NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

MAR 11 2010

MICHAEL S. RICHIE
CLERK

C. O'DARLING,

Petitioner/Appellant,

vs.

S. O'DARLING,

Respondent,

SPEAKER CHRIS BENGE, on behalf of the Oklahoma House of Representatives, and THE STATE OF OKLAHOMA, *ex rel.* Attorney General W.A. "DREW" EDMONDSON,

Intervenors/Appellees.

No. 106,732

APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, OKLAHOMA

HONORABLE ROBERT PERUGINO, JUDGE

AFFIRMED

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Laurie Phillips,
FRASIER, FRASIER
& HICKMAN, LLP,
Tulsa, Oklahoma, For Petitioner/Appellant,

Brian W. Raum,
Austin R. Nimocks,
ALLIANCE DEFENSE FUND,
Scottsdale, Arizona,
and
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Tulsa, Oklahoma,

For Intervenor/Appellee
House Speaker Chris Benge,

Sandra D. Rinehart,
Martha R. Kulmacz,
OKLAHOMA ATTORNEY
GENERAL'S OFFICE,
Oklahoma City, Oklahoma,

For Intervenor/Appellee Attorney
General W.A. "Drew" Edmondson.

Opinion by Kenneth L. Buettner, Presiding Judge:

¶1 Petitioner/Appellant C. O'Darling (Appellant) appeals from the trial court's Final Order, entered December 17, 2008, which dismissed Appellant's Petition for Dissolution of Marriage based on lack of jurisdiction. Appellant filed a Petition seeking dissolution of a marriage between Appellant and Respondent, S. O'Darling (Respondent), who waived appearance. The trial court granted the divorce, then vacated it and dismissed the Petition after learning the parties were both women. The Oklahoma Supreme Court affirmed the vacation order, but reversed and remanded the dismissal order based on lack of notice. On remand, Appellant alleged that she and Respondent had been validly married in Canada, and she argued that while the Oklahoma Constitution bars recognition of marriages between persons of the same

gender performed in other states, it does not bar recognition of such marriages performed in other countries. The trial court found that Appellant failed to present proof of a valid Canadian marriage, but that even if she had done so, it was without jurisdiction to issue the relief sought. On *de novo* review, we affirm.

¶2 The decision from which Appellant now appeals followed remand from the Oklahoma Supreme Court. See *O'Darling v. O'Darling*, 2008 OK 71, 188 P.3d 137.[1] The Oklahoma Supreme Court filed its decision July 1, 2008.

¶3 Following briefing by the parties[2] and a hearing held November 25, 2008,[3] the

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[1] The Oklahoma Supreme Court's decision shows, in summary, that Appellant filed a Petition for Dissolution of Marriage July 18, 2006, alleging the parties were married in Canada in 2002. Respondent was served and filed a waiver of appearance and signed a decree of dissolution. Following a hearing, the trial court entered a Decree of Dissolution November 13, 2006. At the hearing, neither Appellant nor her counsel informed the trial court that the marriage was between two women. The trial court learned that fact a week later when a reporter contacted the court for comment. The trial court entered a minute order November 20, 2006 in which it both vacated the Decree and dismissed Appellant's Petition for Dissolution of Marriage. On appeal from that order, the Oklahoma Supreme Court retained the case. It held that the trial court acted within its discretion to vacate the Decree based either on irregularity or fraud in obtaining the Decree, citing 12 O.S.2001 §1031. However, the reviewing court found that the trial court erred in dismissing Appellant's Petition without affording her notice and an opportunity to respond, because the proceeding potentially affected her property rights. The court remanded the matter to the District Court to conduct a hearing, after affording notice to Appellant (as well as notice to the Oklahoma Attorney General if any state constitutional issue would be addressed).

[2] The "parties" then included Appellant, Oklahoma House of Representatives Speaker Chris Benge and the State. Speaker and the State of Oklahoma, *ex rel.* W.A. "Drew" Edmondson, Attorney General, intervened in the case, claiming the constitutionality of a state law was in question. Appellant filed her "Objection to Benge's Motion to Intervene," in which she contended that intervention was not warranted in this case because she had not raised the constitutionality of any Oklahoma law. The trial court disagreed with Appellant's argument on this issue, and the propriety of intervention in this case is Appellant's first issue on appeal. The outcome of this case would have (continued...)

trial court entered the Final Order December 17, 2008. The court stated the issue as whether it had the power and jurisdiction to grant the relief requested. The court noted that Appellant had not presented a certified copy of a document proving a marriage valid in Canada, and the court held that Appellant had failed to meet her burden of proving a marriage legally cognizable in Canada. The trial court found unpersuasive Appellant's contention that Oklahoma Const., Art. 2 §35(B), is not applicable to her marriage performed in another country.[4] The trial court held that even if Appellant had met her burden of proving a marriage validly performed in another country, the Oklahoma state courts were still without authority to grant the relief requested. The trial court therefore dismissed Appellant's Petition.[5]

¶4 We review *de novo* an order dismissing a petition. *Hayes v. Eateries, Inc.*, 1995 OK 108, 905 P.2d 778. Appellant asserts four propositions of error in support

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[2](...continued)
been the same whether or not Speaker or the State intervened. Accordingly, even if intervention was error, such error was harmless.

[3] Appellant filed an Amended Petition for Dissolution of Marriage or, In the Alternative, Petition for Decree of Annulment November 24, 2008. The trial court dismissed the Amended Petition as untimely. Appellant challenges that dismissal order in this appeal.

[4] Okla. Const., Art. 2, §35(B) 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.

[5] The trial court held Appellant's Amended Petition, in which she alternatively sought annulment, was untimely but that the result would be the same even if the Amended Petition had not been dismissed on that basis.

of reversal. First, Appellant contends the trial court erred in allowing the State and Speaker to intervene. We have disposed of that argument above. Appellant next claims the trial court erred in dismissing her Amended Petition.[6] Appellant's third proposition is that the trial court erred in finding Appellant failed to meet her burden of proving a marriage valid in Canada. Lastly, Appellant contends that Okla. Const. Art. 2, §35(B) and 43 O.S.2001 §3.1 do not bar recognition of foreign marriages between same-sex couples.

¶5 Divorce is wholly a creature of statute and the absolute power to prescribe conditions relative thereto are vested in the state. *Williams v. Williams*, 1975 OK 163, 543 P.2d 1401, *cert. denied* 96 S.Ct. 2220, 426 U.S. 901, 48 L.Ed.2d 826. There is no constitutional right to divorce.[7] *Kiddie v. Kiddie*, 1977 OK 69, 563 P.2d 139,

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[6] Appellant first filed her Petition in 2006. After the original dismissal was reversed and remanded, and after the parties had briefed the issues, Appellant filed an Amended Petition November 24, 2008, the day before the hearing scheduled for November 25, 2008. Appellant's Amended Petition changed the date of the alleged Canadian marriage (apparently the 2002 date she originally pleaded was before same-sex marriage was legalized in Canada) and she added an alternative claim for annulment. The trial court held that Appellant's Amended Petition was untimely. We find no abuse of the trial court's discretion in that decision. Respondent had filed a general appearance and waiver of summons and right to answer the original 2006 Petition. This is a sufficient responsive pleading to invoke the provisions of 12 O.S.2001 §2015A. Under these facts, we hold that §2015A required leave of court to file an Amended Petition. Allowing the Amended Petition, seeking different relief than requested in the Petition, would have required new service and substantially delayed the matter. Additionally, under the trial court's and our analysis herein, the Amended Petition failed to state a claim for relief under Oklahoma state law.

[7] Each state, as a sovereign, is generally deemed to have a rightful and legitimate concern in the marital status of persons domiciled within its borders, and jurisdiction over the matrimonial (continued...)

142. Even before statehood, territorial courts held that the courts' authority to grant dissolutions of marriage is entirely dependent on statutory authority. *Irwin v. Irwin*, 1895 OK 36, 41 P. 369, 374, 3 Okla. 186. In *Williams, supra*, the wife objected to the court granting a divorce based on her contention that the divorce violated the parties' ecclesiastical vows. The Oklahoma Supreme Court responded with an affirmation of the primacy of state statutory authority in the arena of divorce:

> We have no business or right, constitutional or statutory, to interpret and enforce the ecclesiastical vows of marriage. While this court is concerned with the mores and religious beliefs of the citizenry, our jurisdiction extends only to the civil matters of state.
>
> Freedom of religion, which is embodied in the First Amendment to the Constitution of the United States and in the due process clause of the Fourteenth Amendment, reflects the philosophy the church and state should be separate, and that both religion and government can best

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[7](...continued)
status of its citizens. Accordingly, the dissolution of marriages is a matter reserved to the states.

Although a state divorce decree, like any other law governing the economic aspects of domestic relations, must give way, under the Supremacy Clause, to clearly conflicting federal enactments, the United States Constitution confers no power whatsoever on the federal government to regulate the dissolution of marriage in the states. Thus, each state, acting through its legislature, has the exclusive, and, except as constitutionally restricted, unlimited, right and power to regulate, control, prescribe and change the conditions for the dissolution of a marriage for persons residing within its territorial limits.

Since divorce is a privilege existing solely by grant of the legislature, and since there is no natural, inherent, constitutional, or vested right to a divorce, and no common law governing divorce, subject to such constitutional limitations as may exist, divorce rests on statutory provisions. Accordingly, while only the parties can agree to end the marriage, absent the death of one of them, or a marriage void from the start, the state defines the exit terms.
27A C.J.S. Divorce § 11

> work to achieve their lofty aims if each is left free from the other within its respective sphere. We are a civil court having constitutional and legislative sanction to administer man-made laws justly, fairly and equally. We have no jurisdiction to regulate or enforce scriptural obligations. . . .
>
> Divorce is wholly a creature of statute with absolute power to prescribe conditions relative thereto being vested in the State.
>
> Neither the Constitution of the United States, nor the State of Oklahoma, prohibits the legislature from specifying upon what grounds, if any, divorces are to be granted. The State has a constitutional right to declare and maintain a policy in regard to marriage and divorce as to persons domiciled within its borders. The statutory grounds of divorce are exclusive, and the courts have authority in this field to do only that which is prescribed by the legislature. The legislature has vested the courts of this state with ultimate control over the dissolution of marriage. . . . *The State has absolute control over the dissolution of the civil marriage contract.*

543 P.2d at 1402-1404 (citations omitted, emphasis added).

¶6 It is perhaps unnecessary to state that the existence of a valid marriage is an essential element of a claim for dissolution of that marriage, but indeed that question was long ago settled by the Oklahoma Supreme Court.[8] In *Whitney v. Whitney*, 1947

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[8] Marriage must be alleged in a petition seeking dissolution of marriage. See 43 O.S.2001 §105, which states:

> A. A proceeding for dissolution of marriage, an annulment of a marriage, or a legal separation shall be titled "In re the Marriage of __________ and __________".
> B. The initial pleading in all proceedings under this title shall be denominated a petition. The person filing the petition shall be called the petitioner. A responsive pleading shall be denominated a response. The person filing the responsive pleading shall be called the

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OK 44, 181 P.2d 245, 198 Okla. 681, at Syllabus 2 the Oklahoma Supreme Court announced:

> Where, in action for divorce, it is adjudged that a matrimonial relation between the parties never existed, the trial court has exhausted the power conferred on it and cannot assume to exercise in the particular case inherent or statutory powers relating to valid marriages.

That language shows that a valid marriage must be shown in order for the District Court to exercise its dissolution authority. Regardless of whether the failure to show a valid marriage is in fact a jurisdictional defect[9] or is simply a failure to state a claim,

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[8](...continued)

respondent. Other pleadings shall be denominated as provided in the Rules of Civil Procedure, except as otherwise provided in this section.

C. The petition must be verified as true, by the affidavit of the petitioner.

D. A summons may issue thereon, and shall be served, or publication made, as in other civil cases.

E. Wherever it occurs in this title or in any other title of the Oklahoma Statutes or in any forms or court documents prepared pursuant to the provisions of the Oklahoma Statutes, the term "divorce" shall mean and be deemed to refer to a "dissolution of marriage" unless the context or subject matter otherwise requires.

[9] See *Holleyman v. Holleyman*, 2003 OK 48, n. 12, 78 P.3d 921, in which the Oklahoma Supreme Court explained:

Before the 1969 court reorganization, when the district court's constitutional jurisdiction was merely "general," this court had to confirm in a case-by-case approach whether matters not stricto sensu divorce-related (i.e., family-status or divorce-generated post-decree litigation) could be docketed in the district or in the county court. If a case did not fit into the district court's then-maintained civil or divorce docket, it would be deemed a county court matter. See, e.g., *Green v. Green*, 1957 OK 70, 309 P.2d 276 (an action filed under the Uniform Reciprocal Enforcement of Support Act to secure support for a child of a bigamous marriage, in which the court held that it was properly brought before the district court); *Ex parte Yahola*, 1937 OK 306, 71 P.2d 968, 972, 180 Okl. 637 (the court allowed the district court's docket to accommodate an original habeas corpus proceeding by a child's father against its

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our review shows that dismissal was required on either basis because Appellant failed to show proof of a valid marriage.

¶7 In its Final Order, the trial court noted that Appellant failed to produce a "certified copy of a document evidencing a relationship legally cognizable in the country of Canada, ..." The trial court further noted that Appellant testified that "she relied on Respondent to follow through with the requisites in order to obtain a license for a Canadian legally cognizable relationship." Respondent did not appear. These facts show that Appellant did not establish a valid marriage–either by documentary evidence or by personal knowledge.

¶8 As noted above, our review is *de novo*. The trial court correctly determined

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[9](...continued)
grandmother); *Ross v. Ross*, 1949 OK 35, 203 P.2d 702, 705 (an original suit for a minor child's support was allowed to be brought in the district court); the *Whitney v. Whitney* trilogy: (a) 1942 OK 268, 25-26, 134 P.2d 357, 361, 192 Okl. 174 (the court recognized an equitable property right, described as an interest in a quasi-partnership estate, arising from a bigamous marriage and held that this right, though not marital, could be settled in a district court lawsuit between bigamous spouses); (b) 1944 OK 205, 151 P.2d 583, 194 Okl. 361 (the court allowed former bigamous spouses to bring a district court action for settlement of property rights arising from their void marriage); (c) 1947 OK 44, 10, 181 P.2d 245, 246-47, 198 Okl. 681 (the court held that a contract for settlement of rights claimed by bigamous spouses was enforceable in the district court). By the post 1969 district court's transformation from a general to an unlimited jurisdiction tribunal the fitness of a case for processing on the divorce track no longer presents a jurisdictional matter. All cases are now docketable (under one rubric or another) in the same single-level trial court. (Emphasis added).

Appellant testified at the hearing that she and Respondent had no property to divide, but that Appellant wanted the dissolution to end any legal relationship she and Respondent may have. If Appellant had offered a contract executed by her and Respondent, the trial court may have had jurisdiction to entertain an action to either enforce or rescind such an agreement without entertaining a claim for dissolution of a marriage. *Whitney* trilogy cases, *supra*.

that Appellant failed to invoke the court's dissolution jurisdiction because she failed to show a valid marriage. By this decision, we do not imply that an Oklahoma court would have jurisdiction where a valid foreign same-sex marriage is established. That issue is not presented here and we therefore do not reach it. The District Court was without authority to grant relief and it properly dismissed Appellant's Petition. AFFIRMED.

HANSEN, J., and HETHERINGTON, J., concur.