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Actually, You Don't Have to Show Your Work: The Arkansas Court of Appeals Tells Trial Courts That When They Award Attorneys' Fees in Domestic Relations Cases, They Need Not Explain the Basis For The Awards or the Basis for the Amount of the Awards

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ACTUALLY, YOU DON'T HAVE TO SHOW YOUR WORK: THE ARKANSAS COURT OF APPEALS TELLS TRIAL COURTS THAT WHEN THEY AWARD ATTORNEYS' FEES IN DOMESTIC RELATIONS CASES, THEY NEED NOT EXPLAIN THE BASIS FOR THE AWARDS OR THE BASIS FOR THE AMOUNT OF THE AWARDS

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ABSTRACT

Arkansas follows the "American Rule," which is that each litigant is responsible for his or her own attorneys' fees unless a statute says otherwise. This rule is not without exceptions, however, and one such exception is the "domestic relations exception," which says that Arkansas's trial courts have the inherent authority to award attorneys' fees in domestic relations cases. Between 2016 and 2021, the Arkansas Court of Appeals decided cases with attorneys' fees awards ranging from $14,190 to $36,284.60, which one judge of that court remarked evidenced an ever-escalating amount of fee awards in domestic relations cases.

At one point, when Arkansas's trial courts awarded attorneys' fees in domestic relations cases, they had to apply a set of factors known as the *Chrisco* factors, and they had to do so on the record, which usually meant a written explanation for why the courts awarded the fees and an explanation for how the courts arrived at the fee amount. On September 12, 2012, however, all of that changed when the Arkansas Court of Appeals decided *Tiner v. Tiner*, holding that trial courts no longer have to apply the *Chrisco* factors when awarding attorneys' fees in domestic relations cases. But that is not all *Tiner* did; it also told trial courts they no longer have to offer any explanation for their attorneys' fees decisions, which means a court can order a party to pay attorneys' fees totaling tens of thousands of dollars without explaining why it ordered the party to pay or how it arrived at the amount the party has to pay.

Unexplained judicial decision-making is a bad idea. An even worse idea is when a court orders a party to pay another party's attorneys' fees without explaining the basis of the decision or how it arrived at the amount the party has to pay. When a court makes a decision that results in a person losing his property, that person deserves to know why, and an appellate

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court deserves an adequately developed record to review in order to determine if that court erred or abused its discretion. This article calls for the Supreme Court of Arkansas or the Arkansas Court of Appeals to overrule *Tiner* and replace it with a requirement that when a trial court orders a party to pay another party's attorneys' fees, that court must provide a written explanation for the basis of its decision and for the basis of the amount it ordered the party to pay.

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I. INTRODUCTION

Courts wield enormous power over the lives and property of the litigants who appear before them, particularly in domestic relations cases.[1] Domestic relations judges decide who gets custody of children, how much a person pays and receives in alimony and child support, and how marital debts and marital property are divided.[2] Further, given how deferential appellate court standards of review are regarding decisions domestic relations judges make, the decision a domestic relations judge makes is effectively final.[3] Any person wielding this kind of power can abuse it if it is left unchecked. One such check exists for judges, and that is the requirement that they explain themselves when they make decisions that result in a person losing his life or his property. On September 12, 2012, the Arkansas Court of Appeals removed this check when it held in *Tiner v. Tiner* that when trial courts award attorneys' fees in domestic relations cases, they need not explain the basis of the fee award, how they arrived at the amount of the award, or anything else pertaining to the award.[4]

Tiner is an unsound decision for at least three reasons: One, "every party has a right to know why he or she is being ordered to pay someone else's attorney[s'] fee[s]";[5] two, "a person needs to know why he or she is being assessed someone else's attorney[s'] fee[s] so a record for reversal or modification can be clearly made contemporaneous with the adverse ruling";[6] and three, an appellate "court can more properly fulfill its role as an appellate tribunal when it has an express ruling to evaluate; otherwise [it is] left searching for a reason to uphold, reverse, or perhaps modify the circuit court's decision."[7] Moreover, domestic relations cases are the only cases in Arkansas where a court can order one party to pay another party's attorneys' fees without explaining why, and "there is no discernible, qualitative difference between domestic[] relations cases and other civil cases for purposes of awarding attorney[s'] fees [and there is no perceptible] rational basis for treating [domestic relations] cases differently."[8]

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1. *See* DAVID CLAYTON CARRAD, THE COMPLETE QDRO HANDBOOK: DIVIDING ERISA, MILITARY, AND CIVIL SERVICE PENSIONS AND COLLECTING CHILD SUPPORT FROM EMPLOYEE BENEFIT PLANS 266 (3d ed. Am. Bar Ass'n 2009).
2. *Id.*
3. *Id.*
4. Tiner v. Tiner, 2012 Ark. App. 483, at 2, 12–15, 422 S.W.3d 178, 180, 185–87.
5. Folkers v. Buchy, 2019 Ark. App. 30, at 14, 570 S.W.3d 496, 504 (Harrison, J., dissenting).
6. *Id.*, 570 S.W.3d at 504.
7. *Id.*, 570 S.W.3d at 504.
8. *Tiner*, 2012 Ark. App. 483, at 17, 422 S.W.3d at 187–88 (Abramson, J., dissenting).

Unexplained judicial decision-making is a bad idea.[9] An even worse idea is when a court orders a party to pay another party's attorneys' fees without explaining the basis of the decision or how it arrived at the amount the party has to pay.[10] When a court makes a decision that results in a person losing his property, that person deserves to know why, and an appellate court deserves an adequately developed record to review in order to determine if that court erred or abused its discretion.[11] An unexplained judicial decision opens a court up to the allegation that "[p]ower, not reason" is the basis of the decision.[12]

This article calls for the Supreme Court of Arkansas or the Arkansas Court of Appeals to overrule *Tiner* and replace it with a requirement that when a trial court orders a party to pay another party's attorneys' fees, that court must provide a written explanation for the basis of its decision and for the basis of the amount it ordered the party to pay. It does this in two parts. Part I provides the background on how the Arkansas Court of Appeals went from requiring trial courts to explain themselves when they award attorneys' fees in domestic relations cases to essentially saying, on second thought, never mind. Part II explains why *Tiner* is unsound and why Arkansas should abandon *Tiner* in favor of a rule that trial courts must provide written reasons for requiring one party to pay another party's attorneys' fees.

II. HOW DID THE ARKANSAS COURT OF APPEALS GO FROM REQUIRING TRIAL COURTS TO EXPLAIN THEMSELVES WHEN THEY ORDERED FEE SHIFTING TO ABANDONING THAT REQUIREMENT A MERE EIGHTEEN MONTHS LATER?

Arkansas follows the "American Rule," which states that each litigant is responsible for his or her own attorneys' fees unless a statute says otherwise.[13] Put another way, attorneys' fees cannot be shifted from one party to another unless a statute specifically authorizes fee shifting.[14] One such stat-

9. Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 54–55 (1988).

10. *Folkers*, 2019 Ark. App. 30, at 11–16, 570 S.W.3d at 503–05 (Harrison, J., dissenting); *id.* at 17–18, 570 S.W.3d at 505–06 (Hixson, J., dissenting); *Tiner*, 2012 Ark. App. 483, at 17–19, 422 S.W.3d at 187–88 (Abramson, J., dissenting).

11. *Folkers*, 2019 Ark. App. 30, at 11–16, 570 S.W.3d at 503–05 (Harrison, J., dissenting); *id.* at 17–18, 570 S.W.3d at 505–06 (Hixson, J., dissenting); *Tiner*, 2012 Ark. App. 483, at 17–19, 422 S.W.3d at 187–88 (Abramson, J., dissenting).

12. Payne v. Tennessee, 501 U.S. 808, 844 (Marshall, J., dissenting).

13. City of Little Rock v. Nelson *ex rel.* Nelson, 2020 Ark. 19, at 3–4, 592 S.W.3d 666, 669 (citing Lake View Sch. Dist. No. 25 v. Huckabee, 340 Ark. 481, 495, 10 S.W.3d 892, 900 (2000); Love v. Smackover Sch. Dist., 329 Ark. 4, 6, 946 S.W.2d 676, 677 (1997)).

14. *City of Little Rock*, 2020 Ark. 19, at 3, 592 S.W.3d at 669 (citing Furman v. Second Injury Fund, 336 Ark. 10, 11, 983 S.W.2d 923, 923 (1999)).

ute is Ark. Code Ann. § 16-22-308, which authorizes a court to award the prevailing party his or her attorneys' fees "[i]n any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract . . . ."[15]

On December 21, 1990, the Supreme Court of Arkansas decided *Chrisco v. Sun Industries, Inc.*, a breach of contract case that involves § 16-22-308, and set forth a list of factors Arkansas courts should consider in determining the amount of attorneys' fees to award in a case.[16] Those factors are: (1) "the experience and ability of the attorney"; (2) "the time and labor required to perform the legal service properly"; (3) "the amount involved in the case and the results obtained"; (4) "the novelty and difficulty of the issues involved"; (5) "the fee customarily charged in the locality for similar legal services"; (6) "whether the fee is fixed or contingent"; (7) "the time limitations imposed upon the client or by the circumstances"; and (8) "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer."[17]

On January 22, 2004, in the case of *Bailey v. Rahe*, the Supreme Court of Arkansas considered the question of the applicability of the *Chrisco* factors in a guardianship case.[18] In *Bailey*, the guardian sought attorneys' fees for the lawyer she hired to assist her in fulfilling her court-ordered guardianship duties.[19] The guardian sought attorneys' fees in the amount of $10,924.35 and an hourly rate of $150.[20] The trial court awarded $6,200, reduced the hourly rate to $125, and disallowed any fees incurred prior to the May 31, 2001, expiration date of a temporary guardianship the court established in April 2001.[21] The guardian appealed the trial court's decision to reduce her requested fees and her requested hourly rate, as well as the court's decision to disallow any fees she incurred prior to the expiration date of the temporary guardianship.[22]

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15. ARK. CODE ANN. § 16-22-308 ().

16. Chrisco v. Sun Industries. Inc., 304 Ark. 227, 229–30, 800 S.W.2d 717, 718–19 (1990) (citing State Farm Fire & Cas. Co. v. Stockton, 295 Ark. 560, 565–66, 750 S.W.2d 945, 948 (1988); Southall v. Farm Bureau Mut. Ins. Co. of Ark, 283 Ark. 335, 337, 676 S.W.2d 228, 229 (1984); N.H. Ins. Co. v. Quilantan, 269 Ark. 359, 360–61, 601 S.W.2d 836, 837 (1980)).

17. *Chrisco*, 304 Ark. at 229–30, 800 S.W.2d at 718–19 (citing *Stockton*, 295 Ark. at 565–66, 750 S.W.2d at 948; *Southall*, 283 Ark. at 337, 676 S.W.2d at 229; *Quilantan*, 269 Ark. at 360–61, 601 S.W.2d at 837).

18. Bailey v. Rahe, 355 Ark. 560, 561, 142 S.W.3d 634, 635 (2004).

19. *Id.* at 564, 142 S.W.3d at 637.

20. *Id.*, 142 S.W.3d at 637.

21. *Id.* at 561–64, 142 S.W.3d at 635–37.

22. *Id.* at 565–66, 142 S.W.3d at 637–38.

Bailey adverted to the 1963 case of *Jones v. Barnett*, which identified the following factors courts should consider in awarding attorneys' fees in guardianship cases: (1) "the amount and character of the services rendered"; (2) "the labor, time, and trouble involved"; (3) "the nature and importance of the litigation or business in which the services are rendered"; (4) "the amount or value of the property involved in the employment"; (5) "the skill or experience called for in the performance of the services"; and (6) "the professional character and standing of the attorneys."[23] *Bailey* found the *Jones* factors consistent with, and substantially similar to, the *Chrisco* factors.[24]

The Supreme Court of Arkansas noted in *Bailey* that the trial court did not consider or apply the *Jones* factors or the *Chrisco* factors in deciding to reduce the guardian's requested fees and hourly rate and disallow any fees incurred prior to the expiration date of the temporary guardianship, which meant the Supreme Court of Arkansas could not determine the basis for the trial court's decisions.[25] Because the trial court did not consider the *Chrisco* factors in its attorneys' fees decision, *Bailey* reversed the trial court's fee order and remanded the case with directions to apply the *Chrisco* factors.[26] *Bailey* thus stands for the proposition that if a court is going to award attorneys' fees in a guardianship case, it must apply the *Chrisco* factors, and it is reversible error for it not to do so.[27]

Two hundred fifty-two days after deciding *Bailey*, the Supreme Court of Arkansas decided *Davis v. Williamson*, a paternity and child support case that also involved the issue of attorneys' fees.[28] The appellant in *Davis* argued that the trial court abused its discretion when it denied her motion for attorneys' fees.[29] The *Davis* Court started its analysis with a familiar refrain, that is, a court cannot order one party to pay another party's attorneys' fees in the absence of a statute authorizing fee shifting.[30] In paternity cases, two statutes authorize fee shifting: Ark. Code Ann. § 9-10-109(a)(1)(A) and Ark. Code Ann. § 9-27-342(d).[31]

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23. *Id.* at 563–64, 142 S.W.3d at 637 (quoting Jones v. Barnett, 236 Ark. 117, 123, 365 S.W.2d 241, 245 (1963)).

24. *Bailey*, 355 Ark. at 563–64, 142 S.W.3d at 637.

25. *Id.* at 566–67, 142 S.W.3d at 638.

26. *Id.* at 566, 142 S.W.3d at 639.

27. *Id.*, 142 S.W.3d at 639.

28. Davis v. Williamson, 359 Ark. 33, 37–40, 43–46, 194 S.W.3d 197, 199–01, 203–05 (2004).

29. *Id.* at 39, 43–46, 194 S.W.3d at 200, 203–05.

30. *Id.*, 194 S.W.3d at 201 (citing Cotton v. Fooks, 346 Ark. 130, 134, 55 S.W.3d 290, 293 (2001)).

31. *Davis*, 359 Ark. at 39, 194 S.W.3d at 201 (citing ARK. CODE ANN. §§ 9-10-109 (Repl. 2002) and 9-27-342 (Supp. 2003); Beavers v. Vaughn, 41 Ark. App. 96, 99, 849 S.W.2d 6, 7–8 (1993)).

Section 9-10-109(a)(1)(A) says in relevant part:

> [S]ubsequent to a finding by the court that the putative father in a paternity action is the father of the child, the court shall follow the same guidelines, procedures, and requirements as set forth in the laws of this [S]tate applicable to child support orders and judgments entered by the circuit court as if it were a case involving a child born of a marriage in awarding custody, visitation, setting amounts of support, costs, and attorney[s'] fees . . . .

Section 9-27-342(d) says in relevant part:

> Upon an adjudication by the court that the putative father is the father of the juvenile, the court shall follow the same guidelines, procedures, and requirements as established by the laws of this [S]tate applicable to child support orders and judgments entered upon divorce. The court may award court costs and attorney[s'] fees.

When the trial court in *Davis* considered the appellant's motion for attorneys' fees, it relied on *Paulson v. Paulson* for the factors to consider in deciding whether to grant or deny the motion.[32] The *Paulson* factors are: (1) "the attorney's judgment, learning, ability, skill, experience, [and] professional standing"; (2) "the relationship between the parties and the importance of the subject matter of the case"; (3) "the nature, extent and difficulties of services"; (4) "the research, anticipation of defenses and means of meeting them and receiving of confidential information and giving of confidential advice before any pleadings are filed or other *visual* steps are taken."[33]

Davis found that the *Paulson* factors are "very similar to the factors . . . in [*Chrisco*,]" except for the fact that in domestic relations cases the parties' financial abilities are considered.[34] *Davis* then held that a disparity in the parties' incomes is relevant in awarding or denying attorneys' fees, but standing alone, it will not justify an award of fees.[35] *Davis* ultimately held that the trial court did not abuse its discretion when it denied the appellant's motion for attorneys' fees because it considered the *Chrisco* factors in reaching that decision.[36]

When one synthesizes the holdings of *Bailey v. Rahe* and *Davis v. Williamson*, one can reasonably conclude that when a trial court has a motion

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32. *Davis*, 359 Ark. at 45–46, 194 S.W.3d at 205 (citing Paulson v. Paulson, 8 Ark. App. 306, 311, 652 S.W.2d 46, 49 (1983)).

33. *Paulson*, 8 Ark. App. at 311, 652 S.W.2d at 49.

34. *Davis*, 359 Ark. at 46, 194 S.W.3d at 205.

35. *Id.* at 46, 194 S.W.3d at 205 (citing Scroggins v. Scroggins, 302 Ark. 362, 368, 790 S.W.2d 157, 161 (1990)).

36. *Id.*, 194 S.W.3d at 205.

for attorneys' fees before it in a guardianship case or in a paternity and child support case, that court must decide that motion by applying the *Chrisco* factors, and if it does not, it commits reversible error.[37] And if there was any doubt about this synthesis, the Arkansas Court of Appeals put that doubt to rest on March 9, 2011, when it decided *Stout v. Stout*, a domestic relations case involving child custody, child visitation, the division of marital assets and debts, and the award of attorneys' fees.[38]

A. Stout v. Stout

On the attorneys' fees issue, *Stout* cited a "domestic relations case" exception to the American Rule and said that a trial court has the inherent authority to award attorneys' fees in domestic relations cases subject to an abuse of discretion standard of appellate review with respect to the amount of fees the court awards, and a clearly erroneous standard of appellate review with respect to the factual findings the court relies on in arriving at the amount of fees to award.[39] *Stout* went on to say that when a court awards attorneys' fees, it can "use its own experience as a guide and *can* consider the . . . [*Chrisco*] factors . . . ."[40]

Stout held that a trial court is not required to "conduct an exhaustive hearing on the [attorneys' fees issue]" because of its familiarity with the case and the performance of, and services rendered by, the attorney asking the other party to pay his or her fees.[41] Moreover, there is no "strict" requirement that the attorney asking the other party to pay his or her fees provide documentation of the time he or she spent on the case or the expenses he or she incurred in the case "where the [trial] court [had] the opportunity to observe the parties, their level of cooperation, and their [compliance with] court orders."[42]

The trial court in *Stout* awarded attorneys' fees, however, it did not discuss or apply the *Chrisco* factors; consequently, *Stout* reversed the trial court's fee order and remanded the case with instructions to conduct a *Chrisco* analysis.[43] *Stout* expressly held that awarding attorneys' fees in a

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37. Bailey v. Rahe, 355 Ark. 560, 561, 566, 142 S.W.3d 634, 635, 638–39 (2004); *Davis*, 359 Ark. at 37, 45–46, 194 S.W.3d at 199, 205.

38. Stout v. Stout, 2011 Ark. App. 201, at 5–12, 378 S.W.3d 844, 847–51, *overruled in part by* Tiner v. Tiner, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d 178, 180, 185–87.

39. *Id.* at 10–12, 378 S.W.3d at 850–51.

40. *Id.* at 11, 378 S.W.3d at 850–51 (emphasis added) (citing Paulson v. Paulson, 8 Ark. App. 306, 312, 652 S.W.2d 46, 50 (1983)).

41. *Id.*, 378 S.W.3d at 850–51 (citing *Paulson*, 8 Ark. App. at 312, 652 S.W.2d at 50).

42. *Id.*, 378 S.W.3d at 851 (citing Deaton v. Deaton, 11 Ark. App. 165, 166, 668 S.W.2d 49, 50 (1984)).

43. *Id.* at 11–12, 378 S.W.3d at 851 (citing Bailey v. Rahe, 355 Ark. 560, 566, 142 S.W.3d 634, 638–39 (2004); S. Beach Beverage Co. v. Harris Brands, Inc., 355 Ark. 347,

domestic relations case without applying the *Chrisco* factors is reversible error, just as *Bailey v. Rahe* held for guardianship cases and *Davis v. Williamson* held for paternity and child support cases.[44]

B. Tiner v. Tiner

Eighteen months after the Arkansas Court of Appeals decided *Stout*, it decided *Tiner v. Tiner*, and in an about-face, overruled *Stout* and held that in domestic relations cases, a trial court can award attorneys' fees without applying the *Chrisco* factors.[45] *Tiner* is a domestic relations case involving a trial court's modification of a property settlement agreement and its award of attorneys' fees without applying the *Chrisco* factors.[46] The appellant in *Tiner* asked the trial court to award her "approximately $20,000 in attorney[s'] fees . . . ."[47] The court awarded her $5,500, and in so doing, it did not apply the *Chrisco* factors, so she appealed the trial court's order, and relying on *Stout*, she argued that the trial court's failure to apply the *Chrisco* factors constituted reversible error.[48] *Tiner* said that "[u]pon further reflection . . . *Stout* must be [overruled]."[49]

The first reason *Tiner* gave for overruling *Stout* was the fact that *Stout* is a domestic relations case, and when it held that courts awarding attorneys' fees in domestic relations cases must apply the *Chrisco* factors, it relied on three Supreme Court of Arkansas cases that are not domestic relations cases.[50] The three cases *Stout* cited in support of its holding that trial courts must apply the *Chrisco* factors when awarding attorneys' fees in domestic relations cases are *Bailey v. Rahe*, *S. Beach Beverage Co. v. Harris Brands, Inc.*, and *Lake View Sch. Dist. No. 25 v. Huckabee*.[51] *Bailey* is a guardian-

357, 138 S.W.3d 102, 108 (2003); Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31, 95–96, 91 S.W.3d 472, 510 (2002)).

44. *Stout*, 2011 Ark. App. 201, at 11–12, 378 S.W.3d at 851 (citing *Bailey*, 355 Ark. at 566, 142 S.W.3d at 638–39; *S. Beach Beverage Co.*, 355 Ark. at 357, 138 S.W.3d at 108; *Lake View Sch. Dist. No. 25*, 351 Ark. at 95–96, 91 S.W.3d at 510); *Bailey*, 355 Ark. at 561, 566, 142 S.W.3d at 635, 638–39; *Davis*, 359 Ark. at 37, 45–46, 194 S.W.3d at 199, 205.

45. Tiner v. Tiner, 2012 Ark. App. 483, at 12–17, 422 S.W.3d 178, 185–87.

46. *Id.* at 1–2, 422 S.W.3d at 179–80.

47. *Id.* at 12, 422 S.W.3d at 185.

48. *Id.*, 422 S.W.3d at 185.

49. *Id.* at 13, 422 S.W.3d at 185.

50. *Id.* at 13–14, 422 S.W.3d at 185–86 (citing Bailey v. Rahe, 355 Ark. 560, 566, 142 S.W.3d 634, 638–39 (2004); S. Beach Beverage Co. v. Harris Brands, Inc., 355 Ark. 347, 357, 138 S.W.3d 102, 108 (2003); Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31, 95–96, 91 S.W.3d 472, 510 (2002)).

51. Stout v. Stout, 2011 Ark. App. 201, at 11–12, 378 S.W.3d 844, 851 (citing *Bailey,* 355 Ark. at 566, 142 S.W.3d at 638–39; *S. Beach Beverage Co.,* 355 Ark. At 357, 138 S.W.3d at 108; *Lake View Sch. Dist. No. 25,* 351 Ark. at 95–96, 91 S.W.3d at 510), *overruled in part by* Tiner v. Tiner, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d 178, 180, 185–87.

ship case, *S. Beach Beverage* is a case under the Arkansas Franchise Practices Act, and *Lake View* is a school funding case.[52] *Tiner* reasoned that *Bailey*, *S. Beach Beverage*, and *Lake View* were "limited in application to . . . school funding, guardianship proceedings, and cases involving the [Arkansas] Franchise Act" and therefore, "their holdings with respect to the *Chrisco* factors" should not be "extend[ed] [to] . . . domestic relations cases."[53]

The second reason *Tiner* gave for overruling *Stout* was that Rule 52 of the Arkansas Rules of Civil Procedure "provides an avenue for requesting specific findings[,]" which rendered *Stout*'s requirement that trial courts make *Chrisco* findings unnecessary.[54] *Tiner* held that courts are "permitted and encouraged to consider" the *Chrisco* factors, the factors "set forth in *Robinson v. Champion*,[55] and the financial abilities of the parties," but it was not going to require courts to "make specific findings in domestic relations cases" because doing so would "impose a considerable burden" on those courts "given the myriad of factors to [consider when awarding attorneys' fees.]"[56]

The third reason *Tiner* gave for overruling *Stout* was that courts in domestic relations cases are intimately acquainted with the record and the quality of the representation provided by the attorneys; therefore, they have a "superior perspective" from which to assess the factors involved in ruling on a motion for attorneys' fees, which in turn means appellate review of

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52. *Bailey*, 355 Ark. at 561, 142 S.W.3d at 635; *S. Beach Beverage Co.*, 355 Ark. at 349, 138 S.W.3d at 103; *Lake View Sch. Dist. No. 25*, 351 Ark. at 41–42, 91 S.W.2d at 477.

53. *Tiner*, 2012 Ark. App. 483, at 14, 422 S.W.3d at 186.

54. *Id.* at 14 n.5, 422 S.W.3d at 186 n.5.

55. *Robinson* instructed courts to consider the following factors in awarding attorneys' fees: (1) "the attorney's judgment, learning, ability, skill, experience, professional standing[,] and advice"; (2) "the relationship between the parties"; (3) "the amount or importance of the subject matter of the case"; (4) "the nature, extent[,] and difficulty of services in research, collection, estimation[,] and mental array of evidence and anticipation of defenses and means of meeting them"; (5) "considering the case, receiving confidential information[,] and giving confidential advice before any pleadings are filed or other visible step is taken"; (6) "the preparation of pleadings"; (7) "the proceedings actually taken and the nature and extent of the litigation"; (8) "the time and labor devoted to the client's cause"; (9) "the difficulties presented in the course of the litigation"; (10) "the results obtained"; (11) "and many other factors beside the time visibly employed." Robinson v. Champion, 251 Ark. 817, 818–19, 475 S.W.2d 677, 678 (1972) (citing Turner v. Turner, 219 Ark. 259, 268–69, 243 S.W.2d 22, 27 (1951); Bockman v. Rorex, 212 Ark. 948, 954–55, 208 S.W.2d 991, 995 (1948); St. Louis-S.F. Ry. Co. v. Hurst, 198 Ark. 546, 556, 129 S.W.2d 970, 975 (1939); Rachels v. Garrett, 153 Ark. 343, 347, 240 S.W. 1071, 1072 (1922); Bradshaw & Helm v. Bank of Little Rock, 76 Ark. 501, 505–06, 89 S.W. 316, 317 (1905); Files v. Fuller, 44 Ark. 273, 279, 1884 WL 888, at *4 (1884)).

56. *Tiner,* 2012 Ark. App. 483, at 14–15, 422 S.W.3d at 186–87 (citing *Robinson*, 251 Ark. at 818–19, 475 S.W.2d at 678 (1972)).

domestic relations courts' attorneys' fees decisions will be very deferential.[57]

Tiner concluded by saying that in the absence of "express authority from" the Supreme Court of Arkansas, and given the deference shown to trial court decisions with respect to attorneys' fees awards, the Arkansas Court of Appeals no longer requires the reversal of a trial court's attorneys' fees order in a domestic relations case that does not include an application of the *Chrisco* factors.[58] *Tiner* then expressly overruled the part of *Stout* that requires courts in domestic relations cases to apply the *Chrisco* factors when awarding attorneys' fees.[59]

1. Tension Between the Majority and Dissenting Opinions

Tiner was not a unanimous decision.[60] Judge Doug Martin wrote the majority opinion, and Judges John Mauzy Pittman, John B. Robbins, and Cliff Hoofman joined it.[61] Judge Raymond R. Abramson[62] wrote a dissent joined by Judge Waymond M. Brown.[63]

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57. *Tiner,* 2012 Ark. App. 483, at 15–16, 422 S.W.3d at 187 (citing Stout v. Stout, 2011 Ark. App. 201, at 11, 378 S.W.3d 844, 850–51 ("[T]he court may use its own experience as a guide and can consider the types of factors set forth in [*Chrisco*] . . . ."), *overruled in part by Tiner*, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d at 180, 185–87; Swink v. Lasiter Constr., Inc., 94 Ark. App. 262, 282, 229 S.W.3d 553, 567 (2006) ("[T]here is no fixed formula in determining [an attorneys' fee award]."); Miller v. Miller, 70 Ark. App. 65, 69–70, 14 S.W.3d 903, 907 (2000) ("[C]ourts have the inherent power to award attorney[s'] fees in a domestic relations cases . . . . "); Deaton v. Deaton, 11 Ark. App. 165, 166, 668 S.W.2d 49, 50 (1984); Paulson v. Paulson, 8 Ark. App. 306, 312, 652 S.W.2d 46, 50 (1983) (a court is not required to "conduct an exhaustive hearing on the amount of attorney[s'] fees . . . because [of its familiarity] with both the case and the services rendered by the attorney")).

58. *Tiner*, 2012 Ark. App. 483, at 16, 422 S.W.3d at 187.

59. *Id.* at 16–17, 422 S.W.3d at 187 (overruling *Stout*, 2011 Ark. App. 201, at 11–12, 378 S.W.3d at 851; Clowers v. Stickel, 2012 Ark. App. 346, at 8, 414 S.W.3d 396, 400; Gillison v. Gillison, 2011 Ark. App. 244, at 18–19, 382 S.W.3d 795, 805; Szabo v. Womack, 2011 Ark. App. 664, at 5, 2011 WL 5220503, at *3).

60. *Tiner,* 2012 Ark. App. 483, at 17, 422 S.W.3d at 187.

61. *Id.* at 17, 422 S.W.3d at 179, 187.

62. Judge Abramson wrote for a unanimous court in *Stout*. *Stout,* 2011 Ark. App. 201, at 1, 12, 378 S.W.3d at 846, 851. Judges David M. Glover and Cliff Hoofman joined him. *Id.* at 1, 12, 378 S.W.3d at 846, 851. Judge Hoofman also joined Judge Martin's majority opinion in *Tiner*, which means he cast a vote in *Tiner* to overrule an opinion in *Stout* that he joined without reservation only eighteen months earlier. *Compare Tiner*, 2012 Ark. App. 483, at 2, 10–17, 422 S.W.3d at 180, 186–87 (trial courts *are not* required to analyze and apply the *Chrisco* factors when awarding attorneys' fees in domestic relations cases), *with Stout*, 2011 Ark. App. 201, at 10–12, 378 S.W.3d at 850–51 (trial courts *are* required to analyze and apply the *Chrisco* factors when awarding attorneys' fees in domestic relations cases).
Judge Hoofman did not write separately in either *Stout* or *Tiner*, which is odd given that he voted in *Tiner* to overrule an opinion in *Stout* that he joined. This means his *Tiner* vote contradicted his *Stout* vote. One would think that a judge who voted one way in *Stout* on March

According to the *Tiner* majority, *Stout* required trial courts to make specific findings when awarding attorneys' fees in domestic relations cases and in those cases where a trial court awarded attorneys' fees without considering and analyzing the *Chrisco* factors, that court would be reversed on appeal.[64] The *Tiner* majority held that circuit courts are "permitted and encouraged to consider the . . . factors listed in [*Chrisco v. Sun Industries, Inc.*], as well as [the] factors set forth in [*Robinson v. Champion*], and the financial abilities of the parties"; however, the court said it "[would] not, on its own motion, require [circuit courts] to make specific findings in domestic relations cases."[65]

Requiring circuit courts to make specific findings when awarding attorneys' fees in domestic relations cases would, in the words of the *Tiner* majority, "impose a considerable burden on the circuit court[s] . . . given the myriad of factors to be considered."[66] The *Tiner* dissenters disagreed.[67] Judges Abramson and Brown did not think *Stout* should be overruled, and they chided the majority for its failure to "demonstrate any logical reason to treat attorney[s'] fee[s] awards in domestic relations cases differently [from] attorney[s'] fee[s] awards in other cases."[68] Judge Abramson went on to say "there is no discernible, qualitative difference between domestic relations cases and other civil cases for purposes of awarding attorney[s'] fees . . . [and there is no perceptible] rational basis for treating [domestic relations] cases differently."[69]

2. The Reasons why Trial Courts Should Make Specific Findings when Awarding Attorneys' Fees

The purpose of requiring trial courts to apply the *Chrisco* factors when awarding attorneys' fees in domestic relations cases is to provide appellate courts with a sufficiently developed record to conduct a meaningful review of attorneys' fees awards, for without any trial court findings, analysis, or

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9, 2011, but voted the opposite way in *Tiner* eighteen months later on September 12, 2012, would at least explain why he changed his mind and what led him to do so. *Stout*, 2011 Ark. App. 201, at 1, 10–12, 378 S.W.3d at 844, 850–51; *Tiner*, 2012 Ark. App. 483, at 1, 16–17, 422 S.W.3d at 185–87. By way of contrast, Judge Abramson voted the same way in *Tiner* and *Stout*. *Tiner*, 2012 Ark. App. 483, at 17–19 (Abramson, J., dissenting); *Stout*, 2011 Ark. App. 201, at 1, 10–12, 378 S.W.3d at 844, 850–51.

63. *Tiner*, 2012 Ark. App. 483, at 17, 19, 422 S.W.3d at 187–88 (Abramson, J., dissenting).

64. *Id.* at 14, 422 S.W.3d 178, 186 (majority opinion).

65. *Id.* at 14–15, 422 S.W.3d at 186.

66. *Id.* at 14–15, 422 S.W.3d at 186–87.

67. *Id.* at 17–19, 422 S.W.3d at 187–88 (Abramson, J., dissenting).

68. *Id.* at 17, 422 S.W.3d at 187.

69. *Tiner*, 2012 Ark. App. 483, at 17, 422 S.W.3d at 187 (Abramson, J., dissenting).

reasoning, an appellate court cannot determine whether a trial court abused its discretion in awarding attorneys' fees.[70] As for the *Tiner* majority's contention that requiring trial courts to make specific findings when awarding attorneys' fees in domestic relations cases would "impose a considerable burden" on those courts, Judge Abramson countered that *Stout* did not mandate "an exhaustive hearing on attorney[s'] fees, nor [did] it require strict documentation of time and expenses by the attorneys in . . . divorce [cases]."[71] What *Stout* did require, however, was that trial courts "provide some basis upon which the reasonableness of the fee was determined so that a meaningful [appellate] review [could] be performed."[72]

The most important aspect of the *Tiner* dissent is its recognition that the Supreme Court of Arkansas "*has never held* that the *Chrisco* factors are not applicable in domestic[]relations cases."[73] In fact, the Supreme Court of Arkansas applied the *Chrisco* factors in *Davis v. Williamson*, which is a domestic relations case, and it applied factors similar to the *Chrisco* factors in *Paulson v. Paulson*, which is also a domestic relations case.[74] The *Tiner* majority never addressed this point, nor did it so much as mention that the Supreme Court of Arkansas had never held that *Chrisco* does not apply in domestic relations cases.[75] *Tiner* was not the Arkansas Court of Appeals' last word on the question of whether a trial court can award attorneys' fees in domestic relations cases without considering and analyzing the *Chrisco* factors.[76]

C. Folkers v. Buchy

On January 23, 2019, the Arkansas Court of Appeals decided *Folkers v. Buchy*, a child visitation and attorneys' fees case.[77] The trial court in *Folkers* required the appellant to pay the appellee's attorneys' fees.[78] The appellant did not contest the fee amount on appeal, but he did contend that the trial court abused its discretion when it required him to pay the appellee's attorneys' fees because the trial court did not fully consider that he filed the case in order to get joint custody of the parties' child after the ap-

70. *Id.* at 17–18, 422 S.W.3d at 188.
71. *Id.* at 18–19, 422 S.W.3d at 188.
72. *Id.*, 422 S.W.3d at 188.
73. *Id.*, 422 S.W.3d at 188 (emphasis added).
74. *Id.* at 18 n.2, 422 S.W.3d at 188 n.2 (citing Davis v. Williamson, 359 Ark. 33, 45–46, 194 S.W.3d 197, 205 (2004); Paulson v. Paulson, 8 Ark. App. 306, 310–12, 652 S.W.2d 46, 49–50 (1983)).
75. *Tiner,* 2012 Ark. App. 483, at 12–17, 422 S.W.3d at 185–87.
76. Folkers v. Buchy, 2019 Ark. App. 30, at 8–18, 570 S.W.3d 496, 501–06.
77. *Id.* at 1, 8–11, 570 S.W.3d at 498, 501–02.
78. *Id.* at 8–10, 570 S.W.3d at 501–02.

pellee denied him his requested visitation.[79] He conceded that in the aftermath of *Tiner*, trial courts no longer had to provide a written analysis of the *Chrisco* factors or any other factors in the course of awarding attorneys' fees.[80]

In response to his argument that the trial court abused its discretion when it ordered him to pay the attorneys' fees of the party he had to hale into court in order to get visitation with his child, the *Folkers* Court quoted the part of Rule 52(a) of the Arkansas Rules of Civil Procedure that says, "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under these rules."[81] One can read this to mean that when ruling on a motion for attorneys' fees in domestic relations cases, a trial court does not have to make written findings of fact and conclusions of law, which, if true, contradicts one of the reasons *Tiner* gave for overruling *Stout*'s requirement that trial courts apply the *Chrisco* factors.[82]

Tiner said mandatory application of the *Chrisco* factors is unnecessary because Ark. R. Civ. P. 52(a) provides a mechanism for a party who wants a written explanation for an attorneys' fee award to obtain that written explanation.[83] Yet, *Folkers* said written findings of fact and conclusions of law are also "unnecessary".[84] One is left to wonder what, if anything, a party who has been ordered to pay another party's attorneys' fees can do to obtain a written rationale for being ordered to do so.

The appellant in *Folkers* did not ask the Arkansas Court of Appeals to overrule *Tiner*, but like *Tiner*, *Folkers* was not unanimous on the issue of whether trial courts must apply the *Chrisco* factors when awarding attorneys' fees in domestic relations cases.[85] Judge N. Mark Klappenback wrote the majority opinion in *Folkers*, and Chief Judge Rita W. Gruber, along with Judges Robert J. Gladwin, David M. Glover,[86] and Larry D. Vaught, joined

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79. *Id.* at 8–9, 570 S.W.3d at 501.

80. *Id.*, 570 S.W.3d at 501.

81. *Id.* at 9–10, 570 S.W.3d at 501–02 (quoting ARK. R. CIV. P. 52(a)).

82. Tiner v. Tiner, 2012 Ark. App. 483, at 14 n.5, 422 S.W.3d 178, 186 n.5 ("Arkansas Rule of Civil Procedure 52 . . . provides an avenue for requesting specific findings.").

83. *Id.*, 422 S.W.3d 178, 186 n.5.

84. *Folkers*, 2019 Ark. App. 30, at 9, 570 S.W.3d at 502 (quoting ARK. R. CIV. P. 52(a)).

85. *Tiner*, 2012 Ark. App. 483, at 1, 17, 422 S.W.3d at 180, 187; *Folkers*, 2019 Ark. App. 30, at 1, 10–11, 570 S.W.3d at 497, 502.

86. Judge Glover joined Judge Abramson's unanimous opinion in *Stout*, which *Tiner* overruled. Stout v. Stout, 2011 Ark. App. 201, at 1, 12, 378 S.W.3d 851, 846, 851, *overruled in part by Tiner*, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d at 180, 185–87. One could deem Judge Glover's vote in *Folkers* as contradicting his vote in *Stout* because the dissenters in *Folkers* objected to *Tiner* overruling *Stout* and replacing it with a rule that trial courts need not explain their reasoning when awarding attorneys' fees in domestic relations cases. *Folkers*, 2019 Ark. App. 30, at 11–16, 570 S.W.3d at 502–05 (Harrison, J., dissenting); *id.* at 16–18, 570 S.W.3d at 505–06 (Hixson, J., dissenting). On the other hand, the *Folkers* majority pointed out that the parties did not raise the question of overruling *Tiner*, therefore, the

it.[87] There were two dissents, one by Judge Brandon J. Harrison, which Judges Raymond R. Abramson, Bart Virden, and Kenneth S. Hixson joined, and one by Judge Hixson, which Judges Abramson, Virden, and Harrison joined.[88] The *Folkers* majority said it was improper to consider overruling *Tiner* because no party had asked the Court to do so, and it would only be proper to do so in a case where the question was properly raised and developed, if the Supreme Court of Arkansas weighed in on the matter, or if the Arkansas Legislature changed the law.[89]

Judge Harrison started his dissent with this passage from *Martin v. Franklin Capital Corp.*:

> [A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles. Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.[90]

He then posed the following questions:

> What legal principles inform a circuit court's decision to award an attorney fee in a child[ ]custody and paternity case when each party has a legitimate claim against the other for a potential fee award? And if one or more of the principles can be identified, should a circuit court be required to minimally explain why it has chosen to award a fee to one party over the other? If not, how can this court ensure that like cases will be decided alike?[91]

Tiner's rule that a trial court need not explain the reasons for its attorneys' fees award is an invitation to leave these questions unanswered, which Judge Harrison described as a "problem . . . [the Arkansas Court of Appeals] . . . helped create," and one that the Supreme Court of Arkansas should "lead the effort to correct . . . ."[92] He went on to say that having the discretion to order one party to pay another party's attorneys' fees is not synony-

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issues the dissenters had with the case were not properly before the Court. *Id.* at 10–11, 570 S.W.3d at 502. Seen through that lens, Judge Glover's *Folkers* vote would not contradict his *Stout* vote.

87. *Folkers*, 2019 Ark. App. 30, at 1, 11, 570 S.W.3d at 497, 502.

88. *Id.* at 11–16, 570 S.W.3d at 502–05 (Harrison, J., dissenting); *id.* at 16–18, 570 S.W.3d at 505–06 (Hixson, J., dissenting).

89. *Id.* at 10–11, 570 S.W.3d at 502.

90. *Id.* at 11, 570 S.W.3d at 503 (Harrison, J., dissenting) (quoting Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005)); *see also* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

91. *Folkers,* 2019 Ark. App. 30, at 11, 570 S.W.3d at 503 (Harrison, J., dissenting).

92. *Id.* at 12, 570 S.W.3d at 503.

mous with explaining *why* it did, and requiring an explanation for why it did should not be controversial.[93]

He identified three reasons why a circuit court should be required to explain its reasoning in awarding attorneys' fees in domestic relations cases:[94] One, "every party has a right to know why he or she is being ordered to pay someone else's attorney[s'] fee[s]";[95] two, "a person needs to know why he or she is being assessed someone else's attorney[s'] fee[s] so a record for reversal or modification can be clearly made contemporaneous with the adverse ruling";[96] three, an appellate "court can more properly fulfill its role as an appellate tribunal when it has an express ruling to evaluate; otherwise [it is] left searching for a reason to uphold, reverse, or perhaps modify the circuit court's decision."[97]

He also disagreed with the *Folkers* majority's and the *Tiner* majority's assertion that Ark. R. Civ. P. 52(a) renders the application of the *Chrisco* factors unnecessary.[98] The "better practice", he said, "is for a [trial] court to explain its decision[s]" because that is "a more transparent, party-centered approach."[99] As far as the *Folkers* majority's and the *Tiner* majority's concern that requiring an application of the *Chrisco* factors would add additional burdens to already overburdened trial courts, Judge Harrison retorted that "[o]ne, two, or three well-crafted sentences . . . [in an order prepared by the lawyer for the prevailing party] . . . should nearly always suffice to communicate what is needed in this context."[100]

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93. *Id.* at 14, 570 S.W.3d at 505.

94. *Id.*, 570 S.W.3d at 504.

95. *Id.*, 570 S.W.3d at 504.

96. *Id.*, 570 S.W.3d at 504.

97. *Folkers*, 2019 Ark. App. 30, at 14, 570 S.W.3d at 504 (Harrison, J., dissenting).

98. *Id.* at 15, 570 S.W.3d at 504 (citing Tiner v. Tiner, 2012 Ark. App. 483, at 14–15, n.5, 422 S.W.3d 178, 186, n.5).

99. *Id.* at 15, 570 S.W.3d at 504 (citing Stilley v. Fort Smith Sch. Dist., 367 Ark. 193, 199, 238 S.W.3d 902, 905 (2006)).

100. *Id.*, 570 S.W.3d at 504 (citing 2 DAVID NEWBERN, JOHN J. WATKINS & D.P. MARSHALL JR., ARKANSAS PRACTICE SERIES: CIVIL PRACTICE & PROCEDURE § 20:2 (5th ed. 2010)). Judge Harrison's point that a court need not write an order the length of a learned treatise is well taken, but with due respect to His Honor, his suggestion that "[a] one [or] two . . . [sentence order] should nearly always suffice to communicate what is needed in this context" misses the mark if that mark is providing an adequate explanation to the party being ordered to pay another party's attorneys' fees and providing an appellate court with an adequate record to conduct a meaningful review of the basis of the fee award.

Imagine a trial court ordering a lawyer in a domestic relations case to prepare an order awarding the plaintiff attorneys' fees to be paid by the defendant. The lawyer prepares a "three sentence" order that says the following: "The Plaintiff in this domestic relations case filed a motion requesting an award of attorneys' fees. The Court has the discretion to award attorneys' fees in domestic relations cases. The Court exercises that discretion and awards the Plaintiff $30,000 in attorneys' fees." How does this "three sentence" order tell the Defendant anything about how the court arrived at the $30,000 amount, and how does it provide an

When a court orders one party to pay another party's attorneys' fees, "the administration of justice is better served if everyone knows *why* . . . [the court shifted the responsibility of paying attorneys' fees from one party to another,]" and this is especially necessary in cases involving large fee awards.[101] As for *Tiner*'s statement that requiring trial courts to apply the *Chrisco* factors in domestic relations cases would impose a "considerable burden on [those courts] if [the Arkansas Court of Appeals] required [those courts to make specific findings] when awarding attorney[s'] fees, given the myriad of factors to be considered[,]" Judge Harrison responded, "if . . . 'a myriad of facts' exist that could support an attorney[s'] fee award in [domestic relations cases], . . . that . . . increases, not decreases, the need for a transparent explication."[102]

Judge Harrison concluded his dissent by calling for the overruling of *Tiner* and replacing it with a rule that trial courts explain their attorneys' fees award decisions so that at a minimum, those decisions can be meaningfully reviewed under the court's abuse of discretion standard of review.[103]

Judge Hixson joined Judge Harrison's dissent, but he wrote his own dissent to make the point that when the Arkansas Court of Appeals decided *Tiner*, attorneys' fees awards were typically in the $500 to $1,000 range, but since 2016, Arkansas's appellate courts had seen ever-escalating attorneys' fees awarded in domestic relations cases in amounts ranging from $14,190 to $31,950, and in each of those cases, the appellate courts were tasked with reviewing the reasonableness of those awards under an abuse of discretion standard with records devoid of any reasons or explanations for those awards, which in turn made "intelligent and well-reasoned review" impossible.[104]

Judge Hixson further stated:

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appellate court any useful information for it to conduct a meaningful review of the record to determine whether that court abused its discretion? The answer is, it does not do either because a written order this thin on substance is tantamount to no written order at all.

101. *Id.* at 15–16, 570 S.W.3d at 505 (citing Hargis v. Hargis, 2018 Ark. App. 490, at 1–3, 563 S.W.3d 568, 568–69 (the trial court ordered the appellant to pay the appellee $18,000 in attorneys' fees)).

102. *Id.* at 16, 570 S.W.3d at 504–05.

103. *Folkers*, 2019 Ark. App. 30, at 16, 570 S.W.3d at 505 (Harrison, J., dissenting).

104. *Id.* at 17, 570 S.W.3d at 505 (Hixson, J., dissenting) (citing Foster v. Foster, 2016 Ark. 456, at 16–17, 506 S.W.3d 808, 818–19 (the trial court ordered the appellant to pay the appellee $14,190 in attorneys' fees); Goodson v. Bennett, 2018 Ark. App. 444, at 21–22, 562 S.W.3d 847, 862 (the trial court ordered the appellant to pay the appellee $30,000 in attorneys' fees); Wyatt v. Wyatt, 2018 Ark. App. 177, at 11, 545 S.W.3d 796, 803 (the trial court ordered the appellant to pay the appellee $31,950 in attorneys' fees); Wilhelm v. Wilhelm, 2018 Ark. App. 47, at 4–5, 539 S.W.3d 619, 623 (the trial court ordered the appellant to pay the appellee $18,116.66 in attorneys' fees)).

> [Appellate courts] should not be forced to resort to speculation, conjecture, or divination to ascertain whether [a] circuit court's [attorneys' fees] award was thoughtless, improvident, or without due consideration. Common courtesy requires, and due process should demand, that parties who are encumbered with imposing, and sometimes daunting, monetary judgments for attorney[s'] fees be given the underlying justification and explanation [for those judgments].[105]

He also said that the Supreme Court of the United States, in *Troxel v. Granville*, recognized that parents have a liberty interest protected by the Fourteenth Amendment Due Process Clause in the care, custody, and control of their children, and that requiring one party to pay another party's attorneys' fees in the tens of thousands of dollars in a domestic relations case can have an "undesirable chilling effect" on a parent's exercise of that right.[106] If the Arkansas Court of Appeals is "going to attach substantial financial burdens [on parents] who are exercising their fundamental liberties," it should "explain to those [parents] the reasons for . . . [that] burden[,]" and then an appellate court would have "a competent record [to review][,]" which would in turn allow that court to "faithfully perform [its duty to] . . . determine whether the [trial] court abused its discretion" when it ordered one party to pay another party's attorneys' fees.[107] And like Judge Harrison, Judge Hixson said he would overrule *Tiner* and require trial courts to provide "a thoughtful and thorough explanation" of the reasons it required one party to pay another party's attorneys' fees.[108]

D. Rye v. Rye

The next case where the Arkansas Court of Appeals confronted the issue of overruling *Tiner* and reinstating *Stout*'s requirement that trial courts apply the *Chrisco* factors when awarding attorneys' fees in domestic relations cases came on June 2, 2021, in the case of *Rye v. Rye*, a case involving "the financial aspects of a divorce[,] [including an award of attorneys' fees.]"[109] The trial court in *Rye* ordered the appellant to pay the appellee $36,284.60 in attorneys' fees, and the appellant sought a reversal of that order on the grounds that: One, the trial court did not "properly consider the disparity in [the parties'] income in awarding attorney[s'] fees[,]" and, two,

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105. *Folkers*, 2019 Ark. App. 30, at 17, 570 S.W.3d at 505–06 (Hixson, J., dissenting).
106. *Id.* at 17–18, 570 S.W.3d at 506 (citing Troxel v. Granville, 530 U.S. 57, 65 (2000)).
107. *Id.* at 18, 570 S.W.3d at 506.
108. *Id.* at 16, 570 S.W.3d at 505 (Harrison, J., dissenting); *id.* at 18, 570 S.W.3d at 506 (Hixson, J., dissenting).
109. Rye v. Rye, 2021 Ark. App. 286, at 1, 9–10, 625 S.W.3d 761, 763, 767.

Tiner should be overruled, and trial courts should be required "to 'give a meaningful, party-centric explanation' for an award of attorney[s'] fees."[110]

Rye reviewed the trial court's findings of fact and conclusions of law regarding the fee award and concluded that the trial court did not abuse its discretion, nor did it commit clear error in making the findings that it did to support the award.[111] As for the appellant's request that the appellate court should overrule *Tiner*, the court responded, "[w]e decline the invitation."[112]

Rye was not unanimous.[113] Judge Rita W. Gruber wrote the majority opinion, and Judges Raymond R. Abramson, Mike Murphy, and Waymond M. Brown joined her opinion.[114] Chief Judge Brandon J. Harrison concurred in part and dissented in part, and Judge Bart Virden joined him.[115]

At this point, the reader should recall that Judge Abramson wrote a unanimous opinion in *Stout*, which *Tiner* overruled.[116] Judges David M. Glover and Cliff Hoofman joined that opinion.[117] Judge Hoofman also joined Judge Doug Martin's majority opinion in *Tiner*, which means Judge Hoofman cast a vote in *Tiner* to overrule an opinion in *Stout* that he joined without reservation only eighteen months earlier.[118] Judge Glover was part

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110. *Id.* at 9, 625 S.W.3d at 767; *id.* at 16, 625 S.W.3d at 770–71 (Harrison, C.J., concurring in part and dissenting in part).

111. *Id.* at 9–10, 625 S.W.3d at 767. The appellant in *Rye* "moved for findings of fact and conclusions of law under [ARK. R. CIV. P.] 52(a) [regarding] the award of attorney[s'] fees[,]" and the trial court entered written findings of fact and conclusions of law to "support[ ] the fee award." *Id.* at 4, 625 S.W.3d at 764. The trial court in *Rye* granted the appellant's Rule 52(a) request for written findings of fact and conclusions of law, but it was not *required* to do so because while Rule 52(a) says, "[i]f requested by a party at any time prior to entry of judgment, in all contested actions tried upon the facts without a jury, the court *shall* find the facts specially and state separately its conclusions of law . . . ," Rule 52(a) also says, "[f]indings of fact and conclusions of law are *unnecessary* on decisions of motions under these rules." ARK. R. CIV. P. 52(a) (emphases added); Genz v. Cooksey, 2021 Ark. App. 175, at 14, 2021 WL 1557893, at *7 (despite the use of the word "shall" in Rule 52(a), a trial court *is not required* to make findings when ruling on motions); Peterson v. Davis, 2012 Ark. App. 166, at 4–5, 2012 WL 559935, at *3 (citing ARK. R. CIV. P. 52(a)); Bratton v. Gunn, 300 Ark. 140, 143–44, 777 S.W.2d 219, 221 (1989)) (When deciding motions filed under the Arkansas Rules of Civil Procedure, a trial court is not required to make written findings of fact and conclusions of law. The better practice is to make such findings so an appellate court can conduct a meaningful review of the record, but not doing so does not constitute error.).

112. *Rye*, 2021 Ark. App. 286, at 10, 625 S.W.3d at 767.

113. *Id.* at 1, 11, 625 S.W.3d at 763, 767.

114. *Id.*, 625 S.W.3d at 763, 767.

115. *Id.* at 11–21, 625 S.W.3d at 767–73 (Harrison, C.J., concurring in part and dissenting in part).

116. Stout v. Stout, 2011 Ark. App. 201, at 12, 378 S.W.3d 844, 851, *overruled in part by* Tiner v. Tiner, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d 178, 180, 185–87.

117. *Stout*, 2011 Ark. App. 201, at 12, 378 S.W.3d at 851.

118. *Compare Tiner*, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d at 180, 185–87 (trial courts *are not* required to analyze and apply the *Chrisco* factors when awarding attorneys' fees in domestic relations cases), *with Stout*, 2011 Ark. App. 201, at 10–12, 378 S.W.3d at

of the majority in *Folkers*, which declined to overrule *Tiner* and reinstate *Stout* because no party in *Folkers* asked the Court to overrule *Tiner*.[119]

When one combines the fact that Judge Abramson joined the majority in *Rye*, which "decline[d] the invitation [to overrule *Tiner* and reinstate *Stout*,]" with the fact that Judge Hoofman switched his pro-*Stout* vote to an anti-*Stout* vote in *Tiner*, with the further fact that Judge Glover implicitly switched his pro-*Stout* vote to an anti-*Stout* vote in *Folkers*, one can see that every member of the unanimous opinion in *Stout* voted in a subsequent case to repudiate that very opinion.[120] There is more. Judge Brown, who joined Judge Abramson's dissent in *Tiner* and objected to overruling *Stout*, also joined the majority in *Rye* that "decline[d] the invitation [to overrule *Tiner* and reinstate *Stout*.]"[121] Neither Judge Abramson nor Judge Brown wrote separately in *Rye* to explain why they no longer objected to *Tiner*'s overruling of *Stout*. Perhaps they simply changed their minds. Perhaps they thought there were not enough votes on the Arkansas Court of Appeals to overrule *Tiner* and reinstate *Stout*, so why press the matter? Perhaps there is some other explanation for why Judge Abramson cast a vote in *Rye* that contradicted the unanimous opinion he wrote in *Stout*, the dissent he wrote in *Tin-*

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851 (trial courts *are* required to analyze and apply the *Chrisco* factors when awarding attorneys' fees in domestic relations cases).

119. Folkers v. Buchy, 2019 Ark. App. 30, at 1, 10–11, 570 S.W.3d 496, 502.

120. *Stout*, 2011 Ark. App. 201, at 1, 12, 378 S.W.3d 844, 846, 851 (unanimous opinion by Abramson, J., joined by Glover & Hoofman, JJ.); *Tiner*, 2012 Ark. App. 483, at 1–2, 12–17, 422 S.W.3d at 179–80, 185–87 (majority opinion by Martin, J., joined by Pittman, Robbins & Hoofman, JJ.; dissent by Abramson, J., joined by Brown, J.); *Folkers*, 2019 Ark. App. 30, at 1, 8–11, 570 S.W.3d at 498, 501–02 (majority opinion by Klappenbach, J., joined by Gruber, C.J., Gladwin, Glover & Vaught, JJ.; dissent by Harrison, J., joined by Abramson, Virden & Hixson, JJ.; dissent by Hixson, J., joined by Abramson, Virden & Harrison, JJ.); *Rye*, 2021 Ark. App. 286, at 1, 9–11, 625 S.W.3d at 763, 767 (majority opinion by Gruber, J., joined by Abramson, Murphy & Brown, JJ.; concurrence in part and dissent in part by Harrison, C.J., joined by Virden, J.).

Judge Abramson joined Judge Harrison's dissent in *Folkers*, which expressly called for overruling *Tiner*. *Folkers*, 2019 Ark. App. 30, at 16, 570 S.W.3d at 505 (Harrison, J., dissenting). He also joined Judge Hixson's dissent in *Folkers*, which also called for overruling *Tiner* or modifying it "to require a thoughtful and thorough explanation of [an award of] attorney[s'] fees . . . ." *Id.* at 16–18, 570 S.W.3d at 505–06 (Hixson, J., dissenting).

121. *Tiner*, 2012 Ark. App. 483, at 17–19, 422 S.W.3d at 187–88 (Abramson, J., dissenting); *Rye*, 2021 Ark. App. 286, at 1, 9–10, 625 S.W.3d at 763, 767.

er, and the two dissents he joined in *Folkers*.[122] Likewise for Judge Brown, whose vote in *Rye* contradicted the dissenting vote he cast in *Tiner*.[123]

Regardless of the reason or reasons why Judges Abramson and Brown cast the votes they did in *Rye*, because those votes contradicted their earlier votes to overrule *Tiner*, they both should have explained why they "decline[d] the invitation [to overrule *Tiner* and reinstate *Stout*,]" and they should have explained themselves for the very reasons they both gave in Judge Abramson's *Tiner* dissent:

> [There is no] logical reason to treat attorney[s'] fee[s] awards in domestic[] relations cases differently than attorney[s'] fee[s] awards in other cases . . . there is no discernible, qualitative difference between domestic relations cases and other civil cases for purposes of awarding attorney[s'] fees, . . . [and there is no perceptible] rational basis for treating [domestic relations] cases differently.[124]

There are reasons in addition to the foregoing for why Judges Abramson and Brown should have explained their seeming change of heart with respect to overruling *Tiner*, and Judge Hixson articulated those reasons clearly and forcefully in the dissent he wrote in *Folkers* when he noted that it was "common courtesy" to provide "the underlying justification" for such judgments.[125]

Chief Judge Brandon J. Harrison concurred in part and dissented in part in *Rye*, and Judge Bart Virden joined him.[126] Chief Judge Harrison's partial

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122. *Rye*, 2021 Ark. App. 286, at 1, 9–10, 625 S.W.3d at 763, 767; *Stout*, 2011 Ark. App. 201, at 1, 12, 378 S.W.3d at 846, 851; *Tiner*, 2012 Ark. App. 483, at 17–19, 422 S.W.3d at 187–88 (Abramson, J., dissenting); *Folkers*, 2019 Ark. App. 30, at 11–16, 570 S.W.3d at 502–05 (Harrison, J., dissenting); *id.* at 16–18, 570 S.W.3d at 505–06 (Hixson, J., dissenting).

123. *Rye*, 2021 Ark. App. 286, at 1, 9–10, 625 S.W.3d at 763, 767; *Tiner*, 2012 Ark. App. 483, at 17–19, 422 S.W.3d at 187–88 (Abramson, J., dissenting).

124. *Tiner*, 2012 Ark. App. 483, at 17, 422 S.W.3d at 187–88 (Abramson, J., dissenting). It is ironic that judges who previously stated that trial courts should explain themselves when awarding attorneys' fees so an appellate court can have an adequate record "upon which to [conduct] a meaningful review of an award of fees[,]" would seemingly change their mind on this issue, and in so doing, not explain why they changed their minds. *Id.* at 17, 422 S.W.3d at 187–88 (Abramson, J., dissenting).

125. *Folkers*, 2019 Ark. App. 30, at 17, 570 S.W.3d at 505–06 (Hixson, J., dissenting). Judge Abramson joined Judge Hixson's dissent. *Id.* at 16–18, 570 S.W.3d at 505–06.

126. *Tiner,* 2021 Ark. App. 483, at 11–21, 625 S.W.3d at 767–73 (Harrison, C.J., concurring in part and dissenting in part). Like Chief Judge Harrison, Judge Virden has consistently voted to overrule *Tiner*, which is reflected in his votes in *Folkers*, where he joined the dissents by Judges Harrison and Hixson, and his vote in *Rye*, where he joined Chief Judge Harrison's partial concurrence and partial dissent. *Folkers*, 2019 Ark. App. 30, at 11–16, 570 S.W.3d at 502–05 (Harrison, J., dissenting); *id.* at 16–18, 570 S.W.3d at 505–06 (Hixson, J., dissenting); *Rye*, 2021 Ark. 286, at 11, 16, 19–21, 625 S.W.3d at 767–68, 770–73 (Harrison, C.J, concurring in part and dissenting in part).

concurrence and partial dissent is notable because he called for the overruling of *Tiner* in *Folkers*, and he maintained that position in *Rye*.[127] In *Rye*, Chief Judge Harrison expressed "concern" about the size of the $36,284.60 attorneys' fee award, but also the fact that "one party was made to pay the other's fee at all."[128] He agreed with the appellant that *Tiner* should be overruled and that a trial court should be required to provide a written explanation to the parties whenever it shifted the responsibility for the payment of attorneys' fees from one party to another, but *Folkers* and *Tiner* itself precluded the Court from overruling *Tiner* and from requiring trial courts to provide written reasons for attorneys' fees shifting decisions.[129] He lamented that the Supreme Court of Arkansas had not "yet . . . step[ped] directly into the breach [to] decide whether [trial] courts must do more to justify large—if not potentially financially crippling—attorney[s'] fees [awards] in [domestic relations cases.]"[130] Despite these and other reservations about attorneys' fees shifting in domestic relations cases more generally, Chief Judge Harrison joined the *Rye* majority's disposition of the attorneys' fees issue because he believed that *Folkers* and *Tiner* forced him to do so.[131]

In *Rye*, Chief Judge Harrison lamented that the Supreme Court of Arkansas had not more "directly" intervened to say whether trial courts should more clearly "justify" large attorneys' fees awards."[132] In a very real sense, however, the Supreme Court of Arkansas has directed trial courts to "justify . . . attorney[s'] fees [awards] in [domestic relations cases]" and in any other case where a trial court shifts the responsibility of paying attorneys' fees from one party to another; it did so in *Davis v. Williamson*, *Bailey v. Rahe*, *S. Beach Beverage Co. v. Harris Brands, Inc.*, and *Lake View Sch. Dist. No. 25 v. Huckabee*, all of which antedate *Stout* and *Tiner*, and it did so again in *Walther v. Wilson*, which postdates *Stout* and *Tiner*.[133]

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127. *Folkers*, 2019 Ark. App. 30, at 11–16, 570 S.W.3d at 502–05 (Harrison, J., dissenting); *Rye*, 2021 Ark. 286, at 11, 16, 19–21, 625 S.W.3d at 767–68, 770–73 (Harrison, C.J, concurring in part and dissenting in part).

128. *Rye*, 2021 Ark. App. 286, at 16, 625 S.W.3d at 770 (Harrison, C.J., concurring in part and dissenting in part).

129. *Id.* at 19–20, 625 S.W.3d at 772 (citing *Folkers*, 2019 Ark. App. 30, at 11, 570 S.W.3d at 503 (Harrison, J., dissenting); *Tiner*, 2012 Ark. App. 483, at 17, 422 S.W.3d at 188 (Abramson, J., dissenting)).

130. *Rye*, 2021 Ark. App. 286, at 20, 625 S.W.3d at 772 (Harrison, C.J., concurring in part and dissenting in part) (citing *Folkers*, 2019 Ark. App. 30, at 17, 570 S.W.3d at 505 (Hixson, J., dissenting)).

131. *Id.* at 19–21, 625 S.W.3d at 772–73.

132. *Id.* at 20, 625 S.W.3d at 772 (citing *Folkers*, 2019 Ark. App. 30, at 17, 570 S.W.3d at 505 (Hixson, J., dissenting)).

133. Davis v. Williamson, 359 Ark. 33, 37–38, 45–46, 194 S.W.3d 197, 199–200, 204–05 (2004); Bailey v. Rahe, 355 Ark. 560, 566, 142 S.W.3d 634, 638–39 (2004); S. Beach Beverage Co. v. Harris Brands, Inc., 355 Ark. 347, 357, 138 S.W.3d 102, 108 (2003); Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31, 95–96, 91 S.W.3d 472, 510 (2002).

Notwithstanding these cases, Chief Judge Harrison is no doubt correct that until the Supreme Court of Arkansas expressly overrules *Tiner* and says what it has said multiple times before, that is, trial courts must apply the *Chrisco* factors when awarding attorneys' fees, Arkansas's trial courts are free to shift the responsibility of paying attorneys' fees from one party to another without offering a word of explanation to the parties or to a reviewing court.[134]

III. WHEN COURTS ORDER ONE PARTY TO PAY ANOTHER PARTY'S ATTORNEYS' FEES, THEY SHOULD EXPLAIN THE BASIS OF THOSE DECISIONS FOR THE BENEFIT OF THE PARTIES AND FOR THE BENEFIT OF REVIEWING COURTS SO THOSE COURTS CAN CONDUCT A MEANINGFUL APPELLATE REVIEW OF THOSE DECISIONS

One of the reasons *Tiner* gave for overruling *Stout* was the fact that *Stout* is a domestic relations case, and when it held that courts awarding attorneys' fees in domestic relations cases must apply the *Chrisco* factors, it relied on three Supreme Court of Arkansas cases that are not domestic relations cases.[135] Those cases are *Bailey*, *South Beach Beverage*, and *Lake View*, a guardianship case, a case under the Arkansas Franchise Practices Act, and a school funding case respectively.[136] *Tiner* reasoned that *Bailey*, *South Beach Beverage*, and *Lake View* were "limited in application to . . . school funding, guardianship proceedings, and cases involving the [Arkansas] Franchise Act" and therefore, "their holdings with respect to the *Chrisco* factors" should not be "extend[ed] [to] domestic relations cases."[137]

There is nothing in the language of *Bailey*, *South Beach Beverage*, or *Lake View* that explicitly or implicitly says or suggests that their requirement that trial courts apply the *Chrisco* factors when awarding attorneys' fees is "limited in application to . . . school funding, guardianship proceedings, and cases involving the [Arkansas] Franchise Act."[138] Moreover, when

134. *Rye*, 2021 Ark. App. 286, at 19–21, 625 S.W.3d at 772–73 (Harrison, C.J., concurring in part and dissenting in part).

135. Tiner v. Tiner, 2012 Ark. App. 483, at 13–14, 422 S.W.3d at 185–86 (citing *Bailey*, 355 Ark. at 566, 142 S.W.3d at 638–39 (2004); *S. Beach Beverage Co.*, 355 Ark. at 357, 138 S.W.3d at 108; *Lake View Sch. Dist. No. 25*, 351 Ark. at 95–96, 91 S.W.3d at 510).

136. Stout v. Stout, 2011 Ark. App. 201, at 11–12, 378 S.W.3d 844, 851 (citing *Bailey*, 355 Ark. at 561, 566, 142 S.W.3d at 635, 638–39), *overruled in part by Tiner*, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d at 180, 185–87; *S. Beach Beverage Co.*, 355 Ark. at 349, 357, 138 S.W.3d at 102–03, 108; *Lake View Sch. Dist. No. 25*, 351 Ark. at 41–42, 95–96, 91 S.W.3d at 477, 510).

137. *Tiner*, 2012 Ark. App. 483, at 14, 422 S.W.3d at 186.

138. *Bailey*, 355 Ark. at 561, 566, 142 S.W.3d at 635, 638–39; *S. Beach Beverage Co.*, 355 Ark. at 349, 357, 138 S.W.3d at 102–03, 108; *Lake View Sch. Dist. No. 25*, 351 Ark. at 41–42, 95–96, 91 S.W.3d at 477, 510.

a court wants to limit its holding to the particular circumstances in a particular case it can simply say that is what it is doing, or it can say something along the lines of "the holding in this case is limited to the particular facts of this case."[139] Neither *Bailey*, nor *South Beach Beverage*, nor *Lake View* said any such thing.[140]

Additionally, on April 18, 2019, the Supreme Court of Arkansas decided *Walther*, a case involving attorneys' fees in an illegal exaction case against state officials, and held that the trial court committed reversible error because it awarded attorneys' fees without applying the *Chrisco* factors; therefore, it remanded the case to the trial court with instructions to apply those factors.[141] In reversing and remanding because the trial court failed to apply the *Chrisco* factors, *Walther* did precisely what *Bailey*, *South Beach Beverage*, and *Lake View* did, which is require the application of the *Chrisco* factors when awarding attorneys' fees. Like *Bailey*, *South Beach Beverage*, and *Lake View*, *Walther* did not remotely suggest that requiring the application of the *Chrisco* factors when awarding attorneys' fees is limited to particular kinds of cases.[142]

Another reason *Tiner* overruled *Stout* was that Rule 52 of the Arkansas Rules of Civil Procedure "provides an avenue for requesting specific findings[,]" which rendered *Stout*'s requirement that trial courts make *Chrisco* findings unnecessary.[143] Rule 52 does not do the work *Tiner* claims it does. Rule 52(a)(1) requires a party to request that a court make "findings of fact and conclusions of law" *before* that court enters a judgment.[144] In cases where a court *sua sponte* enters an order granting or denying attorneys' fees, it will be too late for a party to request findings of fact and conclusions of law under Rule 52(a)(1), and at that point, one would have to resort to Ark. R. Civ. P. 52(b)(1), which allows a party to file a motion within ten days

139. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 109 (2000) ("Our consideration *is limited to the present circumstances*, for the problem of equal protection in election processes generally presents many complexities.") (emphasis added).

140. *Bailey*, 355 Ark. at 561, 566, 142 S.W.3d at 635, 638–39; *S. Beach Beverage Co.*, 355 Ark. at 349, 357, 138 S.W.3d 102, 102–03, 108; *Lake View Sch. Dist. No. 25*, 351 Ark. at 41–42, 95–96, 91 S.W.3d at 477, 510.

141. Walther v. Wilson, 2019 Ark. 105, at 1–3, 7, 571 S.W.3d 897, 898–99, 901.

142. *Id.* at 7, 571 S.W.3d at 901; *Bailey*, 355 Ark. at 561, 563–66, 142 S.W.3d at 637–39; *S. Beach Beverage Co.*, 355 Ark. at 349, 357, 138 S.W.3d at 103, 107–108; *Lake View Sch. Dist. No. 25*, 351 Ark. at 92–96, 91 S.W.3d at 508–10. *Lake View* did say, "this is a unique case with a unique set of circumstances . . . [,]" however, the court was not talking about applying the *Chrisco* factors to an attorneys' fee request; rather, it was talking about the uniqueness of awarding attorneys' fees against the State of Arkansas because the State waived its sovereign immunity, which would have otherwise prohibited a court from requiring the State to pay another party's attorneys' fees. *Lake View*, 351 Ark. at 95–96, 91 S.W.3d at 510.

143. *Tiner*, 2012 Ark. App. 483, at 14–15 & n.5, 422 S.W.3d at 186 & n.5.

144. ARK. R. CIV. P. 52(a).

after a court enters a judgment and ask that court to amend its findings or to make additional ones.[145] The court is not, however, *required* to amend its findings or to make additional findings because the text of Rule 52(b)(1) says "the court *may* amend its findings . . . or make additional findings and *may* amend the judgment accordingly."[146]

Moreover, even if a party makes a timely request under Rule 52(a)(1) for findings of fact and conclusions of law, the text of that very rule says "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under [the Arkansas Rules of Civil Procedure,]" which means a court can decide a motion for attorneys' fees filed in accordance with Ark. R. Civ. P. 54(e) without making findings of fact and conclusions of law.[147] Thus, what Rule 52(a)(1) offers on the one hand (i.e., if a party makes a timely request for findings of fact and conclusions of the law, the court is supposed to make those findings and conclusions), it takes away on the other (i.e., a court is not required to make findings of fact and conclusions of law in deciding any motion filed under the Arkansas Rules of Civil Procedure).[148] In sum, Rule 52 provides no succor to the party who seeks a written explanation for why he or she has to pay another party's attorneys' fees, or for how the trial court arrived at the amount of attorneys' fees he or she has to pay.

Yet another reason *Tiner* overruled *Stout* was that courts in domestic relations cases know the record and the quality of the representation provided by the attorneys; therefore, they have a "superior perspective" from which to assess the factors involved in ruling on a motion for attorneys' fees, which in turn means appellate review of domestic relations courts' attorneys' fees decisions will be very deferential.[149] Frankly, one wonders

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145. *Id.* 52(b)(1).

146. *Id.* (emphases added).

147. *Id.* 52(a)(1); Folkers v. Buchy, 2019 Ark. App. 30, at 9, 570 S.W.3d 496, 502 (citing ARK. R. CIV. P. 52(a)).

148. ARK. R. CIV. P. 52(a); Genz v. Cooksey, 2021 Ark. App. 175, at 13–14, 2021 WL 1557893, at *6–7 (despite the use of the word "shall" in Rule 52(a), a trial court *is not required* to make findings when ruling on motions); Peterson v. Davis, 2012 Ark. App. 166, at 4–5, 2012 WL 559935, at *3 (citing ARK. R. CIV. P. 52(a); Bratton v. Gunn, 300 Ark. 140, 143–44, 777 S.W.2d 219, 221 (1989)) (When deciding motions filed under the Arkansas Rules of Civil Procedure, a trial court is not required to make written findings of fact and conclusions of law. The better practice is to make such findings so an appellate court can conduct a meaningful review of the record, but not doing so does not constitute error.).

149. *Tiner*, 2012 Ark. App. 483, at 15–16, 422 S.W.3d at 187 (citing Stout v. Stout, 2011 Ark. App. 201, at 11, 378 S.W.3d 844, 850–51 ("[T]he court may use its own experience as a guide and can consider the types of factors set forth in [*Chrisco*] . . . .")), *overruled in part by Tiner*, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d at 180, 185–87; Swink v. Lasiter Constr., Inc., 94 Ark. App. 262, 282, 229 S.W.3d 553, 567 (2006) ("[T]here is no fixed formula in determining [an attorneys' fee award]."); Miller v. Miller, 70 Ark. App. 65, 69–70, 14 S.W.3d 903, 907 (2000) ("[C]ourts have the inherent power to award attorney[s'] fees in a

what any of the foregoing has to do with requiring a trial court to provide the parties and an appellate court with a written explanation for why it ordered one party to pay another party's attorneys' fees. That an appellate court defers to a trial court's factual findings is an unremarkable proposition. Deference, however, should not be, and cannot be, a proverbial rubber stamp because trial judges are human beings, which means every one of them is fallible. The fact that appellate courts exist in the first place proves that point.[150] Be that as it may, the fact that a trial court addresses attorneys' fees issues in the first instance, and the fact that such court will be familiar with the lawyers and the parties, in no way diminishes the parties' right and need to know why that court ruled in the way it did, nor does it diminish an appellate court's need to have a fully developed record to review in order to determine if the trial court's decision is erroneous or an abuse of discretion.[151] Thus, a deferential standard of review is no reason to relieve trial courts of the necessary duty to explain their attorneys' fees decisions to the parties or to an appellate court.

Tiner overruled *Stout*'s requirement that trial courts apply the *Chrisco* factors when awarding attorneys' fees because it ostensibly added an unnecessary burden to already overburdened trial courts.[152] The desire to lighten trial judges' workload is understandable. Many have large caseloads, some may not have law clerks to assist them, and others may not have convenient access to a comprehensive law library.[153] Some of them may labor under fatigue from regularly presiding over contentious and emotional divorce, custody, and support cases.[154]

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domestic relations cases . . . . "); Deaton v. Deaton, 11 Ark. App. 165, 166, 668 S.W.2d 49, 50 (1984); Paulson v. Paulson, 8 Ark. App. 306, 312, 652 S.W.2d 46, 50 (1983) (a court is not required to "conduct an exhaustive hearing on the amount of attorney[s'] fees . . . because [of its familiarity] with both the case and the services rendered by the attorney")).

150. Of course, appellate judges are human beings, which means they are fallible too, but in a hierarchical judicial system, some court has to have the final say. "[An appellate court is] not final because [it is] infallible, [it is] infallible only because [it is] final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in* O'Brien v. Dubois, 145 F.3d 16, 19 (1st Cir. 1998).

151. *Folkers*, 2019 Ark. App. 30, at 14–16, 570 S.W.3d at 504–05 (Harrison, J., dissenting) ("a court's decision to exercise its discretionary authority to order a party to pay the other party's attorney[s'] fee[s] is not the same as explaining *why* the court ordered it done. . . . Why a court has acted is as important [as the fact] that it has acted.").

152. *Tiner*, 2012 Ark. App. 483, at 14–15, 422 S.W.3d at 186–87.

153. *See* DAVID CLAYTON CARRAD, *supra* note 1, at 266.

154. *Id.*

In 2021, there were 158,442 filings in Arkansas's circuit courts and 135,178 dispositions.[155] Of the 158,442 filings, 33,320 (21.03%) were civil cases; 49,135 (31.01%) were criminal cases; 42,069 (26.55%) were domestic relations cases; 14,566 (9.19%) were juvenile cases; and 19,352 (12.21%) were probate cases.[156] Of the 135,178 dispositions, 31,849 (23.56%) were civil cases; 35,209 (26.08%) were criminal cases; 39,310 (29.08%) were domestic relations cases; 13,933 (10.31%) were juvenile cases; and 14,877 (11.01%) were probate cases.[157]

Six judges[158] participated in *Tiner v. Tiner*; three of those six served as trial court judges before serving on the Arkansas Court of Appeals, and one of those three returned to the trial court bench after completing his service on the Arkansas Court of Appeals.[159] Nine judges[160] participated in *Folkers*, and two of those nine served as trial court judges before serving on the Arkansas Court of Appeals.[161] Six judges[162] participated in *Rye*, and two of

155. SUPREME COURT OF ARKANSAS, ARKANSAS JUDICIARY 2021 REPORT TO THE COMMUNITY 22 (2022), https://www.arcourts.gov/sites/default/files/2021-ANNUAL-REPORT.pdf.

156. *Id.*

157. *Id.*

158. Doug Martin, John Mauzy Pittman, John B. Robbins, Cliff Hoofman, Raymond R. Abramson, and Waymond M. Brown. *Tiner*, 2012 Ark. App. 483, at 1, 17, 422 S.W.3d at 179, 187.

159. Doug Martin served as a trial court judge from September 2009 to December 2010 and resumed that service in January 2013. Doug Martin, LINKEDIN, https://www.linkedin.com/in/doug-martin-a2a03167 (last visited Oct. 14, 2022).
John Mauzy Pittman served as a trial court judge from 1981 to 1992. LITIGATION ANALYTICS, WESTLAW EDGE, https://1.next.westlaw.com/Analytics (select "Judges" then type "John Mauzy Pittman" in the search field) (last visited Oct. 14, 2022).
John B. Robbins served as a trial court judge from 1985 to 1992. LITIGATION ANALYTICS, WESTLAW EDGE, https://1.next.westlaw.com/Analytics (select "Judges" then type "John B. Robbins" in the search field) (last visited Oct. 14, 2022).

160. N. Mark Klappenbach, Rita W. Gruber, Robert J. Gladwin, David M. Glover, Larry D. Vaught, Raymond R. Abramson, Bart Virden, Brandon J. Harrison, and Kenneth S. Hixson. Folkers v. Buchy, 2019 Ark. App. 30, at 1, 10, 570 S.W.3d 496, 498, 502.

161. Rita W. Gruber served as a trial court judge from 1990 to 2008. *Rita Gruber*, ARKANSAS JUDICIARY, https://www.arcourts.gov/courts/court-of-appeals/judges/rita-w-gruber (last visited Mar. 3, 2023).
Robert J. Gladwin served as a trial court judge in 2002. Litigation Analytics, WESTLAW EDGE, https://1.next.westlaw.com/Analytics (select "Judges" then type "Robert J. Gladwin" in the search field) (last visited Oct. 14, 2022).

162. Rita W. Gruber, Raymond R. Abramson, Mike Murphy, Waymond M. Brown, Brandon J. Harrison, and Bart Virden. Rye v. Rye, 2021 Ark. App. 286, at 1, 11, 625 S.W.3d 761, 763, 767.

those six served as trial court judges before serving on the Arkansas Court of Appeals.[163]

Deducing that current appellate judges, who are former trial judges, are acutely aware of, and sensitive to, the workload trial judges have to manage from day to day is reasonable, and that this awareness and sensitivity might have partially informed a decision to lighten that workload by eliminating the requirement that trial judges apply the *Chrisco* factors when awarding attorneys' fees. On the other hand, one could also deduce that the professional backgrounds and experiences of the appellate judges had nothing to do with how they voted in *Tiner*, *Folkers*, and *Rye*, even at the margin. Regardless, Arkansas's trial judges are busy, and the work they do can be exhausting and even thankless. Notwithstanding all of that, not a single person serving as a judge in the State of Arkansas is serving involuntarily. Simply put, "[t]his is the business [they have] chosen[,]"[164] and they chose it with knowledge that the job entails a lot of work.

Arkansas has 126 circuit judges spread across 28 judicial districts.[165] As of October 11, 2021, Arkansas's judge's salaries were: $205,324.50 for

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163. Mike Murphy served as a trial court judge from 2014 to 2016. *Mike Murphy*, ARKANSAS JUDICIARY, https://www.arcourts.gov/courts/court-of-appeals/judges/Mike-Murphy (last visited Mar. 3, 2023). *See Rita Gruber*, *supra* note 161.

164. THE GODFATHER PART II (Paramount Pictures 1974).

165. The First Judicial Circuit consists of the counties of Cross, Lee, Monroe, Phillips, St. Francis, and Woodruff, and has five judges. ARK. CODE ANN. §§ 16-13-901; 16-13-903(a)(1)–(3).

The Second Judicial District consists of the counties of Clay, Craighead, Crittenden, Greene, Mississippi, and Poinsett, and has twelve judges. *Id.* §§ 16-13-1001; 16-13-1003(a)(1)(A)–(D); 16-13-1003(2)(A); 16-13-1003(e)(1); 16-13-1003(f); 16-13-1005(a).

The Third Judicial District consists of the counties of Jackson, Lawrence, Randolph, and Sharp, and has three judges. *Id.* §§ 16-13-1101; 16-13-1103(a)(1); 16-13-1103(b)(1); 16-13-1103(c)(1)(A).

The Fourth Judicial District consists of the counties of Madison and Washington and has eight judges. *Id.* §§ 16-13-1201; 16-13-1203(a)(1)–(3); 16-13-1203(c); 16-13-1205(a); 16-13-1208(a).

The Fifth Judicial District consists of the counties of Franklin, Johnson, and Pope, and has four judges. *Id.* §§ 16-13-1301; 16-13-1303(1)–(3)(A); 16-13-1303(4)(A).

The Sixth Judicial District consists of the counties of Perry and Pulaski and has seventeen judges. *Id.* §§ 16-13-1401; 16-13-1403(a)(1)–(4); 16-13-1403(b)(1); 16-13-1403(d)(1).

The Seventh Judicial District consists of the counties of Grant and Hot Spring and has two judges. ARK. CODE ANN. §§ 16-13-3101(b); 16-13-3103(b)(1)–(2).

The Eighth Judicial District—North consists of the counties of Hempstead and Nevada and has two judges. *Id.* §§ 16-13-3201(a); 16-13-3202(a)(1)–(2).

The Eighth Judicial District—South consists of the counties of Lafayette and Miller and has three judges. *Id.* §§ 16-13-3201(b); 16-13-3203(a)(1)–(3).

The Ninth Judicial District—East consists of the county of Clark and has one judge. *Id.* §§ 16-13-1701(a); 16-13-1703(a).

The Ninth Judicial District—West consists of the counties of Howard, Little River, Sevier, and Pike, and has two judges. *Id.* §§ 16-13-1701(b); 16-13-1703(b)(1)–(2)(A).

the Chief Justice of the Supreme Court; $190,126.08 for Associate Justices of the Supreme Court; $187,311.57 for the Chief Judge of the Court of Appeals; $184,497.03 for the Judges of the Court of Appeals; $180,129.37 for Circuit Court Judges; and $157,613.20 for State District Court Judges.[166]

The median household income in the United States as of July 2022 is $69,021.[167] That same number for the State of Arkansas is $52,123.[168] The

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The Tenth Judicial District consists of the counties of Ashley, Bradley, Chicot, Desha, and Drew, and has five judges. *Id.* §§ 16-13-1801; 16-13-1803(a)(1)–(2).

The Eleventh Judicial District—East consists of the county of Arkansas and has one judge. ARK. CODE ANN. §§ 16-13-1901(a); 16-13-1903(b).

The Eleventh Judicial District—West consists of the counties of Jefferson and Lincoln and has six judges. *Id.* §§ 16-13-1901(b); 16-13-1903(a)(1)(A)–(D).

The Twelfth Judicial District consists of the county of Sebastian and has eight judges. *Id.* §§ 16-13-2001; 16-13-2003(a)(1)–(3); 16-13-2003(b)(1); 16-13-2003(c); 16-13-2003(e).

The Thirteenth Judicial District consists of the counties of Calhoun, Cleveland, Columbia, Dallas, Ouachita, and Union, and has six judges. *Id.* §§ 16-13-2101; 16-13-2103(a)(1)–(4).

The Fourteenth Judicial District consists of the counties of Baxter, Boone, Marion, and Newton, and has four judges. *Id.* §§ 16-13-2201; 16-13-2203(a)(1)(A)–(C); 16-13-2203(2)(A).

The Fifteenth Judicial District consists of the counties of Conway, Logan, Scott, and Yell, and has three judges. *Id.* §§ 16-13-2301; 16-13-2303(a)(1)–(3).

The Sixteenth Judicial District consists of the counties of Cleburne, Fulton, Independence, Izard, and Stone, and has four judges. ARK. CODE ANN. §§ 16-13-2401; 16-13-2403(a)(1); 16-13-2403(a)(2)(A).

The Seventeenth Judicial District consists of the counties of Prairie and White and has three judges. *Id.* §§ 16-13-2501(a); 16-13-2503(a)(1)–(3)(A).

The Eighteenth Judicial District—East consists of the county of Garland and has four judges. *Id.* §§ 16-13-2601(a); 16-13-2603(a)(1)(A)–(B); 16-13-2603(a)(2)(A).

The Eighteenth Judicial District—West consists of the counties of Montgomery and Polk and has one judge. *Id.* §§ 16-13-2601(b); 16-13-2603(b).

The Nineteenth Judicial District—East consists of the county of Carroll and has one judge. *Id.* §§ 16-13-3001(a); 16-13-3002(a)–(b).

The Nineteenth Judicial District—West consists of the county of Benton and has seven judges. *Id.* §§ 16-13-3001(b); 16-13-3002(c)–(d); 16-13-3002(h)(1); 16-13-3002(i).

The Twentieth Judicial District consists of the counties of Faulkner, Searcy, and Van Buren, and has five judges. ARK. CODE ANN. §§ 16-13-2801; 16-13-2803(a)(1)–(3); 16-13-2803(e); 16-13-2803(f)(1).

The Twenty-First Judicial District consists of the county of Crawford and has three judges. *Id.* §§ 16-13-2901; 16-13-2903(a)–(b).

The Twenty-Second Judicial District consists of the county of Saline and has four judges. *Id.* §§ 16-13-3101(a); 16-13-3103(a)(1)–(3); 16-13-3103(e)(1); 16-13-3104(a).

The Twenty-Third Judicial District consists of the county of Lonoke and has three judges. *Id.* §§ 16-13-2501(b); 16-13-2503(b)(1); 16-13-2503(b)(2)(A)(i); 16-13-2503(c)(1).

166. As of November 5, 2014, an "Independent Citizens Commission" sets the salaries of Arkansas's judges. ARK. CONST. art. 19, §§ 31(b)(1); 31(d)(9)–(14); 31(e)(2)(A)–(B); 31(e)(3)–(5); 31(g)(1)–(4). INDEP. CITIZENS COMM'N OF ARK., SALARY ADJUSTMENT RESOLUTION (2021), https://www.citizenscommission.arkansas.gov/wp-content/uploads/2021/10/Resolution-100121-Signed.pdf.

167. *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/AR,US/PST045221 (last visited Mar. 11, 2023) (measured in 2021 dollars).

per capita income in the United States over the prior twelve months was $37,638, and that same number for the State of Arkansas was $29,210.[169] Arkansas's circuit court judges earn 160.98% more than the United States median household income in 2021 dollars, and 245.59% more than the median household income in the State of Arkansas in 2021 dollars.[170] Those same judges earn 378.58% more than the per capita income in the United States in 2021 dollars, and 516.67% more than the per capita income in the State of Arkansas in 2021 dollars.[171]

In addition to being comparatively well-compensated, Arkansas's judges wield considerable power, including the power to compel parties, lawyers, and witnesses to appear in their courtrooms on pain of imprisonment.[172] When a judge enters his or her courtroom, people are required to stand quietly and respectfully until the judge grants them permission to sit.[173] And judges are routinely addressed with the honorific, "Your Honor."[174]

Domestic relations judges decide who gets custody of children, how much a person pays and receives in alimony and child support, and how marital debts and marital property are divided.[175] Given how deferential appellate court standards of review are regarding decisions domestic relations judges make, the decision a domestic relations judge makes is effectively final.[176] The power of prestige associated with being a judge leads people to behave very deferentially towards judges, which is a perquisite of the job to which judges become accustomed to very quickly.[177] In sum, despite all the work and the occasional headaches and grief that come along with it, being a judge is nice work if you can get it.[178]

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168. *Id.*

169. *Id.*

170. *Id.*; INDEP. CITIZENS COMM'N OF ARK., *supra* note 166.

171. INDEP. CITIZENS COMM'N OF ARK., *supra* note 166; *see Quick Facts*, *supra* note 167.

172. *See* DAVID CLAYTON CARRAD, *supra* note 1, at 266.

173. *Id.*

174. Benjamin Beaton, a United States District Judge for the Western District of Kentucky, has waged what he describes as a "guerilla campaign against judicial honorifics[,]" and eschews being called "Your Honor," preferring to be called "Judge" instead. Benjamin Beaton, *Judging Titles*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 1–2 (2022). According to "Judge" Beaton, " . . . a daily dose of honorifics can't help but affect any judge, and not necessarily in a good way." Beaton, *supra* at 4. He also posits that "Your Honor" is a title of nobility that is prohibited by Article 1, Section 9, Clause 8 of the Constitution, which says in relevant part, "[n]o Title of Nobility shall be granted by the United States[.]" Beaton, *supra* at 3.

175. *See* DAVID CLAYTON CARRAD, *supra* note 1, at 266.

176. *See id.*

177. *See id.*

178. GEORGE GERSHWIN & IRA GERSHWIN, NICE WORK IF YOU CAN GET IT (Gershwin Publ'g Corp. 1937).

The Arkansas Court of Appeals decided *Stout* on March 9, 2011, and overruled it when it decided *Tiner* eighteen months later on September 12, 2012.[179] As of November 2022, the Supreme Court of Arkansas has never cited *Stout* or *Tiner*. Before the Arkansas Court of Appeals decided *Stout* and *Tiner*, the Supreme Court of Arkansas held in at least four cases that awarding attorneys' fees without applying the *Chrisco* factors or something similar is reversible error, and one of those cases is a domestic relations case.[180] And after the Arkansas Court of Appeals decided *Stout* and *Tiner*, the Supreme Court of Arkansas decided *Walther* and repeated what it had said multiple times before, that is, it is reversible error to award attorneys' fees without applying the *Chrisco* factors.[181]

When the Arkansas Court of Appeals decided *Tiner*, the Supreme Court of Arkansas *had never* held that *Chrisco* is inapplicable in domestic relations cases.[182] And as of November 2022, the Supreme Court of Arkansas has still *never held* that *Chrisco* is inapplicable in domestic relations cases. Further, *Tiner* conflicts with and contravenes *Davis v. Williamson*, which is a Supreme Court of Arkansas domestic relations case.[183] Although the Arkansas Court of Appeals had the authority to overrule *Tiner*, which is one of its own cases, it did not have, and it does not have, the authority to overrule *Davis* because *Davis* is a Supreme Court of Arkansas case, and the Arkansas Court of Appeals "must follow the precedent set by the [S]upreme [C]ourt [of Arkansas] and [is] powerless to overrule its decisions."[184]

The Due Process Clause of the Fourteenth Amendment is designed as a bulwark against arbitrary, capricious, or discriminatory state action.[185] To invite trial courts to shift the responsibility of paying attorneys' fees from one party to another without requiring those courts to provide an explanation for their decisions is an invitation to those courts to make arbitrary, capricious, or discriminatory decisions. It is not at all difficult to fathom a trial

179. Stout v. Stout, 2011 Ark. App. 201, 1, 10–12, 378 S.W.3d 844, 844, 850–51, *overruled in part by* Tiner v. Tiner, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d 178, 180, 185–87; *Tiner*, at 1–2, 12–17, 422 S.W.3d at 178, 180, 185–87.

180. Davis v. Williamson, 359 Ark. 33, 37–38, 45–46, 194 S.W.3d 197, 199–200, 204–05 (2004) (attorneys' fees in a paternity case); Bailey v. Rahe, 355 Ark. 560, 566, 142 S.W.3d 634, 638–39 (2004) (attorneys' fees in a guardianship case); S. Beach Beverage Co. v. Harris Brands, Inc., 355 Ark. 347, 357, 138 S.W.3d 102, 108 (2003) (attorneys' fees in an Arkansas Franchise Act case); Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31, 95–96, 91 S.W.3d 472, 510 (2002) (attorneys' fees in a school funding case).

181. Walther v. Wilson, 2019 Ark. 105, at 7, 571 S.W.3d 897, 901 (attorneys' fees in an illegal exaction case against state officials).

182. *Tiner,* 2012 Ark. App. 483, at 18–19, 422 S.W.3d at 188 (Abramson, J., dissenting).

183. *Davis,* 359 Ark. at 45–46, 194 S.W.3d at 205.

184. Northport Health Servs. of Ark., LLC v. Chaney, 2022 Ark. App. 103, at 10, 642 S.W.3d 253, 259 (citing Rice v. Ragsdale, 104 Ark. App. 364, 368, 292 S.W.3d 856, 860 (2009)).

185. Daniels v. Williams, 474 U.S. 327, 331–32 (1986).

court motivated by an impermissible or illicit motive acting on that motive in making an attorneys' fees shifting decision, all the while hidden from view because it did not have to explain itself.

This is not to say that most trial courts make decisions motivated by impermissible or illicit motives. The point is that as long as courts are invited to make decisions about whether one party will have to pay another party's attorneys' fees and how much those fees will be, and they are invited to do so without having to provide any kind of explanation or reason, no party or reviewing court will be able to distinguish unexplained attorneys' fees decisions that are legitimate from unexplained attorneys' fees decisions that are illegitimate.

Presuming that a trial court made a fee shifting decision solely for legitimate reasons is not, by itself, untenable. Allowing that decision to be made without an explanation, however, renders that presumption untenable because there is no way to test the presumption. One party should not be ordered to pay another party's attorneys' fees without being fully informed of the reasoning underlying the order, and it is not too much to ask that such a person be provided with that reasoning; in fact, the Due Process Clause demands as much.[186]

When a trial court orders one party to pay another party's attorneys' fees, that court should be required to explain its reasoning, if for no other reason than to enable an appellate court to determine whether the evidence in the record supports the order; otherwise, an appellate court cannot conduct a meaningful review of the decision to determine whether the trial court clearly erred or abused its discretion.[187] If a trial court makes a discretionary decision that results in a party losing his property, that court should explain the basis of its decision not only for the benefit of the party losing his property but also to provide a sufficient record for appellate review, for without such a record, an appellate court will "be forced to resort to speculation,

186. Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (citing Dent v. West Virginia, 192 U.S. 114, 123 (1889)) ("[t]he touchstone of due process is protection of the individual against arbitrary action of government"); Folkers v. Buchy, 2019 Ark. App. 30, at 17, 570 S.W.3d 496, 505–06 (Hixson, J., dissenting) ("due process . . . demand[s] that parties who are encumbered with imposing, and sometimes daunting, monetary judgments for attorney[s'] fees be given the underlying justification and explanation [for judgments].").

187. *Tiner*, 2012 Ark. App. 483, at 17–18, 422 S.W.3d at 188 (Abramson, J., dissenting); *Folkers*, 2019 Ark. App. 30, at 11–16, 570 S.W.3d at 502–05 (Harrison, J., dissenting); *id.* at 16–18, 570 S.W.3d at 505–06 (Hixson, J., dissenting); State v. Fuentes, 217 N.J. 57, 74, 85 A.3d 923, 932 (2014) (citing State v. Bieniek, 200 N.J. 601, 609, 985 A.2d 1251, 1255 (2010)).

conjecture, or divination to ascertain whether [a] circuit court's . . . [decision] . . . was thoughtless, improvident, or without due consideration."[188]

Then there is the issue of intellectual consistency. Both the Supreme Court of Arkansas and the Arkansas Court of Appeals are ruthlessly unforgiving in requiring that litigants be specific when making objections in trial courts if they want the Supreme Court or the Court of Appeals to review a circuit court's decisions on those objections.[189] Both courts are likewise unforgiving, if not dogmatic, in the requirement that motions for a directed verdict be specific if a party wants either court to review the sufficiency of the evidence used to obtain a conviction.[190] It is intellectually incongruous to demand that litigants explain to trial courts the basis of their objections and motions with specificity while at the same time telling those same courts that they can impose attorneys' fees awards in the tens of thousands of dollars and need not bother with telling the party responsible for paying those fees or a reviewing court exactly why.[191]

Courts should be candid in their rulings so litigants can understand the reasons underlying those rulings and so other courts can understand the scope of those rulings and how they might impact future cases. A judge should not disguise how he or she decides a case; rather, he or she should disclose and explain the basis of his or her decisions, including "recounting how [he or she] dealt with initial intuitive responses and initially appealing reasons before selecting one set of justifications over other possible ones."[192] Doing so would "assist advocates who [might] seek to persuade the judge in the future, [and] . . . would also assist judges in integrating their work in the act of judging and . . . in explaining those judgments to others."[193]

At times, there will be a gap between the reasons a judge offers in a written or oral decision and the reasons a judge "turns over in his or her own mind before" rendering that decision.[194] If a judge does not attempt to close

188. *Tiner*, 2012 Ark. App. 483, at 17–19, 422 S.W.3d at 187–88 (Abramson, J., dissenting); *Folkers*, 2019 Ark. App. 30, at 11–16, 570 S.W.3d at 502–05 (Harrison, J., dissenting); *id.* at 16–18, 570 S.W.3d at 505–06 (Hixson, J., dissenting).

189. Ellison v. State, 354 Ark. 340, 344, 123 S.W.3d 874, 876–77 (2003) (citing Vanesch v. State, 343 Ark. 381, 387, 37 S.W.3d 196, 200 (2001); Dodson v. State, 341 Ark. 41, 48, 14 S.W.3d 489, 494 (2000)) (party has to make a specific objection in order to preserve an issue for appellate review); Morgan v. State, 2021 Ark. App. 344, at 8, 632 S.W.3d 759, 764 (citing Goins v. State, 2019 Ark. App. 11, at 7, 568 S.W.3d 300, 304) (if a party makes an objection that is not specific and the circuit court overrules it, the appellate court will not review the court's ruling).

190. Dortch v. State, 2018 Ark. 135, at 6–7, 544 S.W.3d 518, 522–23 (a general motion for a directed verdict is inadequate to preserve the sufficiency of the evidence issue for appellate review); Still v. State, 2022 Ark. App. 156, at 6, 643 S.W.3d 830, 834 (same).

191. *Folkers*, 2019 Ark. App. 30, at 18, 570 S.W.3d at 506 (Hixson, J., dissenting).

192. *See* Minow & Spelman, *supra* note 9, at 54.

193. *See id.* at 55.

194. *See id.*

that gap by disclosing his or her reasons for deciding a contested matter, the judge "neglects the critical responsibility to give account to the human beings affected by the [his or her] exercise of power." [195]Additionally, if a judge cannot or will not explain his or her reasons for deciding a contested matter, "the judge loses the chance, and slackens the discipline, to use words and concepts to frame and improve judgment—to combine 'reason' and 'passion' in a process of conscious reflection."[196]

At bottom, the Supreme Court of Arkansas or the Arkansas Court of Appeals should explicitly overrule *Tiner* and reinstate the *Stout* requirement that trial courts apply the *Chrisco* factors or something similar to those factors when ordering one party to pay another party's attorneys' fees.[197] *Stout* should not, however, be reinstated in toto because there are aspects of it and *Tiner* that remain problematic even if trial courts do apply the *Chrisco* factors when ruling on motions for attorneys' fees. *Stout* and *Tiner* both said that "we have not strictly required documentation of time and expense in a divorce case where the trial court has had the opportunity to observe the parties, their level of cooperation, and their obedience to court orders."[198] The premise for this is that a trial court will be familiar with the parties, the attorneys, and the record of the case; consequently, it can decide an attorneys' fees issue without all the fuss of a hearing and documentation.[199] There is a fiction in this premise, and a dangerous one at that.

In 2021, there were 158,442 filings in Arkansas's circuit courts, 42,069 (26.55%) of those were domestic relations cases.[200] In that same year, there were 135,178 dispositions in these courts, 39,310 (29.08%) of those were domestic relations cases.[201] Domestic relations cases occupy a significant portion of Arkansas's circuit courts' dockets, and it is unrealistic to believe that a judge with so many cases on his or her docket will remember the particulars of a given case with such specificity that he or she can decide an attorneys' fees issue without any documentation from the lawyer who seeks

195. *See id.*

196. *Id.*

197. Stout v. Stout, 2011 Ark. App. 201, at 1, 12, 378 S.W.3d 851, 846, 851, *overruled in part by* Tiner v. Tiner, 2012 Ark. App. 483, at 2, 12–17, 422 S.W.3d 178, 180, 185–87.

198. *Stout*, 2011 Ark. App. 201, at 11, 378 S.W.3d at 850–51 (citing Paulson v. Paulson, 8 Ark. App. 306, 312, 652 S.W.2d 46, 50 (1983); Deaton v. Deaton, 11 Ark. App. 165, 166, 668 S.W.2d 49, 50 (1984)); *Tiner*, 2012 Ark. App. 483, at 16, 422 S.W.3d at 187 (citing *Paulson*, 8 Ark. App. at 312, 652 S.W.2d at 50; *Deaton*, 11 Ark. App. at 166, 668 S.W.2d at 50).

199. *Stout*, 2011 Ark. App. 201, at 11, 378 S.W.3d at 850–51 (citing *Paulson*, 8 Ark. App. at 312, 652 S.W.2d at 50; *Deaton*, 11 Ark. App. at 166, 668 S.W.2d at 50); *Tiner*, 2012 Ark. App. 483, at 16, 422 S.W.3d at 187 (citing *Paulson*, 8 Ark. App. at 312, 652 S.W.2d at 50; *Deaton*, 11 Ark. App. at 166, 668 S.W.2d at 50).

200. SUPREME COURT OF ARKANSAS, *supra* note 155, at 22.

201. *Id.*

the fees. And even a judge who does remember the particulars of a case will have no basis to know what work a lawyer put into a case that took place outside of his or her courtroom. If a court can award attorneys' fees to a lawyer who does not provide any documentation of the time and expense he or she put into a case, a lawyer could fabricate a fee amount and ask the court to tax another party for that fee. A court deciding a fee shifting question should receive more information from the lawyer requesting fees rather than less because a court cannot determine the reasonableness of a fee request without documentation of the time a lawyer put into a case and the rate he or she charged for that time.

It is ironic that *Stout* held that a trial court must explain itself when it awards attorneys' fees because the parties deserve to know the basis of the award and an appellate court needs an adequately developed record to determine whether the court exercised its discretion properly, but at the same time it held that lawyers do not need to provide any documentation to explain the basis of their fee requests.[202] The lawyer requesting fees should be required to produce documentation demonstrating the reasonableness of his or her fee, not only for the party the lawyer is asking the court to order to pay that fee, but also for an appellate court so it can review the reasonableness of that fee. If a court should explain the basis of its attorneys' fees decisions, the lawyers who seek those fees should likewise explain the basis of their requests because the same vices that apply to unexplained judicial decisions apply also to documentation-free attorneys' fees requests.

There is another needed reform when it comes to the law of attorneys' fees in domestic relations cases. In *Conley v. Conley*, the Arkansas Court of Appeals held, without analysis or explanation, that in a domestic relations case, a trial court can award a party his or her attorneys' fees even if he or she does not prevail.[203] This is untenable, and the law should change to require that a party must prevail in order to shift the responsibility of paying its attorneys' fees to another party.

The primary purpose of fee shifting is to provide a financial incentive to a party to act as a "private attorney general" and vindicate a public interest.[204] Parents have a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment in "the care, custody, and control of their children."[205] At times, one needs to enlist the aid of the courts in order to exercise that right, and there is an important public interest in ensur-

202. *Stout*, 2011 Ark. App. 201, at 1, 11–12, 378 S.W.3d at 846, 850–51.

203. Conley v. Conley, 2019 Ark. App. 424, at 11–12, 587 S.W.3d 241, 247–48.

204. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–03 (1968) (per curiam) (When Congress enacted the Civil Rights Act of 1964, it included fee shifting provisions so private parties would have a financial incentive to act as private attorneys general to vindicate the anti-discrimination policies of the law.).

205. Troxel v. Granville, 530 U.S. 57, 65 (2000).

ing that the courts remain accessible to the impecunious parent who seeks to exercise that right. Fee shifting provides an incentive to lawyers who represent parents who need representation but cannot afford it, and a parent in this situation who prevails not only vindicates his or her private interest but also vindicates the public interest in courts giving effect to that parent's constitutional rights.[206] But awarding a party his or her attorneys' fees when he or she does not prevail does not serve any discernable public interest; consequently, it makes little sense to award that party his or her attorneys' fees.

IV. CONCLUSION

Unexplained judicial decision-making deprives the parties of their right to know why a court made the decision it made, it deprives an appellate court of the kind of record it needs to conduct meaningful appellate review of trial court decisions, and it allows a trial court to make decisions based on illicit factors, impermissible factors, or both. Courts should not make secret decisions that are functionally immune from appellate scrutiny and that result in a person losing his liberty or his property. After all, "[s]unlight is said to be the best of disinfectants."[207]

206. *Newman*, 390 U.S. at 401–02.

207. Buckley v. Valeo, 424 U.S. 1, 67 n.80 (1976) (quoting LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (Nat'l Home Libr. Found. ed. 1933)).