

**FILED**  
SUPREME COURT  
STATE OF OKLAHOMA

Case No. DF-104107

AUG 22 2007

MICHAEL S. RICHIE  
CLERK

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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**C. O'DARLING,**

**Appellant/Petitioner,**

**v.**

**S. O'DARLING**

**Appellee/Respondent.**

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**ATTORNEY GENERAL'S BRIEF IN RESPONSE TO  
BRIEF IN CHIEF OF APPELLANT**

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**Appeal from Tulsa County District Court, Honorable Judge Michael Zacharius**

**Case No. FD-2006-2820**

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

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**AUGUST 22, 2007**

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

ATTORNEY GENERAL'S BRIEF IN RESPONSE TO  
BRIEF IN CHIEF OF APPELLANT

INTRODUCTION

The issue in this case, as it relates to Oklahoma's constitutional provision and statutes, is whether Oklahoma is required to recognize a Canadian same sex marriage either under the federal constitutional principles of full faith and credit or by principles of comity. Appellant claims Oklahoma must recognize a Canadian same sex marriage pursuant to full faith and credit and the Supremacy Clause. Appellant's Brief at 6. By raising these issues, Appellant has drawn in question the constitutionality of Oklahoma's constitutional provision and statute which prohibit the recognition of marriages between persons of the same sex, Okla. Const. art. II, § 35; 43 O.S.2001, § 3.1.<sup>1</sup> Appellant concludes her brief by stating she "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." Appellant's Brief at 7. At the least, this

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<sup>1</sup>Petitioner specifically attacked Oklahoma's constitutional provision, Okla. Const. art. II, § 35, in her Petition in Error by listing as an issue to be raised on appeal, "whether Okl. Const. Art. 2, § 35 is unconstitutional as applied to marriages performed in a foreign country." Amended Petition in Error, Exhibit C.

challenge on the basis of comity and/or equal protection could result in a decision which impacts the constitutionality of Oklahoma's constitutional provision and statutes relating to same sex marriage. Therefore, the Attorney General files this response pursuant to 12 O.S. Supp. 2003, § 2024(D)(1) which allows the Attorney General to present argument when the constitutionality of a statute is drawn in question.

**A. This Court may recast these proceedings.**

This Court, should it desire to do so, has the authority to recast this appeal as an original proceeding. *See Christian v. Gray*, 2003 OK 10, 65 P.3d 591 (court may recast proceedings where an issue is one of first impression or of statewide importance). Under the unique facts of this case, it is likely the current designation of this case as an appeal from a divorce proceeding will not result in adversarial testing of the issues raised. Appellant sought a divorce and Appellee signed a Waiver of Summons and Time to Plead. The claims raised are presumably claims with which both parties are in agreement.

Another indication this case may not be subject to adversarial testing is that Appellee, Stephanie O'Darling, has not entered an appearance in the case pro se, nor has an attorney entered an appearance on her behalf. Pleadings mailed to Stephanie O'Darling's last known address by the Attorney General have been returned.

**B. The applicable statutes do not require recognition of the Canadian same sex marriage.**

Appellant argues 43 O.S. 2001, § 3.1 does not prohibit the recognition of foreign country judgments and therefore, the district court was required to recognize her Canadian marriage under full faith and credit principles. The Oklahoma statute 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.

*Id.* Oklahoma's constitutional provision contains the same language. Okla. Const. art. II, § 35.

The Full Faith and Credit Clause, U.S. Const. art. 4, § 1 provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings *of every other State*. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

(Emphasis added). This same basic language is contained in 28 U.S.C. § 1738 where Congress extended full faith and credit to the United States' territories and possessions by stating:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

As demonstrated below, these statutes and constitutional provisions do not require Oklahoma to recognize a Canadian same sex marriage.

## I.

**THE FULL FAITH AND CREDIT CLAUSE DOES NOT REQUIRE OKLAHOMA TO RECOGNIZE A SAME SEX MARRIAGE AS A MARRIAGE CERTIFICATE IS NOT A JUDGMENT AND SAME SEX MARRIAGE IS CONTRARY TO OKLAHOMA'S PUBLIC POLICY.**

In applying the Full Faith and Credit Clause, the United States Supreme Court has drawn a distinction between statutes and judgments. *Baker ex rel. Thomas v. Gen. Motors*

*Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). A judgment in this context has been explained as “[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons government by the judgment.” *Id.* at 233. Although the Full Faith and Credit Clause applies unequivocally to the judgments of sister states, it applies with less force to other acts. As to these other acts, a court may be guided by the forum state’s public policy in determining the applicable law. A marriage certificate is not a judgment resulting from a court action. It is a creature of statute and the state has a constitutional right to declare and maintain policy as to persons domiciled within its borders. *Williams. v. Williams*, 1975 OK 163, ¶ 10, 543 P.2d 1401, *appeal dismissed, cert denied*, 426 U.S. 901, 96 S.Ct. 2220, 48 L.Ed.2d 826 (1976). Oklahoma has defined a marriage at 43 O.S. 2001, § 1 as “a personal relationship arising out of a civil contract” Therefore, there is no requirement under full faith and credit that Oklahoma recognize the Canadian marriage if that marriage is contrary to Oklahoma’s public policy.

Oklahoma has a strong public policy against same sex marriages and the recognition of such marriages from other forums. This is seen by its legislative enactments, both in the past and recently, and recent Constitutional provisions. The language in Oklahoma’s statute that marriage is “with a person of the opposite sex”, 43 O.S. Supp. 2004, § 3, has been in existence since 1975. *See* 1975 Okla. Sess. Laws, ch. 39, § 1. Several amendments have been made to the statute over the years and the requirement that marriage be with a person of the opposite sex has remained. In 2004, Oklahoma passed 43 O.S. 2001, § 3.1 which

specifically provides that Oklahoma does not recognize marriages of persons of the same sex performed in other states. That same year, the people of Oklahoma voted to amend the Oklahoma Constitution to provide at Okla. Const. art. II, § 35 that “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.” Okla. Const. art, II, § 35(B), State Question No. 711, Legislative Referendum No. 344, adopted at election November 2, 2004. Therefore, Oklahoma is not required to recognize a Canadian same sex marriage under the Full Faith and Credit Clause.<sup>2</sup>

## II.

### **THE FULL FAITH AND CREDIT CLAUSE DOES NOT REQUIRE OKLAHOMA TO RECOGNIZE A MARRIAGE ENTERED INTO IN A FOREIGN COUNTRY.**

Additionally, even if a marriage certificate were considered a judgment, the Full Faith and Credit Clause would not require Oklahoma to recognize a Canadian marriage.<sup>3</sup> By its

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<sup>2</sup>Judge Zacharias did not know, at the time he initially granted the divorce, that the parties were both female. The minute order of November 20, 2006, demonstrates that counsel for Appellant disclosed to Judge Zacharias on November 16, 2006, a few days after the divorce was granted, that both parties were women.

<sup>3</sup>Additionally, a foreign court’s jurisdiction of a cause of action may ordinarily be the subject of a collateral attack. *Veiser v. Armstrong*, 1984 OK 61, 688 P.2d 796, 799, fn. 5. Thus, an Oklahoma court could question whether Canada, in this case, had jurisdiction to issue a marriage license to two Oklahoma residents. It should be noted that Appellant’s only allegation regarding residence was in paragraph 2 of her Petition for Dissolution of Marriage and Decree of Divorce in which she alleged residence in Oklahoma. She does not allege bona fine residence in Canada at the time of marriage. Residents of Oklahoma may not evade Oklahoma’s public policy against same sex marriage by traveling to foreign jurisdictions to attempt to contract a marriage prohibited in their place of residence. *See Sosna v. Iowa*, 419 U.S. 393, 408, 95 S.Ct. 553, 562, 42 L.Ed.2d 532 (1975) (one-year residency requirement for divorce was not unconstitutional as it could be reasonably justified on grounds of state’s interest in requiring those seeking divorce from its

very terms, the Full Faith and Credit Clause of the United States Constitution, cited in its entirety above, does not require recognition of foreign countries' judgments.

A number of courts, including this one, have held that states are not required to recognize judgments of foreign nations. *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190, 32 S.Ct. 309, 56 L.Ed. 398 (1912); *Taveras v. Taveras*, 477 F.3d 767, 783 (6<sup>th</sup> Cir. 2007); *Society of Lloyd's v. Reinhart*, 402 F.3d 982, 993 (10<sup>th</sup> Cir. 2005), *cert denied Bennett v. Society of Lloyd's*, 546 U.S. 826, 126 S.Ct. 366, 163 L.Ed.2d 73 (2005); *Miller v. Miller*, 240 F.3d 392, 400 (4<sup>th</sup> Cir. 2001); *Diorinou v. Mezitis*, 237 F.3d 133, 142 (2<sup>nd</sup> Cir. 2001); *Wilson v. Marchington*, 127 F.3d 805, 808 (9<sup>th</sup> Cir. 1997), *cert denied*, 523 U.S. 1074, 118 S.Ct. 1516, 140 L.Ed.2d 669 (1998); *Slessinger v. Secretary of Health and Human Services*, 835 F.2d 937, 941 (5<sup>th</sup> Cir. 1987); *Panama Processes v. Cities Service Co.*, 1990 OK 66, 796 P.2d 276.

The United States District Court for the Northern District of Oklahoma, in *Bishop v. Oklahoma*, 447 F.Supp.2d 1239, 1248-49 (N.D. Okla. 2007), specifically rejected the notion that a Canadian marriage qualifies for full faith and credit in Oklahoma. The court observed that only principles of comity are relevant in determining what effect a state will give to a

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courts to be genuinely attached to the state); . *Williams v. North Carolina*, 325 U.S. 226, 229, 64 S.Ct. 1092 (1945) (North Carolina not required to give full faith and credit to Nevada's finding of domicile when residents of North Carolina were granted a divorce in Nevada). *See also Cote-Whiteacre v. Department of Public Health*, 844 N.E.2d 623, 645 (Mass. 2006) (Massachusetts law which forbade individuals to marry in Massachusetts if they intended to reside in another state and the marriage would be "void" in that state was upheld against equal protection and due process challenges as it was reasonable to believe that non-residents would come to Massachusetts to marry to evade the marriage laws of their home states).

foreign country marriage and noted that it is a discretionary decision of the forum state as to whether a Canadian marriage will be recognized.

Thus, the district court was not required to recognize the Canadian marriage under full faith and credit for two reasons: (1) the marriage was not a judgment and is contrary to Oklahoma's public policy and (2) the marriage was from a foreign country rather than a sister state.

### III.

**EVEN IF A MARRIAGE CERTIFICATE WERE A JUDGMENT, OKLAHOMA IS NOT REQUIRED TO RECOGNIZE A CANADIAN SAME SEX MARRIAGE UNDER PRINCIPLES OF COMITY AS SUCH MARRIAGE IS CONTRARY TO OKLAHOMA'S PUBLIC POLICY.**

In *Panama Processes*, 1990 OK 66, 796 P.2d 276, this Court explained that “[t]he full faith and credit clause of the United States Constitution does not extend to foreign nation judgments, but state courts have the power to recognize them.” *Id.* 1990 OK 66 at ¶ 7, 796 P.2d at 181. Even if the Canadian marriage was a judgment, a foreign-country judgment may be denied recognition when it is contrary to “the crucial public policies of the forum in which enforcement is requested.” *Id.* 1990 OK 66 at ¶ 10, 796 P.2d at 283. This position is reenforced by the Restatement (Second) on Conflict of Laws § 117, Comment c [1971] which states:

Judgments rendered in foreign nations are not entitled to the protection of full faith and credit. A State of the United States is therefore free to refuse enforcement to such a judgment on the ground that the original claim on which the judgment is based is *contrary to its public policy*. (Emphasis added).

*Panama Processes*, 1990 OK 66 at ¶ 10, 796 P.2d at 283, fn. 22. “This rule concedes that a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests.” *Id.* This Court further stated:

In the Restatement (Second) of Conflict of Laws, Comment c, the drafters explain that the original claim must not be ‘repugnant to the fundamental notions of what is decent and just in the State where enforcement is sought.’

*Id.* While the standard for refusing to enforce judgments on public policy grounds is narrow in scope, the invocation of such a policy to preclude recognition of the Canadian same sex marriage is clearly warranted here. As discussed above, Oklahoma’s policy against the recognition of same sex marriage is powerfully strong and the trial court did not err in refusing to recognize the Canadian marriage under principles of comity.<sup>4</sup>

### CONCLUSION

In summary, Oklahoma was not required to recognize the Canadian same sex marriage under either the constitutional principle of full faith and credit or based on comity. As the parties’ Canadian same sex marriage was invalid in Oklahoma, the trial court did not err in refusing to grant the divorce.

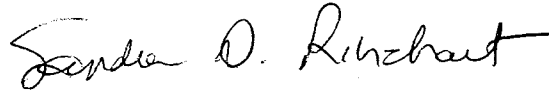
Should this Court decide to construe this appeal as an attack on the constitutionality of the statute beyond issues addressed in this response, the Attorney General would request an opportunity to further respond.

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<sup>4</sup>Appellant also argues the trial court was required to recognize her Canadian marriage on the basis of a Canadian treaty (Appellant’s Appendix 2). It is obvious from a review of the treaty that it is an agreement with respect to social security benefits and does not require Oklahoma to recognize a Canadian same sex marriage.

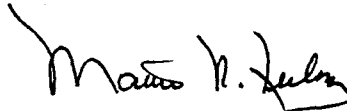
Respectfully submitted,

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**CERTIFICATE OF MAILING**

On this 22<sup>nd</sup> day of August, 2007, a true and correct of the foregoing was mailed,  
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\* This is the last known address of Stephanie O'Darling. Pleadings sent to this address by the Attorney General have been returned as undeliverable as recently as August 9, 2007.

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