

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Case No. DF-104107

**C. O'DARLING,
Petitioner/Appellant,**

vs.

**S. O'DARLING,
Respondent/Appellee.**

FILED
SUPREME COURT
STATE OF OKLAHOMA
JUL 18 2007
MICHAEL S. BISHOP
CLERK

BRIEF IN CHIEF OF APPELLANT

Appeal from Tulsa County District Court, Honorable Judge Michael Zacharias

case No. FD-2006-2820

**CONCERNING AN APPEAL FROM
AN ORDER VACATING DECREE OF DISSOLUTION OF MARRIAGE
AND DISMISSING PETITION FOR DISSOLUTION OF MARRIAGE**

**John W. Flippo, OBA #2987
Laurie Phillips, OBA#19910
FRASIER, FRASIER & HICKMAN, LLP
1700 Southwest Boulevard
P.O. Box 799
Tulsa, Oklahoma 74101
918/ 584-4724, Facsimile 583-5637
ATTORNEY FOR PETITIONER/APPELLEE**

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
FACTS.....	1
ARGUMENT AND AUTHORITIES	3
PROPOSITION I.....	3
The Trial Court Erred When it Dismissed Appellant's Petition for Dissolution of Marriage, <i>Sua Sponte</i> , Without Notice and an Opportunity to Be Heard.	
PROPOSITION II.	5
The Trial Court Erred When It Applied 43 OS § 3.1 to a Marriage Performed in Canada.	
CONCLUSION	7

TABLE OF AUTHORITIES

Page

Kordis v. Kordis, 37 P.3d 866.....3

Grace v. Foster, 880 P.2d 902.....4

Heiman v. Atlantic Richfield Co., 1991 OK 22, 807 P.2d 257.....4

43 OS § 3.1.....5

Bishop v. The State of Oklahoma, ex rel. Edmondson 447 F. Supp 2d
1239 (Okla. 2006).....5

35 U.S.T 3403 (1984).....6

Hays v. Simmons, 1928 OK 734, 277 P.213.....6

Butler v. Wilson, 153 P. 8236

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

C. O'DARLING,)
)
 Appellant/Petitioner)
) No. DF-104107
 vs.)
)
 S. O'DARLING,)
) Tulsa County Case No. FD-2006-2820
 Appellee/Respondent.)

APPELLANT'S BRIEF IN CHIEF

COMES NOW Appellant by and through the law firm Frasier, Frasier and Hickman, LLP and in support of her Brief states as follows:

I.
FACTS

1. Appellant and Appellee were married in Toronto, Canada on 16 December 2002. (Petition for Dissolution of Marriage, paragraph 3)
2. Appellant filed her Petition for Dissolution of Marriage on 18 July 2006, in Tulsa County. (Petition for Dissolution of Marriage)
3. The Petition and Summons were properly served on Appellee on 25 July 2006. The Appellee failed to file a response. (Proof of Service Affidavit)
4. Appellant filed a Motion for Default which was set for hearing on 20 November 2006. Prior to the hearing, Appellee signed a Waiver of Summons and Time to Plead and signed the Decree of Dissolution of Marriage. (Motion for Default, Waiver of Summons)

5. On 13 November 2006 Appellant appeared with her attorney, John W. Flippo ("Flippo") of the law firm Frasier, Frasier & Hickman, LLP, before the Honorable C. Michael Zacharias and presented testimony.

6. As is Flippo's usual custom, he introduced Judge Zacharias and the Appellant. Judge Zacharias proceeded to swear in Appellant and review the court file. The Judge's review of the file was very thorough. Appellant was asked and answered standard questions about jurisdiction and division of property and debts. At one point, the Judge asked Appellant about the Appellee. Appellant responded that she married Appellant in Toronto, Canada. (Narrative Statement)

6. Judge Zacharias granted the dissolution of marriage and signed the Decree of Dissolution of Marriage on 13 November 2006. The Decree was filed on 14 November 2006. (Decree of Dissolution of Marriage)

7. Sometime after 14 November 2006, Judge Zacharias was contacted by a reporter from the *Tulsa World* concerning allegations that a dissolution of marriage had been granted to persons of the same gender. (Narrative Statement)

8. On or about 15 November 2006, Judge Zacharias called Laurie Phillips ("Phillips"), an associate with the law firm of Frasier, Frasier & Hickman, LLP, to his chambers concerning the allegations. Flippo was out of the state. (Narrative Statement)

9. Phillips informed Judge Zacharias that she had researched the issue of same-gender dissolution of marriage but did not have the law with her at that time. Judge Zacharias told Phillips that he wanted "the research" on his desk when Flippo

returned. Flippo was scheduled to return on 27 November, 2006. (Narrative Statement)

10. On 20 November 2006, without notice to Appellant, Judge Zacharias entered a Minute Order vacating the Decree of Dissolution of Marriage and dismissing the Petition for Dissolution of Marriage. (Minute Order)

11. The Minute Order of 20 November 2006 was formalized in an Order and filed on 17 January 2007 with the Tulsa County District Court. (Order)

II. ARGUMENT & AUTHORITIES

PROPOSITION I: The Trial Court Erred When it Dismissed Appellant's Petition for Dissolution of Marriage, *Sua Sponte*, Without Notice and an Opportunity to Be Heard.

The court failed to give notice to Appellant prior to dismissing the Petition for Dissolution of Marriage. A fundamental principal of due process is notice and an opportunity to be heard. Even a prisoner has a right to due process. In Kordis v. Kordis, 2001 OK 99, 37 P.3d 866, the court stated "like any other civil litigant, an inmate is entitled to notice from the court of changes or revisions in the scheduled procedure relating to his case." The court failed to give Kordis (a prisoner) notice that it had reconsidered a previous order. Similar to Appellant, Kordis learned of the order when he received a copy in the mail. (Minute Order, certificate of mailing). The appellate court found that the trial court abused its discretion when it refused to vacate the order that was entered without notice.

"A pleading must not be dismissed for failure to state a legally cognizable claim *unless* the allegations indicate *beyond any doubt* that the claimant can prove no

set of facts which would entitle it to relief.” Groce v. Foster, 1994 ok 88, 880 P.2d 902. Appellant was not given any opportunity to set forth any facts. The trial court, after granting Appellant time to present legal arguments and facts, dismissed the action prior to the response deadline. The Groce court clearly sets out that a party must be given the opportunity to set forth facts that would entitle him to relief. Appellant was not given that opportunity.

In Heiman v. Atlantic Richfield Co., 1991 OK 22, 807 P.2d 257, the court was presented with the question of whether publication notice alone was sufficient to meet the minimum due process standards. Pursuant to statute, the trial court gave notice of its disposition docket by publication only. The parties had no actual notice to inform them of the impending *sua sponte* action by the trial court. Since neither party appeared the case was dismissed by the trial court. The Supreme Court held that publication alone failed to meet the minimum due process standards. “The Due Process Clause of the Fourteenth Amendment inexorably commands that ‘prior to an action which will affect an interest in ... property ... a State must provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” The Decree of Dissolution of Marriage granted by the trial court made dispositions of the parties’ property. (Decree of Dissolution of Marriage, pg. 2, ¶ 7, 8, 9, 10).

Due process is a fundamental right guaranteed by the United States Constitution. In Heiman, the court stated:

“We note that while published notice of the disposition docket appears authorized by statute, if the setting to take place may result in an end-

of-the-line order-one marking an event dispositive of or terminating the litigation – *personal notice is required, whether it be effected by personal service or by mail.*”

In the instant case, Appellant had no notice whatsoever, not even notice by publication. Appellant was afforded no due process and therefore the trial court's order of 20 November 2006 should be set aside.

PROPOSITION 2: The Trial Court Erred When It Applied 43 OS § 3.1 to a Marriage Performed in Canada.

The trial court did not cite 43 OS § 3.1 in its Order. However, the court did refer to the substance of 43 OS § 3.1. 43 OS § 3.1 provides:

“A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.”

The statute only applies to marriages performed in another “state.” The parties were married in Canada. Canada is not a state, it is a foreign country and is not subject to the Full Faith and Credit Clause of the United States Constitution.

In Bishop v. The State of Oklahoma, ex rel. Edmondson, 447 F.Supp.2d 1239 (Okla. 2006) (Appendix, Index 1) a same gendered couple sought to have their Canadian marriage recognized in the State of Oklahoma. The court reasoned that “[t]he Full Faith and Credit Clause applies only to states within the United States and does not mandate that a state give full faith and credit to a foreign country.” According to Bishop, “the principle of comity applies in determining what effect a state in the United States will give to a foreign marriage and it is a discretionary decision of the forum state as to whether a Canadian marriage will be recognized.” However, the court did not address international treaties and agreements.

The United States and Canada entered into a treaty which coordinates social security pension benefits between the two countries for persons who work the requisite time period in the county in which he is not a citizen. The treaty provides for a "spouse's allowance." "Spouse" is not defined in the agreement. Agreement Between the Government of the United States of America and the Government of Canada with Respect to Social Security, 35 U.S.T. 3403 (1984) (Appendix, Index 2). The treaty requires that payments be made by the United States to a qualified Canadian spouse but does not specify that payments cannot be made to a spouse of the same gender. Pursuant to the supremacy clause of the United States Constitution, Oklahoma must recognize a Canadian marriage and comity does not apply.

Oklahoma has a history of recognizing untraditional/irregular marriages. In Hayes v. Simmons, 1928 OK 734, 277 P. 213 where the court stated "A marriage contracted between members of an Indian tribe, in accordance with the customs of such tribe, where the tribal relations and government existed at the time of such marriage, and there was no federal statute rendering the tribal custom invalid, will be recognized by the courts as a regular and valid marriage for all purposes." The court in Butler v. Wilson, 1915 OK 1076, 153 P. 823, referred to these marriages as "irregular marriages."¹ Only as recently as May 13, 2004, the Cherokee Nation, which has its headquarters in Tahlequah, Oklahoma, issued a marriage certificate to a couple of the same gender. A marriage ceremony was performed in accordance with the customs of the tribe.

¹Hayes and Butler involved multiple marriages where the respective spouses did not obtain a divorce. These were not same-gender marriages.

III. CONCLUSION

Appellant was denied the right of due process guaranteed by the United States Constitution. Appellant should have been given notice and an opportunity to present evidence and arguments to the trial court. Instead, the trial court abused its discretion and violated Appellant's basic fundamental due process rights by dismissing the Petition for Dissolution of Marriage and vacating the Decree of Dissolution of Marriage without notice to the Appellant and an opportunity to be heard. Therefore, this court should reverse the order of the trial court of 20 November 2006 which vacated the Decree of Dissolution of Marriage and dismissed the Petition for Dissolution of Marriage

It is clear that 43 OS § 3.1 only applies to marriages performed in other states of the United States. The statute does not apply to marriages performed in a foreign nation. Appellant was married in Canada. The trial court erred in applying 43 OS § 3.1 to Appellant and the trial court's decision should be reversed. Likewise, full faith and credit only applies to states within the United States. The trial court erred in applying full faith and credit principles to a foreign marriage and the trial court's decision should be reversed.

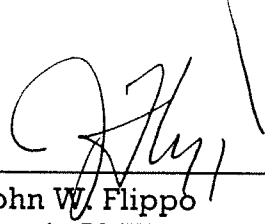
A treaty exists between the United States and Canada which allows for the recognition of same gender marriages. Further, Oklahoma has traditionally recognized "irregular" marriages. Appellant was not allowed to present any argument or evidence in support of her foreign marriage so that the court may recognize the Canadian marriage through principles of comity and/or equal protection.

WHEREFORE, premises considered, for the above and foregoing reasons,
the trial court's order of 20 November 2006 should be reversed.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN, LLP

By:



John W. Flippo
Laurie Phillips
Attorneys for Appellant
1700 Southwest Blvd.
PO Box 799
Tulsa, OK 74101-0799
918.584.4724
800.522.4049
918.583.5637 fax

OBA #2987
OBA#19910

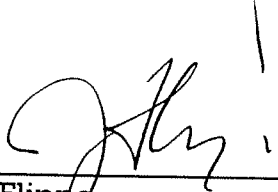
CERTIFICATE OF SERVICE

I, John W. Flippo, hereby certify that in addition to filing the original Appellant's Brief in Chief in the district court, a copy of the foregoing Designation of Record was mailed by first class mail, postage prepaid, this 13 day of ~~January~~, 2007, to the following:

July

S. O'Darling Griffith
8927 N. 151st E. Ave.
Owasso, OK 74055

Martha R. Kulmacz
Assistant Attorney General
Office of the Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105



John W. Flippo