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ARKANSAS COURT OF APPEALS

DIVISIONS I, III, AND IV
No. CV-17-903

	Opinion Delivered January 23, 2019
JASON F. FOLKERS APPELLANT	APPEAL FROM THE POPE COUNTY CIRCUIT COURT
V.	[NO. 58DR-16-553]
BRANDI BOLEY BUCHY APPELLEE	HONORABLE DENNIS CHARLES SUTTERFIELD, JUDGE
	AFFIRMED

N. MARK KLAPPENBACH, Judge

This appeal concerns visitation and attorney's fees. Appellant Jason Folkers and appellee Brandi Boley Buchy were never married but have a son who was born in 2010. Brandi had custody of their son, given that she is the mother of this child born out of wedlock. Litigation ensued between the parties in September 2016, and ultimately the circuit court denied Jason's petition for joint custody, granted Jason visitation, finalized Jason's unpaid and prospective child-support obligation, and awarded Brandi $8,965.21 in attorney's fees. Jason appeals, arguing that the circuit court abused its discretion in awarding him "only a limited visitation schedule" and in awarding Brandi attorney's fees. We affirm.

Before examining the chronology of events and the evidence presented to the circuit court, we set out some legal principles that apply to child-visitation matters and the

standard of appellate review. The primary consideration in child-custody and visitation cases is the welfare and best interest of the child involved. All other considerations are secondary. *Donato v. Walker*, 2010 Ark. App. 566, 377 S.W.3d 437. The primary consideration regarding visitation is the best interest of the child. *Baber v. Baber*, 2011 Ark. 40, 378 S.W.3d 699. Important factors the court considers in determining reasonable visitation are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties, and the relationship with siblings and other relatives. *Id.* Fixing visitation rights is a matter that lies within the sound discretion of the circuit court. *Id.*

On appeal, this court reviews the evidence de novo, but we will not reverse unless the findings are clearly erroneous. *Black v. Black*, 2015 Ark. App. 153, 456 S.W.3d 773. This necessarily turns, in large part, upon credibility determinations, and we give special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the child's best interest. *Id.* There are no cases in which the superior position, ability, and opportunity of the circuit court to observe the parties carry as great a weight as those involving children. *Id.* We do not reverse unless there is clear error, meaning that after conducting a de novo review we are left with a definite and firm conviction that a mistake was made. *Ryan v. White*, 2015 Ark. App. 494, 471 S.W.3d 243.

We now turn to the facts of this case. When their son was born in 2010, both Brandi and Jason signed a notarized acknowledgement that Jason was the child's father.

Jason and Brandi lived as a family with their son and Brandi's older daughter until they broke up after an incident on New Year's Eve 2015. Jason moved out in January 2016. Thereafter, the parties worked together so that Jason could have visitation with their then five-year-old son, but this arrangement broke down in late August 2016.

Shortly thereafter, on September 6, 2016, Jason filed a petition in circuit court in which he (1) asked to formally establish his paternity, (2) stated that he had "exercised continuing and regular visitation, including overnight visitation," with his son since his and Brandi's separation in January 2016, (3) requested joint custody, and (4) requested the return of several unidentified items of personal property and that he be given possession and title to a vehicle that was in Brandi's name. Later in September, Brandi filed responses in which she (1) acknowledged that Jason is their son's father, (2) acknowledged that there had been some visitation, (3) requested child support to be established, (4) asserted that joint custody would not be in the child's best interest, (5) denied that she had any of Jason's personal items, (6) stated that Jason was driving a vehicle titled in her name but continually made untimely payments affecting her credit, and (7) stated that Jason should be ordered to make timely payments or refinance the vehicle in his name.

After a temporary hearing in November 2016, the circuit court entered a temporary order establishing Jason's paternity and stating that both parties waived DNA testing, setting Jason's child-support obligation, and establishing that Jason would have visitation every other weekend (Friday to Sunday) and specific Thanksgiving and Christmas visitation periods.

At the final hearing, Jason's attorney stated to the circuit court that the issue to litigate was his request for joint custody, noting that there had been no problem with visitation since paternity was acknowledged. Jason believed that he had been an involved parent, had been financially responsible toward his son, and had demonstrated that it was in their son's best interest to have joint custody. In the alternative, he wanted an expanded version of standard visitation. Jason withdrew his requests concerning the vehicle and personal property in light of the circuit court's statement that this was not a divorce proceeding and that those issues should be in a separate cause of action.

Brandi's attorney stated to the circuit court that Brandi had major concerns about Jason's diagnosis of intermittent explosive disorder, which she had experienced with Jason's fits of rage and violence toward her and others. After one incident in 2013, Jason had been charged with third-degree battery because he yanked Brandi by the hair, repeatedly threw her into a chair, choked her and broke her finger, and threw a chair out the window. Jason had called her foul and profane names in front of their son. Although Jason had seen a therapist in 2013, he had not seen any therapist since 2014 and had expressed ongoing hatred for Brandi. At the outset of the hearing, Brandi asked for retroactive child support dating back to their separation in January 2016.

The first witness was Jason's therapist, who had diagnosed Jason in 2013 with intermittent explosive disorder because of his periodic episodes of anger disproportionate to the situation. The therapist discharged Jason in 2014 because the therapist believed that Jason had met the treatment goals. When asked whether Jason had told him about an

episode in late 2013 in which he had pinned Brandi against the trailer and cursed her out in front of the children, the therapist said no and that this "would cause me some concern." The therapist's records noted that Jason had these rage episodes "at least once a month," had these rages prior to his relationship with Brandi, and had a family "history of rage issues." The therapist stated that Brandi was the main trigger for Jason's episodes but that Jason had other stressors such as finances and chronic back pain.

Jason testified that he lived alone, that he was self-employed and owned a couple of saw mills, and that he had lived with Brandi and the two children as a family until January 2016. He acknowledged that he and Brandi both drank and cursed in front of the children, although he accused Brandi of being a very heavy drinker. He admitted that he had broken two windows, damaged a couple of doors by slamming and kicking them, and punched a hole in the wall out of anger. Jason agreed that after he had been arrested for the fight during which Brandi was injured, he had gone to anger-management therapy. He downplayed the severity of the fight, however, and said that the charges had been dismissed. Jason recounted the fight on New Year's Eve 2015, but his version was that he was the victim of Brandi's family not appreciating all he had done, attacking him, and screaming at him. Jason admitted that he had probably been rude to Brandi in text messages but said that dealing with Brandi was stressful.

Jason said he had exercised as much visitation as he could between January and August 21, 2016, when Brandi stopped his visitation because she was mad that he had started dating a friend of hers. Jason admitted that he had told Brandi that their son

"should be afraid of me," but he said that this only meant that he would reprimand their son when he got in trouble. Jason had not been to any parent-teacher conferences; he did not know the names of their son's doctor, dentist, or basketball coach.

Their son's first-grade teacher testified that she had not seen Jason at any school-related functions but that Brandi had been an active parent. She said that had Jason made an attempt to contact her to find out what was going on with his son, she would have been open to it. Her contact information was on the school's website.

Brandi testified in line with her attorney's opening statements. She recounted her involvement with their son's school and daily life. Brandi explained that Jason's rages were extreme and took place in front of the children, who were tearful and shaken up by his outbursts. Brandi testified that Jason continued to be uncooperative and mean after they separated. She was afraid for their son to be with Jason for more than a couple days at a time because with his anger problem, "you never know when he could blow up." She admitted that she had been frustrated with Jason not paying child support, with his failure to make truck payments on time, and with his being unreliable on visitation plans.

Brandi's mother testified, recounting her experience with Jason's rages and affirming Brandi's version of events. She recalled the New Year's Eve fight, which was long after Jason had completed his anger-management therapy; she stated that no one provoked Jason when he exploded in anger and came across the table at her (Brandi's mother). She testified that the children were scared. She continued to invite Jason to family activities

after Jason and Brandi separated so he could see his son, but Jason refused to be around any of them.

Both parties filed posttrial briefs with suggested findings of fact and conclusions of law. The circuit court filed its order in July 2017 finding in relevant part that custody would remain with Brandi; joint custody was denied; Jason was entitled to specific holiday visitation and every-other-weekend visitation (none of which exceeded three consecutive days); the parties were encouraged to cooperate and be flexible with visitation and otherwise be civil in all matters; Jason was obligated to pay $90 per week in child support; Jason owed $4220 in child support covering January to November 2016; and Jason was forbidden from drinking alcohol or taking nonprescription drugs in their son's presence.

Simultaneously with their posttrial briefs, each party requested to be awarded attorney's fees and substantiated those requests. Brandi asked for $8,965.21, and Jason asked for $8,062.16. In a separate order, the circuit court awarded Brandi the attorney's fees she requested. Jason appeals both orders.

Jason does not contend that the circuit court erred in denying him joint custody. Jason argues that the circuit court erred in not allowing him more than three consecutive days during his visitation periods and not awarding him any typical summer visitation. This, he says, prevents him from ever being able to take his son on an extended vacation and is contrary to the policy of ensuring liberal contact with the noncustodial parent. Jason argues that there was no evidence that he ever presented a danger to or mistreated his son. Brandi counters that she presented ample evidence that Jason is not cured of his

disorder, he fails to appreciate that he still has extreme and unpredictable anger outbursts, and he cannot handle the stress that caring for a young boy can bring. Brandi asserts that the circuit court did not abuse its discretion in taking Jason's long history of uncontrolled behaviors into account and that Jason was fortunate to be awarded unsupervised, ongoing, regular visitation.

When the best interests of the child are at stake, the circuit court should look into the particular circumstances of each case and act as the welfare of the child appears to require. *Wilson v. Wilson*, 2016 Ark. App. 191, 487 S.W.3d 420. No two situations are ever exactly the same, and a circuit court must be afforded the flexibility to deal with the myriad of circumstances confronting families in determining appropriate visitation. *Bryant v. Bryant*, 2009 Ark. App. 231, 303 S.W.3d 91. Visitation here was set in such a way that it ensures frequent and continuing contact between Jason and his son. The circuit court had evidence before it to substantiate legitimate concerns about Jason's ability to control his reaction to stressors and about whether Jason understood that some of his behaviors could be harmful to his son. Jason has failed to demonstrate that the circuit court abused its discretion in determining what visitation schedule served this child's best interest.[1]

Jason's second point on appeal challenges the circuit court's award of attorney's fees to Brandi. Jason does not contest the reasonableness of the fee or the number of hours spent by the attorney. Jason acknowledges that the circuit court has the inherent power to

[1]The dissenting judges do not take issue with any of the circuit court's findings related to the denial of joint custody, the award of less-than-standard visitation, the establishment of a weekly child-support duty, and the entry of judgment for thousands of dollars in unpaid child support.

award attorney's fees and that circuit courts are "no longer required to provide a written analysis of any particular factors when awarding attorney's fees." Jason's argument on appeal is that the circuit court "failed to fully consider the facts surrounding [Jason's] filing of his Petition to Establish Paternity, for Joint Custody, and Other Relief." In sum, Jason contends that the only reason he filed a suit in September 2016 for joint custody was Brandi's refusing him visitation in late August 2016, and the circuit court failed to consider that when it granted her attorney's fees. Jason asserts that, consequently, the circuit court abused its discretion, requiring reversal. We disagree.

The decision to award attorney's fees and the amount of an award are discretionary determinations that will be reversed only if the appellant can demonstrate an abuse of discretion. *Davis v. Williamson*, 359 Ark. 33, 194 S.W.3d 197 (2004). "Findings of fact and conclusions of law are unnecessary on decisions of motions under the rules of civil procedure." Ark. R. Civ. P. 52(a) (2018). "Unless the contrary can be shown, we presume that the circuit court acted properly and made such findings of fact as were necessary to support its judgment." *Wyatt v. Wyatt*, 2018 Ark. App. 177, at 7, 545 S.W.3d 796, 802 (citing *Curry v. Pope Cty. Equalization Bd.*, 2011 Ark. 408, 385 S.W.3d 130); *Hickory Heights Health & Rehab, LLC v. Cook*, 2018 Ark. App. 409, 557 S.W.3d 286.

Determination of the prevailing party can be a relevant consideration. *See Baber*, *supra*; *James v. Walchli*, 2015 Ark. App. 562, 472 S.W.3d 504. On this record, it is abundantly clear that Brandi prevailed in all meaningful ways in this litigation. Brandi never disputed Jason's paternity. Jason's petition sought joint custody. Visitation was

ongoing from their break up until late August 2016, and it was reinstated when his lawsuit was filed. Jason eventually dropped his claims regarding the truck and other unnamed personal items, so Brandi succeeded on that front. Brandi was successful in acquiring a judgment for child support that had accrued between January and November 2016 and in acquiring an order for prospective child support. Brandi was successful in defeating Jason's petition for joint custody and his subsequent request for expanded standard visitation. The evidence simply does not support Jason's assertion that the only reason he filed and pursued this action was Brandi's refusing him visitation in late August 2016.

As stated heretofore, Jason does not argue that the fee was unreasonable,[2] Jason agrees that the circuit court had the authority to award such fees, and Jason acknowledges that the circuit court was not required to explicitly state its reasons for doing so. To be clear, Jason's argument does not in any way seek a change in existing law. Unlike the dissenting judges, Jason does not cite *Tiner v. Tiner*, 2012 Ark. App. 483, 422 S.W.3d 178, much less argue that *Tiner* should be overturned or modified. The dissenting judges have created this appellate argument on their own, crafting an argument for reversal that no party has raised. It is a well-settled principle of appellate law that we will not make an appellant's argument for him in order to reverse. *See Running M Farms, Inc. v. Farm Bureau Mut. Ins. Co. of Ark.*, 371 Ark. 308, 265 S.W.3d 740 (2007). The concerns raised sua sponte by the dissenting judges can be addressed when we are presented with an appeal in

[2]Jason had filed his own motion in which he requested that Brandi be ordered to pay him over $8,000 in attorney's fees.

which this issue is raised and properly developed by the appellant, if our supreme court decides to change our court rules, or if our legislature enacts a change in the law. It is improper in this case to champion a new legal path as the dissenting judges argue we should. Returning to the issue presented on appeal, Jason bears the burden to demonstrate how the circuit court abused its discretion in this instance, and he has failed to carry that burden.

Affirmed.

GRUBER, C.J., and GLADWIN, GLOVER, and VAUGHT, JJ., agree.

ABRAMSON, VIRDEN, HARRISON, and HIXSON, JJ., dissent.

BRANDON J. HARRISON, Judge, dissenting.

> [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.[1]

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? This case raises these important questions, ones not often asked and answered.

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[1] *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (citations and quotations omitted).

I and three colleagues conclude that a circuit court should state the reason why it has ordered one party to pay another party thousands of dollars in attorney fees. This court has helped create the problem that exists, which is that circuit courts are not required to provide even a minimal amount of reasoning behind an attorney-fee assessment. We should therefore lead the effort to correct a deficiency that has crept into this area of judge-made law. The majority has passed on an opportunity for correction; but the better course is to reverse the award and remand the issue to the circuit court. If that court makes the same decision on remand, then it can explain why it assessed Brandi's fee against Jason. Ditto if the opposite result issues, or if no fee is awarded at all on remand and a party appeals. In any event, we would review the circuit court's reasoning and ultimate decision under the abuse-of-discretion standard.

Since his son's birth in 2010 until the unmarried couple's ultimate separation in January 2016, Jason had frequent and meaningful time with his son and Brandi. Even after the couple's separation, visitation worked out relatively well for some six months, until the summer of 2016. That is when Brandi stopped allowing Jason to see, and perhaps even telephone, his son. The block occurred when Brandi learned that Jason had a sexual relationship with Brandi's best friend. After not seeing his son for what appears to be at least several weeks, Jason's "only remedy" was to file a paternity case in which he sought joint custody and visitation. In Jason's view, had Brandi continued to allow visitation then he would not have had to file his petition, and she would not have accrued more than $8,000 in attorney fees.

Brandi defeated Jason's claim to modify custody and successfully defended against his attempt to dismiss her counterclaim for child support. The court entered a $4,320 judgment against Jason for retroactive child support and ordered him to pay $90 per week in support. Jason's child-support obligation was tied to his paternity case, which he initiated.

In the end, each party asked the circuit court to assess his or her attorney fee against the other. The bills were virtually equal: Jason was charged $8,065, Brandi $8,965. Without explanation, the circuit court ordered Jason to pay Brandi's attorney fees. Jason challenged the decision. He doesn't argue that the amount charged to Brandi by her own lawyer was unreasonable—that would implicate the factorial analysis of *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). Jason's complaint is more fundamental: he claims the circuit court abused its discretion by ordering him to pay Brandi's attorney fee given that he essentially had to sue to regain access to his son.

Statutes permitted the circuit court to award an attorney fee in this case, to either Brandi or Jason. For example, Ark. Code Ann. § 9-10-109(a)(1)(A) (Repl. 2015) authorizes, but does not require, a court to award an attorney fee in a paternity action. *See Davis v. Williamson*, 359 Ark. 33, 194 S.W.3d 197 (2004) (fee denied); *see also* Ark. Code Ann. § 9-27-342(d) (Repl. 2015). Arkansas Code Annotated § 9-14-233 (Repl. 2015) permits a fee award in a successful child-support-enforcement claim. So each party in this case had a statutory basis to request attorney fees.

Our principal point is straightforward: a court's decision to exercise its discretionary authority to order a party to pay the other party's attorney fee is not the same as explaining *why* the court ordered it done. (Flip the coin; had Brandi been ordered to pay Jason's fee and appealed, we'd be asking the same essential questions.)

Requiring circuit courts to briefly explain their reasoning behind a fee award should not be controversial. Three core and salutary consequences result. First, every party has a right to know why he or she is being ordered to pay someone else's attorney fee. Transparency is a hallmark of Arkansas's judicial system. Second, a person needs to know why he or she is being assessed someone else's attorney fee so a record for reversal or modification can be clearly made contemporaneous with the adverse ruling. A party can't pointedly object to a *ratio decidendi* that operates in silence. Finally, this court can more properly fulfill its role as an appellate tribunal when it has an express ruling to evaluate; otherwise we're left searching for a reason to uphold, reverse, or perhaps modify the circuit court's decision.

Our colleagues had to review the record anew and decide—for the first time ever in the case—that Jason should pay Brandi's fee because it is "abundantly clear that Brandi prevailed in all meaningful ways in this litigation." The circuit court made no such statement. This court has supplied its own reason to affirm; and it did so on a record that contains little information about the parties' incomes, their assets, their ability to pay an $8,000 attorney fee, and in the absence of any contempt.

The majority invokes Arkansas Rule of Civil Procedure 52(a) as authority for why factual findings are "unnecessary." This point arguably stems from *Tiner v. Tiner*, 2012 Ark. App. 483, 422 S.W.3d 178, which states that requiring circuit courts to explain why an attorney-fee award has issued will gum up the works. "As a practical matter, this court would impose a considerable burden on the circuit court if we required that specific findings be made when awarding attorney's fees, given the myriad of factors to be considered." *Id.* at 15, 422 S.W.3d at 186–87. We respectfully disagree. *Tiner*'s statement, well-intentioned though it was, should be jettisoned for a more transparent, party-centered approach. *See, e.g.*, *Stilley v. Fort Smith Sch. Dist.*, 367 Ark. 193, 238 S.W.3d 902 (2006) (the "better practice" is for a circuit court to explain its decision).

One, two, or three well-crafted sentences by a lawyer in a proposed precedent should nearly always suffice to communicate what is needed in this context.

> The court may ask the party prevailing on a motion to draft an order. This practice is longstanding in Arkansas. As the Supreme Court has observed, '[i]t is customary for trial judges to rely upon the members of the bar to prepare judgments, orders and decrees in accordance with the court's instructions. Opposing counsel should be given the opportunity to review the document before it is presented to the court.'

David Newbern, John J. Watkins & D.P. Marshall Jr., 2 *Arkansas Practice Series: Civil Practice & Procedure* § 20:2, at 446 (5th ed. 2010) (internal citations omitted).

Many judges, of course, will take up their own pens or turn to the keyboards and explain why one party must pay another's attorney fee. The focus should return to the parties, so they may receive a reason for the decision. Why a court has acted is as

important that it has acted. In the long run, the administration of justice is better served if everyone knows *why* one person is having to pay another person's attorney fee, especially given the increasing amounts we are continually seeing in this state. *See, e.g.*, *Hargis v. Hargis*, 2018 Ark. App. 490, ___ S.W.3d ___ ($18,000 attorney fee awarded to the ex-husband).

And if, in *Tiner*'s words, "a myriad of facts" exist that could support an attorney-fee award in the family-law context, then that specter increases, not decreases, the need for a transparent explication. To the extent *Tiner* holds or implies otherwise, it should be overruled.

* * *

The attorney-fee award in this case should be reversed and remanded to the circuit court so that it can expressly state a reason for any related decision it makes on remand. If a party appeals, then any reason provided would be reviewed under the abuse-of-discretion standard, as has long been the case and which no one seeks to change. But this court should not itself supply the reason (and a debatable one at that) to affirm a substantial fee award against a parent.

ABRAMSON, VIRDEN, and HIXSON, JJ., join.

KENNETH S. HIXSON, Judge, dissenting. I join the dissent written by Judge Harrison but add the following. The landscape of the award of attorney's fees has changed since *Tiner v. Tiner*, 2012 Ark. App. 483, 422 S.W.3d. 178. When *Tiner* was decided, circuit courts routinely awarded attorney's fees of $500, $1,000, or similar sums in

domestic-relations cases by simply filling in the blank of a proposed order or decree. While an award of $500 or $1,000 might have been aggravating or unpleasant for the losing party, it was generally not worthy of a request for posttrial relief or appeal. However, recently this court has witnessed attorney's-fee awards dramatically escalate in domestic-relations cases.

Over the past two years, we have seen attorney's fees awarded in the amounts of $14,190, $18,116, $30,000, and $31,950.[1] While I am not criticizing the entitlement to, or the amount of, those fees, our court is being requested by the parties to review the fees. When requested, our task is to review the entitlement to and the reasonableness of the fees under an abuse-of-discretion standard. However, circuit courts generally do not provide any reason for the amount of an award, nor a reason as to why one party or the other is entitled to attorney's fees. If the record and the decree is completely void of the reasons, findings, or conclusions of the circuit court, how then can we be expected to perform an intelligent and well-reasoned review?

Our court should not be forced to resort to speculation, conjecture, or divination to ascertain whether the circuit court's 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 therefor. Domestic-relations cases comprise a large percentage of the civil dockets around the state. We

[1]*See Foster v. Foster*, 2016 Ark. App. 456, 506 S.W.3d 808; *Wilhelm v. Wilhelm*, 2018 Ark. App. 47, 539 S.W.3d 619; *Goodson v. Bennett*, 2018 Ark. App. 444; and *Wyatt v. Wyatt*, 2018 Ark. App. 177, 545 S.W.3d 796, respectively.

encourage parents to advocate in favor of their children. In fact, in *Troxel v. Granville*, 530 U.S. 57 (2000), the United States Supreme Court recognized a parent's fundamental liberty interest in the care, control, and custody of one's child. An attorney's fee of $500 or $1,000 generally did not have a chilling effect on a party's access to justice. However, the unexpected imposition of the opposing party's attorney's fees in the tens of thousands of dollars after an extended period of litigation can, in fact, have that unwanted and undesirable chilling effect. If we are going to attach substantial financial burdens to these litigants who are exercising their fundamental liberties, the least we can do as a fair and impartial judicial system is explain to those litigants the reasons for their newly acquired burden. Then, we as a reviewing court would have a competent record upon which we can faithfully perform our duties and determine whether the circuit court abused its discretion. I would therefore, overturn *Tiner*, or perhaps modify *Tiner*, to require a thoughtful and thorough explanation of attorney's fees to these litigants in the circuit courts.

ABRAMSON, VIRDEN, and HARRISON, JJ., join in this dissent.

Taylor & Taylor Law Firm, P.A., by: *Andrew M. Taylor* and *Tasha C. Taylor*, for appellant.

Phillips & Veach, P.A., by: *Robert M. Veach*, for appellee.