supplied]

Even before current visitation statutes, appellate decisions looked closely at orders which restricted or denied visitation.<sup>41</sup> Thus, even though trial court discretion is broad, it is not without limitations.<sup>42</sup> No statutory or case authority exists to utilize different considerations

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are likewise applicable: 43 O.S. §1101.1 (shared parenting policy, following); 43 O.S. § 111.1 (minimum visitation) applies to "any order" providing visitation; §113 (preference of child); and §112.2 (evidence and effect of ongoing domestic abuse). See 43 O.S. §109 concerning divorce joint custody and 43 O.S. § 109.1 and 10 O.S. §21 concerning custody and visitation during parental separation without divorce.

<sup>40</sup> *State ex rel. Cox v. Lohah*, 1967 OK 165, 434 P.2d 928, and *Tisdell v. Tisdell*, 1961 OK 102, 363 P.2d 277.

<sup>41</sup> In *Clark v. Clark*, 1936 OK 478, 61 P.2d 28, 177 Okla. 542, one parent had custody for nine months and the other for three, with intervening visitation only if the parties agreed. The order was modified on appeal to provide for visitation. *Taylor v. Taylor*, 1963 OK 263, 387 P.2d 648, reversed and modified a visitation order preventing remarried mother's visitation in her home as "unnecessarily severe." See also *Bussey v. Bussey*, 1931 OK 32, 296 P. 401, 148 Okla. 10. But, in *Gamble v. Gamble*, 1970 OK 150, 477 P.2d 383, the trial court's denial of unsupervised visitation was affirmed where the husband admitted he had changed babysitters so the wife would not know where the child was, had the child baptized without informing the wife, told the child that his mother was possessed of the devil who made her do what she did, he and the children prayed for the mother's improvement and he loved one of the children "a little more than ordinary." *Kuykendall v. Kuykendall*, 1955 OK 294, 290 P.2d 128, affirmed a less than normal visitation schedule where a child's medical conditions provided a rational basis for the decision.

<sup>42</sup> *Gorham v. Gorham*, 1984 OK 90, 692 P.2d 1375, disapproved of decisions based upon "individualized conceptions of morality" and required a showing of a nexus between the behavior and the child's welfare. But, compare *M.J.P. v. J.G.P.*, 1982 OK 13, 640 P.2d 966, concerning a lesbian lifestyle, and *Brim v. Brim*, 1975 OK CIV APP 4, 532 P.2d 1403. Generally, see *Wells v. Wells*, 1982 OK 83, 648 P.2d 1223. Post-decree custody modification temporary orders are probably by the same standards determined applicable in custody modification actions, generally, by *Gibbons v. Gibbons*, 1968 OK 77, 442 P.2d 482.

in temporary as distinguished from final order contexts. However, some authority exists to indicate that pre-decree temporary orders may be modified on a lesser showing than would be required to modify final orders.<sup>43</sup>

**Monetary Support.** 43 O.S. §118.E.1. explicitly states that “All child support shall be computed as a percentage of the combined gross income of both parents. The Child Support Guideline Schedule as provided in Section 119 of this title shall be used for such computation.” There being no apparent debate as to the meaning of what “all is”, the Guidelines are applicable to temporary child support orders. If 43 O.S. §110.1, above, is followed and “shared parenting” is entered as described by the statute, that would arguably force a “shared parenting time” child support computation under 43 O.S. §118.E.10. since both parents would have the children for more than 120 nights a year. No published appellate cases have addressed the points.<sup>44</sup> As to temporary spousal support, see *Gray v. Gray* and *Dorn v. Heritage Trust Co.* for possible guidance.<sup>45</sup>

**Blended Monetary Support Orders.** A temporary order format which blends temporary child support and spousal support with language such as, “Support for the wife and children is set at \$1,000.00 per month”, may result in the full amount being assessed as temporary spousal support under Section 71 of the Internal Revenue Code in the event separate returns are filed.<sup>46</sup>

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<sup>43</sup> From a practical point of view, once a court has entered a temporary order at a point in time, it will probably not want to rehear and redetermine the same evidence again in a later modification procedure. But, since temporary orders are interlocutory and do not have *res judicata* effect (or, per *Boatsman v. Boatsman*, 1984 OK 74, 697 P.2d 516, something akin to it), there is no legal reason that it could not do so. §112.A.3. provides that the court “may modify or change any order whenever circumstances render such change proper.” *Garner v. Garner*, 1930 OK 252, 288 P. 298, 143 Okla. 183, indicated that visitation order modifications were not subject to the change of condition rule.

<sup>44</sup> 43 O.S. §118.E.10.a.: “In cases where shared parenting time has been ordered by a district court or agreed to by the parents, the base monthly obligation shall be adjusted. ‘Shared parenting time’ means that each parent has physical custody of the child or children overnight for more than one hundred twenty (120) nights each year.”

<sup>45</sup> Notes 27 and 28, *infra*.

<sup>46</sup> I have been unable to determine whether an IRS Regulation, 1.17-(e), any longer exists. As reported at 16091 CCH Standard Federal Tax Reports, p. 18,607 (1992), the regulation provided:

“(e) \*\*\* If, however, the periodic payments are received by the wife for the support and maintenance of herself and of the minor children of the husband without such specific designation of the portion for the support of the children, then the whole of such amounts is includible in the income of the wife as provided in section 71(a).

Except in cases of a designated amount or portion for the support of the husband’s minor children, periodic payments described in section 71(a) received by the wife for herself and any other person or persons are includible in whole in the wife’s income, whether or not the amount or portion for such other person or persons is designated.”

At ¶16094.15, CCH Standard Federal Tax Reports, p. 18,450 (2000), a case note reads: “A portion of monthly payments made by a tax attorney to his ex-wife pursuant to a temporary support order that made no allocation between spousal and child support was improperly characterized by the Tax Court as child support because the order fixed no amount of the payments as child support. However, the payments met all the statutory

**Attorney Fees & Expenses.** If requesting temporary attorney fees against the other party, an attorney is obligated to disclose the amount of payments already made by the client.<sup>47</sup> Failure to award fees and litigation expenses to a party who needs them may constitute error<sup>48</sup> even though such an order doing so is not immediately appealable.<sup>49</sup> Payment of temporary attorney fees may be ordered to be paid to the client or directly to the named attorney,<sup>50</sup> although there is Court of Appeals authority to the contrary.<sup>51</sup> Before dismissal, attorneys have standing to request a temporary attorney fee against the other party, even though withdrawing as counsel.<sup>52</sup> But, if no prior motion is pending or order be entered before proper dismissal, jurisdiction is lacking to entertain a fee request unless the

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requirements for alimony because the attorney was legally obligated to pay spousal support and, under state (California) law, his legal obligation to make payments would terminate on the death of his ex-wife. *J.H. Heller*, CA-9 (unpublished opinion), 97-1 USTC ¶150,193.”

<sup>47</sup> Oklahoma Ethics Opinion No. 275 (1973), 523-526 P.2d, Okl.Dec., Adv.Op., p. 63.

<sup>48</sup> *Childers v. Childers*, 1950 OK 31, 214 P.2d 722, 202 Okla. 409. Failure to award temporary fees and suit money in a post-decree custody modification action was error where the ex-wife was without sufficient resources to defend. See *Watson v. Watson*, 1949 OK 276, 212 P.2d 667, 202 Okla. 261.

The former version of 43 O.S. §110 provided that a court could “make such order relative to the expenses of the suit as will insure an efficient preparation of the case”. Similar text is not present in the 1992 amendment. Supreme Court guidance, similar to that provided by *Nichols v. Nichols*, 519 So.2d 620 (Fla. 1988) and *Marriage of Hatch*, 215 Cal.Rptr. 789 (Cal.App. 1985), would be helpful to bench and bar.

<sup>49</sup> *Kantor v. Kantor*, 1994 OK 132, 886 P.2d 480. See §7, Appeals, below.

<sup>50</sup> *Swick v. Swick*, 1993 OK 151, 864 P.2d 819, eliminated any doubt. Earlier, in *Owens v. Owens*, 1953 OK 310, 264 P.2d 341, the trial court ordered, “It is therefore ordered...that plaintiff., pay to said attorneys on or before March 1, 1945, the said sum of \$2,000.00...” The court’s syllabus states, “In a divorce action...and there is an allowance for attorney’s fee sought by the wife, and the husband is ordered to pay a stated sum for such expense, that is for the wife’s attorney fee, that order is not void whether it directs such payment to the wife, or to the clerk, for the use and benefit of the attorneys of record for the wife, or to the attorneys of record themselves.” The husband argued that the award to be paid directly to attorney was void. The court held it not to be void and reviewed several cases, expressly approving the order to pay the attorney directly. See also *Burr v. Burr*, 249 P.2d 722, 207 Okl. 357 (1952).

<sup>51</sup> *Bowman v. Bowman*, 1981 OK CIV APP 71, 639 P.2d 1257, expressly determined that fee orders direct to attorneys were erroneous, relying only upon *Gardner v. Gardner*, 1981 OK CIV APP 9, 629 P.2d 1283, for prior authority. However, *Gardner* dealt with expert witness fees, not attorney fees. Prior Supreme Court decisions (e.g., *Owens*, supra) were not mentioned.

<sup>52</sup> *Statser v. Statser*, 1951 OK 351, 239 P.2d 764, 205 Okla. 608. Wife’s attorney moved to withdraw and be awarded fees under the temporary order statute, where it appeared the parties had reconciled but before case dismissal. *Kelly v. Maupin*, 1936 OK 344, 58 P.2d 116, 177 Okla. 44, in which the case was dismissed after a fee order had been entered (and, so, enforceable) was followed and cases denying fees after dismissal and no prior order were distinguished. In *Burba v. Burba*, 1969 OK 168, 460 P.2d 893, in a post-decree agreed settlement context, where the settlement contemplated that the husband would pay the wife’s attorney fees, the issue was properly presented.

dismissal be vacated.<sup>53</sup> A fee motion may be filed after the attorney's client has died after the divorce is granted, but, presumably, this rule would not apply to temporary orders.<sup>54</sup>

## 6. OTHER TEMPORARY ORDERS

Increasingly, trial courts are appointing guardian ad litem for children under the authority of 43 O.S. §107.3.<sup>55</sup> Or, perhaps a 22 O.S. §§60 et seq. protective order proceeding might be consolidated with a divorce action to better monitor and coordinate the parties' conduct and the various orders which might exist. If custody is involved, the parties can be ordered to individual counseling, if the court finds the parties can afford it<sup>56</sup> or appropriate educational programs.<sup>57</sup> A parenting coordinator can be appointed under this year's new Parenting Coordinator Act.<sup>58</sup> Sometimes, creative attempts to engraft other civil remedies into divorce temporary orders might fail;<sup>59</sup> sometimes, they might not.<sup>60</sup> Perhaps other types of orders can be fashioned under the general authority of 43 O.S. §107.1.C:

C. After a petition has been filed in an action for divorce where there are minor children involved, the court may make any such order concerning property, children, support and expenses of the suit as provided for in Section 110 of this title, to be enforced during the pendency of the action, as may be right and proper.

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<sup>53</sup> *Sherry v. Rowe*, 1937 OK 616, 73 P.2d 134, 181 Okla. 119, and *French v. French*, 1940 OK 423, 110 P.2d 286, 188 Okla. 430.

<sup>54</sup> *Swick v. Swick*, 1993 OK 151, 864 P.2d 819.

<sup>55</sup> "A. In any proceeding for the disposition of children where custody of minor children is contested by any party, the court may appoint an attorney at law as guardian ad litem on the court's motion or upon application of any party to appear for and represent the minor children. Expenses, costs, and attorney's fees for the guardian ad litem may be allocated among the parties as determined by the court."

<sup>56</sup> 43 O.S. §107.3.B.2.

<sup>57</sup> 43 O.S. §107.2.

<sup>58</sup> 43 O.S. §120.1 - §120.6.

<sup>59</sup> *Trevino v. Cannon*, 1975 OK 174, 544 P.2d 513. In the wife's divorce action, an *ex parte* temporary order was obtained which directed the husband's employer to withhold the payment of all wages and earnings of the husband until the further order of the court and set a later show cause hearing. The husband, who was not found, was advised of the order by his employer, who was served with the order. The husband's motion to quash the order failed and he sought, and obtained, prohibition from the Supreme Court. The wife's argument that 12 O.S. §1276 [now 43 O.S. §110] permitted the order failed because her creative temporary order was an indirect attempt to circumvent the more restrictive provisions pertaining to garnishment procedures which were not complied with by her. The majority opinion regarded §1276 as a general statute and the garnishment statutes as specific, which, therefore, controlled.

<sup>60</sup> In *Anderson v. Anderson*, 1928 OK 267, 267 P. 621, 131 Okla. 95, a receiver was appointed to collect income. See *Sullins v. Sullins*, 1955 OK 17, 280 P.2d 1009.

## 7. APPEALS

**Temporary Orders Pending Appeal.** Although appellate courts have jurisdiction to entertain *pendente lite* requests while an appeal is pending from final divorce orders, such requests should be presented to the trial court, it having such jurisdiction, also,<sup>61</sup> including otherwise tardy requests for attorney fees in the main action.<sup>62</sup>

**Appealability of Temporary Orders.** An early issue was the *appealability* of temporary orders, which *Gundry v. Gundry*<sup>63</sup> demonstrates were even validly issued without benefit of hearing to the party who was ordered to perform! In *McKennon v. McKennon*,<sup>64</sup> it was decided that divorce temporary orders were appealable and that was the rule when *Gundry* was decided. But, in *State ex rel Blackaby v. Cullison*, 120 P. 660, 31 Okl. 187 (1912), the *McKennon* holding was rejected and the contrary rule, that temporary orders are not appealable until final orders are entered, was adopted in its place. The *Blackaby* court determined that Oklahoma, having adopted its appellate procedure statutes from Kansas, was bound to follow Kansas Supreme Court decisions in place at the time of statutory adoption. *Earls v. Earls*,<sup>65</sup> setting forth the non-appealable rule in Kansas, was therefore obligatory in Oklahoma's interpretation of appellate procedure statutes. The *Blackaby* court went to considerable length to emphasize that *were* appeals allowable from temporary support and/or attorney fee orders, a derelict husband would be able to defeat the purposes of the temporary orders by appealing, obtaining supersedeas, thereby placing the wife "at the mercy of her derelict husband who was faithless in the duties imposed upon him by virtue of his marriage vows," citing cases from Maine, Alabama, New York, Tennessee and English ecclesiastical courts. It brushed aside *McKennon*'s concern that appealability should be allowed as a check upon possible abuse of trial court power. To the contrary, said *Blackaby*, "the presumption is that the chancellor will exercise that power wisely and justly."

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<sup>61</sup> *Jones v. Jones*, 1980 OK 85, 612 P.2d 266, *Enyart v. Comfort*, 1979 OK 29, 591 P.2d 709, and *Wilks v. Wilks*, 1981 OK 91, 632 P.2d 759, generally; *Cochran v. Rambo*, 1971 OK 55, 484 P.2d 500, temporary custody pending appeal. See Rules 1.31(2),(4) and (5), Jurisdiction of the Trial Court While Appeal Is Pending, Oklahoma Supreme Court Rules On Perfecting A Civil Appeal.

<sup>62</sup> *Harmon v. Harmon*, 1983 OK 89, 770 P.2d 1, even if the fee issue is not reserved in the divorce judgment. But, see 12 O.S. §696.4.B., adopted in 1993.

<sup>63</sup> *Gundry v. Gundry*, 1902 OK 4, 68 P. 509, 11 Okla. 423.

<sup>64</sup> *McKennon v. McKennon*, 1900 OK 90, 63 P. 704, 10 Okla. 400.

<sup>65</sup> 26 Kan. 178 (Kan. 1881).

The rule announced in *Blackaby* has been consistently followed since 1912.<sup>66</sup> It has likewise been held that prohibition does not lie to prevent enforcement of temporary support, fee and injunctive orders,<sup>67</sup> unless personal jurisdiction over the obligor is not established,<sup>68</sup> or unless, upon proper challenge, the party asserting marital status fails to prove its legal<sup>69</sup> or factual<sup>70</sup> existence, in which cases prohibition will lie.

In 1970, a new statute, 12 O.S. §993, made certain interlocutory orders appealable as a matter of right. Even as since amended, the statute gives every appearance as making some divorce related temporary orders appealable.<sup>71</sup> But, the Oklahoma Supreme Court has continued to refuse its participation in such matters (except upon the rare occasion that it recasts such an appeal as an original proceeding). For example, in *Kantor v. Kantor*,<sup>72</sup> the full opinion reads as follows:

¶1 Appellee's motion to dismiss is granted and this appeal is dismissed. The trial judge's September 9, 1994 order, which orders appellant to pay appellee's attorney fees during the pendency of their divorce action, is not appealable. *Nuckolls v.*

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<sup>66</sup> *Moore v. Moore*, 1922 OK 316, 210 P. 728, 87 Okla. 269; *Elliott v. Elliott*, 1954 OK 356, 279 P.2d 328; *Nuckolls v. Nuckolls*, 1960 OK 224, 356 P.2d 1089 [noting the ordinary rule but allowing the appeal because the contempt conviction for violating the temporary order was involved]; *Trevino v. Cannon*, 1975 OK 174, 544 P.2d 513, by implication, since prohibition was granted.

<sup>67</sup> *Spradling v. Hudson*, 1915 OK 76, 146 P. 588, 45 Okla. 767.

<sup>68</sup> *Redcorn v. District Court of Eighth Judicial Dist.*, 1930 OK 79, 284 P. 1113, 141 Okla. 237. Defendant had been served with fatally defective process, including an *ex parte* temporary order commanding fees, support and restraint and the trial court had refused his challenging motions. Prohibition was allowed since personal jurisdiction had not been obtained over him and, since temporary orders were not appealable, "great and irreparable injury might ensue to petitioner \*\*\*."

<sup>69</sup> *Baker v. Carter*, 1937 OK 286, 68 P.2d 85, 180 Okla. 71. The alleged husband filed a motion to dissolve the *ex parte* support, fee and restraint order, alleging the marriage to be "void" as a prohibited marriage under 43 O.S. §12 between persons of African descent and full-blood Indians. The trial court struck his motion since he was not in compliance with the temporary order. Prohibition was granted to prevent enforcement until hearing occurred to determine the marital status issue, since temporary orders were not appealable. The opinion takes care to distinguish between "void" and "voidable" marriages, in which temporary orders are available.

<sup>70</sup> *Utley v. Rowe*, 1943 OK 224, 138 P.2d 71, 192 Okla. 546. The alleged husband moved to vacate the wife's *ex parte* temporary order, denying wife's allegation of a common law marriage. While his motion was pending, an additional support and fee order was entered, although the differences between the two *ex parte* orders was not made clear in the decision. Prohibition was granted to prevent enforcement of these orders until the marital status issue was resolved. See also *Powell v. Powell*, 1942 OK 417, 131 P.2d 1019, 191 Okla. 581.

<sup>71</sup> For example, the statute reads, "A. When an order: \* \* \* 5. Directs the payment of money pendente lite except where granted at an *ex parte* hearing, refuses to direct the payment of money pendente lite, or vacates or refuses to vacate an order directing the payment of money pendente lite \* \* \* the party aggrieved may appeal the order to the Supreme Court without waiting the final determination in said cause \* \* \*."

<sup>72</sup> *Kantor v. Kantor*, 1994 OK 132, 886 P.2d 480.

*Nuckolls*, 356. 2d 1089 (Okl. 1960).

¶2 The provisions of 12 O.S. Supp. 1993 §993(A)(5), by which orders directing the payment of money *pendente lite* are appealable, do not apply to temporary support orders or orders for the payment of temporary attorney fees in matrimonial cases. The latter are predicated on the general duty of parental or spousal support.

¶3 All Justices concur.

As to interlocutory orders which a trial court has certified for appeal pursuant to 12 O.S.1991 § 952(b)(3), *Sommer v. Sommer* states the test: <sup>73</sup>

¶5 This Court has jurisdiction of an appeal to review a sentence imposed for contempt of court occurring in a civil matter. Okla.Sup.Ct.R. 1.21 (e)(1); *Fulreader v. State*, 408 P.2d 775 (Okla.1965). An order in contempt proceedings is not appealable by right until the judgment and sentence become final. *First Nat. Bank and Trust Co. of Ada v. Arles*, 1991 OK 78, 816 P.2d 573, 539; *Hampton v. Hampton*, 1980 OK 46, 609 P.2d 772. The order in this case is not final.

¶6 However, this Court may exercise its discretion to review certain interlocutory trial court orders when certified by the trial court. The order must affect a substantial part of the merits of controversy and be certified by the trial judge that an immediate appeal may materially advance the ultimate termination of the litigation. 12 O.S.1991 § 952(b)(3). We have said that the term "merits" includes the real or substantial grounds of an action or defense, and excludes matters of practice, procedure, and evidence. *Ellison v. Ellison*, 1996 OK 64, ¶ 5, 919 P.2d 1, 2; *Pierson v. Canupp*, 1988 OK 47, 754 P.2d 548, 552 n.8

It is evident that, if the Legislature wishes its existing text to have application to divorce litigation, it will have to add words, to the effect, "and, by the way, this stuff applies to divorce litigation." As it stands, the *possibilities* alluded to in *McKennon v. McKennon* one-hundred and one years ago remain intact. <sup>74</sup> The *McKennon* court quoted with approval this language from *Blake v. Blake*, 80 Ill. 524:

\* \* \* In that case, Chief Justice Scott, speaking for the full court, says:

"The question raised is one that has never been passed on by this court, but, upon first impressions, we are of the opinion the appeal will lie. It is a money decree, is for a specific sum, and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award such an execution, or if the payment was wilfully and contumaciously refused, the decree might be enforced by attachment, as for contempt, or payment might be coerced by sequestration of real or personal estate.

By one mode or the other, the decree could be enforced, and if defendant has property it could, in some way consistently with the practice in courts of chancery, be subjected to its payment. Such decree does not seem to us to

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<sup>73</sup> *Sommer v. Sommer*, 1997 OK 123, 947 P.2d 512.

<sup>74</sup> *McKennon v. McKennon*, 1900 OK 90, 63 P. 704, 10 Okla. 400, 405.

be merely interlocutory. *It is more in the nature of final decree, and if no appeal lies, this case affords an instance of a money decree against a party from which no relief can be had, no matter how unjust or oppressive. This ought not to be.*

It is no answer to this position, to say defendant can have this decree against him reviewed on appeal or error after the final decree in the original cause. *Of what avail would that privilege be to him then?* The litigation might be protracted, and years elapse before any final decision could be reached. In the meantime, he has been imprisoned for disobedience to the decree, or his property under process of law has been subject to the payment of the sum decreed.”

\* \* \* [Emphasis supplied]

As it is, to say that divorce trial courts *effectively* have more latitude concerning divorce temporary orders than the statutes actually provide is simply to acknowledge reality.

## 8. PRACTICE SUGGESTIONS & CONCLUSION

Since temporary order practice varies from county to county and from judge to judge, no single approach may be said to be applicable to all practice suggestions. However, in a general context, the following suggestions may be helpful.

- 1. Know the Local Context.** In addition to knowing any local rules or customs, before the hearing, learn what the judge wants to know from the lawyers and litigants, the manner of temporary order practice before that judge, the procedure followed in that judge’s court, the time limitations which apply to the hearing, and any other local matter significant to presentation.
- 2. Know Your Facts.** Any fact which has significance to the temporary order hearing should be learned *before* the hearing is in progress. Utilize clients extensively for this purpose. Client worksheets should be comprehensive and thorough and their completion should be insisted upon by the lawyer. The worksheet should then be evaluated and adjusted with the client to assure thoroughness and accuracy.
- 3. Know What You Intend to Do.** The client’s realistic objects – whatever it is that is intended to be accomplished at the hearing – should be clearly identified before you appear before the judge. Discuss with the client whether a court reporter will be requested making sure the client understands the significance of the decision. A transcript of that hearing could be quite important in subsequent depositions, trial, and, certainly, preservation of evidence concerning any appeal which may occur in the case.
- 4. Prepare Yourself & Your Client.** Before the hearing, prepare and mark any exhibits which will be utilized, review them with the client, and discuss with the client the realistic probabilities of the hearing. Preparation should include discussion, possibly decisions, concerning settlement parameters. The client will have reviewed and understood his/her summary of testimony and unusual entries in those summaries will have been identified and discussed. It is common, and it is desirable, that the parties’ counsel, with or without the clients’ presence, attempt settlement before any hearing occurs. This can’t be done

effectively unless preparation for the hearing is complete.

**5. Present Your Client's Case.** Preparation will have enabled you to present the testimony briefly, succinctly and clearly. The fewest possible number of witnesses will be used to establish the client's case and all exhibits will have been identified, offered and received. Then, when you're done, be quiet. It is not unknown for lawyers to talk too much!

**6. If Appropriate, Consider an Appeal.** But, know that your appeal will probably be dismissed unless and until someone (maybe, but not likely, you) persuades the Oklahoma Supreme Court that it should reconsider its policy of not entertaining appeals of interlocutory orders in divorce cases. See §7, Appeals, above. At least, your client needs to understand the real truth that the appellate courts will almost certainly afford him/her no relief in such an appeal. But, if you think you're up to asking the Supreme Court to reverse its well-entrenched and self-imposed policy, consider filing a motion with the trial court to stay the order pending appeal. At the hearing on the motion (and being certain that a court reporter is present), conduct the hearing. If the court refuses the stay, (a) instruct the reporter to quickly prepare a transcript of each hearing, and pay for it; (b) request that the stay issue be heard by the appellate court as part of its pendant appellate jurisdiction. Such a motion will not receive serious consideration unless the transcripts are available for review. An informal conference before a Supreme Court Referee will probably occur, which may result in a modification of the trial court's decision on the stay order, but it probably won't. I don't intend that you should automatically be as pessimistic as I have just stated, but you'll be fooling yourself if you aren't, unless and until the Legislature or the Supreme Court itself redefine the appealability of divorce-related interlocutory orders.

The most realistic way to deal with the *real truth* that whatever the trial court does, it sticks during the pendency of the case, is to prepare yourself and your client as well as you possibly can for the temporary order hearing.

Maybe I'm wrong what I said on page one about Sir Isaac Newton's proposition concerning inertia, but I doubt it.