CHAPTER 2. DIVORCE

Read the Oklahoma statutes on divorce, especially 43 O.S. § 101 (2001). Notice what the grounds are for divorce in this state. All grounds but incompatibility grant a divorce only to the innocent spouse. Does this comport with your understanding of most marriage relationships? Of any? Would it be better to provide divorce on request, or would that encourage even more couples to divorce? Does that matter? Should the standard for divorce be higher if only one spouse wants out? If there are children? If one spouse is incapacitated?

A. FAULT DIVORCE

TIGERT
v.
TIGERT
1979 OK CIV APP 14, 595 P.2d 815

BOX, JUDGE.

An appeal by Sam Carl Tigert, plaintiff in the action below, from the portions of a divorce decree dividing the parties' property and granting him a divorce from Sharon Kay Tigert, defendant, on the ground of incompatibility rather than adultery.

The parties were married on April 13, 1968, and have two minor children. It appears from the testimony that their marriage has been a rocky, sometimes violent one, and that on Easter Sunday, April 18, 1976, the plaintiff learned of an adulterous affair by the defendant. The next day the defendant filed an action for divorce, but she dismissed it three days later at the plaintiff's request. On April 24, 1976, she moved back into their mobile home and they attempted a reconciliation.

The reconciliation was short lived, lasting only until May 7 or 8, 1976, and on May 10 the plaintiff filed a petition for divorce, alleging both incompatibility and adultery as grounds. The defendant answered, asserting that the adultery had been condoned, and cross-petitioned for divorce, alleging incompatibility and extreme cruelty. Trial was held on September 7, 1976, and the trial court granted the divorce, taking under advisement the matters of custody of the children, child support, property settlement, and the ground for divorce. On November 5, 1976, the court entered its decree, which awarded custody of the children and child support to the defendant, divided the property, and granted the divorce to the plaintiff on the ground of incompatibility. * * *

[The court affirmed the property division]

* * * *

The plaintiff's second proposition is that the trial court erred in not granting him a divorce on the ground of adultery. The defendant admitted one adulterous relationship but raised the defense of condonation. The plaintiff seems to argue that the condonation was ineffective, and in any event he argues that the offense of adultery was revived by the defendant's conduct after the reconciliation.

Condonation, or condonement, has been defined in Oklahoma cases. In *Kostachek v. Kostachek*, 40 Okl. 747, 140 P. 1021, it is defined this way:

* * * *

> Condonement is forgiveness, with an implied condition that the injury shall not be repeated, and that the party shall be treated with conjugal kindness."

In *Panther v. Panther*, 147 Okl. 131, 295 P.219, it is defined this way:

> Condonation in the law of divorce, means the pardon of an offense, the voluntary overlooking or implied forgiveness of an offense by treating the offender as if it had not been committed.

And in *Every v. Every*, 293 P.2d 612 (per curiam), the Supreme Court used this definition:

> Condonation in the law of divorce is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated, and that the offender shall thereafter treat the forgiving party with conjugal kindness.

Furthermore, "Condonation must be free, voluntary, and not induced by duress or fraud," *Panther v. Panther*, 295 P. at 221; it must not have been "procured by unconscientious and fraudulent practices," *Id*.; "it must not have been obtained by force and violence" *Kostachek v. Kostachek*, 140 P. at 1022; and it must not have been the "result of fraud or mistake." *Id*.

From the above authorities we can say that a condonation of a marital offense is a freely given pardon or forgiveness, carrying with it the implied conditions that the errant spouse not repeat the offense, that the errant spouse treat the other with conjugal kindness and that the errant spouse maintain "good conduct" in the future. In addition, a condonation may be predicated upon an express condition, in which case the expressed condition must be fulfilled. * * *

Even without an affirmative pardon or forgiveness, a condonation may be implied in law. When the parties resume cohabitation and sexual intercourse after the condoning spouse learns of the offense, and there are no further offenses, condonation is implied. In *Owsley v. Owsley*, 121 Okl. 259, 249 P. 692, the Oklahoma Supreme Court stated:

> [T]he trial court finds that with knowledge of these repeated acts of adultery the plaintiff, Owsley, even after filing his petition in the instant case, had himself had repeated acts of intercourse with the defendant, and the court concludes as a matter of law that these repeated acts of intercourse by the plaintiff with the defendant, knowing that she had been guilty of adultery, had fully condoned the alleged offense. This finding of the trial court is sustained by the record. Howsoever reprehensible her conduct from the record appears to be, the rules of law governing the rights of the plaintiff under this state of facts are binding upon the court. A court of equity in such a situation is required to leave the parties where it finds them.

Adultery was also held to have been condoned by cohabitation in *Edgell v. Edgell*, 120 Okl. 281, 251 P. 43, and *Fowler v. Fowler*, 119 Okl. 248 P. 629. *See also, Penn v. Penn*, 37 Okl. 650, 133 P. 207 (adultery condoned by cohabitation, but revived). In this way acts of incompatibility and cruelty were both held to have been condoned in *Every v. Every*, Okl., 293 P.2d 612; and false accusations of larceny were held condoned, though later revived in *Estee v. Estee*, 34 Okl. 305, 125 P. 455.

In the case before us both parties testified that it was the plaintiff who asked the defendant to dismiss her divorce proceeding and return home. Both parties likewise testified that the plaintiff knew of the defendant's adultery and that they had sexual relations during the reconciliation. The trial court found that the plaintiff condoned the defendant's adultery. We find that the evidence amply supports this finding and that the condonation was effective.

Condonation having been shown, its effect was to bar a divorce for adultery. In *Panther*, 295 P. at 221, the Supreme Court stated:

> As a general rule, the condonation of a marital offense deprives the condoning spouse of the right of thereafter seeking a divorce for the condoned offense.

The exception to this general rule is when the condoned offense is revived, as the plaintiff argues happened in this case.

A condoned marital offense may be revived by a breach of either an express condition or an implied condition. In the case before us the plaintiff asserts that he accepted the defendant back into their home upon express promises by her, which being breached, revived the adultery. In his brief in chief to this court he states: "The Appellant condoned adultery but imposed the condition that the Appellee act as a proper and faithful wife." In his reply brief: "The Appellant offered to forgive the Appellee on the condition that their differences be reconciled." And: "Appellant only offered to condone the adultery if Appellee would become a better wife." And: "Appellant agreed to forgive the adultery if Appellee would dismiss divorce proceedings and reconcile." There is no basis for any of these assertions in the transcript. We note that the plaintiff's statement in his brief in chief here also appeared in a brief to the trial court, which was made a part of the record on appeal. We concur in the trial court's rejection of this argument.

A breach of an implied condition of the condonation occurs with a repetition of the condoned offense, the commission of a different marital offense, or with misconduct that would not in itself be sufficient to constitute a ground for divorce. A failure to treat the condoning spouse with "conjugal kindness" or to maintain "good conduct" would fall within one of the latter two categories.

We are not faced with an issue of revival by a repetition of the condoned offense. The defendant testified that she did not commit any further adultery, and the plaintiff states in this brief that "he has no other evidence of the same." The plaintiff does not allege that the defendant committed any specific marital offense after the reconciliation sufficient in itself to constitute a ground for divorce and to revive the condoned adultery. He does, however, argue that the defendant's conduct amounted to such a failure to treat him with "conjugal kindness" as to revive the offense.

In his brief the plaintiff refers us to 27A C.J.S., *Divorce* § 62c, at 215. Further in that section at 217, we find this language used in reference to the revival of condoned acts of cruelty:

> The misconduct, however, must amount to more than slight acts of coldness, unkindness, or mere quarreling, and must be so pronounced as to raise a reasonable probability that if the marriage relation is continued a new cause for divorce would arise. [Footnotes omitted.]

We see no good reason why the same principle should not apply when the condoned offense is adultery. Also in § 61a of 27A C.J.S., *Divorce*, at 213, which deals in general with the revival of a condoned offense either by a repetition of the offense or by the commission of a different offense we find this language:

> Where the act relied on as constituting a breach of the condition of condonation is due to the fault or connivance of the complaining party, the original offense is not revived. [Footnote omitted.]

We hold that this principle should also apply when the alleged breach is a failure of "conjugal kindness" or "good conduct."

The testimony before the trial court was conflicting on the reason for the failure of the parties' reconciliation attempt. The plaintiff testified at the trial that the defendant never really tried to make a go of the marriage and that their final breakup was caused by mysterious phone calls she would receive. He testified that she became quiet, withdrawn, and indifferent and would not care for the house. The defendant admitted the calls and the problem they caused, but denied that there was anything untoward about them.

She introduced testimony that she kept a clean house, and she testified that she tried to make a go of the reconciliation. She claimed that his beating on her caused the reconciliation to fail. The plaintiff admitted committing several serious acts of violence against the defendant including one shortly before they gave up the reconciliation attempt, but asserted that she always brought them on. In their testimony both parties admitted being partially at fault for the failure of the marriage and the reconciliation.

As authority for the asserted revival of the condoned adultery, the plaintiff *cites Estee v. Estee, Penn v. Penn*, and *Kostachek v. Kostachek*, all *supra*. In *Estee* and *Penn* the condoned offenses were both revived by repetition of the same offense. In *Kostachek*, the condoned offense was revived by the breach of an express promise on which the condonation was conditioned and by the commission of acts of cruelty. The facts and allegations before us today are quite different from the ones involved in those cases.

The defense of condonation to an action for divorce dates back to the ecclesiastical courts of England. The rationale behind allowing the defense is that reconciliations will be encouraged and society's interest in the continuation of matrimonial relationships is furthered by allowing the errant spouse some protection under the law when that spouse honestly seeks and is granted forgiveness and an opportunity to reform. The errant spouse must be faithful to the trust reposed by the forgiving spouse, however, and must be proper in future behavior, or the condoned offense will be revived. We would not have the errant spouse be free to flaunt the offense, repeat it, or otherwise refuse to put forth any effort to warrant the pardon granted. On the other hand, a condoned offense should not be lightly revived. We would likewise not have the condoning spouse under threat of a divorce on the ground of a serious—but condoned—offense, all the while neglecting his or her own marital responsibilities.

We perceive it to be a common state of affairs that many men and women cannot live together without discord. Thus, in a case in which there is no repetition of the condoned offense or new offense, and the trial court finds that the circumstances finally bringing the unsuccessfully-reconciled parties before it amount to no greater marital discord that its experience tells it is common and that the discord does not stem from the condoned offense, or that the fault for the troubles since the condonation lies as much with the complaining spouse as with the errant spouse, it should not grant a divorce on the ground of the condoned offense. The condoned offense is not revived in such a case, even if the court finds reason to grant the divorce on another ground.

In the case before us the trial court found that the defendant's adultery had been condoned by the plaintiff. As the Supreme Court held in *Meyers v. Central National Bank*, 183 Okl. 231, 80 P.2d 584:

> In an equity case the judgment of the trial court carries with it a finding of all facts necessary to support it which could have been found from the evidence, and judgment will not be set aside unless clearly against the weight of the evidence.

The trial court's decree carries with it a finding that the defendant's conduct after reconciliation was not of such a nature as to revive the condoned offense. We hold that the finding is not clearly against the weight of the evidence.

The last matter for disposition in this appeal is the defendant's motion for an additional attorney fee. The trial court awarded her an attorney's fee of $350 for the divorce, and in her brief she requests an additional $500 for the defense of this appeal. Such a motion under 12 O.S. Supp 1976, § 1276, made in the brief is proper. *Dowdell v. Dowdell*, Okl., 463 P.2d 948; *see Lavender v. Lavender*, Okl., 435 P.2d 583. The plaintiff is granted her request for an additional attorney's fee of $500 for this appeal, to be taxed as costs and paid for by the plaintiff.

The judgment and decree of the trial court is hereby affirmed.

ROMANG, PRESIDING JUDGE, and REYNOLDS, JUDGE, concur.

Notes

Fault divorce is still available in Oklahoma. The statute, 43 O.S. § 101 (2001), lists twelve grounds for divorce. Should the parties insist on proving fault grounds, the court is supposed to hear the evidence. The parties may not stipulate to the divorce; some evidence as to grounds must be presented. 43 O.S. § 130 (2001); *Davis v. Davis*, 2000 OK CIV APP 137, 16 P.3d 478.

Very few divorces, however, are granted on any ground other than incompatibility. Most trial judges are hostile to a fault-ground divorce. Even when the evidence is presented, the court has great discretion in terms of the basis of the divorce. *See, e.g., Manhart v. Manhart*, 1986 OK 12, 725 P.2d 1234 ("Where the evidence in an action for divorce on the grounds of extreme cruelty is conflicting as to facts and fault, as in the instant case, and the trial judge's judgment is not against the weight of the evidence, it will not be disturbed on appeal."); *Bourlon v. Bourlon*, 1983 OK CIV APP 52, 670 P.2d 1004 (trial judge may grant a divorce on any ground pled and proved at the trial; therefore, no error to grant divorce on basis of incompatibility and deny it on ground of adultery).

B. "NO-FAULT" DIVORCE

VANDERVORT
v.
VANDERVORT
2006 OK CIV APP 34. 134 P.3d 892

JOHN F. REIF, PRESIDING JUDGE.

This appeal arises from post-decree proceedings in which Wife, Patricia Vandervort, sought to vacate the parties' divorce decree. The divorce was the result of a petition signed by Husband, Roger Vandervort, an entry of appearance/waiver of summons signed by Wife, and a "consent decree" signed by both parties. Husband, acting pro se, presented these instruments to the District Court of Oklahoma County. Husband and Wife had agreed to divorce and to divest Wife of nearly all her marital property in anticipation of her eventual need for care in a nursing home for multiple sclerosis. Both believed Wife's single status and complete lack of assets would enable her to receive social security disability income and Medicaid to pay for her nursing home care.

In the time period between the divorce and Wife's need for nursing home care, Husband and Wife were to continue living together at their Texas County residence in Guymon. Husband was to care for Wife until she required nursing home care. Not long after the divorce, however, acrimony developed and Wife ended up living with her parents. Wife claims she went to visit her parents and Husband refused to allow her to return; Husband claims Wife "abandoned" her right to live with him. After considering these facts, along with other evidence and contentions of the parties, the trial court vacated the divorce decree.

In announcing the ruling from the bench, the trial court vacated the decree on the ground of fraud, particularly noting that neither party was a resident of Oklahoma County at the time of the divorce. The court further observed, however, that the parties' lack of residency in Oklahoma County was not the only fraud the court considered, but did not elaborate. The court also announced that the divorce case was

dismissed, but that the court would reconsider the dismissal if the parties could agree to waive venue. The subsequent journal entry of judgment memorializes the ruling from the bench and includes a dismissal order. It appears that the parties could not agree to waive venue in Texas County in favor of venue in Oklahoma County.

On appeal, Husband basically argues that there was no fraud in procuring the divorce because (1) the parties agreed to the divorce for estate planning purposes, and (2) they *both* waived venue in Oklahoma County by the petition and entry of appearance at the time of divorce. In response, Wife argues that the evidence shows (1) legal fraud on Husband's part in taking advantage of Wife's disabilities due to her multiple sclerosis, and (2) incompetency on Wife's part to agree to the divorce, or to enter an appearance to waive venue. For the reasons that follow, we do not agree with the positions advanced by either Husband or Wife, but nonetheless affirm the vacation of the divorce decree and dismissal of the case.

We find that Wife was competent and that she understood what she was doing. The only thing Wife did not know was that Husband would impose conditions and demands on their post-divorce cohabitation and his continuing care of her. We further find Husband misrepresented that he was a resident of Oklahoma County in the petition. The fact that Wife's entry of appearance agreed for the court to hear and enter the decree of divorce in her absence cannot cure the fraud concerning residency.

The misrepresentation of residence was a fraud on the court because it involves misrepresentation directly affecting the judicial process. *Plotner v. A.T.&T. Corp*., 224 F.2d 1161 (10th Cir. 2000). This misrepresentation was not the only fraud on the court, however. The other, more disturbing fraud on the court involves the parties' collusion to misrepresent the statutory ground of incompatibility, 43 O.S.2001 § 101 (Seventh), to obtain the divorce.

The petition signed by Husband affirmatively represented that incompatibility was the ground upon which divorce should be granted, while the "consent decree" signed by both parties reflected their mutual agreement that incompatibility existed between them. However, at the time the divorce was sought and granted, Husband and Wife intended to return to their Texas County residence where they were to continue living together with Husband providing and caring for Wife. In fact, they did so for a short time after the divorce. These facts belie their claim of incompatibility.

"The statutory ground of incompatibility does not permit the court to dissolve a marriage merely because its termination is desired by one or both parties." *Hughes v. Hughes*, 1961 OK 112, ¶ 12, 363 P.2d 155, 158. "[I]ncompatibility [cannot be] dependent in application upon an agreement or stipulation between the parties, and thus furnish a vehicle for a consensual divorce which the law did not intend." *Id*.

"Actionable incompatibility is determined to exist when there is such a conflict of personalities as to destroy the legitimate ends of matrimony and the possibility of reconciliation." *Williams v. Williams*, 1975 OK 163, ¶ 15, 543 P.2d 1401, 1404 (*citing Kirkland v. Kirkland*, 1971 OK 98, ¶ 0, 488 P.2d 1222 (syllabus 1)). Incompatibility must be established "by proof, objective in its character, of causes to which marital disharmony is attributed [and cannot be] bottomed on a mere subterfuge or after-thought [without] a substantial foundation." *Hughes*, 1961 OK 112, ¶ 8, 363 P.2d at 158 (citations omitted).

The State of Oklahoma has constitutional authority "to declare and maintain a policy in regard to marriage and divorce as to persons domiciled within its borders." *Williams*, 1975 OK 163, ¶ 10, 543 P.2d at 1403. "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." *Id*. at ¶ 11, 543 P.2d at 1403.

"[T]he State is a silent third party in every divorce proceeding." *Id*. The State is an interested party because "the rights of the plaintiff and defendant are not isolated from the general interest of society in preserving the marriage relation as the foundation of the home and the state." *Wooden v. Wooden*, 1925 OK 594, ¶ 15, 239 P. 231, 233. To protect the State's interest, a divorce decree is properly vacated where

there is conduct that "amounts to a fraud . . . upon the state as represented by the court in the administration of justice." *Id*.

In cases where parties to a divorce collude to procure a judgment and one party later seeks to vacate that judgment, the law generally "will leave them where it finds them." *Erdman v. Erdman*, 1914 OK 308, ¶ 2, 141 P. 965 (*citing Newman v. Newman*, 27 OK 381, ¶ 8, 112 P. 1007, 1010). However, the Oklahoma Supreme Court has also observed that "where the jurisdiction of the court is invoked and obtained by a fraudulent 'concoction' and the fraud is consummated through the instrumentality of a court of justice, it would impeach the moral sense and that of justice that courts be not protected against such fraud." *Meyers v. Meyers*, 1948 OK 246, ¶ 15, 199 P.2d 819, 821 (citing *Miller v. Miller*, 175 So. 284, 286 (1937)).

We conclude the case at hand falls under the latter rule rather than the former. The parties here colluded to misrepresent incompatibility as a ground for divorce (when they actually intended to continue cohabitating) and, in turn, used the sham divorce to deceive public agencies concerning Wife's eligibility for public benefits. It not only offends public policy for parties to obtain a divorce on a concocted ground, but it also offends public policy to use such a divorce for financial gain. Rather than leave the parties where we find them, we believe equity and justice require they be returned to the state of matrimony. The trial court's judgment accomplishes that purpose.

Husband has also argued on appeal that the trial court erred in awarding Wife attorney fees for prosecuting the motion to vacate and for defending the vacation of the decree on appeal. Considering the fact that Husband controlled nearly all of the marital assets at the time of the attorney fee awards, both equity and necessity dictated that Husband pay Wife's attorney fees incurred in seeking vacation of a patently inequitable decree and in defending the vacation on appeal.

The trial court's judgments vacating the decree of divorce, dismissing the case, and awarding Wife attorney fees are AFFIRMED.

WISEMAN, J., concurs, and GABBARD, J., dissents.

GABBARD, J., dissenting,

This case is a good example of how bad facts sometimes make bad law.

I do not disagree with the majority's analysis of the facts in this case. It finds that Husband and Wife acted together to fraudulently obtain a divorce in Oklahoma County knowing that they were not residents of that county and were not incompatible. The parties were dealing with a problem common to many middle-class Americans: How do couples preserve their marital assets in the face of a catastrophic illness? Their solution was to obtain a divorce in which Husband received virtually all the marital property, thereby qualifying Wife for government assistance when her progressive illness caused her health to deteriorate to the point that she needed nursing home care. Husband promised to care for her in the home until that time. Only after Husband allegedly breached his promise of care did Wife move to set aside the decree. That relief should not be granted.

As the majority and the trial court have concluded, this case involves mutual fraud. It is not a case in which one spouse practices fraud upon the other in order to obtain an advantageous divorce settlement. Where both parties have participated in fraud upon the court, 24 Am.Jur.2d Divorce and Separation ' 438 (1998) sets forth the general rule:

> [A] spouse who *participates* in the fraudulent procurement of a divorce decree, and who freely enjoys the fruits of the decree, will be unable to have it set aside under a rule allowing actions for relief from judgments procured by fraud . . . .

> A court of equity will ordinarily refuse to vacate a decree of divorce where its aid is made necessary by the fault or neglect of the applicant. (Emphasis added)

This rule is based on sound public policy and has been followed by Oklahoma courts since 1910.

In *Newman v. Newman*, 1910 OK 351, 112 P. 1007, the defendant husband obtained a divorce from the plaintiff wife after he convinced her that, if she would agree to the divorce and not claim his property, he would pay her $500 alimony, remarry her within three years, obtain a $5,000 life insurance policy in her favor, and allow her to remain on his land until that time. She agreed, and he obtained the divorce and paid the $500 alimony. Later, the defendant changed his mind and attempted to move the plaintiff off his land contrary to their pre-divorce agreement. As in this case, the plaintiff filed a motion to set aside the divorce on grounds of fraud, based on the defendant's failure to comply with his promise. In refusing to grant the equitable relief requested, the Oklahoma Supreme Court stated:

> There is nothing in the petition which would justify this court in setting aside the decree of divorce on the ground of fraud. The petition so to do discloses the same to have been obtained as a result of collusion between the parties, and this court will leave them where it finds them. The parties thereto are bound by it.

Id. at ¶ 8, 112 P. at 1010. *See also Erdman v. Erdman*, 1914 OK 308, 141 P. 965. Similarly, in *Green v. James*, 1931 OK 75, 296 P. 743, the Supreme Court refused to grant equitable relief to either fraudulent party, stating:

> It would be a special novelty for a plaintiff to address the tribunal with 'the defendant and I have been playing a trick on this court, but I discovered he has got the better of me, so please turn the tables on him.'

Id. at ¶ 31, 296 P. at 746 (quoting 2 BISHOP ON MARRIAGE, DIVORCE & SEPARATION, § 1548).

Here, the majority refers to the above-cited cases, but argues that *Meyers v. Meyers*, 1948 OK 246, 199 P.2d 819, justifies setting this decree aside since this fraud so impeaches the moral sense that equity should step in. *Meyers*, however, is not applicable because the party requesting relief in *Meyers* was not involved in the fraudulent act of obtaining the decree and did not know about the divorce until after it was entered. *Meyers* is a case in which one party committed fraud upon another to obtain an advantageous divorce settlement. Such is not the case here.

Here, Wife was not incompetent at the time of the decree, nor did Husband fraudulently promise to care for her in order to obtain an advantageous divorce decree. On the contrary, the evidence clearly establishes that Wife wanted this divorce, participated in obtaining it, and did not seek relief from it until she suffered from an unanticipated event—Husband's alleged refusal to care for her. This alleged conduct occurred *after the decree was entered*.

Title 43 O.S.2001 §§ 204 and 205 permit married parties to enter into agreements settling property and support issues in anticipation of divorce. Such agreements may be enforceable in a separate action, even when they are not reviewed by the court and merged into the divorce decree itself. *Stockton v. Stockton*, 1956 OK 226, 299 P.2d 146; *Elliott v. Dunham*, 1942 OK 237, 130 P.2d 534; *Eatman v. Eatman*, 1975 OK CIV APP 68, 549 P.2d 389. In such an action, Wife potentially could recover the cost of the interim care which Husband agreed to provide. Here, however, if the divorce decree is vacated, Wife may recover far more than originally agreed.

Because the majority's decision is contrary to established precedent and public policy, and provides an unnecessary and inappropriate remedy, I dissent.

ELLAM
v.
ELLAM
333 A.2d 577
132 N.J. Super. Ct. 358 (1975)

MCKENZIE, J.C.C., Temporarily Assigned.

Plaintiff institutes suit March 1, 1974, seeking a divorce on the grounds of separation. Defendant's amended counterclaim for divorce charges plaintiff with desertion.

The parties, are childless, purchased a house in Elizabeth and commenced moving into their home in June 1972. They were experiencing severe matrimonial difficulties at the time and, according to plaintiff, he moved to his mother's home in nearby Roselle on or about July 5 and did not thereafter live with defendant.

Although his testimony that the parties thereafter never had sexual relations was not challenged, on cross-examination it developed that the parties nevertheless maintained many aspects of their relationship until May 1973.

On weekday mornings plaintiff's mother would drive him in her car from her home to the corner of his street in Elizabeth. He would walk to his house, let himself in, pet his dog, occasionally kiss his wife "good morning" and, as he put it, "make sure everything was O.K." He would then leave the house, take his car out of the garage and proceed to work. When he finished work, or the night classes he was attending, he returned to the matrimonial home. He would play with his dog, converse with defendant and, after she retired, watched television until approximately 12:30 a.m. At that time his mother would arrive to pick him up in her car and take him to her house to sleep, leaving his car in the garage at the marital home. Plaintiff would spend weekends at the matrimonial home doing housecleaning, cutting the lawn and performing household chores. He occasionally ate his meals there, bringing the food with him. On other occasions the parties ate together at plaintiff's mother's home. During this period of time the parties as a couple continued to accept social engagements and once she accompanied him out-of-state to attend a convention lasting several days. They shared a hotel room, but still did not engaged in sexual relations.

Plaintiff, in explaining his continued presence in the matrimonial home, stated that he loved his wife, loved his dog even more, felt obliged to maintain the premises, and, as he stressed, did not want the neighbors to know that he and his wife had separated.

The question presented is whether the foregoing constitutes living "separate and apart in different habitations" within the meaning of N.J.S.A.: 2A:34-2(d).

In *DeRienzo v. DeRienzo*, 119 N.J. Super. 192, 290 A.2d 742 (Ch. Div. 1972), it was held that the words "in different habitations" precluded the granting of a divorce where the parties occupied the same house, although plaintiff slept alone in a locked bedroom for which only he had the key. This language in our statute was the basis for the court distinguishing the holding in that case from cases holding to the contrary in jurisdictions which also recognize separation as grounds for divorce. Thus in Delaware, where the statute requires that the parties live "separate and apart without cohabitation," it was held that a divorce could be granted where the parties occupied the same residence, there being no provision in that statute mandating separate dwellings. A similar holding was reached under the District of Columbia statute which stated the grounds to be "a voluntary separation from bed and board for five consecutive years without cohabitation." In those jurisdictions the test is not separate roofs, but separate lives. Since every word and clause of our statute should be given effect, and a construction which renders any part superflu-

ous must be avoided, our statute clearly requires both. That is the parties must occupy "different habitations" and must live "separate and apart."

Here plaintiff arguably resided with his mother, since he slept, took some meals and kept his clothes, all at her home. But with the additional exception of sexual intercourse, the parties continued their relationship substantially the same as prior to his moving. When he was not working or attending classes, basically all of plaintiff's waking hours were spent with defendant.

His plea that their social intercourse was strained and rife with argument goes to the quality of their association, not its substance. Generally speaking, the policy of our present divorce law is to terminate dead marriages. But the legislature, in requiring objective proof of the lack of viability in the relationship, has laid down specific criteria in determining what marriages are eligible for dissolution. *See* Final Report of the Divorce Law Study Commission 73 (1970). Thus if the parties were not in fact living separate and apart as required by the statute, a mere finding that their relationship was bereft of positive qualities is insufficient.

In other jurisdictions, where the parties have continued some degree of relationship after they have ceased sexual cohabitation, divorces have been granted on the grounds of separation, provided that it is nevertheless manifest to the community that the parties are in fact living separate lives and are not attempting to induce others to regard them as living together.

It has been said that what the law makes a ground for divorce is the living separately and apart of the husband and wife continuously for a certain number of years. This separation implies something more than a discontinuance of sexual relations whether the discontinuance is occasioned by the refusal of the wife to continue them or not. It implies the living apart for such period in such a manner that those in the neighborhood may see that the husband and wife are not living together. 17 AM. JUR., § 162 at 232.

Where, as here, it is apparent that the associations and dealings of the parties with each other after the alleged separation continue to include a substantial number of the many elements and ties which go into and make up the marital relationship and bind the parties together, it cannot be said they are living "separate and apart" within the meaning of our divorce statute.

The court therefore holds that although plaintiff and defendant may have been residing in different habitations for more than 18 months, they were not living separate and apart.

Notes & Questions: Divorce without Fault or Blame?

1. The two no-fault grounds are incompatibility (breakdown) and living separate and apart. No state other than New York retains solely a fault system of divorce. The only no-fault ground available in some states, such as Arkansas, is living separate and apart. Sometimes the length of separation required may depend on whether it is a consent divorce. In Illinois, the time period is six months if it is a consent divorce, two years if it is not. Is this a good policy choice? In Mississippi, a no-fault divorce for irreconcilable differences is only available after the parties have reached a written agreement on all financial matters. If the parties fail to agree, the divorce can only be granted on fault grounds. *Alexander v. Alexander*, 493 So.2d 978 (Miss. 1986).

2. There is a movement to reintroduce fault in the dissolution process. Louisiana became the first state to allow couples to choose a "covenant marriage." *See* LA. REV. STAT. ANN. § 9:272 (West 2000). Couples who choose covenant marriage must sign a declaration on the "nature, purpose and responsibilities" of marriage and that they promise to seek marriage counseling in the event of marital problems. Divorce is only permitted for adultery, conviction of a felony resulting in death or imprisonment, desertion

for at least one year, physical or sexual abuse of a spouse or child, or after a two-year separation without reconciliation. In 2000, of 4,148 marriage license applications, only 115 of those were for covenant marriages. *See Covenant Marriages on the Decline, Couples Opting for Traditional Unions*, SUNDAY ADVOCATE (Baton Rouge, La.) Feb. 4, 2001 at 23. Arizona and Arkansas are the only two other states that have adopted covenant marriage laws. A covenant marriage bill has passed the Oklahoma House of Representative the last three years. However, it has always died in the Senate.

3. In 1992, the legislature enacted 43 O.S. § 107.1. The statute requires a 90-day waiting period for a divorce when there are minor children of the marriage. The 90-day period does not apply when the divorce is sought on certain fault grounds or if the parties have participated in marital counseling and the judge finds that reconciliation is unlikely. The court may also waive the requirement if good cause is shown.

4. In a few states, marital fault is an important criteria for property division and alimony. In Louisiana and South Carolina, for example, an adulterous spouse cannot receive alimony. *See e.g., Rutherford v. Rutherford*, 414 S.E.2d 157 (S.C. 1992)(when wife suffers from multiple-personality syndrome, the trial court must determine whether the personality that committed the adultery is the personality seeking the divorce). In Oklahoma, marital fault is generally irrelevant to a determination of the economic issues. If, however, the marital fault produced a diminution of the marital estate, it will be considered. *Smith v. Smith*, 1993 OK CIV APP 17, 847 P.2d 827; *Hill v. Hill*, 1946 OK 283, 174 P.2d 232.

5. Marriages may be subject to alternative dissolution proceedings. In Chapter One, some of the cases concerned whether an annulment should be granted. The difference between annulment and divorce was once fundamental to domestic relations law. Today, it appears to be of little consequence.

6. Parties may prefer (often for religious reasons) a legal separation rather than a divorce. While a carefully drawn separation agreement may suffice, a legal adjudication of a couple's status may be preferred. *See* 43 O.S. § 129. Due to the jurisdictional requirements, it is easier to qualify for a decree of separation than divorce. *See* 43 O.S. § 102 (2001). Very often people moving into Oklahoma will file for legal separation upon arrival and amend the petition after six months to request a divorce.

7. One of the latest studies of divorce comes from Bowling Green State University which showed that in 2015, the United States' divorce rate hit a 40-year low. There were 16.9 divorces for every 1,000 women that year. Some of the more intriguing findings of the study are:

A. Couples may be most likely to divorce in March and August.

B. Married people who watch porn may be more likely to divorce.

C. Couples who marry in their late 20s or later are less likely to divorce.

D. The closer a couple is in age, the less likely they are to get divorced.

E. Husbands who don't work full-time may be more likely to get divorced.

F. More lavish weddings may predict less successful marriages.

G. Women who have more sexual partners before getting married aren't more likely to get divorced.

H. Divorce may increase the likelihood of a heart attack in women.

I. Divorce itself might not have a negative impact on kids.

J. Infidelity is a major reason why couples divorce.

K. Divorce is becoming more common among older couples.

L. Older women may become healthier after they get divorced.

M. Couples who display "contempt" for each other are more likely to split up.

C. THE ROLE OF THE LAWYER

1. Conflict of Interest

ATKINSON
v.
RUCKER
2009 OK CIV APP 30, 209 P.3d 796

CAROL M. HANSEN, PRESIDING JUDGE.

Plaintiff/Appellant, Patrick Atkinson, and Defendant/Appellant, Margaret Rucker, seek review of the trial court's order granting the motion of Intervenor/Appellee, Frank Tomacek, to disqualify attorneys N. Franklyn Casey, Lawrence A.G. Johnson, and Robert L. Briggs from further representation of Atkinson and Rucker. We affirm, holding the trial court applied the appropriate standard for disqualification, and its fact findings are not clearly erroneous.

Atkinson's petition below, filed on May 13, 2004, sought judgment declaring he and Rucker were not married. The petition alleged Rucker referred to Atkinson as her dependent, spouse, or husband in order to obtain health insurance for Atkinson through Rucker's employer and to "save on taxes." It alleged Atkinson never intended to be married to Rucker and stated he sought "to correct the erroneous tax returns filed during the years 1992-2000." The petition stated, "Before Plaintiff may settle the dispute regarding the tax returns and file corrected returns, it is a prerequisite that this court declare that Plaintiff and Defendant were never married." Rucker did not answer. Atkinson moved for summary judgment, and Rucker did not respond. The trial court entered judgment on July 7, 2004, declaring "the parties are not now and have never been husband and wife."

On September 15, 2005, Tomecek petitioned to vacate the judgment, alleging Rucker had filed a petition for divorce against Tomecek in March 2004, claiming a common law marriage to him and seeking a substantial property division. Rucker objected, asserting Tomecek was a stranger to the litigation. Tomecek moved to intervene, asserting he had an interest in the determination of whether Rucker was common law married to Atkinson because it affected his defense in Rucker's divorce action against him. The trial court granted intervention over Atkinson's objection.[1]

Tomecek moved to disqualify Casey, Johnson, and Briggs from representing either Atkinson or Rucker in this matter on the grounds they were necessary witnesses in this case and had colluded in soliciting Atkinson and providing legal services to prosecute the declaratory action for Rucker's benefit. Atkinson, Rucker, and all three attorneys objected.

After an evidentiary hearing, the trial court granted the motion based on the following findings, among others. Johnson filed the declaratory judgment action as Atkinson's attorney after a lengthy conference with Casey, Rucker's divorce attorney, but without speaking to or meeting with Atkinson. Briggs,

[1] [Footnote omitted.]

an attorney with Casey's firm, prepared the pleadings for the declaratory judgment action under Casey's direction. At the time Casey directed Briggs to prepare the petition, Casey knew Rucker denied any intent to be married to Atkinson and Atkinson denied any intent to be married to Rucker. Atkinson did not authorize Casey to file a declaratory judgment action on his behalf. Johnson first contacted Atkinson on May 17, 2004, after he filed the petition on May 13, 2004. Johnson said he went over with Atkinson the affidavit prepared by Briggs for Atkinson's signature, and advised him that the representations made under oath were admissions of tax fraud and insurance fraud. Atkinson said his discussion of the affidavit with Johnson did not include the consequences of swearing he filed fraudulent tax returns or obtained insurance coverage under a family plan. Johnson said he "could care less" that his testimony contradicted that of his client. No one sent Atkinson a copy of the declaratory judgment.

The trial court concluded (1) Casey, Johnson, and Briggs were necessary witnesses regarding their actions in obtaining the declaratory judgment, (2) they had engaged in professional misconduct, and (3) allowing them to continue their representation of Rucker and Atkinson in this matter would threaten the integrity of the judicial process. It disqualified them from further representation of the parties in this matter. Atkinson and Rucker appeal from this order, represented by Johnson and Casey.

As a preliminary matter, we note the Appellants briefed an issue outside the scope of the disqualification order, namely, whether the trial court erred in allowing Tomecek to intervene. An order disqualifying an attorney is appealable as "an order affecting a substantial right, made in a special proceeding." 12 O.S.2001 §953.[2] We will only consider error arising from the disqualification proceeding. Review of any error arising from the trial court's ruling on the motion to intervene must await appeal from judgment on the merits in the underlying case.

In reviewing a disqualification order, we will examine de novo the trial court's application of ethical standards and review its findings of fact for clear error. *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, 171 P.3d 899, 903. Under this standard we will not disturb the trial court's fact findings unless upon examination of the complete record we are left with a definite and firm conviction that a mistake has been committed. *Independent School Dist. No. 4 of Harper County v. Orange*, 1992 OK CIV APP 145, 841 P.2d 1177, 1180.

In *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, 171 P.3d 899, 904, the Oklahoma Supreme Court acknowledged a litigant "has a fundamental right to employ and be heard by counsel of his or her own choosing," but then addressed the limits of that right:

> Nevertheless, the right to select one's own counsel is not absolute. A litigant's choice of counsel may be set aside under limited circumstances, where honoring the litigant's choice would threaten the integrity of the judicial process. This most often arises where an attorney's compliance with ethical standards of professional responsibility are challenged. It is this Court's nondelegable, constitutional responsibility to regulate both the practice and the ethics, licensure, and discipline of the practitioners of the law, and in doing so, to preserve public confidence in the bar and the judicial process. However, motions to disqualify counsel for failure to comply with the Rules of Professional Conduct are not to be used as procedural weapons. Disqualification is such a drastic measure that it should be invoked if, and only if, the Court is satisfied that real harm is likely to result.

Id. at 905 (footnotes omitted).

The trial court's fact findings in the present case are well supported by the testimony in the record. Therefore we find they are not clearly erroneous. The trial court applied the correct legal standard in de-

[2] [Footnote omitted.]

ciding the motion to disqualify the three attorneys. It considered whether harm to the integrity of the judicial process would result if the attorneys were not disqualified, and properly considered the threat presented by the attorneys' violations of the Rules of Professional Conduct. In particular, the attorneys' roles in deceiving the trial court by presenting the declaratory judgment action as an actual controversy between Atkinson and Rucker when in actuality they were acting in concert for Rucker's benefit constitutes harm to the integrity of the judicial process. Atkinson's later ratification of Johnson's actions does not cure the attorneys' deception of the court. Furthermore, the attorneys' status as necessary witnesses provides independent grounds for their disqualification.

The trial court did not exceed its jurisdiction in disqualifying the attorneys. The Oklahoma Supreme Court has exclusive jurisdiction to regulate the practice of law and to discipline attorneys. *In Re Integration of State Bar of Oklahoma*, 1939 OK 378, 95 P.2d 113. However, the district court has the inherent power to manage its own affairs, subject to the superintending control of the Supreme Court. *State v. Brown*, 1993 OK CIV APP 82, 853 P.2d 793, 796. Its power to disqualify attorneys is derived from this inherent power.

For foregoing reasons, the trial court's order is AFFIRMED.

MITCHELL, C.J., and JOPLIN, J., concur.

STATE ex rel. OKLAHOMA BAR ASSOCIATION
v.
DOWNES
2005 OK 33, 285 P.3d 33

TAYLOR, JUSTICE.

Complainant, the Oklahoma Bar Association (OBA), alleged four counts of misconduct warranting discipline against respondent attorney, Sean Patrick Downes (Respondent). These proceedings were initiated under rule 6 of the Rules Governing Disciplinary Proceedings (RGDP). The complaint alleged that Respondent had violated Rules [numerous rules] . . . of the [Rules of Professional Responsibility], . . .
* * *

I. FACTS

The parties stipulated to some of the facts and to a maximum punishment. Additionally the OBA and Respondent offered testimonial and documentary evidence at the hearing. Respondent was admitted to the practice of law in Oklahoma in 1997. At the time of the hearing, Respondent was a solo practitioner.

A. COUNTS I AND II—THE MRS. W. AND MS. MUSCARI MATTERS

About February 18, 2003, Mrs. W. retained Respondent to represent her in a divorce proceeding. Through church activities, Mrs. W. had known Respondent about seven years before hiring him to represent her. Mrs. W. graduated from law school in 1988 but is not licensed to practice law in Oklahoma or any other jurisdiction. On February 19, 2003, Respondent filed a divorce petition on behalf of Mrs. W.

On March 16, 2003, Respondent and Mrs. W. met for dinner at which time they began a romantic relationship. Thereafter, Respondent began a sexual relationship with Mrs. W. which continued during his representation of her. Often Respondent and Mrs. W. conducted their personal relationship, but without physical contact, in front of her minor children who are the subject matter of a custody dispute in the W.'s divorce.

On April 14, 2003, Ms. Muscari, attorney for Mr. W., sent Respondent a second request for admission of facts. Included in this document were requests that Mrs. W. admit that she had an ongoing romantic relationship with Respondent and that she and Respondent were having sexual relations. There were requests for admission of specific encounters between Mrs. W. and Respondent. In the letter accompanying the request for admissions, Ms. Muscari advised she had evidence to substantiate all of the allegations in the request, demanded Respondent withdraw from the case, and demanded substituted counsel conduct Mr. W.'s deposition. Ms. Muscari continued: "I am personally appalled and as you know ethically I am under a duty to report. The OBA and TCBA [Tulsa County Bar Association] have been contacted."

On April 16, 2003, letter to Ms. Muscari, Respondent refused to withdraw and threatened her with legal action for filing a grievance against him. He wrote: "I caution you that your false reporting of professional misconduct is tantamount to tortious interference with contract and will not be tolerated . . . . I await receipt of communication from the [OBA] and/or the [TCBA] regarding a report so that I may commence the appropriate civil action against you, your law firm, and if appropriate, Mr. [W.]." During Respondent's representation of Mrs. W., neither of them responded to the request for admissions.

By a letter dated April 23, 2003, Ms. Muscari informed Respondent that she had asked for an *in camera* status conference to address Respondent's relationship with his client and his continued representation of Mrs. W. In response, Respondent sent Ms. Muscari another letter dated April 25th in which he accused her of making false statements and continuing to interfere with the contract between him and Mrs. W. He also suggested Ms. Muscari had a conflict of interest. In an April 28th letter, Ms. Muscari informed Respondent that he was a witness in the divorce proceeding in as much as he acknowledged in his April 16th letter that he had personal knowledge of the incidents addressed in the request for admissions. The status conference was scheduled for May 5, 2003. Four days before the scheduled conference, Respondent filed a motion to withdraw as counsel and a motion to withdraw the status conference. Both motions were unopposed, and both motions were granted.

The stipulations show that Respondent would testify that in his response letter of April 16th, he was merely trying to caution Ms. Muscari against making false statements to the OBA. He testified at the hearing before the PRT that he was trying only to "rein in" Ms. Muscari's misstatement of the facts.

On September 30, 2003, the OBA notified Respondent that Ms. Muscari had filed a grievance against him. In his response dated October 27, 2003, Respondent alleged that Ms. Muscari had herself possibly violated Rule 1.7 of the ORPC, asserted that his behavior was appropriate and timely, disagreed that he had violated Rule 1.7, and denied the alleged facts in the request for admission. He admitted that he withdrew because parading his and Mrs. W.'s personal lives before the trial court might have prejudiced it against his client. He also stated that after receiving Ms. Muscari's letter, he discussed the matter with Mrs. W., reviewed Rule 1.7, and consulted three practicing attorneys. He later testified that the consensus of the attorneys was that Ms. Muscari did not have standing to raise the conflict of interest issue. At the hearing, Respondent admitted he had not contacted the OBA General Counsel's office for advice or asked for an ethics opinion.

* * * *

[The court then set out the facts of two other grievances]

II. STIPULATIONS

The parties stipulated to the following facts in mitigation of discipline. Respondent has not been previously disciplined and has been cooperative throughout the investigation. Respondent has recognized and has expressed remorse for the harm that he has brought on the legal profession. Respondent's conduct does not appear to have caused harm to any of his client's interests. Respondent's divorce was final in April of 2003. Respondent began his romantic relationship with Mrs. W. before *State ex rel. Oklaho-*

ma Bar Ass'n v. Groshon, 2003 OK 112, 82 P.3d 99, and his sexual relationship with his client, Mrs. W., appears to be an isolated incident. * * *

The parties submitted that a public censure, with imposition of costs, is the most severe discipline warranted for Respondent's misconduct. Both parties acknowledge that this Court is not bound by the stipulations.

III. PRT FINDINGS AND RECOMMENDATIONS

The PRT incorporated the parties' stipulations into its report. Additionally, the PRT found: (1) Respondent engaged in a consensual personal and intimate dating relationship with Mrs. W. during his representation of her. . . . The PRT reported that Respondent's testimony indicates he was still unconvinced that his letter to Ms. Muscari violated the ethical rules. . . .

According to the PRT, the Respondent was remorseful but needs to become more familiar with the ORPC and RGDP with respect to client funds and disciplinary matters. The PRT report stated that Respondent's testimony indicates he had made improvements in his office practice designed to address some of the problems raised in this proceeding. The PRT found Respondent violated the ORPC and recommended this Court privately reprimand Respondent, order him to participate in a law office management course, and direct him to participate in an education program on the ORPC and RGDP.

IV. JURISDICTION OF ATTORNEY DISCIPLINARY MATTERS

In a bar disciplinary proceeding, this Court exercises exclusive original jurisdiction. This Court's "authority rests on the constitutionally vested, nondelegable power to regulate the practice of law (which includes the ethics, licensure, and discipline of the State's legal practitioners)." This authority is also statutory. In determining whether discipline is warranted and in assessing the appropriate sanction, this Court's review is *de novo.* Neither the PRT's findings of fact, conclusions of law, nor recommendations are binding on this Court. The record is sufficient for this Court's review and supports the stipulation of the facts. However, we do not find that the stipulated mitigating factors are supported in the record and disapprove the recommended discipline.

The PRT's findings and recommendations are not binding on this Court. To keep the investigatory and adjudicatory functions separate in bar disciplinary proceedings, this Court has assigned limited duties to the Oklahoma Bar Association, the Professional Responsibility Commission, and the Professional Responsibility Tribunal. In performing their roles, the OBA, Commission, and PRT act as an official arm of this Court. This Court has assigned the power to investigate grievances to the Commission and the OBA General Counsel. The General Counsel reports to the Commission who has the nondelegable responsibility of determining whether or not formal disciplinary proceedings should be commenced. The General Counsel may delegate "duties imposed upon [it] concerning the general supervision of all disciplinary matters" to other members of the OBA, including "any state or county Bar grievance committee."

Unlike the Commission, another bar member's authority or a state or county bar grievance committee's authority is limited to that delegated by the General Counsel which is in turn is limited to the General Counsel's authority. Neither a bar member, other than acting as part of the Commission, or a state or local bar committee is authorized to determine that a formal complaint should not be initiated or to impose discipline, even by private reprimand. Thus, after a bar member or state or county bar committee investigates a grievance, it should submit its report, together with supporting documentation, to the General Counsel for presentation to the Commission.

In very limited situations, this Court has authorized the Commission to direct the General Counsel to admonish an attorney by letter and to issue private reprimands. In even more limited circumstances and prior to filing formal charges, the General Counsel may refer an attorney charged with misconduct to a diversionary program.

IV. ANALYSIS

A. COUNT I

This case is the first in which this Court has been presented with the issue of whether a lawyer who engages in a sexual relationship with a client involved in a divorce proceeding violates the rules governing lawyers' conduct if the client admittedly consented to the relationship. However, this Court addressed a similar issue in *Groshon*. In *Groshon,* the client had hired Groshon to represent her in a child custody hearing. Groshon made suggestive comments to and inappropriately touched his client in a sexual manner. Groshon stated that he believed that the sexual advances were invited and welcomed. The evidence was such that Groshon could have reasonably believed that his actions were welcomed.

This Court unequivocally recognized that a lawyer's sexual advances toward a client exploit the attorney-client relationship and constitute professional misconduct which will result in discipline. The client's consent does not excuse the lawyer's actions.

In addition to exploiting the attorney-client relationship, Respondent's sexual relationship with Mrs. W. was adverse to her interest. As shown by Mr. W.'s letter to the OBA, Respondent and Mrs. W.'s sexual relationship added even more hostility to an already acrimonious divorce. It put Respondent in a position as a potential witness. As a consequence of Respondent's sexual relationship with Mrs. W., she had to hire a new attorney. It hindered Respondent's representation of Mrs. W. in that he did not comply with the discovery requests for admissions concerning his relationship with her. Respondent recognized that the relationship was adverse to Mrs. W.'s interest when he withdrew because he thought that knowledge of the relationship might prejudice the trial court against his client. We make these findings even though Mrs. W. did not recognize that she had suffered any harm.

In mitigation, Respondent submits that his sexual relationship with Mrs. W. began before the *Groshon* opinion was rendered. Before *Groshon,* this Court had not held that a lawyer who engages in a consensual sexual relationship with a client is subject to discipline, mitigation as to this factor is unwarranted. As early as 1993, it should have been clear to Respondent that his behavior would result in violations of ethical rules. In *State ex rel. Oklahoma Bar Ass'n v. Sopher,* 1993 OK 55, 852 P.2d 707 this Court, quoting with approval *People v. Zeilinger*, 814 P.2d 808, 810 (Colo. 1991), warned of the dangers of an attorney having a sexual relationship with a client undergoing a divorce. The dangers include: (1) destroying the chances of reconciliation, (2) impairing the attorney's independent judgment, and (3) if the property division or the minor children's custody is contested, making the attorney a focal point of the proceedings and a potential witness.

In 1998, OBA Ethics Opinion No. 311 also warned of the risks of sexual relationships between an attorney and a client long before Respondent's relationship with Mrs. W. began. Even though the opinion in *Goshon* was not issued until after Respondent began his sexual relationship with Mrs. W., Respondent should have known that his conduct was prohibited. A minimum of legal research would have put the Respondent on notice of his misconduct. It is troubling that Respondent neglected to make this minimal research effort. It is even more troubling Respondent did not focus on the fact that he was violating the ethics rules but focused on Ms. Muscari's lack of standing to address the issue.

* * * *

V. VIOLATIONS AND DISCIPLINE

As to Count I, the OBA has proven by clear and convincing evidence that Respondent violated Rules [numerous rules] . . . of the [Rules of Professional Responsibility]. . . . * * * [The court concluded that the attorney violated the Rules of Professional Responsibility on all of the counts.]

* * * *

One of this Court's roles is to safeguard the interests of the public, the courts, and the legal profession. In this respect, we must assess Respondent's fitness to practice law. Respondent's attitude and lack of knowledge of acceptable attorney conduct, his misconduct in the matters reflected in the complaint and amended complaint, the harm to his client's interest and to the legal profession, his behavioral pattern of failing to take full responsibility for his actions by blaming others as having a vendetta against him or threatening them when his misconduct is brought to his attention, and his pattern of failing to timely respond to the OBA's grievance requests are considerations in determining discipline. We cannot fulfill our responsibility to safeguard the public and the legal profession without suspending the respondent from the practice of law. We find Respondent should be suspended from the practice of law for one year.

* * * *

ALL JUSTICES CONCUR.

Notes

1. The comment to the Oklahoma Rules of Professional Responsibility, Rule 1.7 provides that:

> A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. *See* Rule 1.8(j). Sexual relations with a client presents a significant risk of violating Rule 1.7(a)(2) and one or more other Rules of Professional Conduct. *See* OBA Legal Ethics Op. No. 311 (1998) and ORPC Rules 1.1, 1.8(j), 1.7, 2.1, and 8.4. A lawyer should strictly scrutinize whether sexual relations with a client may result in harm to the client or impair the representation. The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence.
>
> Sexual relations with a client is likely to present a substantial risk of a conflict of interest. Sexual relations may: (1) unfairly exploit the lawyer's fiduciary role; (2) interfere with the lawyer's independent professional judgment; and (3) impair the lawyer's ability to represent the client competently. Client confidences may lose the protection of the attorney/client evidentiary privilege because the privilege extends only to communications made in the context of the client/lawyer relationship. If the client and the lawyer were engaged in a consensual sexual relationship before the client/lawyer relationship commenced, then the lawyer may ordinarily undertake a representation provided it does not otherwise present an impermissible conflict under this Rule.
>
> "Sexual relations" includes, but is not necessarily limited to, sexual intercourse or any touching of the sexual or other intimate parts of a client or causing such client to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party or to humiliate, harass, degrade, or exploit. "Sexual relationship" means an established course of sexual relations.

2. What is the role of the divorce lawyer? It is sometimes maintained that the lawyer's first responsibility is to reconcile the parties. Do you agree? In handling a divorce case should you consider yourself a counselor, or merely an advocate?

3. Suppose you are consulted by two of your classmates who want a divorce. They have little property, no children, and want to minimize the cost of their divorce. Would you undertake to represent them both? Why? Are there ever circumstances when you would represent husband and wife? *See* Robert G. Spector, *The Do's and Don'ts of Dual Representation*, 13 FAM. ADV. 16 (Spring 1991).

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2. Fees

LEGAL ETHICS OPINION NO. 299
52 O.B.J 2101
(1981)

OPINION

In a recent disciplinary proceeding there was incidentally involved a contract between a member of the bar and his client wherein the attorney's fee was made contingent upon success in securing a decree of divorce for his client, and the amount thereof, upon the value of property and money received by the client in the adjustment of property rights and as alimony temporary and permanent.

Orally an opinion was requested as to the propriety of contingent fee contracts in divorce cases.

It is the opinion of the Board:

1. That such contract involves a matter of public policy; that the proper maintenance of the marriage relation is a matter of public concern; that such a contract between a member of the bar and a client is against public policy and void, the sanctity of the marriage relation, the welfare of the children, the good order of society, the regard for virtue, all of which the law seeks to foster and protect, being ample reasons for declaring such contract to be void as against public policy.

2. That the entering into such a contract involves the personal interest of the member of the bar in preventing a reconciliation between the parties—a thing which the law favors and public policy encourages.

3. That a suit for divorce and for the adjustment of property rights incident thereto is not a "cause of action or claim" arising "ex contact" or "ex delicto" within the meaning of 5 Okl. St. Anno § 7, but is a proceeding for the dissolution of a status in which the public has an interest and to which the state is an implied party, the adjustment of property rights being merely incidental to the dissolution of the status and not the subject matter of the proceeding.

STATE ex rel. OKLAHOMA BAR ASSOCIATION
v.
FAGIN
1992 OK 118, 848 P.2d 11

SIMMS, JUSTICE.

Respondent, Arnold D. Fagin, was the subject of a formal complaint filed by the Oklahoma Bar Association, which alleged that he violated Rule 1.5 of the Oklahoma Rules of Professional Conduct, 5 O.S. Supp. 1988, Ch. 1, App. 3-A. The parties agree as to the material facts leading up to the filing of the complaint, and the only issue to be resolved is the construction of and application of Rule 1.5 to those facts. We find that respondent's conduct violated the rule, and we impose a public reprimand for such misconduct.

Respondent entered into an agreement with Vickie Meyers to represent her in a divorce action. One of the provisions of the contract read as follows:

> 2. Your final fee *shall be based on the results accomplished in your case*, the degree of difficulty your case presents, the amount in controversy, and my hourly rate of $175.00, all of which are criteria used by the Oklahoma Courts in determining appropriate attorney fees in family law cases. It is impossible to tell in advance the amount of time or total cost your case will require. . . . (Emphasis added)

Respondent advised Meyers to refuse two settlement offers proposed by her husband, and the matter went to trial. After trial, the court awarded a much greater amount of property to Meyers than she would have received under either of the settlement offers. In fact, the evidence at respondent's disciplinary hearing indicated that Meyers' trial judgment was over $100,000.00 more favorable than the settlement proposals. On the basis of the above-quoted contract provision, respondent sent Meyers a final bill for $5,021.26 in attorney's fees which included $4,000.00 billed as an:

> Additional attorney fee based upon `results obtained' for client as prescribed in written attorney fee contract, because of extremely beneficial court decision for client on alimony in lieu of property, and support alimony together totaling $114,000 plus interest on the $60,000 alimony in lieu of property award, and with former husband also being required to pay all of the extensive marital debts."

Meyers sent a check in the amount of $1,021.26 with the notation "payment in full" placed upon it. Due to the notation respondent chose not to deposit the check and sent several letters to her requesting the total amount he claimed was due. She then contacted the Oklahoma Bar Association and filed a grievance against respondent.

Respondent answered the grievance, and in turn filed an action in Oklahoma County District Court against Meyers for the amount due in attorney's fees. Subsequently the complainant, Oklahoma Bar Association, filed a complaint against respondent for violating Rule 1.5(d) by entering into a contract for a fee the payment of which was contingent upon the result obtained in a domestic relations matter. Respondent denied that the contract violated the rule and asserted that such contracts have long received acceptance by the courts of this State.

The bar proceeding was conducted before a three member panel which received expert testimony from several lawyers "specializing" in family law that respondent's contract was not a contingent fee and did not violate Rule 1.5(d). The panel concluded that complainant failed to establish by clear and convincing evidence that respondent had violated Rule 1.5, and they recommended a dismissal of the complaint. The panel further requested this Court to promulgate a court rule clarifying the effect of Rule 1.5 in cases such as the one at bar.

In bar disciplinary proceedings, this Court is to conduct a de novo examination of the entire record to determine if the attorney violated a disciplinary rule. *State, ex rel., Oklahoma Bar Ass'n v. Miskovsky*, 804 P.2d 434 (Okla. 1990). We reject the recommendation of the trial panel and find that the clear and convincing evidence establishes that respondent violated the provisions of Rule 1.5 which provide, in pertinent part, as follows:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

* * * *

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law . . . . (d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) *any fee in a domestic relations matter, the payment or amount of which is contingent upon the result obtained, other that to collect past due alimony or child*; . . . (Emphasis added)

Respondent asserts his fee arrangement is not a "contingent" fee prohibited by the rule, but rather, it is an enhanced fee based upon the results which is permissible under the rule for two reasons.

First, he notes the factors listed in Rule 1.5(a) are for determining whether an attorney's fee is reasonable. One of those factors, (a)(4), uses the term "results [plural] obtained" whereas the prohibition in subsection (d)(1) is for fees contingent upon the "result [singular] obtained." He contends that "results" in (a)(4) refers to a fee being based upon the overall results of the case, but the singular term "result" of (d)(1) refers to a specific result such as the granting of a divorce. Respondent contends the distinction between the plural and singular form of the word shows that subsection (a) and subsection (d) are speaking of different types of fee arrangements.

Secondly, respondent relies upon the Comment to the rule to support this argument. The Comment states in part:

A lawyer shall not charge a fee contingent upon securing a divorce or upon the amount of alimony or support or property settlement or obtaining custody of a child or children.

Respondent contends this statement shows that the (d)(1) prohibition against "result [singular] obtained" fees applies to a specific result only, such as "securing a divorce." However, respondent's construction, of the Comment is strained at best. Beyond prohibiting fees contingent upon the successful granting of a divorce, the Comment explains that the rule also prohibits an attorney from charging a fee which is contingent upon "the amount of alimony or support or property settlement" obtained for the client by the attorney. The additional fees charged by respondent violate this prohibition.

His enhanced fee was based upon what he called an "extremely beneficial court decision for client on alimony in lieu of property, and support alimony." His testimony at the hearing was that the fee arrangement entitled him to an additional fee because he obtained a "tremendous result" for her. He apparently was the final arbiter of what result was worthy of an enhanced fee. There was nothing to indicate that this enhanced fee was a "bonus" that his client opted to give him in appreciation for his service. Rather, it appears the additional fee was a charge imposed upon the client when respondent felt he deserved it.

Nevertheless, his fee was to be enhanced because the trial resulted in increased alimony and support awards. The Comment clearly states that fees contingent upon the amount of such alimony or support are prohibited. Hypothetically speaking, he claims that if the result were less favorable, then he would consider reducing his fee accordingly. However, there is nothing in the contract to indicate that he was obligated to decrease his fee in response to an unfavorable result, and such assertion must be dismissed.

Not only does the Comment weigh against respondent's construction of the rule, but the clear language of the rule also contravenes his argument. Before we look to the rule's express language, a brief explanation of the well-settled proscription against contingent fees in domestic relations cases will be beneficial.

In *Opperud v. Bussey*, 172 Okla. 625, 46 P.2d 319 (1935), this Court determined that contingent fees in divorce actions violated the public policy which encourages a reconciliation between the spouses. Citing numerous decisions of sister states, the Court noted that a contingent fee arrangement in divorce actions involves the personal interest of an attorney in procuring a divorce and obtaining a more favorable division of property. The Court stated:

> An agreement between attorney and client as to compensation is not illegal, although contemplating a proceeding to secure a divorce, unless it involves the personal interest of the attorney in preventing a reconciliation between the parties, as where it is contingent on success, or is measured by the amount of alimony secured." 46 P.2d at 324 (*quoting* CORPUS JURI [vol. 13, p. 464]) (Emphasis added).

Hence, any fee arrangement in which the attorney will receive an enhanced fee if his efforts produce a more favorable property division or alimony award to his client involves a personal interest because the greater amount he obtains for his client, the greater he can charge as a fee. Moreover, the attorney has a personal interest in assuring a divorce is granted, because without a divorce he will not be able to charge a fee based upon the alimony and property settlement.

Not only does this sort of arrangement prevent a reconciliation, but contributes to the trend of recent divorce trials becoming a battleground where each combatant employs an attorney to obtain as much property as possible. Such an arrangement fails to promote the "sanctity of the marriage relation, the welfare of children, the good order of society, [and] the regard for virtue, all of which the law seeks to foster and protect." 46 P.2d at 322. *Accord McCreary v. McCreary*, 764 P.2d 522 (Okla. 1988) (*citing* Rule 1.5(c) and (d) and holding that a contingency fee arrangement based upon the amount recovered in a divorce case gives the attorney a personal interest in the litigation thus serving as an impediment to reconciliation).

Rule 1.5 (c) states that a fee "may be contingent on the outcome of the matter for which the service is rendered, except in a manner a contingent fee is prohibited by paragraph (d) or other law." Although many courts have gone to great lengths to define what constitutes a contingent fee, we need not determine what Rule 1.5(c) means by the term "contingent fee" because Rule 1.5(d)(1) forbids "any fee in a domestic relations matter, the payment or amount of which is contingent upon the result obtained." (Emphasis added) Thus, any type of fee which has some aspect of a contingency involved is impermissible. Because respondent's fee is based on an hourly rate subject to enhancement if the results of the case are favorable, it is one, the "amount of which is contingent upon the result obtained." Hence, his fee arrangement violates Rule 1.5(d).

Ignoring the clear prohibition of such fee arrangements by Rule 1.5(d)(1), respondent argues that Rule 1.5(a) and Oklahoma case law, as well as decisions from other jurisdictions, permit the use of the "results obtained" as a factor to use in determining whether an attorney's fee is reasonable in divorce actions. However, neither the rule nor our case law has unequivocally stated such. Another factor which the rule lists as a consideration is "whether the fee is fixed or contingent." As noted, subsection (d) indicates that fees which are contingent on the result obtained in domestic relations matters are forbidden. Thus, that portion of respondent's fee which is prohibited by (d)(1) cannot be considered reasonable under (a). Such a construction would render the enactment contradictory.

Moreover, in *State ex rel. Bark v. City of Oklahoma City*, 598 P.2d 659 (Okla. 1979), this Court held that "the amount involved and the results obtained" was one of several factors to consider in determining

a reasonable attorney's fee in an equitable trust action.[1] Later, we applied the *Bark* factors to find the trial court correctly set the attorney's fee in a bad faith action. *Oliver's Sports Center v. National Standard Ins. Co*., 615 P.2d 291 (Okla. 1980). Respondent, as well as commentators, asserts extended the Bark factors to all types of actions including domestic relations cases. However, there is no language in *Oliver's Sport Center* to indicate that all the factors of Bark are to be used in setting a fee in a domestic relations action. Although we do not at this time pronounce which factors may be considered by an attorney in charging attorney's fees or a court in awarding attorney's fee in a domestic relations action, we hold that Rule 1.5(d) forbids an attorney from charging a fee based upon the results obtained in a divorce action. *See Valparaiso Bank & Trust Co. Sims*, 343 So.2d 967 (Fla. Dist. Ct. App. 1977) in considering several factors similar to those listed in Bark and Rule 1.5(a) appellate court refused to consider "the results accomplished" in awarding fees to wife in divorce action because such factor was contingent in nature).

Numerous courts have considered the question of whether attorneys fees in domestic relations matters may be enhanced based upon favorable results. However, almost all of these cases involved a trial court ordering one spouse to pay all or a large portion of the other spouse's attorneys fees. Few courts have considered the situation before us; i.e., an attorney charging his own client an enhanced fee based upon the "results obtained."

One court considered the issue in an action brought by a law firm against its former client for fees in a divorce action and held that a fee based upon the results of the action was not a contingency fee because it was neither fixed or to be determined under some formula. *Eckell v. Wilson*, 409 Pa. Super. 132, 597 A.2d 696 (1991). The court's rationale is unpersuasive because we have concluded that Rule 1.5(d) prohibits any fee which is contingent upon the amount of support or alimony or property settlement regardless of whether a percentage is set or to be determined under some formula.

Of those courts considering the issue of awarding fees against one spouse in domestic relations cases, the following have permitted the results obtained to be considered where the court sets the fee: *Steadman v. Steadman*, 514 A.2d 1196 (D.C. Ct. App. 1986); *Husband S. v. Wife S*., 294 A.2d 89 (Del. 1972); *Head v. Head*, 66 Md. 655, 505 A.2d 868 (1986); *In re Marriage of Malec*, 205 Ill. App. 3d 273, 562 N.E.2d 1010 (App. Ct. 1990); *Swanson v. Swanson*, 48 Ohio App. 85, 355 N.E.2d 894 (Ohio Ct. App.1976); *In re Marriage of Jayne*, 280 N.W.2d 532 (Iowa 1972); *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987); *In re Marriage of Craig*, 30 Or.App. 419, 567 P.2d 141 (1977); *Beals v. Beals*, 682 P.2d 862 (Utah 1988); *Donahue v. Donahue*, 299 S.C. 353, 403 S.E.2d 313 (1991); *Wood v. Wood*, 403 S.E.2d 761 (W. Va. 1991); *Gross v. Gross*, 319 S.W.2d 880 (Mo. Ct. App.1959); *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980); *Rosser v. Rosser*, 355 So.2d 717 (Ala. Civ. App. 1977); *Margulies v. Margulies*, 506 So.2d 1093 (Fla. Dist. Ct. App. 1987).

Those courts determining that the results achieved may not be considered in awarding fee to one spouse include the following: *Valparaiso Bank & Trust Co., supra; Salerno v. Salerno*, 241 N.J. Super. 536, 575 A.2d 532 (Super. Ct. Ch. Div. 1990); *Hennen v. Hennen*, 53 Wis.2d 600, 193 N.W.2d 717 (1972); *Lien v. Lien*, 278 N.W.2d 436 (S.D. 1979); *Flynn v. Flynn*, 338 N.W.2d 295 (S.D.1983); *Owensby v. Owensby*, 312 N.C. 473, 322 S.E.2d 772 (1984); *Epstein v. Epstein*, 386 So.2d 1200 (Fla. Dist. Ct. App. 1980); *Shepherd v. Shepherd*, 526 So.2d 95 (Fla. Dist. Ct. App. 1987).

The Oklahoma Court of Appeals has spoken on this question to some degree in several cases. In *Longmire v. Hall*, 541 P.2d 276 (Okla. Ct. App. 1975), an action brought by an attorney against his former client in a divorce action, the court determined that a contingent fee arrangement of 25% of the prop-

[1] The approach we adopted in *Bark* is known as the "lodestar approach" because the time spent multiplied by the hourly rate is the lodestar to which additional fees are added based upon the enumerated factors.

erty settlement and support alimony was void. In dicta, the court stated that the results obtained is one factor which enters into the reasonable value of an attorney's services when the court awards fees. In *Gardner v. Gardner*, 629 P.2d 1283 (Okla. Ct. App. 1981), the Court of Appeals held that in the exercise of judicial discretion in awarding fees, a trial court may allow an "additional bonus " to the wife for work done by her attorney and experts. (Emphasis in original) In another case, the court concluded that the trial court erred in awarding attorney's fees without first taking evidence as to the time spent, and the reasonableness thereof, in accordance with *Bark. Mastromonaco v. Mastromonaco*, 751 P.2d 1106 (Okla. Ct. App. 1988). Most recently, a Court of Appeals decision held that if a trial court determines that attorney's fees should be awarded, then the amount must be fixed in accordance with Bark. *O'Connnor v. O'Connor*, 62 O.B.A.J. 2463 (Okla. Ct. App. August 3, 1991). We decline to rule at this time as to the correctness of these decisions, because they do not apply the issue of a contract between an attorney and his client.

Respondent urges that permitting attorneys to enhance their fees based upon the favorable results obtained will "serve to encourage diligence, vigorous advocacy, and overall excellence in that lawyer's representation of his client." He adds that prohibition of such enhanced fees may promote mediocrity. However, we remind the attorneys of this State that diligence, advocacy and excellence are expected of them by not only this Court but also by the Rules of Professional Conduct and the public that pays their fees.

Having addressed all of respondent's contentions, we now turn to the statute which authorizes contingent fees. Title 5 O.S. 1981, § 7 provides:

> It shall be lawful for an attorney to contract for a percentage or portion of the proceeds of a client's cause of action or claim not to exceed fifty percent (50%) of the net amount of such judgment as may be recovered, or such compromise as may be made, whether the same arises ex contact or ex delicto, . . .

This provision was noted by the Legal Ethics Committee of the Oklahoma Bar Association when it issued Advisory Opinion No. 41 (November 25, 1932) concerning contingent fees in divorce cases. The opinion stated that an attorney's fee made contingent upon securing a decree of divorce as well as contingent upon the amount of property and money received under the decree was void as against public policy citing many of the concerns this Court voiced in *Apart v. Bussed, supra*. The committee further held:

> a suit for divorce and for the adjustment of property rights incident thereto is not a 'cause of action or claim' arising 'ex contact' or 'ex delicto' within the meaning of Sec. 4101, C.O.S. 1921, 5 OKL. ST. ANNO. § 7, . . .

Hence, the position of the Legal Ethics Committee has long been that a divorce action, and its resulting property distribution, is not governed by the provisions of 5 O.S.1981, § 7. Fees made contingent upon the amount of property division and alimony in a divorce action are against public policy and contrary to the Oklahoma Rules of Professional Conduct.

Therefore, we find that the clear and convincing evidence shows that respondent violated the provisions of Rule 1.5(d) by entering into an arrangement and charging Meyers for an additional fee based upon the results he obtained for her in her divorce action. Although he obtained a favorable result for his client, the Rules do not permit him to increase his fee based upon those results.

Meyers has not paid the $4,000.00 fee to date. Since respondent has received no more fees than what he is legitimately entitled to, any discipline greater than a public reprimand is unnecessary. Therefore, respondent is publicly reprimanded for this misconduct and ordered to pay costs of the proceeding within Thirty (30) Days of the date that this opinion becomes final. Respondent's Application to Assess Costs against the Oklahoma Bar Association is Denied.

OPALA, C.J., LAVENDER, SIMMS, HARGRAVE, WILSON and WATT, JJ., concur.

KAUGER, J., concurs in result.

HODGES, V.C.J., dissents.

SUMMERS, J., disqualified.

KAUGER, JUSTICE, (concurring in result).

Unquestionably, contingent fees in a divorce proceeding are against public policy. Nevertheless, the respondent offered materials from live Continuing Legal Education programs sponsored by the Oklahoma Bar Association[1] which contained the "results accomplished" provision. It is troubling that although the rule is clear to the Court, at seminars conducted by the official arm of the Court,[2] lawyers have been advised to engage in a billing practice which is contrary to the plain intent of the rule. Both the teachers of OBA-CLE courses and other practitioners testified at the respondent's hearing that they used the same "results accomplished" provision in contracts with their divorce clients, and that it did not violate Rule 1.5

Should we on the one hand suspend lawyers from the practice of law for failure to attend mandatory CLE,[3] and on the other hand, single out one attorney for discipline after he practices what sanctioned seminars have taught him?[4] Rather than do so, I would treat this matter as an application by the OBA for examination of Rule 1.5. In analyzing the rule, I concur with the majority that the rule has been misinterpreted by the respondent.

WRIGHT
v.
ARNOLD
1994 OK CIV APP 26, 877 P.2d 616

BOUDREAU, PRESIDING JUDGE.

Plaintiff, Ellen Wright (Client), appeals an order of the trial court denying her claim for return of a non-refundable retainer fee from Defendant (Attorney). The issue on appeal is whether a non-refundable retainer fee in an hourly contract for legal services may be retained by an attorney irrespective of whether

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[1] Title 5 O.S. 1991, Ch. 19 App. I-B, Rule 7, Regulation 4, 4.2 provides in pertinent part:

> 4.2 Continuing legal education programs sponsored by the following organizations are presumptively approved for credit . . .
>
> Oklahoma Bar Association . . .

[2] Title 5 O.S. 1991, Ch. 1, App. 1 art. 1, sec.1 provides:

> The Oklahoma Bar Association is an official arm of this Court, when acting for and on behalf of this Court in the performance of its governmental powers and functions.

[3] Title 5 O.S. 1991, Ch. 1, App. 1-B, Rule 3 provides:

> Each attorney subject to these rules pursuant to Rule 2 herein shall attend, or complete an approved substitute for attendance, a minimum of twelve (12) hours of approved continuing legal education each year beginning January 1, 1986.

[4] The Respondents assert that "The courts, legal treatises, articles, and practitioners are unanimous in their opinion that a results obtained adjustment to a final hourly-based domestic fee is not a prohibited contingent fee."

the attorney renders the contemplated services. We answer the question in the negative and reverse and remand the action for further proceedings.

Client retained Attorney to perform legal services for her regarding the collection of past-due child support. Client's former husband, a resident of Texas, was approximately one year behind on paying his child support obligation to Client. He had accrued a child support arrearage which ranged from $4,800 to $7,200.

On December 20, 1989, Client signed a document titled "Attorney's Retainer Agreement." The pertinent portions of the contract are as follows:

> I/We, the undersigned, do hereby retain Earl W. Arnold as my/our attorney to institute, prosecute or adjust such claims as may be deemed advisable by said attorney to recover any damages as follows:
>
> collection of past due child support and modification of Decree of Divorce re child support and any matters related thereto
>
> * * * *
>
> 2. In consideration of the services rendered and to be rendered, I/we agree to pay my/our attorney for services . . . in the amount of $100 per hour for in-office time and $125 for in-Court time, based upon 15 minute increments, promptly upon receipt of his itemized periodic billing. *I/We hereby tender to the attorney a retainer in the sum of Four Thousand and No/100's Dollars ($4,000.00), the receipt of which is hereby acknowledged. I/We understand that this retainer is nonrefundable*.
>
> * * * *
>
> I/we hereby give said attorney the exclusive right to take all legal steps to enforce said claim(s), including retaining co-counsel without extra cost to me/us; and I/we hereby further agree not to settle said claim(s) in any manner without the written consent of my/our attorney. (Emphasis ours).

Client claims she did not know that the $4,000 retainer was non-refundable, because she did not read the contract before signing it.

Attorney viewed the retainer as earned and non-refundable immediately upon payment. He alleges that it was required in part to take on the case and to set aside other work previously calendared. In addition, he viewed it as "covering actual hours spent and perhaps some expenses." He further testified that Client would have been required to pay a Texas attorney separately if Attorney was required to employ one to prosecute the claim in a Texas court.

Shortly after she signed the contract, Client requested Attorney to discontinue working on her case. Depending on whose version one accepts, Client did so as early as six days, but no later than thirteen days, after she signed the contract. Attorney testified that he had worked 22.25 hours on Client's case at the time she requested him to stop.

Client filed this action seeking a refund of a portion of the retainer fee which she paid to Attorney. She attacked the non-refundable retainer fee as being void and unenforceable. In the alternative, she alleged that she entered into a modification of the retainer agreement whereby Attorney agreed to refund $3,500 of the retainer fee.

Following a non-jury trial, the trial court entered judgment for Attorney. The court found that the parties had a meeting of the minds, the contract was not ambiguous or unconscionable, and the contract was enforceable. The court specifically refused to make any finding as to the value of the work performed by Attorney on the case before Client discharged him. Client appeals the judgment entered for Attorney.

* * * *

Although the Oklahoma Supreme Court has not addressed the enforceability of non-refundable retainer fees, both decisional and statutory law give guidance on how the court would decide such an issue. The supreme court has held that "[t]he relationship of attorney and client is one of reliance, trust, and confidence [and,] [w]hen any element of this relationship is destroyed, for whatever reason, the client has the absolute right, in the interest of his own welfare, to discharge the attorney." *White v. American Law Book Co*., 106 Okla. 166, 233 P. 426, 427 (1924). Rule 1.16 of the Oklahoma Code of Professional Conduct provides that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned." 5 O.S. 1991, Ch. 1, App. 3-A. The comment to Rule 1.16 provides that "[a] client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Furthermore, a contract between a lawyer and a client for a certain fee "will not be upheld or enforced where the compensation is so excessive as to evidence a purpose on the part of the attorney to obtain an improper or undue advantage over the client." *Robert L. Wheeler, Inc. v. Scott*, 818 P.2d 475, 480 (Okla. 1991) (*citing Reneger v. Staples*, 388 P.2d 867, 872 (Okla. 1964)).

Applying these principles to the case at bar, we hold that a non-refundable retainer provision in an hourly-rate contract for legal services is unenforceable.[3] It is an impermissible restraint on the right of a client to freely discharge her attorney. This provision also contravenes the Code of Professional Conduct, which requires an attorney, upon the termination of the attorney-client relationship, to protect his client's interest by refunding any advanced payment which has not been earned. We hold that the attorney under such circumstances is entitled to only such fees as the attorney can show are reasonable for the services actually performed. *See City of Barnsdall v. Curnutt*, 198 Okl. 3, 174 P.2d 596 (1945).

Other jurisdictions have addressed the enforceability of non-refundable retainer fees. In *Estate of Forrester v. Dawalt*, 562 N.E.2d 1315 (Ind. Ct. App. 1990), the client hired an attorney to represent him in the administration of an estate. The client paid the attorney $15,000 in advance as a fixed fee for his services. The client discharged the attorney after the attorney had spent less than thirty hours administering the estate. The client sought a refund on the advance-fee payment alleging that the attorney was only entitled to the reasonable value of his services under a theory of quantum meruit. The Indiana Court of Appeals agreed.

The court first relied on Indiana Professional Conduct Rule 1.16(d) and its comment, which are identical to Oklahoma's Rule 1.16(d). The court, quoting from a New York case, next discussed a client's right to discharge his counsel:

> We view unenforceable any contractual provision which constrains a client from exercising his right to freely discharge his attorney. A retainer provision which requires a client to pay for legal services in advance, and which permits the attorney to retain the advance payment irrespective of whether the services contemplated are rendered, necessarily has a chilling effect upon a client's right to freely discharge his attorney. Indeed, the larger the amount of the so-called "nonrefundable" retainer, the more securely is the client held hostage to the payment.

* * * The court held that "when an attorney is discharged by a client with or without cause, the attorney's remedy is limited to recovery of the reasonable value of his or her services rendered before discharge on the basis of quantum meruit." * * *

* * * *

[3] We do not address the issue of the enforceability of a non-refundable retainer fee in a contingency-fee contract or in a fixed-rate contract. Here, we are faced only with an hourly-rate contract.

We agree with the rationale and holding. We reject Attorney's argument that the non-refundable retainer should be enforced because he had to "immediately rearrange his schedule," "set aside other work previously calendared," and forego accepting a slip-and-fall case. These items are relevant to a determination of the reasonable value of Attorney's services. They do not, however, mandate enforcement of the non-refundable retainer.

Because the trial court specifically refused to make a finding regarding the reasonableness of the time spent by Attorney, we remand this case to the trial court for further proceedings to determine the reasonable value of the services rendered by Attorney prior to his discharge.

Reversed and remanded for further proceedings.

REIF, C.J., and RAPP, J., concur.

Notes & Questions

1. The 2007 amendments to the Oklahoma Rules of Professional Conduct, Rule 1.5 provides that:

* * * *

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of ~~result obtained, other than actions to collect past due~~ alimony or ~~child~~ support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

* * * *

The comment to this section provides that:

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a ~~A~~ lawyer from charging ~~shall not charge~~ a ~~fee~~ contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. ~~or obtaining custody of a child or children.~~ This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Does this mean that an attorney can handle a modification of custody case on an enhanced fee basis? In other words, can an attorney charge a higher fee if the attorney wins the case and obtains custody for the client? Is this appropriate?

2. For other disciplinary proceedings concerning divorce attorneys, *see State ex. rel. O.B.A. v. Dershem*, 1999 OK 77, 990 P.2d 864 (neglect); *State ex. rel. O.B.A. v. Crane*, 2000 OK 48, 9 P.3d 682 (failure to pay child support).

HANDLING CONTESTED DIVORCE CASES

59 Wis. Bar. Bull 16
(March, 1986)

Attorney's Liability Assurance Society Ltd. (ALAS) last summer reported that almost 25 percent of ALAS' incurred losses had resulted from malpractice claims incident to contested divorce cases.

Claims counsel for ALAS has suggested a series of practical guidelines in a memorandum to ALAS members involving this area of practice:

1. If your firm does not have the expertise in the field, do not undertake representation on a learn-as-you-go basis.

2. This practice requires much client "handholding". Keep your client involved in the process and currently abreast of all developments; do so in writing. If you are not good at handholding, do not get involved.

3. Never represent both spouses, even if they beg you. If you represented both spouses or their common business before the split-up, you may have an irreconcilable conflict in representing either in the divorce.

4. Consult experts where needed (financial, valuation), but get the client's approval in writing in advance along with the client's agreement to pay the expert's fees.

5. Get the client to provide you with a written statement of the assets, income and financial needs of both parties.

6. Get your adversary to fully explain in writing his client's assets, income and financial needs. Get it in a formal way (discovery in a pending action or written communications). Do not rely on your colleague at the Bar to voluntarily tell you everything; remember his client may be holding back from him.

7. You cannot function in this field without tax expertise; make sure you have it.

8. If there are any settlement discussions with the other side, advise the client in detail about them and get his or her input; all this should be in writing.

9. If a settlement is reached, make sure the client thoroughly understands it and genuinely considers it reasonable under the circumstances. Attempt to ferret out any objections, which later can grow to major assertions of inadequate representation. Where the settlement is reached in the course of litigation, put the client on the record under oath. If outside the court, get it in writing.

10. Stay current on court decisions and new legislation, particularly in the tax field.

D. MULTI-STATE DIVORCE

Introductory Note

The following material is among the most difficult in the course. Problems arise because divorce is almost exclusively a matter for state law and people continue to move from state to state. As you read the material keep the following questions in mind:

1. Should it matter whether an Oklahoman travels to another state solely to get a divorce as opposed to moving there permanently?
2. What relationship to the parties must a state have before it can grant a divorce?
3. Does it matter whether the divorce is *ex parte* or bilateral?
4. Is it possible for a person to be divorced in one state but not in another?
5. Is this tolerable?
6. If not, what can be done about it?
7. How would you advise a client who is planning to move to another state and then obtain a divorce?

WILLIAMS
v.
NORTH CAROLINA [I]
317 U.S. 287
(1942)

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners were tried and convicted of bigamous cohabitation under § 4342 of the North Carolina Code, 1939, and each was sentenced for a term of years to a state prison. The judgment of conviction was affirmed by the Supreme Court of North Carolina. The case is here on certiorari. * * *

Petitioner Williams was married to Carrie Wyke in 1916 in North Carolina and lived with her until May, 1940. Petitioner Hendrix was married to Thomas Hendrix in 1920 in North Carolina and lived with him until May, 1940. At that time petitioners went to Las Vegas, Nevada and on June 26, 1940, each filed a divorce action in the Nevada court. The defendants in those divorce actions entered no appearance nor were they served with process in Nevada. In the case of defendant Thomas Hendrix service by publication was had by publication of the summons in a Las Vegas newspaper and by mailing a copy of the summons and complaint to his last post office address. In the case of defendant Carrie Williams a North Carolina sheriff delivered to her in North Carolina a copy of the summons and complaint. A decree of divorce was granted petitioner Williams by the Nevada court on August 26, 1940, on the ground of extreme cruelty, the court finding that "plaintiff has been and now is a bona fide and continuous resident of the County of Clark, State of Nevada, and has been such resident for more than six weeks immediately preceding the commencement of this action in the manner prescribed by law." The Nevada court granted petitioner Hendrix a divorce on October 4, 1940, on the grounds of wilful neglect and extreme cruelty and made the same finding as to this petitioner's bona fide residence in Nevada as it made in the case of Williams. Petitioners were married to each other in Nevada on October 4, 1940. Thereafter they returned to North Carolina where they lived together until the indictment was returned. Petitioners pleaded not guilty

and offered in evidence exemplified copies of the Nevada proceedings, contending that the divorce decrees and the Nevada marriage were valid in North Carolina as well as in Nevada. The State contended that since neither of the defendants in the Nevada actions was served in Nevada nor entered an appearance there, the Nevada decrees would not be recognized as valid in North Carolina. On this issue the court charged the jury in substance that a Nevada divorce decree based on substituted service where the defendant made no appearance would not be recognized in North Carolina. The State further contended that petitioners went to Nevada not to establish a bona fide residence but solely for the purpose of taking advantage of the laws of that State to obtain a divorce through fraud upon that court. On that issue the court charged the jury that the defendants had the burden of satisfying the jury, but not beyond a reasonable doubt of the bona fides of their residence in Nevada for the required time. Petitioners excepted to these charges. The Supreme Court of North Carolina in affirming the judgment held that North Carolina was not required to recognize the Nevada decrees under the full faith and credit clause of the Constitution (Art. IV, § 1) by reason of *Haddock v. Haddock*, 201 U.S. 562. The intimation in the majority opinion that the Nevada divorces were collusive suggests that the second theory on which the state tried the case may have been an alternative ground for the decision below, adequate to sustain the judgment under the rule of *Bell v. Bell*, 181 U.S. 175—a case in which this Court held that a decree of divorce was not entitled to full faith and credit when it had been granted on constructive service by the courts of state in which neither spouse was domiciled. But there are two reasons why we do not reach that issue in this case. In the first place, North Carolina does not seek to sustain the judgment below on that ground. Moreover, it admits that there probably is enough evidence in the record to require that petitioners be considered "to have actually domiciled in Nevada." In the second place, the verdict against petitioners was a general one. Hence even though we cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted, viz. the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over defendants in the divorce suit. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of the constitutional rights. Accordingly, we cannot avoid meeting the *Haddock v. Haddock* issue in this case by saying that the petitioners had acquired no bona fide domicile in Nevada. Rather we must treat the present case for the purpose of the limited issue before us as if petitioner has resided in Nevada for a term of years and had long ago acquired a permanent abode there. * * *

The *Haddock* case involved a suit for separation and alimony brought in New York by the wife on personal service of the husband. The husband pleaded in defense a divorce decree obtained by him in Connecticut where he had established a separate domicil. This Court held that New York, the matrimonial domicil where the wife still resided, need not give full faith and credit to the Connecticut decree, since it was obtained by the husband who wrongfully left his wife in the matrimonial domicil, service on her having been obtained by publication and she not having entered an appearance in that action. But we do not agree with the theory of the *Haddock* case that, so far as the marital status of the parties is concerned, a decree of divorce granted under circumstances by one state need not be given full faith and credit in another.

* * * CHIEF JUSTICE MARSHALL stated in *Hampton v. M'Connel*, 3 Wheat. 234 that "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such a state and none others, could be pleaded in any other court in the United States." That view has survived substantially intact. *Fauntleroy v. Lum*, 210 U.S. 230. Thus even though the cause of action could not be entertained in the state of the forum either because it had been barred by the local statute of

limitations or contravened local policy, the judgment thereon obtained in a sister state is entitled to full faith and credit. *See Christmas v. Russell*, 5 Wall. 290; *Fauntleroy v. Lum, supra*. Some exceptions have been engrafted on the rule laid down by CHIEF JUSTICE MARSHALL. But as stated by Mr. JUSTICE BRANDIES in *Broderick v. Rosner*, 294 U.S. 629, "the room left for the play of conflicting policies is a narrow one." So far as judgments are concerned the decisions show that the actual exceptions have been few and far between, apart from *Haddock v. Haddock*. For this Court has been reluctant to admit exceptions in the case of judgments rendered by the courts of a sister state, since the very purpose of Art. IV § 1 was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation. * * *

This court, to be sure, has recognized that in the case of statutes, "the extrastate effect of which Congress has not prescribed," some "accommodation of the conflicting interests of the two states" is necessary. *Alaska Packers Ass'n v. Industrial Accident Com'n*, 294 U.S. 532. But that principle would come into play only in case the Nevada decrees were assailed on the ground that Nevada must give full faith and credit in its divorce proceedings to the divorce statutes of North Carolina. Even then it would be of no avail here. For as stated in the *Alaska Packers* case, "Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum." It is difficult to perceive how North Carolina could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada. Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state. * * *

Moreover, *Haddock v. Haddock* is not based on the contrary theory. Nor did it hold that a decree of divorce granted by the courts of one state need not be given full faith and credit in another if the grounds for the divorce would not be recognized by the courts of the forum. It does not purport to challenge or disturb the rule, earlier established by *Christmas v. Russell, supra*, and subsequently fortified by *Fauntleroy v. Lum, supra*, that even though the cause of action could not been entertained in the state of the forum, a judgment obtained thereon in a sister state is entitled to full faith and credit. For the majority opinion in the Haddock case accepted both *Cheever v. Wilson*, 9 Wall. 108, and *Atherton v. Atherton*, 181 U.S. 155. *Cheever v. Wilson* held that a decree of divorce granted by a state in which one spouse was domiciled and which had personal jurisdiction over the other was as conclusive in other states as it was in the state where it was obtained. *Atherton v. Atherton* held that full faith and credit must be given a decree of divorce granted by the state of the matrimonial domicil on constructive service against the other spouse who was a non-resident of that state. The decisive difference between those cases and *Haddock v. Haddock* was said to be that in the latter the state granting the divorce had no jurisdiction over the absent spouse, since it was not the state of the matrimonial domicil, but the place where the husband had acquired a separate domicil after having wrongfully left his wife. This Court accordingly classified *Haddock v. Haddock* with that group of cases which hold that when the courts of one state do not have jurisdiction either of the subject matter or of the person of the defendant, the courts of another state are not required by virtue of the full faith and credit clause to enforce the judgment. But such differences in result between *Haddock v. Haddock* and the cases which preceded it rest on distinctions which in our view are immaterial, so far as the full faith and credit clause and the supporting legislation are concerned.

The historical view that a proceeding for a divorce was a proceeding in rem (2 BISHOP, MARRIAGE & DIVORCE, 4th Ed. § 164) was rejected in the *Haddock* case. We likewise agree that it does not aid in the solution of the problem presented by this case to label these proceedings in rem. Such a suit, however, is not a mere in personam action. Domicil of the plaintiff, immaterial to jurisdiction in a personal action, is

recognized in the *Haddock* case and elsewhere as essential to give the court jurisdiction which will entitle the divorce to extraterritorial effect, at least where the defendant has neither been personally served nor entered an appearance. The findings made in the divorce decrees in the instant case must be treated on the issue before us as meeting those requirements. For it seems clear that the provision of the Nevada statute that a plaintiff in this type of case must "reside" in the state for the required period requires him to have a domicile as distinguished from a mere residence in the state. Hence the decrees in this case like other divorce decrees are more than mere in personam judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power. Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its border. The marriage relation creates property interests, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of the substituted service meet the requirements of due process. Accordingly it was admitted in the *Haddock* case that the divorce decree though not recognized in New York was binding on both spouses in Connecticut where granted. It therefore follows that, if the Nevada decrees are taken at their face value (as they must be on the phase of the case with which we are presently concerned), they were wholly effective to change in that state the marital status of the petitioners and each of the other spouses by the North Carolina marriages. Apart from the requirements of procedural due process, not challenged here by North Carolina, no reason based on the Federal Constitution has been advanced for the contrary conclusion. But the concession that the decrees were effective in Nevada makes more compelling the reasons for rejection of the theory and result of the *Haddock* case.

This Court stated in *Atherton v. Atherton, supra*, 181 U.S. at 162, that "A husband without a wife, or a wife without a husband, is unknown to the law." But if one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina, an even more complicated and serious condition would be realized. Under the circumstances of this case, a man would have two wives, a wife two husbands. The reality of a sentence to prison proves that is no mere play on words. Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other. And all that would follow from the legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicil so that the domicil of the other spouse follows him wherever he may go, while if he is to blame, he retains no such power. But such considerations are inapposite. As stated by Mr. JUSTICE HOLMES in his dissent to the *Haddock* case, 210 U.S. at 630, they constitute a "pure fiction and fiction always is a poor ground for changing substantial rights." Furthermore, the fault or wrong of one spouse in leaving the other becomes under that view a jurisdictional fact on which this Court would ultimately have to pass. Whatever may be said as to the practical effect which such a rule would have in clouding divorce decrees, the question as to where the fault lies has no relevancy to the existence of state power in such circumstances. The existence of the power of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise, is not dependent on the underlying causes of the domestic rift. As we have said, it is dependent on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders. As stated above, we see no reason, and none has been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies. And it is difficult to prick out any such line of distinction in the generality of the words of the full faith and credit clause. Moreover, so far as state power is concerned no distinction between a matrimonial domicil and domicil later acquired has been suggested or is apparent. It is one thing to say as a matter of state law that jurisdiction to grant a divorce from an ab-

sent spouse should depend on whether by consent or by conduct the latter has subjected his interest in the marriage status to the law of the separate domicil acquired by the other spouse. But where a state adopts, as it has the power to do so, a less strict rule, it is quite another thing to say that its decrees affecting the marital status of its domiciliaries are not entitled to full faith and credit in sister states. Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring considerable disaster to innocent persons and bastardize children hitherto supposed to be the offspring of lawful marriage, or else encourage collusive divorces. These intensely practical considerations emphasize for us the essential function of the full faith and credit clause in substituting a command for the former principles of comity. . . . * * *

It is objected, however, that if such a divorce decrees must be given full faith and credit, a substantial dilution of the sovereignty of other states will be effected. For it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state. But such an objection goes to the application of the full faith and credit clause to many situations. It is an objection in varying degrees of intensity to the enforcement of a sister state judgment based on a cause of action which could not be enforced in the state of the forum. Mississippi's policy against gambling transactions was overridden in *Fauntleroy v. Lum, supra*, when a Missouri judgment based on such a Mississippi contract was enforced by this Court. Such is the price of our federal system.

This court, of course, is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause. But the question for us is a limited one. In the first place, we repeat that in this case we must assume that petitioners had a bona fide domicil in Nevada, not that the Nevada domicil was a sham. In the second place, the question as to what is a permissible limitation on the full faith and credit clause does not involve a decision on our part as to which state policy on divorce is the more desirable one. It does not involve selection of a rule which will encourage on the one hand or discourage on the other the practice of divorce. That choice in the realm of morals and religion rests with the legislation of the states. Our own views as to the marriage institution and the avenues of escape which some states have created are immaterial. It is a Constitution which we are expounding—a Constitution which in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause. Within the limits of her political power North Carolina may, of course, enforce her own policy regarding the marriage relation—an institution more basic in our civilization than any other. But society also has an interest in the avoidance of polygamous marriages and in the protection of innocent offspring of marriages deemed legitimate in other jurisdictions. And other states have an equally legitimate concern in the status of persons domiciled there as respects the institution of marriage. So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter. * * *

Haddock v. Haddock is overruled. The judgment is reversed and the cause is remanded to the Supreme Court of North Carolina for proceedings not inconsistent with this opinion.

* * * *

FRANKFURTER, JUSTICE (concurring).

I join in the opinion of the Court but think it appropriate to add a few words.

* * * The Constitution of the United States . . . reserves authority over marriage and divorce to each of the forty-eight states. * * *

We are not authorized nor are we qualified to formulate a national code of domestic relations. We cannot, by making "jurisdiction" depend on a determination of who is the deserter and who the deserted, or upon the shifting notions of policy concealed by the cloudy abstraction of "matrimonial domicile" turn this into a divorce and probate court for the United States. * * * There is but one respect in which this Court can, within its traditional authority and professional competence, contribute uniformity to the law of marriage and divorce, and that is to enforce respect for the judgment of a state by its sister states when the judgment was rendered in accordance with settled procedural standards. As the Court's opinion shows, it is clearly settled that if a judgment is binding in the state where it was rendered, it is equally binding in every other state. This rule of law was not created by the federal courts. It comes from the Constitution and the Act of May 26, 1790, . . . * * *

* * * *

* * * It is indisputable that the Nevada decrees here, like the Connecticut decree in the *Haddock* case, were valid and binding in the state where they were rendered. In denying constitutional sanction to such a valid judgment outside the state which rendered it, the *Haddock* decision made an arbitrary break with the past and created distinctions incompatible with the role of this Court in enforcing the Full Faith and Credit Clause. Freed from the hopeless refinements introduced by that case, the question before us is simply whether the Nevada decrees were rendered under circumstances that would make them binding against the absent spouses in the state where they were rendered. North Carolina did not challenge the power of Nevada to declare the marital status of persons found to be Nevada residents. North Carolina chose instead to disrespect the consequences of Nevada's assertion of such power. * * *

* * * Our occasional pronouncements upon the requirements of the Full Faith and Credit Clause doubtless have little effect upon divorces. Be this as it may, a court is likely to lose its way if it strays outside the modest bounds of its own special competence and turns the duty of adjudicating only the legal phases of a broad social problem into an opportunity for formulating judgments of social policy quite beyond its competence as well as its authority.

JACKSON, JUSTICE, (dissenting).

* * * *

The opinion concedes that Nevada's judgment could not be forced upon North Carolina in the absence of personal service if a divorce proceeding were an action *in personam*. In other words, settled family relationships may be destroyed by a procedure we would not recognize if the suit was one to collect a grocery bill.

We have been told that this is because divorce is a proceeding *in rem*. The marriage relation is to be reified and treated as a *res*. Then it seems that this *res* follows a fugitive from matrimony into a state of easy divorce, although the other party remains at home where the *res* was contracted and where years of cohabitation would seem to give it local situs. * * *

I doubt that it promotes clarity of thinking to deal with marriage in terms of a *res*, like a piece of land or a chattel. It might be more helpful to think of marriage as just marriage—a relationship out of which spring duties to both spouses and society and from which are derived rights—such as the right to society and services and to conjugal love and affection—rights which generally prove to be either priceless or worthless, but which none the less the law sometimes attempts to evaluate in terms of money when one is deprived of them by the negligence or design of a third party.

It does not seem consistent with our legal system that one who has these continuing rights should be deprived of them without a hearing. Neither does it seem that he or she should be summoned by mail, publication or otherwise to a remote jurisdiction chosen by the other party and there to be obliged to sub-

mit marital rights to adjudication under a state policy at odds with that of the state under which the marriage was contracted and the matrimonial domicile established.

Marriage is often dealt with as a contract. Of course a personal judgment could not be rendered against an absent party on a cause of action arising out of an ordinary commercial contract, without personal service of process. I see no reason why the marriage contract, if such it be considered, should be discriminated against, nor why a party to a marriage contract should be more vulnerable to a foreign judgment without process than a party to any other contract. I agree that the marriage contract is different, but I should think the differences would be in its favor.

The Court thinks the difference is the other way: we are told that divorce is not a "mere in personam action" since *Haddock v. Haddock, supra*, held that domicile is necessary to jurisdiction for divorce. But to hold that a state cannot have divorce jurisdiction unless it is the domicile is not to hold that it must have such jurisdiction if it is the domicile, as *Haddock v. Haddock* itself demonstrates. * * *

Although the Court concedes that its present decision would be insupportable if divorce were a "mere in personam action" it relies for support on opinions that the state where one is domiciled has the power to enter valid criminal, tax, and simple money judgments against—not for—him. Those opinions are wholly inapposite unless they mean that Nevada has jurisdiction to nullify contract rights of a person never in the state or to declare that he is not liable for the commission of a crime and payment of taxes or the breach of contract in another state; and I am sure that nobody has ever supposed they meant that.

To hold that the Nevada judgments were not binding in North Carolina because they were rendered without jurisdiction over the North Carolina spouses, it is not necessary to hold that they were without any conceivable validity. It may be, and probably is, true that Nevada has sufficient interest in the lives of those who sojourn there to free them and their spouses to take new spouses without incurring criminal penalties under Nevada law. I know of nothing in our Constitution that requires Nevada to adhere to traditional concepts of bigamous unions or the legitimacy of the fruit thereof. And the control of a state over property within its borders is so complete that I suppose that Nevada could effectively deal with it in the name of divorce as completely as in any other. But it is quite a different thing to say that Nevada can dissolve the marriages of North Carolinians and dictate the incidence of the bigamy statutes of North Carolina by which North Carolina has sought to protect her own interests as well as theirs. In this case there is no conceivable basis of jurisdiction in the Nevada court over the absent spouses, and, a fortiori, over North Carolina herself. I cannot but think that in its pre-occupation with the full faith and credit clause the Court has slighted the due process clause.

* * * *

WILLIAMS
v.
NORTH CAROLINA [II]
325 U.S. 226
(1945)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case is here to review judgments of the Supreme Court of North Carolina, affirming convictions for bigamous cohabitation, assailed on the ground that full faith and credit as required by the Constitution of the United States was not accorded divorce decrees by one of the courts of Nevada. Williams *v. North Carolina [I]*, 317 U.S. 287 , 63 S.Ct. 207, 143 A.L.R. 1273, decided an earlier aspect of the controversy.

It was there held that a divorce granted by Nevada on a finding that one spouse was domiciled in Nevada, must be respected in North Carolina, where Nevada's finding of domicil was not questioned though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina. The record before us then did not present the question whether North Carolina had the power "to refuse full faith and credit to the Nevada divorce decrees because contrary to the finding of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada." *Williams v. North Carolina [I], supra, 317 U.S. at page 302, 63 S.Ct. at page 215, 143 A.L.R. 1273*. This is the precise issue which has emerged after retrial of the cause following our reversal. Its obvious importance has brought the case here. * * *

The implications of the Full Faith and Credit Clause, Article IV, Section 1 of the Constitution, first received the sharp analysis of this Court in *Thompson v. Whitman*, 18 Wall. 457. Theretofore, uncritical notions about the scope of that Clause had been expressed in the early case of *Mills v. Duryee*, 7 Cranch 481. The "doctrine" of that case, as restated in another early case, was that the "judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the state where it was pronounced." *Hampton v. McConnel*, 3 Wheat. 234. This utterance . . . was found to be too lose. *Thompson v. Whitman* made it clear that the doctrine of *Mills v. Duryee* comes into operation only, when in the language of KENT, "the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person. Only then is the record of the judgment . . . entitled to full faith and credit." * * *

Under our system of law, judicial power to grant a divorce—jurisdiction strictly speaking—is founded on domicil. *Bell v. Bell*, 181 U.S. 175; *Andrews v. Andrews*, 188 U.S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of *Williams v. North Carolina, supra*, the jurisdictional requirement of domicil is freed from confusing refinements about "matrimonial domicil", . . . Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.

It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. *Forsyth v. Hammond*, 166 U.S. 506, 517 , 17 S.Ct. 665, 670; *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 30 , 37 S. Ct. 492. 493; *Davis v. Davis*, [305 U.S. 32] *supra*. But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish actions of those outside its borders. The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.[6] * * * These considerations of policy are equally applicable whether power was assumed by the court of the first State

[6] We have not here a situation where a State disregards the adjudication of another State on the issue of domicil squarely litigated in a truly adversary proceeding.

or claimed after inquiry. This may lead, no doubt, to conflicting determinations of what judicial power is founded upon. Such conflict is inherent in the federal system.[7] * * * "Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries". * * * If a finding by the court of one State that domicil in another State had been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power. The issue has a far reach. For domicil is the foundation of probate jurisdiction precisely as it is that of divorce. The ruling in *Tilt v. Kelsey*, 207 U.S. 43, regarding the probate of a will, is equally applicable to a sister-State divorce decree: "The full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicil. On the contrary, it is open to the court of any state, in the trial of a collateral issue, to determine, upon the evidence produced the true domicil of the deceased". 207 U.S. at 53, 28 S.Ct. 1, 4. * * * Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as was recently pointed out, to label divorce proceedings as actions in rem. *Williams v. North Carolina [I]*, *supra*, 317 U.S. at page 297, 63 S.Ct. at page 212, 143 A.L.R. 1273. But insofar as a divorce decree partakes of some of the characteristics of a decree *in rem*, it is misleading to say that all the world is a party to a proceeding *in rem*. * * * All the world is not a party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven states provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question. In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable.

But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based on a finding that one spouse had acquired a domicil within the divorcing State would, in the proper functioning of our federal system, be equally indefensible. No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage. The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State.

The problem is to reconcile the reciprocal respect to be accorded by members of the Union to their adjudications with due regard for another most important aspect of our federalism whereby the domestic relations of husband and wife were matters reserved to the States. * * * The rights that belong to all the States and the obligations which membership in the Union impose upon all, are made effective because this Court is open to consider claims, such as this case represents, that the courts of one State have not given the full faith and credit to the judgment of a sister State that is required by Art. IV § 1 of the Constitution.

But the discharge of this duty does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicil. "It is not for us to retry the facts," as was held in a case in which like the present, the jurisdiction underlying a sister-State judgment was dependent on domicil. *Burbank v. Ernst*, 232 U.S. 162. The chal-

[7] Since an appeal to the Full Faith and Credit Clause raises questions arising under the Constitution of the United States, the proper criteria for ascertaining domicil should these be in dispute, becomes a matter for federal determination.

lenged judgment must, however satisfy our scrutiny that the reciprocal duty of respect owned by the States to one another's adjudication has been fairly discharged, and has not been evaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment.

What is immediately before us is the judgment of the Supreme Court of North Carolina. * * * We have authority to upset it only if there is want of foundation for the conclusion that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce cannot, we have seen, foreclose reexamination by another State. Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer. *Thompson v. Whitman, supra*. If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicil—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgement was amply supported in evidence, we cannot upset the judgment before us. And we cannot do so even if we also found in the record of the court of original judgment warrant for its finding that it had jurisdiction. If it is a matter turning on local law, great deference is owed by the courts of one State to what a court of another State has done. * * * But when we are dealing as here with an historic notion common to all English-speaking courts, that of domicil, we should not find a want of deference to a sister State on the part of a court of another State which finds an absence of domicil where such a conclusion is warranted by the record.

When this case was first here, North Carolina did not challenge the finding of the Nevada court that petitioners had acquired domicils in Nevada. * * * Upon retrial, however, the existence of domicil in Nevada became the decisive issue. The judgments of conviction now under review bring before us a record which may be fairly summarized by saying that the petitioners left North Carolina for the purpose of getting divorces from their respective spouses in Nevada and as soon as each had done so and married one another they left Nevada and returned to North Carolina to live there together as man and wife. Against the charge of bigamous cohabitation under the North Carolina Statutes, petitioners stood on their Nevada divorces and offered exemplified copies of the Nevada proceedings. The trial judge charged that the State had the burden of proving beyond a reasonable doubt that (1) each petitioner was lawfully married to one person; (2) thereafter each petitioner contracted a second marriage with another person outside North Carolina; (3) the spouses of petitioners were living at the time of this second marriage; (4) petitioners cohabited with one another in North Carolina after the second marriage. The burden, it was charged, then devolved upon petitioners "to satisfy the trial jury not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy" the jury from all the evidence, that petitioners were domiciled in Nevada at the time they obtained their divorces. The court further charged that "the recitation" of bona fide domicil in the Nevada decree was "prima facie evidence" sufficient to warrant a finding of domicil in Nevada but not compelling "such an inference". If the jury found as they were told, that petitioners had domicils in North Carolina and went to Nevada "simply and solely for the purpose of obtaining" divorces, intending to return to North Carolina on obtaining them, they never lost their North Carolina domicils nor acquired new domicils in Nevada. Domicil, the jury was instructed was that place where a person "has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home either permanently or for an indefinite or unlimited length of time".

The scales of justice must not be unfairly weighted by a State when full faith and credit is claimed for a sister-State judgment. But North Carolina has not so dealt with the Nevada decrees. She has not raised unfair barriers to their recognition. North Carolina did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicil in the Nevada decrees and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence.

State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. *Norris v. Alabama*, 294 U.S. 587. This record is barren of such attempted evasion. * * * In seeking a decree of divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system whereby one State can grant a divorce of validity in other States only if the applicant has a bona fide domicil in the State of the court purporting to dissolve a prior legal marriage. The petitioners therefore assumed the risk that this court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada. * * * A man's fate often depends, as for instance in the enforcement of the Sherman Law . . . on far greater risks that he will estimate "rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here, he may incur the penalty of death". * * * Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime. * * * We conclude that North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, that they did not acquire domicile in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations. And, as was said in connection with another aspect of the Full Faith and Credit Clause, our conclusion "is not a matter to arouse the susceptibilities of the states, all of which are equally concerned in the question and equally on both sides." *Fauntleroy v. Lum*, 210 U.S. 230, 238, 28 S.Ct. 641, 643.

As for the suggestion that *Williams v. North Carolina [I], supra*, foreclosed the Supreme Court of North Carolina from ordering a second trial upon the issues of domicil, it suffices to refer to our opinion in the earlier case.

AFFIRMED.

[MR. JUSTICE MURPHY, joined by CHIEF JUSTICE STONE and MR. JUSTICE JACKSON, concurred in the Court's opinion and added that Nevada had "unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it seems fit to all who meet its statutory requirements" and to "give to its divorce decrees absolute and binding finality within the confines of its border.]

[JUSTICES BLACK, DOUGLAS, and RUTLEDGE dissented, the latter stressing that the Court had not declared the divorces void in Nevada, so that the remarriage was legal in one state and illegal in another.]

Notes & Questions: The Jurisdictional Jumble

1. After *Williams I*, are Mr. Williams and Ms. Hendrix divorced or married to their former spouses? Is the certainty of your answer to that question worth the cost of a procedure where the stay-at-home spouse loses without being subject to the Nevada court's jurisdiction? Did MR. JUSTICE JACKSON have a point?

2. After *Williams II*, are Mr. Williams and Ms. Hendrix divorced or married to their former spouse? Does the answer to that question depend upon whether we are asking the question in Nevada or North

Carolina? Suppose Mr. Williams and Ms. Hendrix move to Oklahoma where Mr. Williams dies two years later? Is Ms. Williams entitled to share in his estate, or is Ms. Hendrix the surviving spouse? Why?

3. In *Williams II*, what does MR. JUSTICE FRANKFURTER require before a state can grant a divorce? If it is domicile, then what is domicile? How do you know when someone has changed their domicile? If FRANKFURTER is correct, how can a state ever grant a divorce to someone in the military? For a case which shows again how unilateral excursions to Nevada can have devastating effects, *see Fink v. Fink*, 346 N.E.2d 415 (Ill. Ct. App. 1976).

4. In Oklahoma, jurisdiction to grant a divorce is governed by 43 O.S. § 102 (2001). Is there any problem with the "military" provisions of that statute? For an Oklahoma case where the action was dismissed because neither of the parties was "domiciled" in the state, *see Burnworth v. Burnworth*, 1977 OK CIV APP 52, 572 P.2d 301.

SHERRER
v.
SHERRER
334 U.S. 343
(1948)

[The statement of facts is taken from the dissenting opinion of Mr. JUSTICE FRANKFURTER.]

The petitioner and respondent were married in New Jersey in 1930, and moved to Monterey, Massachusetts in 1932, where they lived together until 1944. They had two children. There was evidence that their relationship became less than harmonious toward the end of this period, that Mrs. Sherrer was troubled by a sinus infection and had been advised by a physician to go to Florida, and that she consulted a Massachusetts attorney about divorce before leaving. In March, 1944, she told Sherrer that she wished to take a trip to Florida for a month's rest and wanted to take the children along. She later testified that she had intended even then to go to Florida to stay, but had lied in order to obtain her husband's consent. His consent and the necessary funds were forthcoming. On April 3, 1944, Mrs. Sherrer and the children left for Florida, taking along a suitcase and a small bag, but leaving behind a trunk, some housedresses, and much of the children's clothing. They arrived the following day. She rented an apartment in St. Petersburg, which they occupied for about three weeks, then moved into a furnished cottage and later into another furnished cottage.

About a week after Mrs. Sherrer's departure, one Phelps, who had previously been at least an acquaintance of hers, knowing that she had gone to St. Petersburg, went there, met her soon after, and saw her frequently. On April 20, she wrote to her husband that she did not care to go back to him, and returned the money for train fare which he had sent. She sent her older daughter to school and took a job as a waitress. Phelps found employment in a lumber yard.

Florida law permits institution of proceedings for divorce after ninety days of bona fide residency in the State. On July 6, ninety-three days after her arrival in the State, Mrs. Sherrer consulted an attorney, had the necessary papers drawn up, and filed a libel for divorce the same day. Sherrer, receiving notice by mail, retained Florida counsel, who entered a general appearance and filed an answer, which denied Mrs. Sherrer's allegations as to residence. The case was set for hearing on November 14. On November 9, Sherrer arrived on the scene. He and his wife entered into a stipulation, subject to the approval of the court, providing for custody of the children in him during the school year and in her during summer months. At the hearing, Sherrer's attorney was present, and Sherrer remained in a side room. The attor-

ney did not cross-examine Mrs. Sherrer or offer evidence as to either jurisdiction or the merits, other than the stipulation regarding custody of the children. Sherrer was called into the courtroom and questioned as to his ability to look after the children during the school year. The hearing was closed, the decree being held up pending filing of a deposition by Mrs. Sherrer. On November 19, Sherrer returned to Massachusetts with the children. On November 29, the deposition was filed and the decree entered. On December 1, the petitioner married Phelps and the couple took up residence in the cottage which she and the children previously occupied.

There they remained until early in February, 1945, when they returned to Massachusetts, staying for a few days at Westfield and then returning to Monterey. Phelps's father lived in Westfield, and Phelps testified that his father's critical illness occasioned their return. A few days later, Phelps was served with papers in a $15,000 alienation of affections action brought by Sherrer. He testified that the pendency of this action was the reason for his remaining in Massachusetts even after his father's health had become less critical. The trial was set many months ahead, but Phelps and the petitioner did not return to Florida. Rent on the Florida cottage for a month following their departure was paid, but this may have been required, as it was paid on a monthly basis. Some personal belongings were left behind there. Later, the landlord was informed that Phelps and the petitioner would not continue renting the cottage, and still later they asked that their belongings be sent to Monterey.

Sherrer has meanwhile moved out of the house which he and the petitioner had formerly lived in, which they owned together. On June 28, 1945, a petition was filed by Sherrer in the Berkshire County Probate Court for a decree setting forth that his wife had deserted him and that he was living apart from her for justifiable cause. A statute provided that such a decree would empower a husband to convey realty free of dower rights. The Probate Court found that Mrs. Sherrer had not gone to Florida to make it her permanent home but with the intention of meeting Phelps, divorcing Sherrer, marrying Phelps, and returning to Massachusetts. These findings were upheld by the Supreme Judicial Court of the State.

CHIEF JUSTICE VINSON delivered the opinion of the Court.

We granted certiorari in this case . . . to consider the contention of petitioners that Massachusetts has failed to accord full faith and credit to decrees of divorce rendered by courts of sister States.

* * * *

At the outset, it should be observed that the proceedings in the Florida court prior to the entry of the decree of divorce were in no way inconsistent with the requirements of procedural due process. * * * It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. *Chicago Life Insurance Co. v. Cherry*, 244 U.S. 25; *Baldwin v. Iowa Traveling Men's Association*, 283 U.S. 522.

It should also be observed that there has been no suggestion that under the law of Florida, the decree of divorce in question is in any respect invalid or could successfully be subject to the type of collateral attack permitted by the Massachusetts court. The implicit assumption underlying the position taken by respondent and the Massachusetts court is that this case involves a decree of divorce valid and final in the State which rendered it; and we so assume.

That the jurisdiction of the Florida court to enter a valid decree of divorce was dependent upon petitioner's domicile in that State is not disputed. This requirement was recognized by the Florida court which rendered the divorce decree, and the principle has been given frequent application in the decisions of the State Supreme Court. But whether or not petitioner was domiciled in Florida at the time the divorce was granted was a matter to be resolved by judicial determination. Here, unlike the situation pre-

sented in *Williams v. North Carolina [II]*, 1945, 325 U.S. 226, 157 A.L.R. 1366, the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated. The question with which we are confronted, therefore, is whether such a finding made under the circumstances presented by this case may, consistently with the requirements of full faith and credit, be subjected to collateral attack in the courts of a sister State in a suit brought by the defendant in the original proceedings.

The question of what effect is to be given to an adjudication by a court that it possesses requisite jurisdiction in a case, where the judgment of that court is subsequently subjected to collateral attack on jurisdictional grounds, has been given frequent consideration by this Court over a period of many years. Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate. The reasons for this doctrine have frequently been stated. Thus in *Stoll v. Gottlieb*, 305 U.S. 165, it was said:

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

This Court has also held that the doctrine of *res judicata* must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack.

In *Davis v. Davis*, 305 U.S. 32, the courts of the District of Columbia had refused to give effect to a decree of absolute divorce rendered in Virginia, on the ground that the Virginia court had lacked jurisdiction despite the fact that the defendant had appeared in the Virginia proceedings and had fully litigated the issue of the plaintiff's domicile. This Court held that in failing to give recognition to the Virginia decree, the courts of the District had failed to accord the full faith and credit required by the Constitution. During the course of the opinion, this Court stated:

> As to petitioner's domicil for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation.
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> * * * *

Applying these principles to this case, we hold that the Massachusetts courts erred in permitting the Florida divorce decree to be subjected to attack on the ground that petitioner was not domiciled in Florida at the time the decree was entered. Respondent participated in the Florida proceedings by entering a general appearance filing pleadings placing in issue the very matters he sought subsequently to contest in the Massachusetts courts, personally appearing before the Florida court and giving testimony in the case, and by retaining attorneys who represented him throughout the entire proceedings. It had not been contended that respondent was given less that a full opportunity to contest the issue of petitioner's domicile or any other issue relevant to the litigation. If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such cir-

cumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered.

* * * *

It is urged further, however, that because we are dealing with litigation involving the dissolution of the marital relation, a different result is demanded from that which might properly be reached if this case were concerned with other types of litigation. It is pointed out that under the Constitution, the regulation and control of marital and family relationships are reserved to the States. It is urged and properly so, that the regulation of the incidents of the marital relation involves the exercise by the state of powers of the most vital importance. Finally, it is contended that a recognition of the importance to the States of such powers demands that the requirements of full faith and credit be viewed in such a light as to permit an attack upon a divorce decree granted by a court of a sister State under the circumstances of this case even where the attack is initiated in a suit brought by the defendant in the original proceedings.

But the recognition of the importance of a State's power to determine the incidents of basic social relationships into which its domiciliaries enter does not resolve the issues of this case. This is, rather, a case involving inconsistent assertions of power by courts of two States of the Federal Union and thus presents considerations which go beyond the interests of local policy, however vital. The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign States into a nation. If in its application local policy must at time be required to give way, such "is part of the price of our federal system". *Williams v. North Carolina [I]*, 1942, 317 U.S. 287, 302, 63 S.Ct. 207, 215.

* * * *

It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated. We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gauntlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected. That vital interests are involved in divorce litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end litigation. And where a decree of divorce is rendered by a competent court under circumstances of this case, the obligation of full faith and credit requires that such litigation should end in the courts of the State in which the judgment was rendered.

Reversed.

FRANKFURTER and MURPHY, JUSTICES (dissenting).

It would certainly have been easier if from the beginning if the Full Faith and Credit Clause had been construed to mean that the assumption of jurisdiction by the courts of a State would be conclusive, so that every other State would have to respect it. But such certainly has not been the law since 1873. *Thompson v. Whitman*, 18 Wall. 457. Nor was it the law when this Court last considered the divorce problem in 1945. *Williams v. North Carolina [II]*, 1945, 325 U.S. 226, 157 A.L.R. 1366. A State that is asked to enforce the action of another State may appropriately ascertain whether that other State had power to do what it purported to do. And if the enforcing State has an interest under our Constitution in regard to the

subject-matter that is vital and intimate, it should not be within the power of private parties to foreclose that interest by their private arrangement. * * *

If the marriage contract were no different from a contract to sell an automobile, the parties thereto might well be permitted to bargain away all interests involved, in or out of court. But the State has an interest in the family relations of its citizens vastly different from the interest it has in an ordinary commercial transaction. That interest cannot be bartered away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a State to which the parties are strangers. Therefore, the constitutional power of a State to determine the marriage status of two of its citizens should not be deemed foreclosed by a proceeding between the parties in another State, even though in other types of controversy considerations making it desirable to put an end to litigation might foreclose the parties themselves from reopening the dispute.[1] * * *

* * * Nowhere in the United States, not even in the States which grant divorces most freely, may a husband and wife rescind their marriage at will as they might a commercial contract. Even if one thought that such a view of the institution of marriage was socially desirable, it could scarcely be held that such a personal view was incorporated into the Constitution or into the law for the enforcement of the Full Faith and Credit Clause enacted by the First Congress. * * *

* * * *

* * * Massachusetts has a right to define the terms on which it will grant divorces, and to refuse to recognize divorces granted by other States and to parties who at the time are still Massachusetts domiciliaries. Has it not also the right to frustrate evasion of its policies by those of its permanent residents who leave the State to change their spouses rather than to change their homes, merely because they go through a lukewarm or feigned contest over jurisdiction?

The nub of the *Williams* decision was that the State of domicile has an independent interest in the marital status of its citizens that neither they nor any other State with which they may have a transitory connection may abrogate its will. Its interest is not less because both parties to the marital relationship instead of one sought to evade its laws. In the *Williams* case, it was not the interest of Mrs. Williams, or that of Mr. Hendrix, that North Carolina asserted. It was the interest of the people of North Carolina. The same is true here of the interest of Massachusetts.[9] While the State's interest may be expressed in criminal prosecutions, with itself formally a party as in the *Williams* case, the State also expresses its sovereign power when it speaks through its courts in a civil litigation between private parties. *Cf., Shelly v. Kramer*, 334 U.S. 1.

* * * *

Today's decision may stir hope of contributing toward greater certainty of status of those divorced. But when people choose to avail themselves of laws laxer than those of the state in which they permanently abide, and where, barring only the interlude necessary to get a divorce, they choose to continue to abide, doubts and conflicts are inevitable, so long as the divorce laws of the forty-eight states remain diverse, and so long as we respect the law that a judgment without jurisdictional foundation is not constitu-

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[1] Nor do I regard Davis v. Davis, 305 U.S. 32, as contrary authority. That case did not depend for its result on the fact that there had been an adjudication of the jurisdiction of the court rendering the divorce, inasmuch as this Court found that the State granting the divorce was in fact the domicile. * * *

[9] The result of the assertion of the State's interest may be a windfall to a party who has sought to bargain his or her rights away and now seeks to renege on the agreement. This fact, however, should scarcely be allowed to stand in the way of the assertion by the State of its paramount concern in the matter. Such an unexpected windfall to a party, who by ethical standards may be regarded as undeserving, is a frequent consequence of finding of lack of jurisdiction. *See* HOLMES, C.J., in Andrews v. Andrews, 176 Mass. 92, 96 N.E. 333.

tionally entitled to recognition everywhere. These are difficulties, as this Court has often reminded, inherent in our federal system, in which governmental power over domestic relations is not given to the central government. Uniformity regarding divorce is not within the power of this Court to achieve so long as the domestic relations of husband and wife . . . were matters reserved to the states. * * * And so long as the Congress has not exercised its powers under the Full Faith and Credit Clause to meet the special problems raised by divorce decrees, this Court cannot through its adjudications achieve the result sought to be accomplished by a long train of abortive efforts at legislative and constitutional reform. To attempt to shape policy so as to avoid disharmonies in our divorce laws was not a power entrusted to us, nor is the judiciary competent to exercise it. * * * We cannot draw on the available power for social invention afforded by the Constitution for dealing adequately with the problem, because the power belongs to the Congress and not to the Court. The only way in which this Court can achieve uniformity, in the absence of Congressional action or constitutional amendment, is by permitting the States with the laxest divorce laws to impose their policies upon all other States. We cannot as judges be ignorant of that which is common knowledge to all men. We cannot close our eyes to the fact that certain States made an industry of their divorce laws, and encourage inhabitants of other States to obtain "quickie" divorces which their home States would deny them. To permit such States to bind all others to their decrees would endow with constitutional sanctity a *Gresham's Law* of domestic relations.

Fortunately, today's decision does not go that far. But its practical result will be to offer new inducements for conduct by parties and counsel, which, in any other type of litigation, would be regarded as perjury, but which is not so regarded where divorce is involved because men and women indulge in it. But if the doctrine of *res judicata* as to jurisdictional facts in controversies involving exclusively private interests as infused into the Full Faith and Credit Clause is applied to divorce decrees so as to foreclose subsequent inquiry into jurisdiction, there is neither logic nor reason nor practical desirability in not taking the entire doctrine over. *Res judicata* forecloses relitigation if there has been an opportunity to litigate once, whether or not it has been availed of, or carried as far as possible. *Cromwell v. County of Sac*, 94 U.S. 351; *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371. And it applies to questions of jurisdiction of subject matter as well as to that of persons. *Stoll v. Gottlieb*, 305 U.S. 165; *Trienies v. Sunshine Mining Co.*, 308 U.S. 66. Why should it not apply where there has been a wasted opportunity to litigate, but should apply where the form of a contest has been gone through?[16] Or if more than form is required, how much of a contest must it be? Must the contest be bellicose or may it be pacific? Must it be fierce or may it be tepid? Must there be a cloud of witnesses to negative the testimony of the plaintiff, or may a single doubter be enough? Certainly if the considerations that establish res judicata as between private litigants in the ordinary situations apply to the validity of a divorce against the public policy of the State of domicile, it cannot make a rational difference that the question of domicile is contested with bad feeling rather than amicably adjusted. The essence of the matter is that through the device of a consent decree a policy of vital concern to States should not be allowed to be defiled with the sanction of this Court. If perchance the Court leaves open the right of a State to prove fraud in the ordinary sense—

[16] It is by no means clear that the issue before the Massachusetts courts in this case was or could have been litigated in Florida. All that the Florida court could have determined was whether the jurisdictional requisites of State law and of the due process clause of the Constitution, Amend. 14, were met. And if a direct attack on these decrees had been made in this Court, all that we could have decided would have been the due process point. A divorce may satisfy due process requirements, and be valid where rendered, and still lack the jurisdictional requisites for full faith and credit to be mandatory. *Compare* Williams v. North Carolina [I], 317 U.S. 287, 307, 217 (concurring opinion), with Williams v. North Carolina [II], 325 U.S. 226. This is true even though the Florida court characterizes the jurisdictional requisites under its law as domicile. Since we may be unwilling to apply as loose a test of "domicile" in determining whether extrastate enforcement is mandatory, as those States might properly choose to use in determining what divorces might be granted and effective within their own borders. Thus, at no point in the proceedings in Florida was there an opportunity to litigate whether Mrs. Sherrer had acquired Florida domicile sufficient to entitle her divorce to extraterritorial recognition.

namely, that a mock contest was won by prearrangement—the claim falls that today's decision will substantially restrict the area of uncertainty as to the validity of divorces. If the Court seeks to avoid this result by holding that a party to a feigned legal contest cannot question in his home state the good faith behind an adjudication of domicile in another State, such holding is bound to encourage fraud and collusion still further.

In considering whether the importance of the asserted uncertainties of marital status under existing law is sufficient to justify this result, it is important to think quantitatively, not dramatically. One would suppose that the diversity in the divorce laws of the forty-eight states, and the unwillingness of most of them to allow the few which make an industry out of granting divorce to impose their policies upon the others, undermines the structure of the family and renders insecure all marriages of previously divorced persons in the United States. The proportion of divorced people who have cause to worry is very small indeed. Those who were divorced at home have no problem. Those whose desire to be rid of a spouse coincided with an unrelated shift of domicile will hardly be suspect where, as is usually true, the State to which they moved did not afford easy divorces or required a long residence period. * * * The only persons at all insecure are that small minority who temporarily left their home States for a State—one of the few—offering quick and easy divorce, obtained one and departed. Is their security so important to the nation that we must safeguard it even at the price of depriving the great majority of States which do not offer bargain-counter divorces of the right to determine the laws of domestic relations applicable to their citizens?

Even to a believer in the desirability of easier divorces—an issue that is not our concern—this decision should bring little solace. It offers a way out only to that small portion of those unhappily married who are sufficiently wealthy to be able to afford a trip to Nevada or Florida, and a six-week or three-month stay there.[18]

* * * *

* * * But the crux of today's decision is that regardless of how overwhelming the evidence may have been that the asserted domicile in the State offering the bargain-counter divorces was a sham, the home State is not permitted to question the matter if the form of a controversy has been gone through. To such a proposition I cannot assent. Decisions of this Court that have not stood the test of time have been due not to want of foresight by the prescient Framers of the Constitution, but to misconceptions regarding its requirements. I cannot bring myself to believe that the Full Faith and Credit Clause gave to the few States which offer bargain-counter divorces constitutional power to control the social policy governing domestic relations of the many States which do not.

Notes & Questions: Res Judicata and the Multi-State Divorce

1. What is the basis of FRANKFURTER'S dissent? Is he saying that the issue was different in Massachusetts than it was in Florida? How would you frame the distinction between the two issues? If his views were adopted, would Nevada be "out of business?"

2. In *Sosna v. Iowa*, 419 U.S. 393 (1975), the court upheld the constitutionality of Iowa's one-year durational residency requirement for divorce. Discussing Iowa's interest in requiring a longer time period to file for divorce, JUSTICE REHNQUIST opined:

[18] The easier it is made for those who through affluence are able to exercise disproportionately large influence on legislation, to obtain migratory divorces, the less likely it is that the divorce laws of their home State will be liberalized, insofar as that is deemed desirable, so as to affect all. * * *

> A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there so short a time as appellant had when she commenced her action in the state court after having long resided elsewhere. Until such time as Iowa is convinced that appellant intends to remain in the State, it lacks the "nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." *Williams v. North Carolina [II]*. Perhaps even more importantly, Iowa's interests extend beyond its borders and include the recognition of its divorce decrees by other States under the Full Faith and Credit Clause of the Constitution, Art. IV § 1. For that purpose, this Court has often stated that "judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile." *Williams v. North Carolina, supra*.

Does this confirm JUSTICE FRANKFURTER'S view of multi-state divorce?

3. Does the *Sherrer* rationale apply to persons in privity to the parties to the divorce? Yes, said the Supreme Court in *Johnson v. Muelberger*, 340 U.S. 581 (1951), if the third party would be precluded from collaterally attacking the divorce in the state that rendered it. Could Massachusetts prosecute Ms. Sherrer for bigamy? How can the State be precluded by a decision in which it was not present?

4. If *res judicata* principles apply to jurisdictional facts and issues which could have been litigated in bilateral proceedings, do they also apply to other issues which could have been litigated? In other words, if Ms. Sherrer did not ask for alimony in Florida, would she be barred from requesting it in Massachusetts?

Notes: Foreign Country Divorces and Estoppel

1. In the United States, recognition of other nations' divorce decrees is not governed by the Full Faith and Credit Clause, but instead by notions of comity. Foreign migratory divorces fall into three classes. The first class is comprised of foreign mail-order divorces. They are not recognized in the United States because they have none of the traditional bases for divorce jurisdiction. However, in some states, the doctrine of estoppel may be available to prevent attacks upon such divorces.

The second class of cases are those obtained *ex parte*—solely on the basis of the plaintiff spouse's physical presence in the divorcing nation without domicile. Divorces of this kind are generally not recognized in the United States but may be immune from attack by the estoppel doctrine. *See e.g.*, *Mayer v. Mayer*, 311 S.E.2d 659 (N.C. Ct. App. 1984). The reason usually given for this result is that jurisdiction for divorce is dependent upon domicile of at least one of the spouses in the divorcing state. Without jurisdiction over the subject matter, the divorce will not be recognized. This is analogous to *Williams II*.

In the third class of cases, the plaintiff not only goes to Mexico or Haiti and makes a personal appearance in the action, but the defendant does also. Here, a situation analogous to the *Sherrer* case arises. In this situation some American courts will recognize the foreign divorce and some will not. *Compare Greschler v. Greschler*, 414 N.E.2d 694 (N.Y. 1980) *with Weber v. Weber*, 265 N.W.2d 436 (Neb. 1978).

2. *Mayer v. Mayer*, 311 S.E.2d 659 (N.C. Ct. App. 1984):

> The development of a quasi-estoppel doctrine is reflected in the RESTATEMENT (SECOND) CONFLICT OF LAWS § 74 (1971), which states that "a person may be precluded from attacking the validity of a foreign decree if, under the circumstances, it would be inequitable for him to do so." The scope of § 74 is defined in Comment b: "It is not limited to situations of true estoppel where one party induces another to rely to his damage upon certain representations. The rule may be applied whenever, under all the circumstances, it would be inequitable to permit a particular person

to challenge the validity of a divorce decree. Such inequity may exist when action has been taken in reliance on the divorce or expectations are based on it or when the attack on the divorce is inconsistent with the earlier conduct of the attacking party."

According to Professor Clark, when analyzing quasi-estoppel cases, "three factors seem to be involved: (1) the attack on the divorce is inconsistent with prior conduct of the attacking party; (2) the party upholding the divorce has relied upon it, or has formed expectations based on it; (3) these relations or expectations will be upset if the divorce is held invalid." Clark, *supra*, at 56. Significantly, all three factors do not have to be present for estoppel to apply. When all three factors are present, however, the application of the estoppel doctrine is especially compelling.

In addition to the position taken in the RESTATEMENT, there is considerable authority from other jurisdictions that a husband who encourages his wife to obtain a divorce from her prior spouse, is stopped from questioning its validity. Professor Clark, as though presciently writing for the case sub judice, sets forth the problem this way: "This problem most commonly arises when a man persuades a married woman to divorce her husband so that she will be free to marry him. He may even finance the divorce, provide a lawyer, or take an active part in other ways. When he does so, or even when he merely marries her with full knowledge of the circumstances surrounding the divorce, he is stopped to question the validity of the divorce. He has engaged in conduct calculated to induce reliance on the divorce, and indeed, he has relied on it himself. Therefore, the reasons of policy which prevent attack by a party to the divorce action are equally persuasive here." Clark, *supra*, at 66.

E. DIVORCE PROCEDURE

1. Venue

MANHART
v.
BURRIS
1980 OK 154, 618 P.2d 945

HARGRAVE, JUSTICE.

These two original proceedings each seek assumption of original jurisdiction and the issuance of a writ of prohibition against respondent judges. The proceedings are here consolidated for decision as they present but one common controversy for resolution, that being two actions, brought in separate district courts filed at substantially the same time, for a dissolution of the marriage of Melba Manhart and Peter Manhart.

Melba Manhart filed a petition for divorce in the District Court of Delaware County seeking also custody of the minor children, child support, temporary and permanent alimony and a division of the property acquired during the marriage. Summons was issued at the time of filing and served on Peter Manhart on July 21, (the day the action was filed.)

Seven minutes after the filing of the above petition, Peter Manhart filed his petition for divorce in the District Court of Cherokee County, requesting custody of the minor children and other relief. Summons was issued and Melba Manhart was served on August 13, 1980.

As stated in Melba Manhart's petition in this Court, she filed a special appearance, plea to the venue and motion to quash in the Cherokee County action. The position she takes in these instruments was that the prior filing (7 minutes) of her action in Delaware County required the District Court of Cherokee County to dismiss or abate the action pending there. A hearing was had on the question of venue and the Cherokee County Court determined venue was proper.

Similarly, the District Court of Delaware County found after a hearing the plaintiff wife's residence to be within its jurisdiction and thus venue was proper in Delaware County. This finding was made after evidence was taken on the issues and in the absence of Peter A. Manhart, defendant, after summons was properly served.

The situation thus presented is two courts of general jurisdiction have exercised authority over the same subject matter in two separate actions. This Court has previously held prohibition to be an appropriate remedy to prevent an intolerable conflict in the exercise of jurisdiction between courts of equal jurisdiction. *Turk v. Cornell*, 419 P.2d 555 (Okl. 1966); *State v. Johnson*, 418 P.2d 337 (Okl. 1966). Original jurisdiction is therefore assumed.

The resolution of a conflict in jurisdictional exercise in domestic relations matters such as that before this Court now has invariably been the first court acquiring jurisdiction will retain that jurisdiction to the exclusion of the other. *Turk v. Cornell, supra*. In *State v. Johnson, supra*, at 339, this Court recognized the firm nature of the Court's commitment to this precept by observing the holding that the first court to obtain jurisdiction retains it to the exclusion of the others has been adhered to "under an unbroken line of decisions." This tenet has the advantage of setting forth a rule which can be applied without appellate intervention for the most part, providing a speedy reference in divorce actions, where under 12 O.S. 1971 § 1272.1 it is frequently possible for venue to rest properly in two jurisdictions. Thus venue is properly set in Delaware County and a writ of prohibition is issued to the District Court of Cherokee County, abating further proceedings in Cherokee County Cause # J.D. 80-189. Accordingly the writ requested to halt proceedings in Delaware County Cause # J.D. 80-142 is refused.

There remains but a single issue to conclude the matters raised by the parties. Peter Manhart objects here to the lack of notice of the hearing to determine venue had on the 13th day of August, 1980. Service of process was had on him prior to the hearing originally set for September 4. That hearing date was modified by an amended order of which Peter Manhart had no notice. That objection is countered by the statement that notice of the hearing was given to his attorney, but conceitedly not to the party. 12 O.S. 1971 § 1113 provides for notice of motions to be made upon the opposing party or his attorney of record. During the relevant *interim* Peter Manhart had no attorney of record disclosed by the court file in the Delaware County action, and opposing counsel candidly admitted in the transcripts before the court that there was uncertainty as to who was to represent Peter Manhart in the Delaware County action. That lack of proper notice renders the *ex parte* August 13 hearing infirm and the venue issue litigated at that time should be subject of inquiry in the Delaware County trial court after notice.

ORIGINAL JURISDICTION ASSUMED.

WRIT OF PROHIBITION ISSUED, CAUSE # 55,687.

WRIT OF PROHIBITION DENIED, CAUSE # 55,712.

All Justices concur.

Notes & Questions: Problems of Venue

1. What is residency for venue purposes? Is it mere presence or is the concept to be interpreted as domicile? *See Bixby v. Bixby*, 1961 OK 100, 361 P.2d 1075, *Pingleton v. Pingleton*, 1974 OK CIV APP 62, 529 P.2d 550.

2. The priority-in-time problem of the principle case is also discussed in *State ex rel. Roacher v. Caldwell*, 1974 OK 59, 522 P.2d 1031 and *State ex rel. Robedeaux v. Johnson*, 1966 OK 157, 418 P.2d 337. To determine which action has precedence, should the court base its decision upon the filing of the petition or the service of summons? *See State ex rel. Medlin v. Ferris*, 1965 OK 123, 405 P.2d 156; *McAdams v. District Court*, 1946 OK 186, 169 P.2d 1011.

3. Suppose the husband and wife reside in different counties. If she files for separate maintenance before he files for divorce, which court should proceed? *See Autry v. District Court*, 1969 OK 159, 459 P.2d 865. Is divorce a mandatory counter-claim to an action for separate maintenance? If the separate maintenance claim is amended to ask for divorce, does the amendment relate back to the filing of the pleading so as to give priority to a first-filed separate maintenance action? *See Langley v. District Court*, 1993 OK 3, 846 P.2d 376.

4. 43 O.S. §103(B)-(D) provides for *forum non conveniens*. The court is to apply the factors of the Uniform Child Custody Jurisdiction and Enforcement Act, 43 O.S. § 551-207, to determine whether another county would be a more convenient forum.

5. Proceedings to modify a divorce decree must ordinarily be brought in the court which rendered the original decree. *See Jones v. Jones*, 1936 OK 423, 58 P.2d 330. In *Cooper v. Cooper*, 1980 OK 128, 616 P.2d 1154, the court allowed another district court to exercise concurrent "jurisdiction" in a modification procedure when the following conditions are met:

(1) One party has moved away from Oklahoma and is now domiciled in another state.

(2) The child is physically and lawfully present within the county in which the motion to modify is filed.

(3) The action is not brought for purposes of forum shopping.

(4) The nonresident parent is properly served with process, in order to confer personal jurisdiction upon the new court.

(5) The movant demonstrates that it would be a burden to return to the court that granted the original decree.

6. When the *Cooper* case requirements are met, venue will be proper in either the county the in-state party is a resident or where the divorce decree was rendered. The doctrine of *forum non conveniens* can be used to determine which county would be more appropriate. *See Griffy v. McAllister,* 59 O.B.J 1884 (Okla. 1988), as discussed in *Barnett v. Klein,* 1988 OK 132, 765 P.2d 777.

7. At the time of the motion to modify child support, the mother, the child and the father all were living in a different county than where the decree was entered. The father raised no objection to trying the case in that county until after the trial court granted the mother's motion and increased child support. The father then filed a post trial motion to vacate the order on the ground that the court did not have "subject matter jurisdiction." The trial court denied the motion and the father appealed. What result? *See Rodriguez v. Moinian*, 1990 OK CIV APP 55, 798 P.2d 232.

8. Contempt of court proceedings for failure to pay child support or for visitation violations may be brought in the county in which the support order was entered, the county in which the obligee resides, or the county in which the obligor resides or receives income. 21 O.S. § 566 (C). Contempt of court pro-

ceedings for violation of the property or alimony provisions of a divorce decree must be brought before the court whose order has been violated. *Dancy v. Owens*, 1927 OK 203, 258 P. 879.

9. An action to reduce unpaid alimony or child support to judgment, or to enforce the judgment, can be brought where the defendant may be found since the cause of action is one for debt enforcement. *Turk v. Coryell,* 1966 OK 194, 419 P.2d 555; *Reynolds v. Reynolds,* 1943 OK 133, 137 P.2d 914.

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2. Fraud

CHAPMAN
v.
CHAPMAN
1984 OK 89, 692 P.2d 1369

OPALA, JUSTICE.

The issue presented on certiorari is whether any one of the plaintiff's [wife's] three claims against the former husband's estate can withstand a challenge by demurrer to her amended petition. We answer in the affirmative and hold that the pleading in question states a claim only insofar as it seeks enforcement of that provision in the divorce decree which requires the decedent to maintain in force for her benefit a life insurance policy.

The wife and the decedent [husband] were divorced by an Oklahoma decree on October 25, 1965, after 32 years of marriage. The terms of a pre-divorce property settlement agreement were incorporated in that decree. So far as pertinent here, the agreement provided that the husband (a) would maintain an insurance policy on his life and designate his former wife as beneficiary of one-third of its proceeds and (b) would assign the balance of a note and mortgage to his wife in lieu of any interest she might have in any spousal assets not listed in the agreement. Both parties later remarried other persons.

According to the allegations, the decedent, without his wife's knowledge until after his death, (a) cashed in the life insurance policy, keeping the proceeds for himself, and (b) failed to assign to her the note and mortgage, retaining all the payments collected thereon.

The husband died on December 12, 1978, and the wife pressed a claim against his estate for the principal balance due upon the note, with interest thereon, and one-third of the value of the life insurance policy. When her claim was rejected, the wife sued, stating in essence three separate causes of action. She alleged that: (1) the husband intentionally and wilfully secreted spousal assets and failed to disclose them at the time of the divorce; (2) failed to maintain in force the life insurance policy designating her as beneficiary of one-third of its value and (3) failed to endorse the note and assign the mortgage. The primary relief sought was the vacation of the property settlement provisions of the decree. In the alternative, she sought a judgment for the amount of the principal balance due her upon the note with interest thereon and one-third of the value of the insurance policy.

The trial court sustained the estate's demurrer to the wife's amended petition and the Court of Appeals affirmed. We vacate the Court of Appeals opinion, reverse in part the trial court's judgment and remand the cause with directions.

While the principal relief the wife sought sounded in derogation of the divorce decree, her alternative plea prayed for enforcement of some of its terms. Her request for the latter is affected by 12 O.S. 1981

§§ 731 *et seq*. The judgment becomes dormant if no execution issues thereon within five years of its rendition. 12 O.S. 1981 § 735. When, as here, judgment is sought to be vacated for fraud, the claim is governed by 12 O.S. § 1031(4). It must be brought within two years after the judgment. 12 O.S. 1981 § 1038. A vacation claim instituted more than two years after judgment—by an independent suit in equity rather than in the original case—must be predicated upon extrinsic fraud practiced in obtaining the judgment.[2] The equity suit may be maintained only if it is commenced within two years from the date fraud was discovered. 12 O.S. 1981 § 95(3).

I

THE WIFE'S CLAIM IN DEROGATION OF THE DIVORCE DECREE

Her amended petition alleged: (a) the husband handled all of the spousal property and assets; (b) in drafting and negotiating a property settlement he occupied a position of trust; (c) he owed a fiduciary duty to disclose all of their jointly acquired assets; and (d) after the husband's death the wife discovered that the deceased had not disclosed all of their conjugal assets but instead knowingly, wilfully and wantonly concealed from her some of their spousal property. Invoking the trial court's equitable powers, the wife sought vacation of those provisions in the decree by which the property settlement had been judicially approved.

The claim, brought some 15 years after the divorce had been granted, was commenced long after the expiration of the two-year time limit in 12 O.S.1981 § 1038. The wife can prevail in her equity suit only if her amended petition states a timely cause of action for extrinsic fraud. To withstand a demurrer, her pleading must allege with particularity the material facts constituting the husband's fraudulent conduct.[5]

Extrinsic fraud differs from intrinsic fraud.[6] The former consists of (a) any fraudulent conduct of a successful party (b) which was practiced outside of an actual adversary trial or process and (c) which was practiced directly and affirmatively on the defeated party, (d) whereby he was prevented from presenting fully and fairly his side of the case. In essence, acts which result in the court being imposed on and by which interested parties are prevented from having their interests protected constitute extrinsic fraud that vitiates a judgment. The fraud alleged by the wife consists of the husband's concealment of spousal property in the course of pre-divorce settlement negotiations which operated to induce her inaction or to make her forego further inquiry during the ensuing court proceedings.

The record is crystal-clear that the wife agreed to accept "as full share of any unknown or overlooked property, real or personal, in full settlement and payment for any interest in such property or assets" a promissory note, together with real estate mortgage securing. The amended petition is devoid of any allegation as to specific acts of fraud, practiced by the husband outside the adversary process in the divorce suit, from which we might infer that the wife had been either deprived of an opportunity to ascertain the extent and value of spousal assets or prevented from making any inquiry into their nature. The record

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[2] Phillips v. Ball, Okl., 358 P.2d 193, 197 (1961); Caraway v. Overholser, 182 Okl. 357, 77 P.2d 688, 691 (1938).

[5] Ward v. Thompson, 111 Okl. 52, 237 P. 569, 571 (1925).

[6] An independent suit in equity, by which a collateral attack is launched on a judgment will not lie for relief from intrinsic fraud but only from extrinsic fraud. Relief from the former must be by direct attack in the same case in which fraud was committed. Intrinsic fraud is ". . . any fraudulent conduct of the successful party which was practiced during the course of an actual adversary trial of the issues joined and which had no effect directly and affirmatively to mislead the defeated party to his injury after he announced that he was ready to proceed with the trial. If during the trial the successful party urges forged instruments or perjured testimony or fails to introduce witnesses of whom he has knowledge and whose testimony would help his adversary and impair his own case, he is guilty of fraud; but it is intrinsic fraud, for relief from which application must be made to the court having jurisdiction of the issues joined and tried." Calkin v. Wolcott, 182 Okl. 278, 77 P.2d 96, 100 (1938); *Phillips v. Ball*, *supra* note 2 at 197.

before us is clear that throughout the divorce proceedings the wife had been assisted by her own counsel. Her failure to discover all the spousal assets is nowhere ascribed to the husband's extrinsic fraud. Rather, it is sought to be attributed to her own inaction in reliance on a pre-existing fiduciary relationship with him. Pleading a fiduciary status that subsisted between married parties before the divorce will not relieve the wife of her duty to spell out the specific acts on which extrinsic fraud is to be rested. Parties locked in forensic combat, with each represented by separate counsel are regarded in law as standing in an adversarial posture. Viewing the wife's pleading in a light most favorable to her, as we are bound to do, we are constrained to conclude that the husband's alleged concealment of spousal assets does not rise above intrinsic fraud—one perpetrated within the course of adversary proceedings. The character of his alleged conduct may not be distinguished from either perjured testimony or any other act of fraud committed by a suitor in the course of a forensic contest. Since his fraud, if any, was of an intrinsic nature, § 1038 time limit operated to bar the wife's equity suit after the lapse of two years from the rendition of the divorce decree. Inasmuch as the wife failed to allege any acts of extrinsic fraud, her claim for vacation was correctly held to have been barred.

The wife also contends on appeal that a fiduciary relationship existed between her and her husband when they entered into the pre-divorce agreement and that the statute of limitations does not start to run in an action for fraud until there has been a clear repudiation of the trust. We can find no merit in this argument. First, the essential elements of extrinsic fraud were not pleaded. Secondly, the decree operates effectively to extinguish all pre-existing rights of the parties arising out of their former marital status. Once the pre-decree property settlement agreement was incorporated in the decree with judicial approval, the rights which the parties had thereunder became merged in that decree. Unless there is a valid post-divorce agreement, assets acquired during coverture which are omitted from the court's division of spousal property in the decree are owned by the party in whose name title was vested before the divorce. Except in cases of fraud, in which vacation relief is timely invoked, the divorce constitutes an effective bar to the claims by either party to the property of the other.

Because the wife failed to plead the essential elements of actionable extrinsic fraud, the judgment on the demurrer to her claim is free from legal error. * * *

* * * *

[The court also held the wife was entitled to one-third of the proceeds of the life insurance policy but her claim on the note was time barred.]

BARNES, C.J., SIMMS, V.C.J., and HODGES, LAVENDER, HARGRAVE and KAUGER, JJ., concur.

DOOLIN and WILSON, JJ., disqualified.

Notes & Questions: Extrinsic Fraud

1. It is now generally agreed that the fiduciary relationship which exists between husband and wife during marriage ceases when the divorce petition is filed and the parties hire counsel. *See Gabbert v. Johnson*, 1981 OK CIV APP 42, 632 P.2d 443.

2. In *King v. King*, 1985 OK CIV APP 3, 695 P.2d 20, the facts as outlined by the court are as follows:

> The husband files a verified petition asking the court to modify a divorce decree one year after it was rendered, under the authority of 12 O.S. 1981 §§ 1031(4) and 1033. More specifically, the man alleged that the decree ordered the home of the parties sold and the equity realized split equally between the parties. The man said he was not present when the decree was rendered and,

though he had signed a waiver of summons and notice of hearing, he did so at the request of the woman, who agreed to seek only $6,000 for her share of the equity of the house, payable when the home was sold. He was further alleged to have been induced to sign the waiver by the promise of the woman's lawyer to send him a copy of the proposed decree for his approval before having a judgment entered.

The woman's answer does not contain a general denial but does allege that the decree correctly set out the parties pre-decree agreement. The woman stated that before the hearing she tried to contact the man but could not find him either at work or at home. She further said that her counsel sent a copy of the decree to the man with a request to contact him if it was not in accordance with the parties agreement, and that defendant never made any complaint and is therefore guilty of laches.

The trial court found that the defendant had made known to the woman his desire to be present at the hearing and his whereabouts were known to her and that the parties pre-decree agreement was that the woman was to receive $6,000 as her share of the equity of the house, payable at no certain time. The court then ordered the property division of the decree modified to reflect what he found to be the agreement and further ordered the house sold to satisfy the $6,000 payment or, in the alternative, the man to deliver a certified check for $6,000 to the woman within 90 days.

Should the trial court be affirmed on appeal? Was the fraud intrinsic or extrinsic? For a case involving extrinsic fraud in a divorce, *see Pitman v. Pitman*, 1985 OK CIV APP 16, 699 P.2d 1108. For cases on intrinsic fraud *see Key v. Key*, 1963 OK 288, 388 P.2d 505 (Okla. 1963); *Bradshaw v. Bradshaw*, 1977 OK CIV APP 51, 578 P.2d 762.

3. Divorce decrees, like any other judgment, can be vacated for lack of service. For an egregious case, *see Herrington v. Dykes*, 1983 OK CIV APP 7, 661 P.2d 77.

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3. Temporary Orders

Notes

1. Upon the service of the divorce petition, an automatic injunction will go into effect restraining the parties from doing a variety of things that might change the status quo. 43 O.S. § 110(A)(1)(a)(b) (2001). The provisions of the automatic temporary injunction stay in effect until such time as the court modifies them in a temporary order. In order to effect a modification, the temporary order should specifically indicate that it is modifying the automatic temporary injunction. *DeLeon v. Avery*, 2007 OK CIV APP 91, 170 P.3d 1043.

2. In 2011, the legislature amended the temporary injunction to require mandatory disclosure of certain financial material within 30 days of whichever comes earlier: the date of service of the summons or the filing of the initial pleading in the case. The following material must be provided to the opposite party:

(a) all federal and state income tax returns for the last two years, including those for any business that one party holds an interest in. If the return has not been completed, all documents necessary to complete a return must be disclosed.

(b) two months of the most recent pay stubs.

(c) the past six months bank statements, including those accounts held for the benefit of one of the parties and accounts held by one of the parties for the benefit of the children.

(d) documentation regarding the cost and availability of health insurance for the party and the children.

(e) documentation regarding the nature and cost of child care expenses.

(f) documentation concerning the nature of all debts, whether individual or joint.

If a particular document is unavailable, the party must sign an affidavit indicating why it is unavailable and what efforts have been made to obtain it. The duty to disclose the material is a continuing one and if new material becomes available it must be disclosed. Nothing in the statute prohibits a party from conducting further discovery under the Oklahoma Rules of Civil Procedure.

3. The parties will also request and the court will enter temporary orders after the filing of the petition. A temporary order may cover the subjects of possession of marital property, spousal maintenance, child custody, attorney fees, child support, and payment of debts. 43 O.S. § 110 (2001).

4. 43 O.S. § 110(B)(2) allows the court to issue a temporary restraining order to prevent irreparable harm to a party or a child. A temporary restraining order must be set for a hearing on a permanent order within ten days.

5. Temporary orders that are made in the course of a proceeding are not binding on the trial court when rendering a final decree. *Reynolds v. Reynolds,* 1943 OK 133, 137 P.2d 914. Obligations created by these orders merge into the final judgment. If the decree does not preserve the amounts ordered *pendente lite*, then those amounts not paid are generally thought of as extinguished with the exception of child support. The trial judge retains continuing authority to modify, even retroactively, the amounts of a temporary order, except that child support can never be modified retroactively. *See Johnson v. Johnson,* 1983 OK 117, 674 P.2d 539. Temporary orders in divorce cases cannot be appealed. *Kantor v. Kantor*, 1994 OK 132, 886 P.2d 480. Title 43 O.S. § 112.4 provides that if domestic abuse, stalking or harassment is proved by a preponderance of the evidence at the temporary order, the victim is entitled to reasonable attorney fees. It is unclear whether the statute provides fees only for the temporary order hearing or whether it is intended to provide attorney fees in order for the victim to pay an attorney for the divorce.

6. The trial court also has authority to provide for temporary orders pending the case's appeal. *See Jones v. Jones,* 1980 OK 85, 612 P.2d 266.

F. RELATIONSHIP TO OTHER PROCEEDINGS

1. Probate

ALEXANDER
v.
ALEXANDER
2015 OK 52, 357 P.3d 481

WINCHESTER, J.

Both parties in this matter sought dissolution of their marriage on grounds of incompatibility. The wife informed the trial court that she was terminally ill and wanted to finalize the divorce before her death as she wished to leave her part of the estate to her daughters. The judge granted the parties the divorce, and filed a Court Minute memorializing his ruling. The judge signed and dated the Court Minute and the attorneys who represented the parties also signed. The judge included an order in the Court Minute for mediation to resolve property issues and further ordered that a journal entry be presented to the court within five days. However, the wife died before reaching a property settlement with the husband. No journal entry was filed.

The husband filed a motion to dismiss on the grounds that after the wife died, the trial court lacked jurisdiction to proceed with the dissolution of marriage action. The wife's successors filed a response objecting to dismissal of the action. The trial court granted the husband's motion to dismiss. On appeal, the Court of Civil Appeals affirmed the dismissal. This Court granted certiorari. The issue is whether a divorce, where both parties sought dissolution of their marriage, is effective at the time pronounced by the trial court even though property issues had not been settled and no journal entry had been filed. We hold that it is effective as explained in this opinion.

I. FACTS

Rhonda L. Alexander and Joseph Dean Alexander ("Appellee") married on May 5, 1973. After nearly forty years of marriage, on October 23, 2012, Ms. Alexander filed a Petition for Dissolution of Marriage on the ground of incompatibility. Appellee filed his Answer to the Petition on March 28, 2013, agreeing that the two were incompatible and that they should be granted a divorce.

On July 23, 2013, before the marital property had been divided, Ms. Alexander filed a Motion for a Grant of Divorce, wherein she explained she had been diagnosed with stage-four lung cancer and had only a short time to live. Appellee objected to this motion, arguing that statutory law requires the dissolution of marriage take place at the same time as the division of marital assets—thus the court should wait to grant the divorce until the property had been divided.

In Ms. Alexander's reply, she stated that she and Appellee had accumulated millions of dollars in properties during the marriage, most of which were titled under various corporations in Appellee's name. Additionally, she alleged that Appellee had withdrawn over $200,000 from an account titled solely in her name, and that Appellee was trying to force her into a quick settlement by delaying the divorce process so that she "may have to face the possibility of passing away before she can have her day in court."

At the hearing over the Motion for a Grant of Divorce on August 20, 2013, the judge pronounced in court that the two were "divorced from the other henceforth." After granting the dissolution of marriage, the court memorialized the decision in a handwritten Court Minute, which the judge and both parties' attorneys signed, and filed it with the court clerk. The court ordered the parties to mediation within five

days to resolve their property issues, and to present a journal entry to the court within ten days. Over the following weeks, neither party presented a journal entry to the court.

On October 10, 2013, Ms. Alexander passed away. Eight days later Appellee filed a motion to dismiss the action, claiming that the death of a party to a divorce proceeding abates the cause of action and deprives the trial court of jurisdiction. Ms. Alexander's successors, Tiffany McClung and Lacey Hart (collectively, "Appellants"), filed a Response. After various technical delays, the trial court granted Appellee's Motion to Dismiss and the Court of Civil Appeals affirmed. The matter now comes before this Court for review.

II. STANDARD OF REVIEW

When evaluating a motion to dismiss, this Court examines only the controlling law, taking as true all factual allegations together with all reasonable inferences that can be drawn from them. *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157. Thus the standard of review before this Court is *de novo*. *Simonson v. Schaefer*, 2013 OK 25, ¶ 3, 301 P.3d 413, 414. *See also Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶ 6, 212 P.3d 1158, 1163 (stating that the party moving for dismissal bears the burden of proof). Because courts may only hear cases over which they have jurisdiction, the general rule that motions to dismiss are viewed with disfavor does not apply to cases in which the court finds it lacks jurisdiction. *H & En, Inc. v. Okla. Dept. of Labor*, 2006 OK CIV APP 70, ¶ 8, 136 P.3d 1070, 1071.

III. DISCUSSION

Was the divorce of the parties final at the time it was pronounced by the trial court, or must a journal entry be filed before the divorce becomes final?

A. The August 20th Decision was Enforceable Whether or Not it was an Appealable Judgment.

Generally speaking, a judgment[1] is "the final determination of the rights of the parties in an action." 12 O.S. 2011, § 681; OKLA. SUP. CT. R. 1.20(a). In order to constitute a judgment, a document memorializing such a "final determination" must at minimum contain four elements: (1) A caption setting forth the name of the court, the names and designation of the parties, the file number of the case, and the title of the instrument; (2) a statement of the disposition of the action, proceeding, or motion; (3) the signature and title of the court; and (4) any other matter approved by the court. 12 O.S. 2011, § 696.3(A). Additionally, the document must be filed with, and endorsed and dated by, the clerk of the court.

This Court held in *Corbit v. Williams*, 1995 OK 53, ¶ 8, 897 P.2d 1129, 1131, that some documents satisfying these requirements—specifically, documents titled as court minutes—do not constitute judgments. The document at issue in *Corbit* was a form titled "Court Minute," which, as in the present case, contained all the elements required by § 696.3(A). *Corbit*, 1995 OK 53, ¶ 7, 897 P.2d at 1131. But even though the document satisfied those statutory requirements, the *Corbit* court held it was not a valid judgment. The Court explained that the legislature, through 12 O.S. 2011, § 696.2(D),[2] created a bright-line rule that a minute entry can never constitute a judgment, decree, or appealable order. *Corbit*, 1995 OK 53, ¶ 8-9, 897 P.2d at 1131. Any document titled "Court Minute" (or some similar title), therefore, cannot be a judgment even if it satisfies the requirements of § 696.3(A). *Id*. at ¶ 9. The advantage of this rule is

[1] The Supreme Court Rules use "judgment" and "final order" interchangeably. OKLA. SUP. CT. R. 1.20 ("The term 'judgment' is synonymous with a final order for the purpose of these rules.").

[2] The provisions of 12 O.S. 2011, § 696.2(D) state in pertinent part:

> D. The following shall not constitute a judgment, decree or appealable order: A minute entry; verdict; informal statement of the proceedings and relief awarded, including, but not limited to, a letter to a party or parties indicating the ruling or instructions for preparing the judgment, decree or appealable order.

that parties to a lawsuit do not have to speculate whether a minute order entered by the trial court was a final order from which point the time for appeal began to run.

Although a judgment is generally not "enforceable in whole or in part unless or until it is signed by the court and filed," Oklahoma law carves out an exception for divorce proceedings, where the adjudication of any issue shall be "enforceable when pronounced by the court." 12 O.S. 2011, § 696.2(E). This Court has long held that "entry of the written memorial upon the court's journal is not essential to the validity of the judgment, and failure to properly file a journal entry of judgment does not render judgment void." *Pellow v. Pellow*, 1985 OK 88, ¶ 10, 714 P.2d 593, 595. Because the district court in this case pronounced the dissolution of marriage in court on August 20, 2013, the divorce was enforceable at that time—ending the parties' marriage immediately.

An otherwise enforceable grant of divorce can be stayed, however, if a party appeals the decision within the statutory period. 43 O.S. 2011, § 127. Appellee claims that he initiated an appeal from the trial court's decision before his wife's death, and as a result the judgment was not final before she died. It is unclear precisely what action Appellee believes constituted an appeal of the trial court's decision. An appeal from a district court may only be commenced by: (1) filing a petition in error with the Clerk of this Court within the time prescribed in Rule 1.21; and (2) remitting the cost deposit provided by statute. OKLA. SUP. CT. R. 1.23. There is no evidence before this Court that Appellee filed an appeal of any kind, either in regard to the divorce itself or to the order to divide the property. The only action Appellee took to oppose the trial court's eventual decision was his August 13, 2013, Objection to Motion for a Grant of Divorce. But the trial court granted the Motion for Divorce on August 20th over Appellee's objection, and he did not renew his objection after the court pronounced its decision. Because Appellee never filed a petition in error with this Court, he did not initiate an appeal that would stay enforcement of the trial court's decision.

We reiterate, Appellee did not oppose the dissolution of the marriage; what he opposed in essence was the bifurcation of the divorce between the dissolution of the marriage and the property settlement. The trial court and the Court of Civil Appeals relied upon *Whitmire v. Whitmire*, 2003 OK CIV APP 87, 78 P.3d 556, for their respective conclusions in deciding the case that is now before this Court. In *Whitmire* the facts are similar to those in the present matter. The husband died after the court announced the parties were divorced, but before a journal entry was filed. The wife, therefore, argued that the trial court lost jurisdiction over the matter. The Court of Civil Appeals held that because the husband died before the entry of the final decree of divorce, the trial court was without jurisdiction to later enter a final decree divorcing the parties. *Whitmire*, 2003 OK CIV APP 87, ¶ 1, 78 P.3d at 557. The dissent concluded that the *Whitmire* case was indistinguishable from *Chastain v. Posey*, 1983 OK 46, 665 P.2d 1179, where the challenge to the entitlement to a divorce was not raised until after the trial court had made an effective pronouncement of the divorce and dissolved the marriage. The dissent cited 12 O.S.2001, § 696.2(E)[3] that " 'the adjudication of any issue' in a divorce case is 'enforceable when pronounced by the court.' " We agree and accordingly, we overrule *Whitmire*.

B. Oklahoma Law Allows Issues to be Bifurcated and Presented in Separate Proceedings in Dissolution of Marriage Actions.

As a procedural note, it is of no consequence that at the time of Ms. Alexander's death, the parties had not yet divided their marital property as directed by the August 20th Court Minute. It is common for district courts to grant a divorce at one point in time but then reserve jurisdiction to address other pending issues—such as division of property or determinations as to custody or child support—at a later date. *See e.g.*, *Barnett v. Barnett*, 1996 OK 60, ¶ 2, 917 P.2d 473, 475; *Hibbard v. Hibbard*, 1952 OK 273, ¶ 4, 247

[3] That provision now codified at 12 O.S.2011, § 696.2(E) remains the same.

P.2d 504, 505 ("This court has repeatedly held that an action for divorce and for division of jointly acquired property presents two causes of action maintainable separately . . . ."). ¶16 The last sentence of 12 O.S.2011, § 696.2(E) provides,

> "The time for appeal shall not begin to run until a written judgment, decree or appealable order, prepared in conformance with Section 696.3 of this title, is filed with the court clerk, regardless of whether the judgment, decree, or appealable order is effective when pronounced or when it is filed."

The dissolution of the marriage was effective when pronounced by the trial court, but would not have been appealable unless it had been properly filed.

The implications of this for proceedings in which a spouse dies before a journal entry is filed, is that a trial court may pronounce that the marriage is dissolved, effective immediately, but that decision is not appealable until it is filed. The decision has been made, but not memorialized. In the case at hand, the court sought to grant the divorce as soon as possible because Ms. Alexander had only a short time left to live. The fact that the parties did not divide their marital property before Ms. Alexander's death does not affect the finality of the August 20th grant of divorce.

Conclusion

The Oklahoma Pleading Code[4] states that our rules of procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." 12 O.S. 2011, § 2001. This provision echoes our state constitutional requirement that "right and justice shall be administered without sale, denial, delay, or prejudice." OKLA. CONST. art 2, § 6 (emphasis added). A party should not be denied enforcement of a valid judgment simply because she passes from this life. In this case, therefore, not to enforce the trial court's decision to grant the dissolution of marriage would be an injustice. We hold that the district court erred in dismissing this case for lack of jurisdiction and remand for the trial court to divide the property and take such further actions as are consistent with the views expressed in this opinion.

THE DECISION OF THE COURT OF CIVIL APPEALS IS VACATED, AND THE DECISION OF THE TRIAL COURT IS REVERSED AND REMANDED.

ALL JUSTICES CONCUR

Note: Death and Divorce

All other judgments must be reduced to writing and filed with the court clerk to be effective. However, family law judgments are effective when pronounced by the trial court. *See* 12 O.S. § 692.2(E) (2001). However, time limitations with regard to motions for new trial as well as for appeals will run from the date the decree is filed with the court clerk.

It is well settled that if one party dies pending an appeal from a divorce action, the parties are divorced. The only exception to that rule is if one party is appealing the granting of the divorce. *See* 43 O.S. § 127 (2001); *Balfour v. Page*, 1972 OK 1, 492 P.2d 1088. The deceased spouse's estate may continue the appeal only if property rights are involved. *See Pellow v. Pellow*, 1985 OK 88, 714 P.2d 593; *Siler v. Siler*, 1960 OK 19, 350 P.2d 510. Provisions of the divorce decree regarding alimony, child support, custody, and visitation lapse with the death of one of the parties.

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[4] Although Title 12 of the Oklahoma Statutes is designated generally as "Civil Procedure," the beginning of Chapter 39 clarifies that "[t]he provisions of Sections 1 through 2027 of this title [Title 12] may be cited as the 'Oklahoma Pleading Code.' " 12 O.S. 2011, § 2001.

If death occurs before the final judgment divorcing the parties is rendered, the survivor is married for purposes of electing against the estate. *See Matter of Will of Clem*, 1984 OK 79, 692 P.2d 552 (wife's death before divorce is rendered allows husband to elect against wife's will; provision in husband's divorce petition renouncing claims to wife's separate property does not estop husband from pursuing the election); *DeLeon v. Avery*, 2007 OK CIV APP 91, 170 P.3d 1043. This may create problems when the trial court takes the entire case under advisement for a considerable time. For a horrendous example of what can occur when a case is neglected by both court and counsel, *see Duck v. Duck*, 55 O.B.J 1729 (Okla. Ct. Civ. App. 1984), *cert. den*., opinion withdrawn, 56 O.B.J 480 (Okla. 1985).

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2. Tort

STUART
v.
STUART
410 N.W.2d 632 (Wis. Ct. App. 1987),
vacated in part, 421 N.W.2d 505 (Wis. 1988))

MYSE, JUDGE.

Joy Stuart appeals a judgment dismissing her tort action against her former husband, Ronald Stuart, and awarding him attorney's fees and costs pursuant to the frivolous action statute, sec. 814.025, Stats. She argues that the trial court erroneously concluded that her tort action was barred under the doctrines of *res judicata*, equitable estoppel, and waiver. She also argues that the trial court erroneously concluded that her action was frivolous. We agree and reverse the judgment.

The facts are undisputed. On November 14, 1984, Ronald and Joy Stuart were divorced. The divorce and the division of the marital estate were based upon a stipulation that there had been a full disclosure of all assets, debts, and other ramifications of the marriage. The parties agreed to waive maintenance.

During the divorce proceedings, no mention was made of Joy Stuart's potential claims against her husband for assault, battery, and intentional infliction of mental distress arising from alleged incidents that occurred during the marriage. Less than three months following the judgment of divorce, she filed a tort action against Ronald Stuart based upon these claims. In response, he moved for summary judgment arguing that the tort action was barred under the doctrines of res judicata, equitable estoppel, and waiver. The trial court granted summary judgment and dismissed the tort action. The court concluded that in the divorce proceedings, Joy Stuart had been aware of those same allegations, circumstances, and damages upon which she based her tort action and that, therefore, the action was barred under the doctrines of res judicata, equitable estoppel, and waiver. The court also concluded that it was "absolutely unconscionable" that she would negotiate all aspects of a stipulated divorce and advise the court that it was based upon full disclosure when she knew a civil lawsuit would be filed immediately after the divorce was granted. The court considered such a procedure to be an abuse of the judicial system.

In Ronald Stuart's answer to the tort complaint, he asserted that the action was brought in bad faith and solely for the purposes of harassment and malicious injury. The trial court agreed, concluded that the action was frivolous, and awarded him over $10,000 for his legal expenses pursuant to § 814.025.

The decision in this case turns on whether the trial court properly granted summary judgment and dismissed Joy Stuart's tort action based upon the doctrines of *res judicata*, equitable estoppel, and waiver. The trial court concluded that based upon the prior divorce proceedings, Joy Stuart's tort action was barred pursuant to the doctrine of *res judicata*. The court ostensibly reasoned that there was an identity of causes of action or claims in the two actions because in the divorce proceedings Joy Stuart was aware of her tort claim and could have raised that claim.

Under the doctrine of *res judicata*, a final judgment on the merits in a prior action is conclusive and bars all subsequent actions between the same parties, or their privies as to all matters that were or that might have been litigated in the prior action. For *res judicata* to act as a bar to a subsequent action, there must be not only an identity of the parties but also an identity of the causes of action or claims in the two actions.

In the Stuarts' divorce proceedings, the issues litigated were the termination of the marriage and the equitable division of the marital estate. Under Wisconsin's no-fault divorce code, these determinations are made by the court without regard to the fault of the parties. *Dixon v. Dixon*, 107 Wis. 2d 492, 500 01, 319 N.W.2d 846, 850 51 (1982); ch. 767, Stats. Consequently, in making the financial allocation between the parties, the court could not consider one spouse's tortious conduct or, based upon that conduct, award the injured spouse punitive damages or compensatory damages for past pain, suffering, and emotional distress. *See Dixon*, 107 Wis.2d at 500-01, 319 N.W.2d at 850-51.

In contrast, tort actions based on assault, battery, or intentional infliction of emotional distress rest on an allegation of wrongful conduct. *See* WIS. J I-CIVIL 2004 (1972), 2005 (1977), 2725 (1981). The parties to such actions are entitled to have these matters heard by a jury. WIS. CONST. art. I, § 5; § 805.01, Stats. In such actions, the jury may determine fault and award punitive damages, as well as compensatory damages for past pain, suffering, and emotional distress. *See* WIS J I-CIVIL 1707 (1986), 1708 (1983), 1750 1755 (1983).

In light of the conflicting proofs between a no fault divorce and an intentional tort action, the claims that were, or might have been, determined in the prior divorce proceedings are distinct from those that are raised in Joy Stuart's tort action. Accordingly, in the two actions, there is not an identity of causes of action or claims. Additionally, requiring joinder does not fulfill the objectives of the *res judicata* doctrine. *Res judicata* seeks judicial economy and the conservation of those resources parties would expend in repeated and needless litigation of issues that were, or that might have been, resolved in a single prior action. In a divorce action, the court alone makes all necessary determinations such as property division and maintenance without regard to fault. Sections 767.255 and 767.12(2), Stats. In a tort action, however, a jury may determine issues such as alleged wrongful conduct and fault and award damages based upon those determinations. Accordingly, divorce and tort actions do not easily fit within the framework of a single trial and the objectives of *res judicata* cannot be attained. *See Windauer v. O'Connor*, 107 Ariz. 267, 485 P.2d 1157, 1158 (1971).

In applying the doctrine of *res judicata*, the essential principle is fairness. The doctrine must never be applied in such a fashion as to deprive a party of the opportunity to have a full and fair determination of an issue. Here, applying the *res judicata* doctrine would violate the principle of fairness. In the divorce action the court was restricted in regard to the matters it could consider, and consequently, that forum did not provide an opportunity for a full and fair determination of Joy Stuart's tort claim.

In sum, the divorce and tort actions lack an identity of causes of action or claims. Applying the *res judicata* doctrine to bar the tort action fails to achieve the doctrine's objectives and would be fundamentally unfair. Therefore, we conclude that the doctrine of *res judicata* cannot act as a bar to Joy Stuart's tort action.

The trial court also concluded that the tort action was barred pursuant to the doctrine of equitable estoppel. The court ostensibly reasoned that Joy Stuart's failure to disclose the potential tort claim during the divorce proceedings was equivalent to a representation that no such claim existed and that, in agreeing to the divorce stipulation, her former husband relied upon that representation to his detriment.

The defense of equitable estoppel consists of action or nonaction by the party against whom estoppel is asserted that induces reliance thereon by the party asserting estoppel, either in action or nonaction, which is to that party's detriment. For equitable estoppel to apply, the reliance on the action or nonaction of another must be reasonable.

Failing to disclose a potential tort claim cannot be interpreted as a representation that no such claim exists. More importantly, in achieving the divorce stipulation and the division of the marital estate, there is no evidence that Ronald Stuart relied to his detriment upon any such representation. The stipulation and the equitable division of the marital estate were achieved according to the dictates of state law. Accordingly, in the absence of a representation that a tort claim did not exist and a showing of Ronald Stuart's detrimental reliance upon such a representation, the doctrine of equitable estoppel cannot act as a bar to the tort action.

In reaching our conclusions, we do not hold that the doctrines of *res judicata* and equitable estoppel would be inapplicable under all similar procedural facts. If, in a divorce action, a spouse pursued maintenance for a disability caused by the other spouse's tortious conduct, those same damages may be precluded in any subsequent tort action. Here, however, maintenance was waived and the property division represents only that required by law. Joy Stuart neither claimed nor received an additional property award as compensation for her alleged injury.

The trial court also relied upon the doctrine of waiver in dismissing the tort action. The court ostensibly reasoned that Joy Stuart's decision not to raise the tort claim in the divorce proceedings constituted a waiver of her right to commence a subsequent action and seek damages based upon that claim. Waiver is a voluntary and intentional relinquishment of a known right. *Mulvaney v. Tri State Truck & Auto Body, Inc*., 70 Wis.2d 760, 768, 235 N.W.2d 460, 465 (1975). Intent to waive is an essential element of the doctrine. *Id*. Although in the divorce proceedings Joy Stuart may have been aware of her right to claim damages as a result of her former husband's alleged tortious conduct, merely proceeding in that forum cannot be regarded as a voluntary relinquishment of that right. The record is devoid of any evidence that Joy Stuart intended to waive her right to proceed on the tort claim by entering into the divorce stipulation. Moreover, the law will not force one party to a marriage to choose between commencing an action to terminate a marriage or one to recover compensation for injuries sustained as a result of spousal abuse. The two actions are not exclusive, and proceeding in one forum does not constitute a waiver of the right to proceed in the other.

The trial court's principal reason for dismissing the tort action is perhaps best found in its statement that commencing such an action following a stipulated divorce was "absolutely unconscionable" and constituted an abuse of the judicial system. Clearly, this statement reflects the court's belief that public policy should preclude a party from first obtaining determinations as to the division of the marital estate, maintenance, support, and alimony, and then, by commencing a subsequent tort action, assert a claim against a former spouse's share of the marital estate.

Wisconsin has long recognized both the right of one spouse to maintain a tort action against another and the right to recover damages for injuries sustained as a result of spousal abuse. The existence of such a claim, however, is not a basis upon which a divorce court may depart from the statutory directive regarding the division of the marital estate. *See Dixon*, 107 Wis.2d at 500-01, 319 N.W.2d at 850-51; *see also* § 766.55(2)(cm), Stats. As noted, under Wisconsin's no fault divorce code, a court may grant maintenance payments for a disability arising from spousal abuse. A divorce court cannot, however, con-

sider one spouse's intentional tortious conduct or, based upon that conduct, award punitive or compensatory damages for past suffering to the injured spouse. In light of a party's right to maintain a tort action against a spouse and the inadequacies of the divorce forum to fully address such a claim, we conclude that it would be contrary to public policy to require a party to join a tort claim in a divorce action.

Indeed, public policy mandates that a party be permitted to commence a tort action subsequent to a divorce judgment. If a legal claim, such as tort, is required to be joined with an equitable claim, such as divorce, a party has a right to a jury trial on the legal claim. If, however, a party voluntarily joins such claims, the right to a jury trial on the legal claim is lost. Wisconsin does not require mandatory joinder of claims or compulsory counterclaims. Thus, if an abused spouse chooses not to commence a tort action against his or her marital partner prior to divorce, the spouse must be permitted to maintain a tort action subsequent to divorce to preserve the right to a jury trial. If an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: (1) Commence a tort action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or (3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse. To enforce such an election would require an abused spouse to surrender both the constitutional right to a jury trial and valuable property rights to preserve his or her well-being. This the law will not do.

Although joinder is permissible, the administration of justice is better served by keeping tort and divorce actions separate. *See Lord v. Shaw*, 665 P.2d 1288, 1291 (Utah 1983). Divorce actions will become unduly complicated if tort claims must be litigated in the same action. A divorce action is equitable in nature and involves a trial to the court. On the other hand, a trial of a tort claim is one at law and may involve, as in this case, a request for a jury trial. Resolution of tort claims may necessarily involve numerous witnesses and other parties such as joint tortfeasors and insurance carriers whose interests are at stake. Consequently, requiring joinder of tort claims in a divorce action could unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support determinations. The legislature did not intend such a result in enacting the divorce code. In summary, we conclude that the trial court erred by concluding that Joy Stuart's tort action was barred pursuant to the doctrines of *res judicata*, equitable estoppel, and waiver. Because we reach this conclusion, we also conclude that the action has a reasonable basis in law. Accordingly, the trial court also erred by concluding that the action was frivolous and awarding costs pursuant to § 814.025.

Judgment reversed.

Notes: Marital Torts

1. One of the most dramatic developments in family law has been the relationship between tort and domestic actions. The breakup of a marriage leads inexorably to acrimony between the spouses. Today this anger and frustration often leads to filing a tort suit. *See e.g.*, *Tice v. Tice*, *supra* Chapter 1.

2. The common law recognized a series of actions for intentional interference with the marital relationship. The most prominent were alienation of affections and criminal conversation. Alienation of affections consisted of depriving one spouse of the love, society, companionship, and comfort of the other. Criminal conversation was the tortious interference with the exclusive right to sexual intercourse. Because sexual intercourse is not an element of alienation of affections, the action would lie against anyone who alienated one spouse from another. On the other hand, criminal conversation did not require any proof of alienating the affections of the spouse. For a full discussion of the subject, *see* PROSSER &

KEETON, TORTS § 124 (5th ed. 1984). The actions for intentional interference with the marital relationship have fallen into disfavor. Many states have abolished the claims by statute. *See e.g.*, 76 O.S. § 8.1 (2001). *Lynn v. Shaw*, 1980 OK 179, 620 P.2d 899. Other states have abolished the actions by judicial decision. *See e.g., O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986); *Feldman v. Feldman*, 480 A.2d 34 (N.H. 1984). Even in those states that have abolished the actions, there may be recovery against third parties if the conduct falls within an otherwise recognized tort. *See Lockhart v. Loosen*, 1997 OK 103, 943 P.2d 1074, where the court ruled that a married woman's paramour who had a venereal disease may be liable in tort to the woman's husband for transmission of the disease to him. However, the court said, there would not be any liability on the paramour's part if the wife knew or should of known that her paramour was infected. *See also Smith v. Speligene*, 1999 OK CIV APP 95, 990 P.2d 312 (liability for inflicting Herpes I virus).

Disgruntled ex-spouses, seeking a way around the abolishment of alienation of affection and criminal conversation, may disguise the claim under the aegis of another tort. In *Wilson v. Still*, 1991 OK 108, 819 P.2d 714, the court held that even if the claim is labeled as one for "emotional distress," if it relates events that would otherwise be alienation of affections, it is still barred.

3. Most of the tort cases that spring from the marital relationship involve battered spouses and the torts of assault and battery. *See e.g., Noble v. Noble*, 761 P.2d 1369 (Utah 1988)(husband shot wife in head with .22 caliber rifle); *Aubert v. Aubert*, 529 A.2d 909 (N.H. 1987)(husband recovers $350,000 against wife who shot him without provocation from a few feet; wife had been convicted of attempted murder).

4. Other conduct may also be actionable if it fits within the bounds of a recognized tort. *See e.g., Davis v. Bostick*, 580 P.2d 544 (Or. 1978)(intentional infliction of emotional distress); *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988) (tortious infliction of a venereal disease); *Brown v. Brown*, 409 N.E.2d 717 (Mass. 1980)(ordinary negligence; wife recovers for injuries due to husband's failure to shovel snow off sidewalk); *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991)(violation of wiretapping statute); *American Velodur Metal v. Schinabeck*, 481 N.E.2d 209 (Mass. Ct. App. 1985)(abuse of process).

5. Marital tort cases present problems of *res judicata* and collateral estoppel. The holding in *Stuart* is the majority position in the United States. In *Roesler v. Roesler*, 1982 OK 21, 641 P.2d 550, the court held that it is not misjoinder to bring the tort action and the divorce together, but the two actions should be tried separately to avoid prejudice. Since joinder is not compulsory but only permissive, there is no *res judicata* effect from failure to raise the tort action in the divorce. If the tort theory is raised in the divorce action, there may be *res judicata* effects. *Kemp v. Kemp*, 723 S.W.2d 138 (Tenn. Ct. App. 1986)(wife received a sum of money for past medical expenses and lost wages in divorce action as alimony when she was battered by her husband; wife, therefore, precluded from bringing subsequent tort claim). *Res judicata* can also arise from an overbroad settlement agreement. *See Jackson v. Hall*, 460 So.2d 1290 (Ala. 1984)(parties agreement provides that it is a full, final, and complete settlement of all claims between the parties; wife precluded from bringing subsequent tort suit).

6. Collateral estoppel will operate to prevent re-adjudication of facts found in the divorce action. *See McCoy v. Cooke*, 419 N.W.2d 44 (Mich. Ct. App. 1988)(finding in divorce case that husband battered wife is binding in later tort litigation); *Nelson v. Jones*, 787 P.2d 1031 (Alaska 1990)(husband may not relitigate divorce court finding that he abused the child in his tort suit against wife for defamation).

3. Domestic Violence

FLURY
v.
HOWARD
1991 OK 69, 813 P.2d 1052

Petitioner in an original action seeks a writ (a) to direct dismissal of a proceeding brought against him under the Protection From Domestic Abuse Act,[1] (b) to prohibit the trial judge from enforcing an emergency protective order issued therein and (c) to bar future issuance of other protective orders in this case.

APPLICATION TO ASSUME ORIGINAL JURISDICTION GRANTED;
PETITION FOR PREROGATIVE WRITS DENIED;
CAUSE TRANSFERRED TO THE COURT OF CRIMINAL APPEALS.

OPALA, CHIEF JUSTICE.

This court's original cognizance is invoked primarily to invalidate an emergency protective order issued by the District Court, Logan County. We assume jurisdiction and, for the reasons to be explained, transfer the cause to the Court of Criminal Appeals.

I

THE ANATOMY OF DISTRICT COURT LITIGATION

A proceeding was commenced under the Protection From Domestic Abuse Act [Protection Act][2] by David and Janet E. Skaggs on behalf of their daughter, Janet D., for protective order against the petitioner, Sean F. Flury [Flury], who had been in a dating relationship with the daughter. The respondent trial judge issued an emergency *ex parte* order[3] to protect the daughter from "immediate and present danger of domestic abuse"[4] by Flury. Five days later the trial judge issued a final protective order[5] and denied Flury' motions to dismiss the case and to dissolve the temporary protective order. In a presently pending criminal case Flury stands charged with violating the emergency ex parte order.[6]

II

RELIEF SOUGHT IN THIS COURT

In this original action Flury seeks (a) the dismissal of the district court case for want of trial court's "subject matter jurisdiction" to invoke the Act's remedy for the protection of one like him who stands vis-a-vis the threatened person in a dating relationship,[7] (b) to bar the trial judge from issuing future protec-

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[1] 22 O.S.Supp.1982 §§ 60 *et seq*.

[2] *See supra* note 1.

[3] The authority for such order is provided by 22 O.S. Supp. 1983 § 60.3. An emergency ex parte order remains in effect until a full hearing has been conducted.

[4] The trial court's order quotes the statutory language of 22 O.S. Supp.1983 § 60.3.

[5] Final protective orders are authorized by 22 O.S. Supp.1987 § 60.4(C). Any protective order issued pursuant to subsection C "shall not be for a fixed period but shall be continuous until modified or rescinded upon motion by either party or if the court approves any consent agreement entered into by the plaintiff and defendant." § 60.4(F).

[6] A protective order's violation constitutes a criminal offense. 22 O.S. Supp. 1988 § 60.6. For an explanation of this section, *see infra* note 8.

[7] The Protection Act lists seven categories of interpersonal relationship which fall within its purview. *See* 22 O.S. Supp.

tive orders and (c) to prohibit the objectionable order's enforcement by criminal process. The petitioner also presses for relief against the trial judge's ancillary order that directs him to pay for the transcript of undesignated portions of the record to be used in this proceeding.

III

THE DISPOSITIVE ISSUE TO BE DECIDED IN ASSESSING PETITIONER'S RIGHT TO THE RELIEF SOUGHT

As we analyze this case, the dispositive issue before us is the legal validity of the pending criminal process presently prosecuted to enforce the emergency protective order. Petitioner's ultimate goal is to secure from this court relief against the criminal enforcement of that order's violation. This in turn calls for determining whether petitioner's alleged misconduct in the context of a dating relationship, which gave rise to the complaint against him, falls within the Act's purview so that its disobedience may be prosecuted as a public offense under § 60.6.[8] In sum, the petitioner is entitled to have the criminal process arrested or prohibited if there is indeed a fatal flaw in the trial court's judicial extension of the Protection Act to shield one standing in a dating relationship with him. As we have no cognizance over criminal process,[9] we are powerless to grant the relief sought in this proceeding.

IV

THE COURT OF CRIMINAL APPEALS HAS EXCLUSIVE JURISDICTION OVER THE PROTECTION ACT'S PENAL PROVISIONS

Because violators of a protective order are liable to criminal penalties,[10] the validity of that process must be tested in the court with exclusive and final appellate cognizance over criminal prosecutions. The Court of Criminal Appeals has the exclusive power over matters incident or essential to the complete exercise of its appellate jurisdiction in criminal cases.[11] Only that court can determine whether the proceed-

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1986 § 60.1(2) *infra*. The dating relationship is not one among the enumerated categories. The terms of § 60.1(2) include the following categories of a protected person:

> Family or household members' means spouses, former spouses, parents, children, persons otherwise related by blood or marriage, or persons living in the same household or who formerly lived in the same household. This shall include the elderly and handicapped.

The Protection Act bears the earmarks of a penal statute (*see* Part IV *infra*) which must be strictly construed and cannot be enlarged by implication. *See* Ex parte Barnett, 96 Okl.Cr. 254, 252 P.2d 496,501 (1953); Cummings v. Board of Education, 190 Okl. 533, 125 P.2d 989, 995 (1942).

[8] *See* 22 O.S. Supp. 1988 § 60.6, which provides that violations of ex parte or final protective orders are misdemeanors. The penalty for violating the order is a fine not to exceed $1,000 and/or a term of imprisonment in the county jail not to exceed one year. 60.6(A). Repeat offenders will be punished by incarceration in the county jail for a period of not less than 10 days nor more than one year and may be fined not less than $500 and not more than $1,000. § 60.6(B). A violation of the Protection Act, which results in physical injury or physical impairment to any person named in the order, is punishable by a term in the county jail of not less than 10 days and not more than one year and/or a fine not to exceed $5,000. § 60.6(C).

[9] The terms of Art. 7 § 4, Okl. Const., provide in pertinent part:

> The appellate jurisdiction of the Supreme Court shall be coextensive with the State and shall extend to all cases at law and in equity; except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute and in the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction and such determination shall be final . . . .

[10] *See supra* note 8.

[11] Art. 7, § 4, Okl. Const., *supra* note 9, provides in pertinent part "in the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction [over a case alleged to be criminal] and such determination shall be final". *See also* State ex rel. Henry v. Mahler, Okl., 786 P.2d 82, 85 (1990); Walters v. Oklahoma Ethics Com'n,

ings which culminated in the emergency ex parte order and the petitioner's alleged violation afford a legitimate predicate for a public offense under 22 O.S. Supp. 1988 § 60.6.[12] It is clearly the Court of Criminal Appeals which must decide whether the petitioner's charged misconduct in the context of his dating relationship comes within the Act's purview and may hence result in a criminal charge.

SUMMARY

The Protection Act's criminal enforcement provisions make this controversy inappropriate for our consideration in this proceeding. The case must be transferred to the Court of Criminal Appeals which has the exclusive and final cognizance over the legal sufficiency and efficacy of criminal process triggered below for the emergency protective order's enforcement.[13] In sum, the dispositive issue here cannot be authoritatively settled dehors that court's criminal judicature.

Original jurisdiction is assumed, the prerogative writs sought are denied and cause stands transferred to the Court of Criminal Appeals.

LAVENDER, SIMMS, DOOLIN and SUMMERS, JJ., concur.

HODGES, V.C.J., and ALMA WILSON and KAUGER, JJ., concur in part and dissent in part.

Notes & Questions: Protective Orders

1. In *Marquette v. Marquette*, 1984 OK CIV APP 25, 686 P.2d 990, the defendant husband appealed from the establishment of a restraining order that prohibited him from visiting or threatening his ex-wife. He claimed that the protective order was criminal in nature and that the protections of criminal procedure should apply to the case. The court held that the provisions of the Domestic Violence statute were civil in nature. The court's decision in *Howard* raises some interesting issues with regard to the *Marquette* case. If the Domestic Violence statute is criminal in nature, at what point do other criminal procedure rules affect the proceedings? Is it only the proceeding to punish the violation of the restraining order that is criminal? It is possible that a hybrid procedure has been created. The original proceedings to obtain the victim protection order seem to be civil and the enforcement proceedings are criminal.

2. Protective orders may not affect title to real property. 22 O.S. § 60.4(I) (2001). However, if the defendant has been ordered to vacate the house, this determines who is entitled to possession of the premises. If, at a later time, the defendant takes something from the house, he may be charged and convicted of burglary. *Calhoun v. State*, 1991 OK CR 112, 820 P.2d 819. While petitioners may obtain attorney fees in protective order cases, respondents may not, even if they are the prevailing party. *Alford v. Garzone*, 1998 OK CIV APP 105, 964 P.2d 944. A court may not grant a "mutual protective order" unless both parties request one following the statutory procedures. *Gibilisco v. Gibilisco*, 1994 OK CIV APP 50, 875 P.2d 447.

3. Protective orders can also be obtained to prevent stalking and harassment, regardless of a family relationship.

Okl., 746 P.2d 172,180-181 (1987)(OPALA, J., concurring); Carder v. Court of Criminal Appeals, Okl., 595 P.2d 416, 419 (1979); Anderson v. Trimble, Okl., 519 P.2d 1352, 1354-1355 (1974); Hinkle v. Kenny, 178 Okl. 210, 62 P.2d 621, 622 (1936).

[12] *See supra* note 8.

[13] *See supra* note 9 for the pertinent provisions of Art. 7, § 4, Okl. Const.; *see also* in this connection *State ex rel. Henry v. Mahler, supra* note 11; *Walters v. Oklahoma Ethics Com'n, supra* note 11 at 181-182 (OPALA, J., concurring); *Carder v. Court of Criminal Appeals, supra* note 11.