

**IN THE DISTRICT COURT OF NOWATA COUNTY
STATE OF OKLAHOMA**

Adoptive Couple,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. FA-2013-4
)	Judge Curtis L. DeLapp
Baby Girl, a minor under)	
the age of fourteen years, Birth)	
Father, and the Cherokee)	
Indian Nation,)	
)	
Defendants.)	

FILED ⁷
NOWATA CO. OK. COURT CLERK

NOV 01 2013

SARAH WEBB
BY _____

**MOTION FOR ATTORNEY FEES AND COSTS
AND BRIEF IN SUPPORT**

Come Now, the Adoptive Couple, Matthew Capobianco and Melanie Duncan, husband and wife ("Capobiancos"), and hereby move the Court for an order awarding them attorney fees and costs as the prevailing party in this action. In support of their Application, the Capobiancos allege and state as follows:

This is an action pursuant to 43 O.S. §§551-101 *et seq* ("UCCJEA") to register orders from the Family Court of the Ninth Judicial District of the State of South Carolina regarding custody. On August 30, 2013, this Court entered an order that the South Carolina orders submitted for registration were granted registration and domestication and were accorded full faith and credit.

43 O.S. §551-312 provides that:

- A. The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees,

expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate

The Petitioners will submit detailed affidavits and time records to the court and counsel upon the Court entering an Order requiring confidential information in the records be kept confidential by the parties. The affidavits will be executed by Paul E. Swain, Lori McGill and Lisa Blatt and Noel Tucker who are a part of the team of lawyers that has represented the Capobiancos on this case. Ms. McGill and the law firm of Latham and Watkins LLP and Ms. Blatt and the law firm of Arnold and Porter LLP are attorneys in Washington D.C. who were involved in this matter when it was presented to the United States Supreme Court and they are knowledgeable in the prior proceedings and law of this case. The Total fees and expenses are as follows:

Law Firm	Hours	Fees	Costs
Paul E. Swain PLC	539.90	\$133,058.75	\$2,257.53
Tucker & Tucker	440.00	\$131,375.00	\$3,647.74
Latham & Watkins	613.10	\$441,931.50	0.00
Arnold & Porter	521.50	\$322,431.25	\$630.00
Total	2114.5	\$1,028,796.50	\$6,535.27

The Capobiancos are entitled to recover \$1,028,796 in fees and \$6,535.27 in costs against Defendants Brown and Cherokee Nation of Oklahoma, representing attorney fees, costs, and expenses incurred as a result being forced to register and enforce their Decree of Adoption, issued on July 31, 2013, by the Ninth Judicial Circuit Family Court in Charleston, South Carolina (SC Family Court), and related orders of that court and the Supreme Court of South Carolina. On August 30, 2013, this Court issued an order registering and granting full faith and credit to the Decree of Adoption and a related

Transition Order. Later that day, Defendant Brown filed for, and obtained, a stay of the enforcement of the Transition Order in the Oklahoma Supreme Court. Defendant Brown also filed a Petition for Writ of Prohibition.

The Capobiancos are the prevailing party under 43 O.S. § 551-312.

Oklahoma applies the American Rule to determine if attorney fees may be recovered from the opposing party. Under the "American Rule," each litigant bears the cost of his or her legal representation and the courts are without authority to assess and award attorney fees in the absence of a specific statute or a specific contract therefor between the parties. *In the Matter of the Adoption of Baby Boy L.*,--- P.3d ----, (Okla. Civ. App. Div. 1), 2013 OK CIV APP 63. In 1998, Oklahoma enacted the Uniform Child Custody Jurisdiction and Enforcement Act, Title 43, §551-101 *et seq.* Under the UCCJEA, the court *shall* award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate. 43 O.S. §551-312 A (emphasis added).

Criteria Standards for Awarding Attorney Fees

State Ex Rel. Burke v. City of Oklahoma City, 598 P.2d 659 (Okla. 1979), as well as, *Oliver's Sports Center, Inc. v. National Standards Inc. Co.*, 615 P.2d 291 (Okla. 1980) are the current landmark cases in Oklahoma as to the procedure used in the setting of attorney's fees.

The *Burke* case sets out the eight standards of criterion that the Courts commonly use in affixing attorney's fees where said attorney's fees are allowed by statute. They are as follows:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

In *Oliver's Sports Center, Inc.* the Supreme Court noted that the time and labor element spent by an attorney in performing services is an important factor to be considered in setting a reasonable attorney fee. However, the time element *must be considered in connection with other factors* as use of time alone is of "dubious value because economy of time could cease to be a virtue; and inexperience, inefficiency, and incompetence may be rewarded to the detriment of expeditious disposition of litigation." *Id.* 615 P.2d 291,294.

Relevant Procedural History

On July 30, 2013, the SC Family Court entered a Final Decree of Adoption and a Transition Order requiring Mr. Brown to appear with the minor child and begin transition visits that would ultimately result in the minor child being placed in the full physical custody of the Capobiancos. Due to Mr. Brown's blatant refusal to comply with the SC Family Court orders, the Capobiancos were required to begin the process of domesticating the SC Orders in Oklahoma in order that they could enforce them as if they were Oklahoma Court orders.

The Capobiancos filed this action in Nowata County to register the orders as foreign custody determinations pursuant to the UCCJEA. At the time the proceedings with commenced in Nowata County, Brown and the minor child were residents of Nowata. The process of registration of foreign orders under the UCCJEA allowed Mr. Brown and the Cherokee Nation twenty days to file an objection to the registration request.

Before the objection period had elapsed, the Capobiancos discovered that Brown and the Tribe had moved the minor child to Cherokee County and secreted her on Tribal Land under the belief that the child was not subject to actions by the State of Oklahoma while on Tribal property.

During the months of August and September, 2013 the parties appeared in six different court rooms in the State of Oklahoma including the Oklahoma Court of Civil Appeals and the Oklahoma Supreme Court which eventually resulted in the Capobiancos obtaining physical custody of Veronica by court order.

Equities to Consider

Throughout this case, Mr. Brown and the Cherokee Nation have exacerbated this litigation so that their conduct throughout the enforcement of the Decree of Adoption entered by the State of South Carolina has served to only increase the resulting legal fees of the Adoptive Parents.

They have been required to defend the numerous unfounded allegations; re-argue judicial decisions (because Mr. Brown and the Cherokee Nation believed that every decision from the Unites States Supreme Court down did not apply to them).

In balancing judicial equities, the Oklahoma Court of Civil Appeals' decision *Finger v. Finger*, 1996 OK CIV APP 91, 923 P.2d 1195 listed factors for the court to consider in a post decree custody modification attorney fee quest. The "*Finger* factors" include the following:

- (1) outcome of the modification action;
- (2) whether subsequent action was brought because one of the parties had endangered or compromised the health, safety, or welfare of the children;
- (3) whether one party's behavior demonstrated the most interest in the children's physical, material, moral and spiritual welfare;
- (4) whether one party's behavior demonstrated a priority of self-interest over the best interests of the children;
- (5) whether either party unnecessarily complicated or delayed the proceedings, or made the subsequent litigation more vexatious than it needed to be; and
- (6) the means and property of the respective parties. *Finger*, 923 P.2d at 1197-98.

While these post decree proceedings did not involve custody, per se, the *Finger* factors are illustrative that in awarding fees and costs, the Court needs to carefully measure Mr. Brown and the Cherokee Nation's conduct. Further, in *Woods v. Woods*, 1990 OK CIV APP 49, 793 P.2d 1372, the Court of Appeals noted in "[t]he extensive record in this case shows that nearly every journal entry of the trial court's orders required Appellee to file a motion to settle." See *Finger* factor #5 (whether either party unnecessarily complicated or delayed the proceedings, or made the subsequent litigation more vexatious than it needed to be). Mr. Brown and Cherokee Nation's conduct has resulted in a long and extremely expensive process, as shown by the time spent by the Capobianco's attorneys on this case.

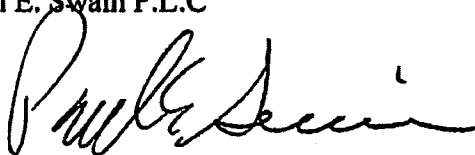
The Capobiancos were successful in their efforts to register and enforce their Adoption Decree and related Transition Order. They now request \$1,028,796.50 in attorney fees and \$6,535.27 as their necessary and reasonable expenses from Defendant Parties Brown and Cherokee Nation — expenses they never would be required to incur had Defendants Brown and Cherokee Nation of Oklahoma simply obeyed the Adoption

Decree issued by the State of South Carolina. Instead, Defendants embarked on series of dilatory actions in an all-out assault on an adoption decree lawfully issued by a sister state.¹

Defendants have the burden of proving the unreasonableness of these fees. 43 O.S. §551-312A, Official Comment (“The non-prevailing party has the burden of showing that such an award would be clearly inappropriate. Fees and costs may be inappropriate if their payment would cause the parent and child to seek public assistance.”).

WHEREFORE, PREMISES CONSIDERED, the Petitioners request that they be awarded a judgment against the Defendants, Dusten Brown and the Cherokee Nation, for its attorney fees in the amount of \$1,028796.50 and costs in the amount of \$6,535.27 that have accrued to date, plus post-judgment interest at the statutory rate until paid in full.

Respectfully Submitted,
Paul E. Swain P.L.C



By: Paul E. Swain, OBA #8785
406 S. Boulder Ave.
Suite 423
Tulsa, OK 74103
(918) 599-0100
(918) 599-0136
PSwain@SwainLaw.com
Attorney for Mr. and Mrs. Capobianco

Noel K. Tucker, OBA #17264
Phillip J. Tucker, OBA #10560
The Tucker Law Firm, Attorneys

¹ Although Defendants claims are designed to cause delay, Plaintiffs do not seek conduct based attorney's fees or sanctions in this motion.

and Counselors at Law
One South Broadway, Suite 300
Post Office Box 601
Edmond, Oklahoma 73083-0601
(405) 348-1789
(405) 348-9724 - fax
e-mail: nktlaw@juno.com
Co-Counsel for Mr. and Mrs. Capobianco

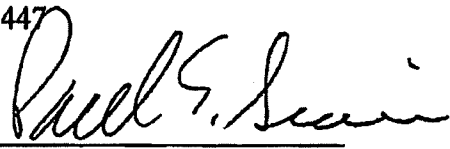
CERTIFICATE OF MAILING

I hereby certify that on this 1 day of November, 2013, a full, true and correct copy of the above and foregoing instrument was mailed, with proper postage prepaid thereon, to the following:

Chrissi Nimmo
Assistant Attorney General
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465

Shannon Prescott
114 N. Grand Ave,
North Lobby
Okmulgee, OK 74447

Robert Nigh
2617 E. 21st St.
Tulsa, OK 74114


Paul E. Swain