Chapter 1.
Marriage and Divorce

I. Marriage

A. Introduction

Marriage is defined in Oklahoma as "a personal relation arising out of a civil contract to which the consent of parties legally competent of contracting and of entering into it is necessary, and the marriage relation shall only be entered into, maintained or abrogated as provided by law."[1] The law regarding marriage is thus partly based on contract and partly based on status. The state of Oklahoma has a strong interest in the marital relationship and follows the traditional limitations on who may enter into marriage.

B. The Traditional Restrictions on Marriage

1. Bigamy

All states, including Oklahoma, prohibit bigamy and restrict people to one spouse at a time.[2] It is also prohibited by the Constitution of Oklahoma which provides: "Polygamous or plural marriages are forever prohibited."[3] Bigamous marriages are void and do not require the authority of any court to declare them void. An action can be brought to declare the marriage void. The usual method is through a suit for an annulment.[4] It is also permissible for the legislature to authorize the mechanism of the divorce case as a procedure to declare the marriage void.[5]

However, the utilization of the divorce process to declare a marriage void does not give the divorce court the power to order the financial incidents of dissolution. There can be no alimony, whether permanent or pendente lite, if the marriage is

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1 43 O.S. § 1 (1991).

2 Bigamy is also a crime. *See* 21 O.S. §§ 881-884 (1991); Madison v. Steckleberg, 1924 OK 378, 224 P. 961. ("Syllabus by the Court. * * * An attempted marriage between a man and woman who has a living, undivorced husband, is bigamous, and a continued cohabitation is unlawful.").

3 OKLA. CONST. art. 1 § 2.

4 Whitebird v. Luckey, 1937 OK 242, 67 P.2d 775.

5 Whitney v. Whitney, 1942 OK 268, 134 P.2d 357.

void.[6] Nor does the court have the authority to divide marital property under 43 O.S. § 121.[7]

The Supreme Court has likened the relationship of parties in a bigamous cohabitation to a "quasi-partnership." As such it has held that the trial court does have equitable powers to effect a division of partnership property.[8] The court utilizes partnership law and not family law when it makes the property division. Thus, a reconciliation of the parties does not vitiate the parties' agreement on property division since they are partners and not husband and wife.[9]

If parties to a bigamous marriage continue to live together as husband and wife following the removal of the impediment through death or divorce, they have a common law marriage as of the time the impediment is removed.[10]

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[6] Baker v. Carter, 1937 OK 286, 68 P.2d 85.

[7] Custody and child support do not, of course, depend on the marital status of the parties. If there are children, the court must decide those issues regardless of the nature of the proceedings.

[8] Krauter v. Krauter, 1920 OK 249,190 P. 1088; Tingley v. Tingley, 1936 OK 791, 64 P.2d 865; Whitney v. Whitney, 1942 OK 268, 134 P.2d 357.

[9] *Compare* Hale v. Hale, 1913 OK 540,135 P. 1143 *with* Whitney v. Whitney, *supra*.

[10] Hill v. Shreve, 1968 OK 182, 448 P.2d 848 ("The rule . . . , is that the acts of living together and holding themselves out as husband and wife, after removal of a legal impediment to marriage constitute a common-law marriage, even though both parties knew of the impediment."); Earley v. State Indus. Com'n, 1954 OK 122, 269 P.2d 977; Olinghouse v. Olinghouse, 1954 OK 2, 265 P.2d 711 ("Syllabus by the Court. 1. The acts of living together and holding themselves out as husband and wife, after removal of a legal impediment to marriage, constitute a common-law marriage, even though both parties knew of the impediment."); *In re* Cully's Estate, 1941 OK 183, 117 P.2d 126 ("Syllabus by the Court. * * * When parties in good faith comply with the forms of law which would give rise to their marriage but for one being under a disability, the law infers that the matrimonial consent was interchanged between them as soon as the disability is removed, and stamps their relation with the status of a valid marriage."); *In re* Webster's Estate, 1925 OK 396, 242 P. 555 ("[W]here the parties are cohabiting with matrimonial intentions, but it is without sanction of law because one is under an impediment, matrimonial consent must be presumed to have been interchanged as soon as the parties were capable by the removal of the impediment; and that the ceremony, although invalid to effectuate a legal marriage, was a consent by the parties to a cohabitation which was matrimonial in character, and as soon as the impediment is removed, by death or otherwise, their continued cohabitation creates a conclusive presumption of mutual consent thereto."); Mudd v. Perry, 1925 OK 139, 235 P. 479. The important issue is whether the couple intended to live together as husband and wife after the removal of the impediment. The fact that they did not do so because they were separated by military service abroad does effect the existence of the common law marriage. Burdine v. Burdine, 1952 OK 103, 242 P.2d 148.

2. Incest

All states, including Oklahoma, have rules which prohibit marriages between people that are too closely related by blood.[11] Although incestuous marriages are void,[12] the Supreme Court has held that property accumulated during the time the couple lived together as if they were husband and wife should be divided between them as if they were a partnership, thus adopting the same approach as in the case of bigamous marriages.[13]

3. Age

In Oklahoma, as in most states, a person can marry at age eighteen.[14] Between the age of sixteen and eighteen, a person can marry with the consent of a parent or a guardian. The statute goes to great length in determining who is the appropriate person to give consent in a variety of circumstances. The application for a marriage license for a couple between the ages of sixteen and eighteen is held for seventy-two hours before the license can be issued.[15]

Any person under sixteen is expressly prohibited from marrying. Although there is an exception for judicially authorized marriages in settlement of suits for seduction or paternity or when the unmarried minor is pregnant, it does not appear that such power has ever been exercised. Indeed, Oklahoma no longer recognizes the tort of seduction.

Although under age marriages are prohibited, they receive very different treatment from bigamous or incestuous marriages. Under age marriages are not void

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[11] 43 O.S. § 2 provides:

> Marriages between ancestors and descendants of any degree, of a stepfather with a stepdaughter, stepmother with stepson, between uncles and nieces, aunts and nephews, except in cases where such relationship is only by marriage, between brothers and sisters of the half as well as the whole blood, and first cousins are declared to be incestuous, illegal and void, and are expressly prohibited. Provided, that any marriage of first cousins performed in another state authorizing such marriages, which is otherwise legal, is hereby recognized as valid and binding in this state as of the date of such marriage.

[12] Fearnow v. Jones, 1912 OK 542, 126 P. 1015.

[13] Krauter v. Krauter, 1920 OK 249,190 P. 1088 ("It is our opinion, however, that in all judicial separations of persons who have lived together as husband and wife, a fair and equitable division of their property should be had; and the court in making such division should inquire into the amount that each party originally owned, the amount each party received while they were living together, and the amount of their joint accumulations.").

[14] 43 O.S. § 3.

[15] 43 O.S. § 5(C).

but merely voidable.[16] A void marriage may be attacked by any person, at any time the question of the validity of the marriage becomes an issue in the case. A voidable marriage must be attacked in a suit for an annulment while the disability exists.[17] When the underage couple continues to cohabit as husband and wife after obtaining legal age, they have a common law marriage.[18]

In a suit to annul the marriage of an underage couple, the court has the same power it has in a divorce case to issue a temporary order for support and attorney fees.[19] However, the court cannot in conjunction with the decree for an annulment require support alimony.[20]

4. Mental Capacity

Since marriage is defined as requiring the "consent of parties legally competent of contracting"[21] it follows that, just as in the case of nonage, persons who do not have the mental capacity to enter into a contract are incapable of entering into a marriage relationship. Like nonage marriages, those marriages between persons who are not mentally capable of entering in a marriage contract, are voidable and not

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[16] Stone v. Stone, 1944 OK 28, 145 P.2d 212 ("Syllabus by the Court. * * * 2. * * * Marriage entered into by persons under certain ages prohibited from marrying by 43 O.S.1941 § 3 is voidable but not void."); Hughes v. Kano, 1918 OK 332, 173 P. 447.

[17] 43 O.S. § 128 provides that:

> When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void by the district court, in an action brought by the incapable party or by the parent or guardian of such party; but the children of such marriage begotten before the same is annulled, shall be legitimate. Cohabitation after such incapacity ceases, shall be a sufficient defense to any such action.

See White v. McGee, 1931 OK 280, 299 P. 222 ("Syllabus by the Court. * * * 2. * * * Marriage between persons under the ages prescribed in section 7490, C. O. S. 1921, is voidable and not void. In a marriage where the male is 17 years of age and the female is 15 years of age, and the male dies before any legal proceedings were taken to annul the marriage, held, the surviving spouse is the legal widow of such deceased.").

[18] Hughes v. Kano, 1918 OK 332, 173 P. 447.

[19] Hunt v. Hunt, 1909 OK 72, 100 P. 541 ("Syllabus by the Court. * * * 3. * * * In a suit at the instance of a husband to annul such marriage, the court, at any stage of the proceedings where he is shown to have property sufficient, may make and enforce an order requiring him to pay a reasonable allowance for the maintenance and support of his wife and a child born of such marriage, and a reasonable allowance for suit money to enable her to defend."); Stone v. Stone, 1944 OK 28, 145 P.2d 212.

[20] Whitebird v. Luckey, 1937 OK 242, 67 P.2d 775.

[21] 43 O.S. § 1.

void.[22] Therefore by statute, such marriages can only be attacked in a suit for an annulment between the parties while the disability exists or immediately thereafter. Cohabitation after the incapacity ceases is a defense to the annulment action and the parties will be deemed to have a common law marriage from the time the incapacity ceases.[23] Although there is no case that so holds, because it is a voidable and not a void marriage, a court in an annulment action would have the same power to order support that it would have in a case involving an underage couple.

C. Common Law Marriage

Oklahoma has always held the statutes regulating the form of ceremonial marriages are directory and not mandatory.[24] Thus, even though 43 O.S § 4 requires that:

> No person shall enter into or contract the marriage relation, nor shall any person perform or solemnize the ceremony of any marriage in this state without a license being first issued by the judge or clerk of the district court, of some county in this state, authorizing the marriage between the persons named in such license. . . .

marriages without a license are preserved in Oklahoma. The legislature has made the provisions of 43 O.S. § 5 mandatory. Those provisions relate to the information that must be provided to obtain a license and not to the requirement of a license. Since the legislature did not amend 43 O.S. § 4 at the same time, it seems clear that amendments to 43 O.S. § 5 did not affect the validity of common law marriages in Oklahoma.

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[22] Ross v. Ross, 1936 OK 130, 54 P.2d 611. ("Syllabus by the Court. I. * * * Marriage by adjudicated incompetent under guardianship is voidable, not void.

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"It is significant that the Legislature has not declared void the marriage of a party incapable, from lack of understanding, of contracting, but it has opened the door of relief by authorizing the district court to declare such marriage void at the suit of the incapable party or his guardian, and, to bar injustice, it has coupled with the statutory remedy the wholesome provision that cohabitation, after the incapacity ends, shall be a sufficient defense to the action.

"* * * 'Mere insane delusions or hallucinations are not sufficient in and of themselves to annul a marriage; but before such a contract can be canceled on the ground of lunacy, or for want of understanding, it must be satisfactorily shown that the party in whose interest or right the action is brought was mentally incapable of understanding the nature, effect, and consequences of the marriage.' ").

[23] 43 O.S. § 128.

[24] *See* Reaves v. Reaves, 1905 OK 32, 82 P. 490 (Okla. Terr. 1905); *In re* Love's Estate, 1914 OK 332, 142 P. 305.

In Oklahoma a common law marriage occurs when the parties agree that they are married. In the court's latest case on the issue, it said: "A common law marriage is formed when 'the minds of the parties meet in consent at the same time.' "[25] There are earlier cases where the court indicated that there are the following elements to a common law marriage:

(1) an actual and mutual agreement between spouses to be husband and wife;

(2) a permanent relationship;

(3) an exclusive relationship;

(4) cohabitation as man and wife;[26]

(5) the parties to the marriage must hold themselves out publicly as husband and wife.[27]

However, as the *Standefer* case clearly notes, elements (2) through (5) are merely evidence of the existence of the marriage relationship. The presence or absence of those factors can be persuasive evidence of the existence or non-existence of the marriage relationship, but are not elements for which proof is required.[28] Therefore, those earlier cases should no longer be considered good law.

Often the most persuasive evidence of the existence of a common law marriage is whether the couple listed each other as a "spouse" on legal documents. For example, in *Estate of Phifer*,[29] the court noted, in finding that there was no common law

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[25] Standefer v. Standefer, 2001 OK 37, 26 P.3d 104, quoting Reaves v. Reaves, 1905 OK 32, 82 P. 490. Cavanaugh v. Cavanaugh, 1929 OK 101, 275 P. 315 ("Syllabus by the Court. 1. * * * A mere promise of future marriage, followed by illicit relations, is not, in itself, sufficient to constitute such marriage.").

[26] Quinton v. Webb, 1952 OK 294, 248 P.2d 586 ("In any event, it can be said that open and notorious cohabitation of the parties is evidentiary of a marriage agreement, other elements being present, while lack of such open cohabitation of the parties may be evidence tending to discredit the alleged agreement, thus casting upon the alleging party a greater burden in the actual proof of such agreement.").

[27] Estate of Stinchcomb, 1983 OK 120, 674 P.2d 26; Earnheart v. Earnheart, 1999 OK CIV APP 42, 979 P.2d 761; Estate of Phifer,1981 OK CIV APP 21, 629 P.2d 808.

[28] *See*, for example, the discussion in Sanders v. Sanders, 1997 OK CIV APP 67, 948 P.2d 719, concerning whether the affairs of the parties disqualified them from having a common law marriage. The presence or absence of the affairs is evidence of the existence of the relationship but is not required to prove the relationship. As noted in Tiuna v. Willmott, 1933 OK 6, 19 P.2d 145 ("Syllabus by the Court. 1. * * * All that is necessary to render competent parties husband and wife is that they agree in the present tense to be such; no time being contemplated to elapse between the assumption of the status. It is not necessary that such a contract be followed by holding themselves out to the public as husband and wife or that it be acted on by them professedly living together in that relation. The distinction noted between the fact of marriage and the proof of it.").

[29] 1981 OK CIV APP 21, 629 P.2d 808.

marriage: "There is ample documentary evidence that the deceased considered himself to be an unmarried man right up to the time of his death. These included income tax returns, mortgages, loan applications and deeds." Similarly, in *Reed v. Reed*,[30] the court found that the fact that the parties only began making joint income tax returns in 1958 would in effect negate the contention that they were husband and wife since 1948.[31]

A more modern case showing the importance of declaring marital status on legal documents is *Oklahoma Dept. of Mental Health v. Pierce.*[32] In this worker's compensation case the claimant was seeking death benefits for his wife, Dunn, who died in an automobile accident while working for the Department of Mental Health. Previously a probate court in Woodward found the claimant to be the common law husband of the deceased and appointed him as the personal representative of the estate. The defendant claimed that it was not bound by the probate court's determination since it was not present and had no notice of that proceeding. At the trial the claimant testified that his wife moved into his home in 2005, and the couple began to live together as husband and wife. The couple started telling people they were husband and wife in 2006. Claimant introduced evidence that Dunn, appointed him as payee on a payable-on-death credit union bank account, they had a joint checking account with right of survivorship, and they purchased an automobile together and put both of their names on the title. Claimant testified that they held themselves out as husband and wife and shared family duties and responsibilities, money, and bills.

Most importantly in 2007 Dunn and the claimant signed "Request for Coverage for Common Law Spouse," which was accepted by the Oklahoma Benefits Council. After Dunn's death, the Mental Health Department also reviewed and considered who was entitled to receive Dunn's final paycheck and then sent it to Claimant as her husband. The couple planned a Las Vegas wedding celebration but Dunn died

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30 1969 OK 95, 456 P.2d 529.

31 *See also* Hunter v. Whitaker, 1951 OK 287, 237 P.2d 150 ("Syllabus by the Court. Where the evidence discloses that a man and woman lived and cohabited together as husband and wife from 1923 to the time of the death of the woman in 1948, during which period of time they mutually held themselves out to the general public as husband and wife, and during such period of time when a policy of burial insurance was procured by the woman, she, in the application, listed the man as her husband, held: that where the trial court finds from such facts and circumstances that a common-law marriage existed between the parties, such judgment is not clearly against the weight of the evidence."); Red Eagle v. Cannon, 1949 OK 5, 208 P.2d 557 ("Syllabus by the Court. 2. * * * Deeds executed by a man and woman at a time when they are living together and cohabiting, which deeds recite that such man and woman are husband and wife, and are acknowledged by each, are solemn admissions or declarations of the fact that they are husband and wife, and constitute direct evidence that they are married at that time.").

32 2012 OK CIV APP 73, 283 P.3d 894.

before it could take place. On cross-examination the claimant testified that he never put Dunn's name on the deed to his home or on any corporate records for their business. He admitted that the couple never filed their taxes jointly while Dunn was alive. Dunn was not listed on any of Claimant's insurance policies.

Both the Workers' Compensation Court and the en banc review panel found the claimant to be the surviving spouse of the deceased. The appellate panel affirmed the finding of a common law marriage. It particular if found that the affidavit seeking coverage for the claimant, executed under penalty of perjury, was extremely important given that the coverage request declared the parties had a common law marriage. This, according to the panel, supported the decision of the Workers' Compensation Court, and the refusal of the court to invalidate the marriage based on the evidence adduced by the Department was not against the clear weight of the evidence. Although the trial court made no decision as to whether it was bound by the Woodward County determination, the trial court was free to consider the Woodward Court's appointment of claimant as surviving spouse to act as personal representative of Dunn's estate.[33]

A common law marriage must be proved by clear and convincing evidence.[34] When there is a contest concerning the validity of a common law marriage during a divorce case, the court must find there is a common law marriage in order to enter a temporary order concerning support and attorney fees.[35] However, the determination that there is a common law marriage for the issuance of the temporary order is not binding on the court in determining the ultimate issue of whether a marriage did exist.[36] In other words, a court can find that there is a common law marriage for purposes of the temporary order but can ultimately rule after a trial that no marriage existed.[37]

D. Marriage Presumptions

All states indulge in a variety of presumptions concerning marriage. The effect of presumptions is to find a large number of relationships to be marriages rather than cohabitation. The policy reason is usually that, "the law is astute to preserve the sanctity of the marriage relation, the legitimacy of children, and stability of descent

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[33] The panel also determined that the Department's opposition to the common law marriage claim was not reasonable and therefore attorney fees should be allowed to the claimant.

[34] Standefer v. Standefer, 2001 OK 37, 26 P.3d 104; Mueggenborg v. Walling, 1992 OK 121, 836 P.2d 112; Lee v. Cotten, 1990 OK CIV APP 48, 793 P.2d 1369.

[35] Utley v. Rowe, 1943 OK 224, 138 P.2d 71.

[36] Powell v. Powell, 1942 OK 417, 131 P.2d 1019.

[37] Renbarger v. Renbarger, 1994 OK 140, 889 P.2d 1250 (reversible error to refuse to hear evidence after the temporary hearing that the parties were not common law married).

and distribution, and therefore presumes innocence and virtue, in the absence of proof."[38]

Oklahoma recognizes three marriage presumptions. One of the strongest is the presumption in favor of the subsequent marriage's validity. When a marriage in form is shown, either ceremonial or common law, the law presumes its validity in assuming the previous marriage has ended.[39]

The presumption can be rebutted.[40] Thus, in *Parkhill Trucking Co. v. Row*,[41] the decedent's first wife testified that at the time of the employee's death they had been separated less than ten months, during which period they were residents of Oklahoma. The first wife testified that she did not obtain a divorce from employee and that he did not obtain a divorce from her. Since they were both residents of Oklahoma, the court noted, the employee could only obtain a valid divorce by causing personal service of summons in a divorce action to be made on her. She received no service of summons. Therefore, she was in a position to testify that employee had not obtained a divorce.[42]

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[38] Coachman v. Simms, 1913 OK 9, 129 P. 845.

[39] Marcum v. Zaring, 1965 OK 125, 406 P.2d 970 ("Syllabus by the Court. * * * 2. * * * In the case of conflicting marriages of the same spouse, the presumption of validity operates in favor of the last marriage. Accordingly the burden of showing the validity of the first marriage is on the party asserting it, and even where this is established it may be presumed in favor of the last marriage that at the time thereof the first marriage had been dissolved either by a decree of divorce or by the death of the former spouse, so as to cast the burden of adducing evidence to the contrary on the party attacking the last marriage."); McVey v. Chester, 1955 OK 275, 288 P.2d 740; Templeton v. Jones, 1927 OK 308, 259 P. 543 ("Syllabus by the Court. 1. * * * In the case of conflicting marriages of the same spouse, the presumption of validity operates in favor of the second marriage. Accordingly the burden of showing the validity of the first marriage is on the party asserting it, and even where this is established it may be presumed in favor of the second marriage that at the time thereof the first marriage had been dissolved either by a decree of divorce or by the death of the former spouse, so as to cast the burden of adducing evidence to the contrary on the party attacking the second marriage. 2. * * * Where the evidence is not sufficiently clear or satisfactory that a party to a second marriage had not obtained a divorce from the prior spouse, the trial court is justified in holding that the presumption of divorce from such prior spouse had not been overcome.").

[40] Harrison v. Burton, 1954 OK 332, 303 P.2d 962 ("Syllabus by the Court. * * * 2. [T]he one contending against the legality of a second marriage is not required to make plenary proof of a negative averment. It is enough that he introduce such evidence as, in the absence of all counter-testimony will afford reasonable grounds for presuming that the allegation is true, and when it is done the onus probandi will be thrown on his adversary.").

[41] 1963 OK 92, 383 P.2d 203.

[42] *See also* Madison v. Steckleberg, 1924 OK 378, 224 P. 961 ("Syllabus by the Court. * * * 4. * * * [W]hen one of the parties to the prior marriage testifies that she had never procured a divorce, and that her former husband had never sued her for a divorce, and where it appears that both parties to the prior marriage had at all times been residents of the state of Oklahoma, such testimony is

Another method of rebutting the presumption is to show that no divorce was obtained by the parties to the first marriage in any county in which such a divorce could occur.[43] The fact that the courthouse burned and destroyed all the records means that it may be impossible to rebut the presumption.[44] Once evidence is introduced tending to prove that neither party to the prior marriage had procured a divorce, the presumption disappears, and the question then becomes one of fact to be decided in the light of all the circumstances and the reasonable inferences from them.[45]

The second presumption is the presumption of the validity of a ceremonial marriage.[46] One asserting a ceremonial marriage must prove that a ceremony occurred. Upon proof of the ceremony, a presumption favors its validity and the law will presume those facts necessary to validate the marriage.[47]

The third presumption operates to assume that a connubial relationship is a marriage rather than simply meretricious cohabitation.[48]

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sufficient to overcome the presumption, and to shift the burden of proof to the other party to introduce evidence showing that a divorce had been granted to one of the parties of the former marriage, and, in the absence of such proof, the finding of the trial court sustaining the second marriage is clearly against the weight of the evidence.").

[43] *In re* Estate of Cox, 1923 OK 397, 217 P. 493 ("The evidence in this case shows that these parties were citizens of the Osage tribe of Indians, that their home at all times was in Osage county, that while Catherine had been in Oklahoma and Tulsa counties at intervals, the records disclose that no divorce was ever granted her in either of said counties, and no divorce was granted her husband, Gilbert Cox."); Brokeshoulder v. Brokeshoulder, 1921 OK 412, 204 P. 284; Copeland v. Copeland, 1918 OK 597, 175 P. 764.

[44] Norton v. Coffield, 1960 OK 182, 357 P.2d 434 ("The evidence shows that it was impossible to establish with any degree of certainty the numerous places in which testator resided and the evidence also shows that competent evidence was not introduced that testator did not in fact obtain a divorce in some one of the counties in which he resided after deserting Rose.").

[45] Madison v. Steckleberg, 1924 OK 378, 224 P. 961.

[46] Norton v. Coffield, 1960 OK 182, 357 P.2d 434 ("Syllabus by the Court. 1. One of the strongest presumptions of the law, grounded in public policy favoring and presuming morality, marriage and legitimacy, is that a marriage once shown is presumed legal and valid. This presumption increases in strength with the lapse of time, recognition and acknowledgment of the marriage and the birth of children.").

[47] *See e.g.*, Hale v. Hale, 1913 OK 540, 135 P. 1143.

[48] Webster v. Webster, 1925 OK 396, 242 P. 555; Horrigan v. Gibson, 1922 OK 110, 206 P. 219.

E. Remarriage[49]

In Oklahoma, it is illegal to marry any person, other than your former spouse,[50] for six months following the divorce.[51] If a person does marry, within this state, during the six month period, they are deemed guilty of bigamy.[52] If a person marries out of state during the six month period, they are guilty of felony adultery.

In *Copeland v. Stone*, the supreme court construed the statute as to only prohibit remarriages within the state of Oklahoma.[53] The plaintiff divorced his first wife on December 10, 1986 and married the defendant in Las Vegas on January 5, 1987. The parties lived together in Nevada and Oklahoma for three weeks. They separated at the end of January, 1987 and did not resume the marriage relationship. On July 22, 1987 the plaintiff married a third woman. On March 28, 1988, Copeland filed for divorce from the defendant. The trial court concluded that there was no marriage since the parties did not live together beyond the six-month prohibitory period and dismissed the case. The court of appeals affirmed. The supreme court reversed.

The supreme court read the statute narrowly. The plain language of the statute prohibits only the remarriage of a husband or wife in this state. Since the legislature did not expressly prohibit remarriage outside of the state, the court concluded that the marriage was valid, even though within the six-month period. While cohabiting within the state following an out-of-state marriage within the six month period is criminal and constitutes felony adultery that does not, according to the court, affect the validity of the marriage.

The court overruled *Wasson v. Carden*[54] and *Estate of Rogers*,[55] to the extent that they applied the prohibition on remarriage to marriages which occurred out of state.

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[49] Remarriage must be distinguished from setting aside the divorce decree. 43 O.S. § 133 allows parties to file a joint petition to set aside the divorce decree and must show that neither party has married another. There is a distinct legal difference between remarriage and setting aside the divorce decree if the parties should get divorced a second time. If the parties remarry, the court can only go back to the remarriage to determine what property was acquired during the marriage. However, if the divorce decree was set aside, the court, upon another divorce, will go back to the date of the first marriage in determine what property is to be considered marital. *Compare* Henderson v. Henderson, 1988 OK 111, 764 P.2d 156 (Okla. 1988) *with* Estate of Pugh, 1955 OK 87, 281 P.2d 937.

[50] The divorced couple may remarry without any problem. Thomas v. James, 1918 OK 241, 171 P. 855.

[51] 43 O.S. § 123.

[52] 43 O.S §§ 123, 124.

[53] 1992 OK 154, 842 P.2d 754.

[54] 1979 OK 69, 594 P.2d 1223.

[55] 1977 OK CIV APP 9, 569 P.2d 536.

The court returned to the question of the six-months prohibitory period in *Brooks v. Sanders*,[56] when it took up the question of the status of the parties relationship during the time that they are living together prior to the expiration of the six-month period. Brooks appealed a decision of the Workers Compensation Court that held she was not the surviving spouse of the deceased, Roy Sanders. Sanders and Debbie Sanders married in a ceremony in 1991. They separated sometime prior to the year 2000. In 2000, Brooks and the deceased established a relationship. Brooks believed that the deceased had previously been divorced from Debbie Sanders. This relationship continued until Roy Sanders' death and had all the attributes of a common-law marriage. However, Roy and Debbie Sanders did not divorce until a decree was entered on February 14, 2006. Roy Sanders died from his work-related injury on May 13, 2006. A three-judge panel of the Workers Compensation Court found that Roy Sanders was a single person at the time of his death and no common-law marriage existed between him and Brooks.

The normal rule is that a remarriage that violates the six-month prohibition is not void but merely voidable.[57] There is no question that if Brooks and Saunders continued to cohabit past the six-month period they would have a common law marriage at the end of six months. However, Saunders died prior to the end of that period and, therefore, the issue concerns the status of the parties during that six-month time frame.

In *Plummer v. Davis*,[58] the court seemed to suggest that the a marriage within that six-month period was a valid marriage but was voidable in that it could be subject to a suit for an annulment. However, in *Earley v. State Industrial Comm'n*,[59] and *Burdine v. Burdine*,[60] the court ruled that the removal of a legal impediment to marriage while parties continue to live together as husband and wife gives rise to marriage by common-law as of the time of removal of impediment. The court apparently treated the six-month period under 43 O.S. § 123 as an impediment to remarriage. Those decisions were based in an earlier case of *In re Mo-se-che-he's Estate*[61]. In that case the court noted that:

> The general rule is that such a marriage has no validity whatever during the time within which either party is prohibited by law from marrying any person except the other party to the divorce. This has been the universal holding of

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56 2008 OK CIV APP 66, 190 P.3d 357 (Released for Publication by the Supreme Court).

57 Plummer v. Davis, 1934 OK 499, 36 P.2d 938; Wasson v. Carden, 1979 OK 69, 594 P.2d 1223.

58 1934 OK 499, 36 P.2d 938.

59 1954 OK 122, 269 P.2d 977.

60 1952 OK 103, 242 P.2d 148.

61 1940 OK 453, 107 P.2d 999.

this court with the possible exception of *Plummer v. Davis*, [1934 OK 499] 169 Okla. 374, 36 P.2d 938.

Following *Early* and *Burdine*, the court of civil appeals held in *In re Estate of Rogers*,[62] that *Plummer* was overruled by *In re Mo-se-che-he's Estate*. In *Rogers*, the appellate panel found the Oklahoma rule to be that a voidable marriage has no validity during the six-month limitation period and, if the elements of a common-law marriage are present, the parties' relationship ripens into a marriage after the expiration of the six months.

This view was followed by the panel in this case. It held that the voidable common-law marriage may be terminated at any time during the running of the prohibitory marriage period by any one of the following events: voluntary action by either party or by the death of either party. Therefore when Roy Sanders died the couple was not validly married since their relationship did not survive the six-month prohibitory period.

The decision of the appellate panel, approved by the supreme court is unfortunate in that it violates the normal rule regarding voidable marriages. As noted earlier in this chapter, a void marriage may be attacked by any person, at any time the question of the validity of the marriage becomes an issue in the case. However, a voidable marriage, such as those that violate the rules on age and mental capacity, must be attacked in a suit for an annulment while the disability exists.[63]

A comparable situation to *Brooks v. Sanders* arose in *White v. McGee*.[64] The court there held that a marriage between persons under age prescribed by statute is voidable and not void. Therefore, where a male 17 and female 15 years of age are married and the male dies before annulment of marriage, or before it can ripen into a common law marriage when the parties become of age, the "wife" was held to be the surviving spouse. Thus, in *Sanders* the court created an unwarranted distinction between marriages that are voidable due to nonage or lack of mental capacity and those that are voidable because of the six-month prohibitory period. The former can only be challenged in a suit for an annulment while the incapacity exists while in the latter case the marriage can expire due to the death of one of the parties. If the normal rule on voidable marriage was applied in *Brooks v. Sanders*, the result would

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62 1977 OK CIV APP 9, 569 P.2d 536.

63 *See* 43 O.S. § 128 which provides that:

> When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void by the district court, in an action brought by the incapable party or by the parent or guardian of such party; but the children of such marriage begotten before the same is annulled, shall be legitimate. Cohabitation after such incapacity ceases, shall be a sufficient defense to any such action.

64 1931 OK 280, 299 P. 222.

have been that since the marriage was not annulled during the prohibitory period it cannot be attacked after the death of one of the parties.

The statute prohibiting remarriage within six months after a divorce, except to one's former spouse, is a hang-over from an earlier age. It used to be that upon showing the grounds for divorce a litigant received a decree nici, a temporary decree of divorce. That would turn into a final decree of divorce after six months.[65]

Should this issue rise again, attorneys ought to consider challenging the constitutionality of the statute. In *Zablocki v. Redhail*,[66] the court found that the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause. Therefore, restrictions on the right to enter into a marriage can only be upheld if the state can show that the statute "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

With a statute as ancient as this one, it is hard to discern the purpose of not allowing divorced couples to re-marry for six months. One purpose is undoubtedly to discourage divorce. The theory would be that if a divorced person had to wait for six months to remarry, he or she might rethink the divorce. Such a purpose may be found to be a substantially important state interest. However, the method of carrying out that purpose is suspect. I do not know of any family law attorney who has had a client, that upon learning of the six-months prohibition decided to abandon the divorce. If the state was clearly intent upon discouraging divorce it should not have a no-fault divorce system.

The vast majority of states have abolished any prohibition against remarriage. For most people who violate the six-months prohibition their marriage will ultimately be upheld after six months, therefore, rendering any attack on the statute moot. However, as *Brooks v. Sanders* clearly indicates, there are some couples who are clearly penalized by the continuation of this relic.

F. Same-Sex Marriages

The issue of whether same-sex couples can marry was a major public policy debate in this country for a number of years. The first state to hold that same-sex couples have a constitutional right to marry under their state constitution was Massachusetts.[67]

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[65] See the discussion of the evolution of the statute in Wasson v. Carden, 1979 OK 69, 594 P.2d 1223.

[66] 434 U.S. 374 (1978).

[67] Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

Bishop v. United States ex rel. Holder[68] challenged the Oklahoma ban on same-sex marriage. The case was originally brought in 2004. The petitioners challenged the Oklahoma amendment as violating the 14th Amendment's Equal Protection Clause. Ultimately the 10th Circuit directed that the state governor and attorney general be dismissed as defendants and the Court Clerk for Tulsa County was named in their place. The clerk had denied a marriage license to the couple based on their same-sex status.

Upon a resumption of the case, the district court granted summary judgment for the petitioners. The district court found that in applying the *Windsor* case, it must be careful to determine whether the purpose of " 'defending' traditional marriage is a guise for impermissible discrimination against same-sex couples." The court found that this was "a classic, class-based equal protection case in which a line was purposely drawn between two groups of Oklahoma citizens," same-sex and opposite-sex couples desiring an Oklahoma marriage license and is best described as sexual-orientation discrimination, which is not subject to any form of heightened review in the 10th Circuit.[69]

Therefore, the Oklahoma ban on same-sex marriages "must be reviewed merely for 'rationality.' " The trial judge said that its supporters had cited "morality" as a reason for barring same-sex marriage in a "Bible Belt state." He said that although the ban rationally promoted the state's interest in upholding a certain definition of marriage, "moral disapproval of homosexuals as a class, or same-sex marriage as a practice, is not a permissible justification for a law."[70]

The court also found that the ban was not rationally related to the state's interest in encouraging responsible procreation or steering "naturally procreative" couples to marriage. Among other things, "[c]ivil marriage in Oklahoma does not have any procreative prerequisites" the court said and added that "[a]ssuming a state can rationally exclude citizens from marital benefits due to those citizens' inability to 'naturally procreate,' the state's exclusion of only same-sex couples [and not the infertile, the elderly, and persons not wanting to procreate] is so grossly underinclusive that it is irrational and arbitrary." Further, the court said "Rationality review has a limit, and this well exceeds it."

As for the claim that barring same-sex marriage is rationally related to the goal of promoting the "ideal" family environment, the court remarked that "[e]xcluding same-sex couples from marriage has done little to keep Oklahoma families together thus far, as Oklahoma consistently has one of the highest divorce rates in the

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68 962 F.Supp.2d 1252 (N.D. Okla. 2014).

69 *See e.g.*, Price-Cornelison v. Brooks, 524 F.3d 1103 (10th Cir. 2008).

70 Lawrence v. Texas, 539 U.S. 558 (2003).

country." Thus, concluding that the denial of same-sex marriage "does nothing to promote stability in heterosexual parenting," he likewise rejected the argument that "fundamentally redefining marriage" would have a negative impact on that institution. This claim, he said, "is impermissibly tied to moral disapproval of same-sex couples as a class of Oklahoma citizens."

Holding, therefore, that the ban violates the Federal Constitution's Equal Protection Clause, the court permanently enjoined its enforcement. The district court's decision was affirmed by the 10th Circuit in *Bishop v. Oklahoma.*[71] The Supreme Court denied the state's petition for certiorari,[72] with the result that same-sex marriage is legal in Oklahoma.

Same-sex marriage came to the rest of the country when the United States Supreme Court decided *Obergefell v. Hodges*,[73] and determined that same-sex couples have a right under the Due Process Clause of the United States Constitution to marry.[74]

The *Obergefell* decision also dealt with the issue of recognition of same-sex marriages performed in other states. Because all states must allow same-sex marriages the issue will no longer occur. There may be some cases that raise the issue of whether a Oklahoma must recognize a same-sex marriage from another state that preceded *Obergefell* and *Bishop* cases. The Supreme Court decided that issue as follows:

> Being married in one State but having that valid marriage denied in another is one of "the most perplexing and distressing complication[s]" in the law of domestic relations. *Williams v. North Carolina*, 317 U.S. 287, 299, 63 S.Ct. 207, 87 L.Ed. 279 (1942) (internal quotation marks omitted). Leaving the current state of affairs in place would maintain and promote instability and uncertainty. For some couples, even an ordinary drive into a neighboring State to visit family or friends risks causing severe hardship in the event of a spouse's hospitalization while across state lines. In light of the fact that many States already allow same-sex marriage—and hundreds of thousands of these marriages already have occurred—the disruption caused by the recognition bans is significant and ever-growing.
>
> The Court, in this decision, holds same-sex couples may exercise the

71 760 F.3d 1070 (10th Cir. 2014).

72 Smith v. Bishop, 135 S.Ct. 271 (U.S. 2014).

73 135 S.Ct. 2584 (U.S. 2015).

74 One of the effects of the decision is to make it unnecessary to decide the appropriate gender of a person who underwent a sex-change operation for purposes of marriage. *Cf.* Application of Harvery, 2012 OK CIV APP 112, 293 P.3d 224 (person who underwent a sex change operation has a right to a name change that reflects the gender change).

> fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

The court's language appears to limit the recognition issue to same-sex marriages. Whether a state may continue to refuse to recognize marriage from other states that would otherwise be invalid under the law of the forum is probably not affected by the *Obergefell* decision.

One of the thornier issues concerning the legalization of same-sex marriage is the question of retroactivity.[75] There were no doubt a number of same-sex Oklahoma residents that went to one of the states that legalized same-sex marriages and were married there. Or went to a state that recognized civil unions and entered into a civil union. Assume the couple then returned to Oklahoma. Two scenarios could follow from this. First, assume the couple separated. Nobody filed a court action because Oklahoma would not divorce the couple because it did not recognize the marriage and the couple could not afford to return to the place of celebration for the length of time it would take to qualify for a divorce. Second, assume the couple stays together and is still residing in the same household.

The effect on the answer to these fact patterns depends on whether the decision in *Obergefell* is retroactive to facts that occurred prior its date. In one of its recent cases discussing retroactivity in the civil context is *Harper v. Virginia Department of Taxation*,[76] where the court held that

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[77]

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[75] The issue of the retroactivity of *Obergefell* is a much broader issue that can be considered in this book. There is the issue of whether *Obergefell* can be read to mandate the retroactivity of its decision. And, if so, to what date? The date the couple began to live together; the date they entered into a marriage or civil union in another state; or some other date? The answer to this question matters for many of the federal benefits such as social security and military pension qualification among other issues. It is also entirely possible that the federal government will work out the answers to federal benefits either for all benefits or on a benefit by benefit approach. This discussion focuses only on the distinctly family law issues of status and property division.

[76] 509 U.S. 86 (1993).

[77] 509 U.S. at 97.

Whether or not the Supreme Court adheres to this rule will determine a large number of issues with regard to this Oklahoma couple.[78]

First consider the Oklahoma couple that entered into a marriage or a civil union in another state, returned to Oklahoma, and subsequently separated without the blessing of the state. After the decision in the *Bishop* case, is this couple married to each other or not? Does it depend on whether the question is asked in Oklahoma or the state where the marriage took place? Whatever the answer to this question, hopefully, the answer will be the same regardless of where it is asked. Otherwise we will find ourselves with the same problems that existed prior to the decision in *Williams v. North Carolina (I)*[79] when it was possible for a couple to be married in one state and not in another.[80]

If the decisions in *Bishop* and *Obergefell* are to be applied retroactively, then this couple is still married regardless of the fact that the couple is no longer together. Therefore, this couple would need to obtain a divorce before either one of them could marry another person. If, in the meantime, one of them has married another person, the second marriage would be bigamous and invalid.[81]

Couples which lived together in Oklahoma prior to the decision in *Bishop* could have cohabitation arrangements which today would be considered as common law marriages. This will create for same-sex couples in Oklahoma the same problems faced by opposite sex couples with regard to common law marriage. It is entirely possible that when one member of this couple later enters into a ceremonial marriage and, for example, dies, the former cohabitant will come forth claiming to be a common law spouse, resulting in potentially extensive litigation.[82]

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[78] Some lower courts are apparently applying *Obergefell* retroactively. In Bucks County Pennsylvania a judge has ruled that two women were in a valid common-law marriage when one of them passed away in 2013, before marriage equality was recognized in the state. *See* http://thinkprogress.org/lgbt/2015/07/30/3686006/retroactive-marriage-equality/. In Texas, a district judge ordered the Texas Department of State Health Services to issue an amended death certificate listing a man's same-sex partner as his surviving spouse. Prior to a contempt hearing, the state agreed to amend death certificates for same-sex spouses. http://www.dallasbar.org/book-page/back-future-will-texas-courts-apply-obergefell-retroactively.

[79] 317 U.S. 287 (1942).

[80] One of the benefits of the *Obergefell* decision is it prevented that from happening to same-sex couples who could be determined to be married in the state that performed the marriage but not in the state of their domicile.

[81] On the other hand, if *Obergefell* is not retroactive, then this couple is not married in Oklahoma, but could be determined to be married in the state where the marriage occurred.

[82] For illustrative cases, *see* Parkhill Trucking Co. v. Row, 1963 OK 92, 383 P.2d 203; Estate of Allen, 1987 OK 45, 738 P.2d 142.

It seems that until this issue is settled the best practical advise is to counsel a client to obtain a divorce from the former same-sex partner and, if married, to remarry their current spouse.[83]

In the second scenario where the couple married in another state where it was legal to do so prior to the *Bishop* decision and continued to live together, they no doubt have a common law marriage as of the date the Oklahoma ban on same-sex marriage was declared invalid. However, if this couple gets divorced, the retroactivity issue also will arise.

In Oklahoma, as well as most equitable distribution states, in a divorce case a trial court must divide between the spouses that property which is classified as marital. However, that property which is separate must be confirmed to the spouse that owns it.[84] One category of separate property is property that was acquired prior to marriage.[85] Whether property was acquired during the marriage depends on the source of the funds which purchased the property, not when the property was purchased.[86] Thus, the first day to acquire marital property is the date after the marriage when property is acquired with funds earned during the marriage.[87]

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[83] A case somewhat like this is Estate of Smart v. Smart,1983 OK CIV APP 49, 676 P.2d 1379 where Mr. Smart was married to Marie back in Oklahoma. He then went to California and married Gwendolyn. He finally divorced Marie but never remarried Gwendolyn which led to the issue of whether Gwendolyn was the surviving spouse for property located in Oklahoma. Issues like this are in our future if the *Obergefell* and *Bishop* decision are retroactive.

[84] The property division statute for divorce cases is 43 O.S. § 121. For a full discussion of Oklahoma marital property law, *see* Chapter 3., Equitable Distribution of Property, *infra*.

[85] There are many cases. *See e.g.*, Colclasure v. Colclasure, 1995 OK CIV APP 36, 892 P.2d 676. ("The court properly found the land acquired by Appellee prior to his marriage remained his separate property and that only the improvements to the land, done by joint industry of the parties, were divisible as such."); Whitley v. Whitley, 1988 OK CIV APP 6, 757 P.2d 849 ("Appellant argues that the trial court erred in ordering her to pay a debt of Appellee acquired prior to the marriage. We agree."); Morey v. Morey, 1981 OK CIV APP 46, 632 P.2d 773 ("To summarize, at the commencement of this marriage, Wife had virtually no separate property, except what Husband had given her during the courtship. He did not work, nor did he re-invest any of his income. Under these unique circumstances, the couple could not have possibly accumulated any "jointly acquired" property"); Chapman v. Chapman, 1980 OK CIV APP 27, 614 P.2d 90; Owen v. Owen, 1938 OK 419, 80 P.2d 628.

[86] *See* May v. May, 1979 OK 82, 596 P.2d 536 (Okla. 1979), where the husband took a sum from his separate savings account and purchased a house in his name after the marriage. ("Its purchase after the marriage in point of time, did not *ipso facto* invest the wife with any greater interest in that property than she would have had in the money [before it was spent for this purpose] if that money had remained intact in husband's separate premarriage account.").

[87] Herndon v. Herndon, 1972 OK 134, 503 P.2d 545; Sylvan v. Sylvan, 1962 OK 171, 373 P.2d 232 ("Defendant asserts that there is competent evidence showing that the property which plaintiff asserts was jointly acquired during the marriage resulted from defendant's investing or expending money on hand as of date of marriage or proceeds from the sale of property owned as of said date. We find that

Therefore, in order to determine which property is marital and which property is separate, the court will need to decide the question of when did the marriage begin. There are three possible dates in the above scenario. If *Bishop* and *Obergefell* are not retroactive, then the marriage began when the *Bishop* case declared the Oklahoma law prohibiting same-sex marriage unconstitutional and the parties intended to be married, i.e., a common law marriage as of the date when certiorari was denied on the *Bishop* decision. However, if *Bishop* and *Obergefell* are retroactive, the issue then is retroactive to when? It could be retroactive to the date the couple married in another states. Or, it could be retroactive to the date the couple began cohabiting in Oklahoma and would have been married if they were allowed to do so.

Obviously the earlier the date of the marriage the greater the size of the marital estate that is available for division.[88] For example, if the couple purchased a home prior to the *Bishop* case then, if Bishop is retroactive, the home is marital property to the extent that marital funds were used to purchase equity in the home. However, if the cases are not retroactive only that part of the equity purchased with marital funds after the *Bishop* case is martial, as well as any increase in value attributable to marital funds or marital labor.

It is possible that our appellate panels could decide that Oklahoma ought to have a third category of property called pre-marital property. This would be property acquired prior to marriage in the name of one party and was acquired in contemplation of marriage.[89] Another approach might be to designate the start for marital property as the date where the couple began their economic partnership. This would correspond with the end date for the acquisition of marital property which is date the parties separate not intending to reconcile, i.e., the end of the economic partnership.[90] While neither date can always be ascertained with particularity, it would bring the beginning date and the ending date into conformity.

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such is the case."); Colvin v. Colvin, 1952 OK 267, 246 P.2d 744 ("Syllabus by the Court. 1. Where separate property of a spouse, owned prior to his marriage, is sold and the proceeds are traced into his investment in other property, the identity of his separate property is not lost, and the mere change of the form of the property is not to be considered property acquired by joint efforts of the husband and wife during coverture."); Boyes' Estate v. Boyes, 1939 OK 85, 87 P.2d 1102.

[88] The problem also arises in the alimony context. One of the factors that has always been considered in whether to award alimony, as well as the amount of the alimony, has been the length of the marriage. McLaughlin v. McLaughlin, 1999 OK 34, 979 P.2d 257; Peyravy v. Peyravy, 2003 OK 92, 84 P.3d 720; Hutchings v. Hutchings, 2011 OK 17, 250 P.3d 324.

[89] Coney v. Coney, 503 A.2d 912 (N.J. Super. Ct. Ch. Div. 1985); Berrie v. Berrie, 600 A.2d 512 (N.J. Super. Ct. App. Div. 1991). *See also* the discussion in Allison Anna Taite, *Divorce Equality*, 90 WASH. L. REV. 1245 (2015).

[90] *See e.g.*, Weaver v. Weaver, 1975 OK CIV APP 25, 545 P.2d 1305. *See also* Ettinger v. Ettinger, 1981 OK 130, 637 P.2d 63; Harden v. Harden, 1938 OK 54, 77 P.2d 721 (1938); Estate of Keith,

Another possibility is to use the concept of quasi-partnership. The concept arose early in Oklahoma's history in the context of void marriages such as bigamy and incest. In that context where a couple lived together in a situation where the marriage was actually void, the court said that there is an equitable power to divide the property the couple accumulated during the void relationship. This comes about by analogizing the relationship to a partnership, hence the term quasi-partnership.[91] The court utilizes partnership law and not family law when it makes the property division.[92] Thus, a reconciliation of the parties does not vitiate the parties' agreement on property division since they are partners and not husband and wife.[93]

This concept could be applied to same-sex couple who get divorced in Oklahoma and whose cohabitation predated the *Bishop* case. By applying this concept the court could divide the cohabitation acquired property by essentially the same standards that it would in dividing the marital property.

1956 OK 178, 298 P.2d 423. For a recent case *see* Marriage of Janitz, 2013 OK CIV APP 107, 315 P.3d 410.

[91] *See* Krauter v. Krauter, 1920 OK 249,190 P. 1088; Tingley v. Tingley, 1936 OK 791, 64 P.2d 865; Whitney v. Whitney, 1942 OK 268, 134 P.2d 357.

[92] Of course, the "partnership" law looks very much like the normal rules used in equitable division of property.

[93] *Compare* Hale v. Hale, 1913 OK 540,135 P. 1143 *with* Whitney v. Whitney, *supra*. The court of civil appeals has taken that approach in a case where it affirmed a trial court determination that although the parties did not have a common law marriage it could divide the parties property "using equitable principles." The court then decided that case using the same principles it would have used had the court divided property pursuant to 43 O.S. § 121. *See* Marriage of Roye, #103,234 (Tulsa 2007)(unpublished).

II. Divorce and Other Dissolution Actions

A. Divorce

1. Generally

Divorce, now called dissolution of marriage,[94] is one of three actions that can be brought to affect the marital relationship. The other two are annulment and legal separation. Oklahoma is considered a mixed state, in that divorce is available on both fault and a no-fault ground. As a practical matter, however, just about all divorces are brought under the no-fault ground, since the concept of fault has no applicability to any of the financial aspects of the divorce. The case law is clear that a trial court can grant a divorce on any ground that has been pled and proved.[95] Since most of the fault grounds indicate that the couple is incompatible, many divorces that start out as fault divorces are often granted on the basis of incompatibility so long as one of the parties requests the divorce on that ground.[96]

Oklahoma law lists twelve grounds for divorce.[97] If one of the grounds is proven, the court is supposed to grant the divorce.[98] There are no appellate cases on a

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[94] 43 O.S. § 105E provides that:

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

This text uses the older term "divorce" since it appears that the new term is not yet in general usage.

[95] *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). It is, however, permissible to grant one party a divorce on a fault ground and to grant the other party a divorce on the ground of incompatibility. Lavender v. Lavender, 1967 OK 250, 435 P.2d 583.

[96] Although one party cannot be denied to right to introduce evidence relevant to a fault divorce, the issue must be before the court. Therefore, when the wife failed to get leave of court to amend her divorce petition to assert both adultery and extreme cruelty the failure to obtain leave of court rendered the amendment a nullity. Hunter v. Echols, 1991 OK 114, 820 P.2d 450; Smith v. Smith, 1993 OK CIV APP 17, 847 P.2d 827.

[97] 43 O.S. § 101 provides that:

> The district court may grant a divorce for any of the following causes:
>
> First. Abandonment for one (1) year.
>
> Second. Adultery.
>
> Third. Impotency.

number of grounds such as impotency or where the wife is pregnant by another at the time of the marriage. Only those grounds which have an appellate construction are discussed in these materials.

Fourth. When the wife at the time of her marriage, was pregnant by another than her husband.

Fifth. Extreme cruelty.

Sixth. Fraudulent contract.

Seventh. Incompatibility.

Eighth. Habitual drunkenness.

Ninth. Gross neglect of duty.

Tenth. Imprisonment of the other party in a state or federal penal institution under sentence thereto for the commission of a felony at the time the petition is filed.

Eleventh. The procurement of a final divorce decree without this state by a husband or wife which does not in this state release the other party from the obligations of the marriage.

Twelfth. Insanity for a period of five (5) years, the insane person having been an inmate of a state institution for the insane in the State of Oklahoma, or inmate of a state institution for the insane in some other state for such period, or of a private sanitarium, and affected with a type of insanity with a poor prognosis for recovery; provided, that no divorce shall be granted because of insanity until after a thorough examination of such insane person by three physicians, one of which physicians shall be a superintendent of the hospital or sanitarium for the insane, in which the insane defendant is confined, and the other two physicians to be appointed by the court before whom the action is pending, any two of such physicians shall agree that such insane person, at the time the petition in the divorce action is filed, has a poor prognosis for recovery; provided, further, however, that no divorce shall be granted on this ground to any person whose husband or wife is an inmate of a state institution in any other than the State of Oklahoma, unless the person applying for such divorce shall have been a resident of the State of Oklahoma for at least five (5) years prior to the commencement of an action; and provided further, that a decree granted on this ground shall not relieve the successful party from contributing to the support and maintenance of the defendant. The court shall appoint a guardian ad litem to represent the insane defendant, which appointment shall be made at least ten (10) days before any decree is entered.

[98] *See* Williams v. Williams, 1975 OK 163, 543 P.2d 1401. ("The sole issue on appeal is the authority of the district court to grant a divorce on the grounds of incompatibility. Appellant wife contends that the court is without such authority because it contravenes the religious oaths and vows taken by the parties, and, the authority of God, the Bible and Jesus Christ. * * *

* * * *

"* * * Although the State is a silent third party in every divorce proceeding, it is not interested in perpetrating a marriage after all possibility of accomplishing any desirable purpose of such relationship is gone.

* * * *

"The State has absolute control over the dissolution of the civil marriage contract. Dissolution of the marital relationship or religious vows are a matter of conscience; extinguishment of the civil marriage contract and the marital status are matters of statutory construction.").

Divorce is a personal action. The normal rule is that a person must be of sound mind to bring an action for divorce.[99] In the only Oklahoma case to consider this issue, the court held that the mere fact that a guardian has been appointed to preserve the estate of the ward did not impose a disability to seek a divorce.[100] The court expressed no opinion on whether a ward who has had a guardian appointed for his person could seek a divorce.

A divorce can be maintained against an insane spouse who is represented by a guardian providing the grounds for divorce arose prior to the insanity.[101] A divorce can also be maintained against an insane person when the insanity arose after the divorce petition was filed.[102]

2. No Fault Divorce

Oklahoma became the second state to authorize divorce on a no-fault basis when, in 1953, it added incompatibility as a ground for divorce. Incompatibility exists when there is such a conflict of personalities as to destroy the legitimate ends of matrimony and the possibility of reconciliation. Such a state may exist although the situation is considered serious by one spouse and less so by the other.[103] It does not matter which spouse caused the incompatibility.[104] Although if incompatibility exists as a result of the misconduct of the complaining spouse, the trial court is vested with broad discretion in the weighing of the possibilities of reconciliation and the restoration of a normal marital status and in the granting of a divorce.[105] An appeal on the ground that the trial court should have exercised its discretion to not grant the divorce is unlikely to be successful.[106] The court has often noted that incompatibility is a "two-way proposition," and, therefore, a divorce cannot be granted if only one party is incompatible since the statute was not intended to authorize a divorce on demand.[107] If one party contests the divorce, the trial court and the appellate panel

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[99] Apparently adopted in Oklahoma in Scoufos v. Fuller, 1954 OK 363, 280 P.2d 720. However, the issue was addressed only in dicta where the court indicated that an insane person did not have the capacity to institute a collateral attack against a divorce decree.

[100] State ex rel. Robedeaux v. Johnson, 1966 OK 157, 418 P.2d 337.

[101] Lewis v. Lewis, 1916 OK 351, 158 P. 368.

[102] Scoufos v. Fuller, 1954 OK 363, 280 P.2d 720.

[103] Kirkland v. Kirkland, 1971 OK 98, 488 P.2d 1222; Wegener v. Wegener, 1961 OK 241, 365 P.2d 728.

[104] Rakestraw v. Rakestraw, 1959 OK 202, 345 P.2d 888.

[105] Wegener v. Wegener, 1961 OK 241, 365 P.2d 728. However, there is no appellate case where the trial court exercised its discretion not to grant the divorce.

[106] *See* Newman v. Newman, 1964 OK 101, 391 P.2d 902.

[107] Chappell v. Chappell, 1956 OK 190, 298 P.2d 768.

are entitled to weight the evidence and, if the evidence shows the parties are incompatible, grant the divorce.[108]

Since incompatibility implies mutual incompatibility, a trial court should grant the divorce to both parties.[109] Although if one of the parties objects to being divorced, the court can grant the divorce to only one of the parties.[110] Of course, doing so has no effect on the subsequent status of the parties. They are divorced since a divorce, even though granted to only one of the parties, severs the marital status.

Incompatibility must be proved by objective evidence.[111] The parties cannot stipulate to a divorce.[112] The interesting question of what is the effect of a granting a divorce where the parties stipulated to incompatibility in a situation where actionable incompatibility did not actually exist was discussed in *Vandervort v. Vandervort*.[113] In this case the divorce was the result of a petition signed by the husband, an entry of appearance/waiver of summons signed by the wife, and a "consent decree" signed by both parties. The husband, acting pro se, presented these instruments to the District Court of Oklahoma County. The parties had agreed to a divorce and to divest the 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 the wife's need for nursing home care, they were to continue living together at their Texas County residence in Guymon, Oklahoma. The husband was to care for the wife until she required nursing home care. Not long after the divorce, however, acrimony developed and the wife ended up living with her parents.

The wife petitioned to vacate the divorce decree. After considering the above facts, the trial court vacated the divorce 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.

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[108] Kirkland v. Kirkland, 1971 OK 98, 488 P.2d 1222; Waller v. Waller, 1968 OK 42, 439 P.2d 952.

[109] Allen v. Allen, 1979 OK CIV APP 56, 601 P.2d 760. ("The court therefore erred in granting only the woman a divorce on the ground of incompatibility an error the effect of which is mainly psychological since the granting of a divorce to only one party effectively dissolves the bonds.").

[110] Rakestraw v. Rakestraw, 1959 OK 202, 345 P.2d 888.

[111] Hughes v. Hughes, 1961 OK 112, 363 P.2d 155.

[112] 43 O.S. § 130 provides: "* * * But no divorce shall be granted without proof."

[113] 2006 OK CIV APP 34, 134 P.3d 892.

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 memorialized the ruling from the bench and included a dismissal order. It appears that the parties could not agree to waive venue in Texas County in favor of venue in Oklahoma County.

The husband appealed and the appellate panel affirmed. The panel was not very concerned about the alleged fraud concerning venue. It focused instead on what it considered a more significant problem. The petition signed by the 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 they intended to return to their Texas County residence where they were to continue living together with the husband providing and caring for the wife. In fact, they did so for a short time after the divorce. The panel then concluded that the couple perpetrated a fraud on the court.

The panel noted that "[A]ctionable 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." The panel then found that "[T]he State is a silent third party in every divorce proceeding." 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."[114] 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."

Normally, when the 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."[115] However, the panel noted that there is a case which held that when 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."[116]

The court found that the fraud in this case was so serious that the *Meyers* rule would apply. It held that 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

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[114] Wooden v. Wooden, 1925 OK 594, 239 P. 231.

[115] Erdman v. Erdman, 1914 OK 308, 141 P. 965.

[116] Meyers v. Meyers, 1948 OK 246, 199 P.2d 819.

for financial gain. Therefore, rather than leave the parties where they found them, the panel returned them to the state of matrimony.

Judge Gabbard dissented, correctly noting that the majority had misstated the law. This case involved mutual fraud and the normal rule is that when the parties commit a fraud on the court, the law will leave them where they are found. The *Newman* case, cited by the majority, is an example of such fraud. In that case the husband obtained a divorce from the 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 husband changed his mind and attempted to move the plaintiff off his land contrary to their pre-divorce agreement. The wife then filed a motion to set aside the divorce on grounds of fraud, based on the husband's failure to comply with his promise. The Supreme Court denied her motion and found that it was a case of mutual fraud and, therefore, the law would refuse to help her.[117]

However, the *Myers* case, upon which the majority opinion was based, is quite different because the party requesting the vacation of the divorce was not involved in the fraudulent act of obtaining it 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. In cases where there is one fraudfeasor and one innocent party, the court will grant relief to the innocent party.

Judge Gabbard was correct in his characterization of how the case should have been determined. The majority opinion raises the possibility that if the parties to a divorce decree should resume cohabitation following the divorce the divorce is vulnerable to being set aside for fraud on the court.

3. Fault Divorce

a. Adultery

There are two elements to proving a case of adultery. There must be a criminal disposition or desire in the minds of both parties and an opportunity to commit the adultery. It is not necessary to prove the direct fact of adultery. Adultery may be proven by circumstances. However, the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion of guilt.[118] Therefore, the evidence must be convincing and the uncorroborated testimony of a

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[117] *See also* Erdman v. Erdman, 1914 OK 308, 141 P. 965; Green v. James, 1931 OK 75, 296 P. 743.

[118] Chamberlain v. Chamberlain, 1926 OK 305, 247 P. 684; Hartshorn v. Hartshorn, 1917 OK 538, 168 P. 822.

friend of the husband that he had sexual relations with the wife is not sufficient when his testimony is contradicted and the wife denied the affair.[119]

b. Abandonment for One Year

Abandonment or desertion as a ground for divorce requires that the parties live separate and apart for one year. It also requires that the leaving spouse have good cause for abandoning the marital home. Therefore, when the wife leaves the home of the husband and "takes up her abode with her parents and refuses to return or live with the husband for a period of more than one year", it amounts to "abandonment" within the meaning of the statute.[120] It also amounts to abandonment under older statutes if the wife refused to live in the marital home chosen by the husband.[121] An abandoned spouse is not required to follow her husband's footsteps in an endless quest to achieve reunion. "The law would indeed be both inastute and unrealistic if it expected a wife to abandon her only precious possessions in a fruitless quest after an errant husband who had given no indication of his desire to return and stay."[122]

If, however, the abandoning spouse in good faith offers to return, the fault of desertion will be thrown on the other spouse and will bar a divorce, if the offer is refused. Whether the offer to return is made in good faith or not is a question of fact for the trial judge.[123]

c. Extreme Cruelty

Prior to the advent of incompatibility as a ground for divorce, most divorces in Oklahoma were granted on the ground of extreme cruelty. Extreme cruelty has been defined as:

> 1. "Extreme cruelty" within the contemplation of our divorce statutes is conduct on the part of either spouse which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health or utterly destroy the legitimate ends of matrimony.
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> 2. The "legitimate ends of matrimony" are not destroyed within the terms of the above definition by spouses' minor differences and disagreements

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[119] Evans v. Evans, 1926 OK 757, 252 P. 837.

[120] Stieber v. Stieber, 1921 OK 264, 200 P. 141.

[121] *See* the discussion in De Vry v. De Vry, 1915 OK 260, 148 P. 840.

[122] Tatum v. Tatum, 1982 OK 62, 736 P.2d 506. *Tatum* is a workers' compensation case. The Workers Compensation law, 85 O.S. § 3.1, defines surviving spouse as one living with and dependent upon the worker or who has been deserted. The term "deserted" in the workers compensation statutes means the same thing as "abandonment" in the divorce statutes.

[123] De Vry v. De Vry, 1915 OK 260, 148 P. 840.

> resulting from incompatibility of their tastes or temperaments, or intermittent clashes of will or estrangements produced by differences of opinion, as these must be endured along with other minor misfortunes of life.[124]

Extreme cruelty does encompass physical violence.[125] However, the court decided very early that the term also includes cruelty that "grievously wounds the mental feeling of the other."[126] False charges of adultery where there is a clear effect on the other spouse was a common basis upon which a divorce was granted.[127] Among the factors that a court was to consider in determining whether extreme cruelty existed include "the intent and ability of the accused spouse to inflict such cruelty, and the susceptibility of the other spouse to such cruelty, as well as whether such other spouse is of a provocative disposition, are material points of inquiry. In such case, the trial court may take into consideration the demeanor and appearance of the parties at the trial."[128]

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[124] Vincent v. Vincent, 1953 OK 154, 257 P.2d 512. *See also* Hornor v. Hornor, 1931 OK 499, 3 P.2d 670 ("The remedy of absolute divorce is an extraordinary remedy for evils which are unavoidable and unendurable, and which cannot be relieved by any proper and reasonable exertion of the party seeking the aid of the courts.").

[125] *See* Clark v. Clark, 1916 OK 95, 154 P. 1142 ("If cursing and whipping one's wife do not constitute "extreme cruelty," it is difficult to imagine a condition that would comply with the term.").

[126] Collins v. Collins, 1938 OK 94, 77 P.2d 74 ("Syllabus by the Court. 1. * * * There may be a divorce on the ground of "extreme cruelty" in the absence of physical violence when there is conduct or treatment which destroys the concord, harmony, happiness, and affection of the parties, and the legitimate aims, objects, purposes, and end of matrimony, or grievously wounds the mental feelings, or so destroys the peace of mind as seriously to impair the health or endanger the life of the other."); Finnell v. Finnell, 1925 OK 679, 240 P. 62 ("Syllabus by the Court. 2. * * * Extreme cruelty as a ground for divorce, while there is no actual violence, contemplates treatment, abuse, neglect, or bad conduct such as damages health or renders cohabitation intolerable and unsafe, and charges of infidelity and misconduct which are untrue."); Hildebrand v. Hildebrand,1913 OK 744, 137 P. 711 ("False charges of adultery, made by the husband of the wife maliciously and without probable cause, constitute legal cruelty.").

[127] Reed v. Reed, 1938 OK 140, 77 P.2d 30 ("Syllabus by the Court. 1. * * * Evidence that a wife has made false accusations of her husband's infidelity, both in public and in private, with the result that his health has become impaired and his business diminished, is sufficient to support a judgment granting the husband a decree of divorce on the ground of extreme cruelty.").

[128] Robertson v. Robertson, 1918 OK 640, 176 P. 387; Routh v. Routh, 1942 OK 371, 130 P.2d 1000 ("[D]efendant [wife] continually indulged in abusive, accusative and vituperative conversations with the neighbors and friends of the plaintiff pretending to want to re-establish the marital relation; that she would often call women of the neighborhood claiming to want to know of the whereabouts of her husband; that she often used aliases and questioned the neighbors with relation to the plaintiff's business dealings and social conduct; that at one time she threatened to kill him and any woman companion seen with him.").

If, however, the cruelty was provoked by the acts of the complainant, a divorce could be denied.[129] In addition, if the acts complained of were committed with a good motive, the acts did not constitute extreme cruelty.[130] The trial court was entitled to weigh the evidence and, where the divorce was not against the weight of the evidence, an appellate court would affirm.[131]

d. Gross Neglect of Duty

Gross neglect of duty was defined as "such a glaring, shameful, or monstrous neglect from marital duties as to be obvious from the common understanding and inexcusable under all the relevant facts in the case."[132] This included, among other things, the failure of the husband to provide for his wife when he able to do so.[133] In also include situations where the wife refused to prepare meals, asked a salary for the performance of household duties and living apart from her husband in the home.[134] Other inexcusable conduct would also qualify.[135]

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[129] Hatchett v. Hatchett, 1923 OK 215, 214 P. 929 ("Syllabus by the Court. 1. * * * It is the general rule that a divorce will not be granted on the ground of cruelty, where the cruelty was provoked by the misconduct of the complainant.").

[130] Vincent v. Vincent, 1953 OK 154, 257 P.2d 512 ("Syllabus by the Court. 3. Where the conduct complained of as ground for a divorce consists of accusations of infidelity made by the wife against the husband, which were not made from malevolent motives, or through hatred and spite, but in good faith, the wife having reasonable cause for believing their truth, and making them for the purpose of inducing the husband to abandon such supposed course of wrong-doing, and return to a proper observance of his marital obligations, it does not constitute such 'extreme cruelty' as to justify a dissolution of the marriage.").

[131] Nelson v. Nelson, 1941 OK 221, 117 P.2d 110.

[132] White v. White, 1955 OK 56, 281 P.2d 745; Hornor v. Hornor, 1931 OK 499, 3 P.2d 670.

[133] Hayes v. Hayes, 1936 OK 608, 62 P.2d 62; McGee v. McGee, 1914 OK 439, 143 P. 178.

[134] Clark v. Clark, 1949 OK 13, 202 P.2d 990.

[135] *See* Hatchett v. Hatchett, 1923 OK 215, 214 P. 929. ("Syllabus by the Court. 2. * * * While neglect of duty, in order to constitute a ground for divorce, must be glaring, flagrant, shameful, or monstrous, where the testimony shows that the husband is 67 years of age and the wife approximately one-half that age, and the wife, by importunity, threats, and false imprisonment, obtains from the husband the full possession and control of the property and excludes him from the use and benefit thereof, and where the wife has the husband arrested on a false charge of insanity and arrested on groundless complaints for the sake of getting rid of his presence and for the purpose of obtaining control and to secure for herself the full and sole use and enjoyment of the property that the two had earned during their married life; and where the wife is guilty of such conduct as is calculated to bring reproach upon her good name and that of her family, such acts constitute "gross neglect of duty" within the scope of the statute providing for divorce on that ground.").

However, where the wife owned considerable property and was not actually dependent on her husband for support she could not obtain a divorce for his failure to support her.[136]

e. Other Cases on Grounds for Divorce

The twelfth ground for divorce in 43 O.S. § 101 is insanity for a period of five years. In *Raines v. Gifford*,[137] there was substantial evidence that the husband was of unsound mind when the divorce was granted. The Supreme Court, however, held that the rules regarding an insanity divorce were only applicable when that was the ground relied on. Since the wife sought the divorce on the basis of extreme cruelty, the provisions of the insanity section were not applicable.

f. Defenses to a Fault Divorce

The only defense to a fault divorce that has been developed in Oklahoma case law is condonation.[138] Condonement is forgiveness conditioned on future good conduct. A repetition of the offense condoned is a revivor thereof, as is also the commission of another cause for divorce, and subsequent acts of cruelty will revive condoned adultery, although they would not support an original suit for divorce on that statutory ground."[139] If, after a marital offense is committed, the innocent party returns to live with the guilty party, there is a condonation.[140] "Resumption of cohabitation by parties to a divorce suit is in abrogation of any cause of action for divorce by condonation."[141] However, the act of condonation must be free from fraud or duress. Therefore, when the husband induces his wife to live with him by threats against her and the children, there is no condonation.[142]

Like other affirmative defenses, condonation must be specially pleaded or insisted upon in the answer as a defense.[143] Condonation that occurs during the pendency of a divorce has been held not to divest the court of jurisdiction to entertain

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136 Beauchamp v. Beauchamp, 1915 OK 45, 146 P. 30.

137 1962 OK 66, 370 P.2d 1.

138 For a full discussion of condonation *see* Tigert v. Tigert, 1979 OK CIV APP 14, 595 P.2d 815, which is the last appellate case in Oklahoma discussing fault divorce and its defenses.

139 Hubbard v. Hubbard, 1979 OK 154, 603 P.2d 747; Kostachek v. Kostachek, 140 P. 1021 (Okla. 1914) (no public domain citation available, ed.).

140 Estee v. Estee, 1912 OK 494, 125 P. 455.

141 Panther v. Panther, 1931 OK 10, 295 P. 219.

142 *Id*.

143 McDaniels v. McDaniels, 1931 OK 650, 4 P.2d 112.

a cross-petition for divorce or to award temporary support or counsel fees. The reconciliation of the parties is not the legal equivalent of a dismissal of the action.[144]

B. Annulment

A suit for an annulment is an action to declare that the marriage was invalid at its inception. The only Oklahoma statute on annulment is 43 O.S. § 128 which governs annulments when the marriage was attempted by an underage couple or by a person who is mentally incompetent.[145] The annulment action is also available to declare invalid a marriage entered into within the six-month prohibitory period.[146] Void marriages can also be attacked in a suit for an annulment. No action is actually necessary to annul a void marriage, "but though no sentence of avoidance be absolutely necessary, yet as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction."[147]

However, in addition to granting annulments for underage or incompetent marriages, Oklahoma also will entertain an annulment action for fraudulent inducement into marriage or for other reasons that would normally apply to the cancellation of contracts.[148] Not any type of fraud will serve as the basis for an annulment. The fraud must go to the essence of marriage.[149] Fraudulent promises

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144 Every v. Every, 1956 OK 6, 293 P.2d 612.

145 43 O.S. § 128 provides:

> When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void by the district court, in an action brought by the incapable party or by the parent or guardian of such party; but the children of such marriage begotten before the same is annulled, shall be legitimate. Cohabitation after such incapacity ceases, shall be a sufficient defense to any such action.

See e.g., Ross v. Bryant, 1923 OK 562, 217 P. 364 (annulment of an underage marriage); Ross v. Ross, 1936 OK 130, 54 P.2d 611 (attempted annulment of a marriage of an incompetent).

146 *In re* Mo-se-che-he's Estate, 1940 OK 453, 107 P.2d 999.

147 Whitney v. Whitney, 1942 OK 268, 134 P.2d 357; Whitney v. Whitney, 1944 OK 205, 151 P.2d 583 (1944). The *Whitney* cases dealt with a marriage void because of bigamy. The same would no doubt be true of a marriage that is void because of incest.

148 Janes v. Janes, 1933 OK 257, 21 P.2d 500. In Kildoo v. Kildoo, 1989 OK 6, 767 P.2d 884, the court noted that the grounds for annulment are usually those that apply to the cancellation of a contract. "However, the relationship brought about by marriage is of such public concern as to require the courts to scrutinize actions to annul marriages to discern their probable effect upon the public as upon the individual parties." Ross v. Bryant, 1923 OK 562, 217 P. 364. Fraudulent inducement into marriage can also be a tort and, in certain circumstances, damages can be recovered. *See* Tice v. Tice, 1983 OK 108, 672 P.2d 1168.

149 *See* the discussion in Miller v. Miller, 1998 OK 24, 956 P.2d 887.

that have been sufficient to sustain an action for annulment in other states include concealment of the fact that one party was suffering from syphilis, concealment by the husband that he lacked the physical and mental capacity to engage in normal sexual relations with his wife, concealment of the fact that one party married the other for the sole purpose of obtaining a "green card" from the Immigration Department,[150] concealment of a former narcotics addiction and a prior criminal record, concealment of heroin addiction, and concealment of a criminal record and a false representation that joint funds were being used for child support when they were really being used to pay fines and restitution.

Misrepresentations which have been found not to be essential to the purposes of the marriage relationship in other states include: misrepresentation of affection, concealment of lesbian activities and drug use prior to marriage, concealment of prior marriage and divorce, concealment of the fact that inheriting the property of the spouse at death was the motive for the marriage, and concealment of a misdemeanor narcotics conviction coupled with a periodic, but not consistent, disabling narcotics addiction.[151]

Cohabitation after the incapacity ceases is a defense to an annulment action.[152] An action for an annulment cannot be maintained after the parties have been divorced regardless of the religious scruples of one of the parties.[153] The trial court in an annulment action has the power to enter a temporary order providing for temporary support for one spouse and for attorney fees.[154] However, the court cannot, in conjunction with the decree for an annulment, require one party to pay support alimony to the other.[155]

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[150] For an Oklahoma case, *see* Seirafi-Pour v. Bagherinassab, 2008 OK CIV APP 98,197 P.3d 1097.

[151] *See* the discussion of this issue in Miller v. Miller, 1998 OK 24, 956 P.2d 887. Although *Miller* involved the tort of fraudulent inducement into marriage, the Supreme Court determined that the seriousness of the fraud which will serve as a basis of a cause of action for tortuous fraud is the same as that which would support an annulment. The specific instances given are those that a mentioned in *Miller*. There are no actual cases in Oklahoma in the annulment context which set out the type of fraud which would be necessary for an annulment.

[152] Blunt v. Blunt, 1947 OK 13, 176 P.2d 471 (Parents who seek to annul the marriage of the minor son "must act promptly upon the first opportunity they have to annul the marriage, . . .").

[153] Janes v. Janes, 1933 OK 257, 21 P.2d 500.

[154] Hunt v. Hunt, 1909 OK 72, 100 P. 541; Stone v. Stone, 1944 OK 28, 145 P.2d 212. Child support is not affected by the marital status of the parties.

[155] Whitebird v. Luckey, 1937 OK 242, 67 P.2d 775.

C. Alimony Without Divorce or Legal Separation

A legal separation, or, as the statute calls it, alimony without divorce, is provided for in 43 O.S. §§ 108 and 129.[156] This action contemplates the continuation of the marriage, however, the court may provide for the economic separation of the parties including property division and support alimony.[157] A legal separation can be obtained for any reason that a divorce may be granted,[158] including incompatibility.[159] However, there is no case stating whether there can be a "no-fault" legal separation, although there is no reason why it should not be proper.

Many of the cases involving alimony without divorce concern situations where the parties were divorced in another state where there was no jurisdiction to deal with the economic aspects of the marriage.[160] When this occurs a suit for alimony without divorce is proper in Oklahoma where there is jurisdiction to handle the alimony and property issues.[161] It does not matter whether the spouse who brought the divorce action in the other state is also the person bringing the legal separation action in Oklahoma.[162]

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[156] 43 O.S. § 108 provides as follows:

> That the parties appear to be in equal wrong shall not be a basis for refusing to grant a divorce, but if a divorce is granted in such circumstances, it shall be granted to both parties. In any such case or where the court grants alimony without a divorce or in any case where a divorce is refused, the court may for good cause shown make such order as may be proper for the custody, maintenance and education of the children, and for the control and equitable division and disposition of the property of the parties, or of either of them, as may be proper, equitable and just, having due regard to the time and manner of acquiring such property, whether the title thereto be in either or both of said parties.

43 O.S. § 129 provides:

> The wife or husband may obtain alimony from the other without a divorce, in an action brought for that purpose in the district court, for any of the causes for which a divorce may be granted. Either may make the same defense to such action as he might to an action for divorce, and may, for sufficient cause, obtain a divorce from the other in such action.

[157] Walker v. Walker, 1929 OK 501, 282 P. 361. Since the parties remain married, the decree of legal separation cannot affect the homestead rights of either spouse. McAdoo v. McAdoo, 1929 OK 210, 277 P. 943.

[158] Lewis v. Lewis, 1913 OK 561, 135 P. 397. It appears that in one case the ground may be slightly less rigorous. In Branson v. Branson, 1942 OK 77, 123 P.2d 643 the court held that a wife may obtain a legal separation from her husband for abandonment even though the abandonment had not been continuous for one year.

[159] Husband v. Husband, 2010 OK CIV APP 42, 233 P.3d 383.

[160] West v. West, 1926 OK 204, 246 P. 599.

[161] Miller v. Miller, 1940 OK 95, 99 P.2d 515.

[162] Seely v. Seely, 1959 OK 167, 348 P.2d 1064; Spradling v. Spradling, 1919 OK 23, 181 P. 148.

There is no durational residency requirement to bring an action for legal separation.[163] However, an Oklahoma court must have personal jurisdiction over the defendant to decide economic issues. Thus, in *Anderson v. Anderson*,[164] the court found it had no jurisdiction in a legal separation case where both parties were residents of California, even though the husband did own property in the state. The court held that one of the parties must be a resident of Oklahoma.

The trial court has the same power to issue temporary orders in a legal separation action as it has in divorce cases.[165] When a legal separation order is entered, the court as an incident thereof may divide the property acquired during marriage[166] and set support alimony. Earlier cases in Oklahoma concerning the relationship between separate maintenance and divorce were somewhat confused.[167] A number of cases had held that where a petition was brought for separate maintenance under 43 O.S. §129 any property division or alimony was temporary because the marriage was still on-going. However, if the action was brought for divorce and the court denied the divorce but granted separate maintenance, a division of the property under 43 O.S. § 108 was considered proper. The court resolved this apparent contradiction in *Woodroof v. Barrington*,[168] where it held that:

> In an action for divorce, alimony, and the division of jointly acquired property, where the plaintiff, upon submission of the cause to the court, in open court withdraws her prayer for divorce and asks only for separate maintenance, and division of the jointly acquired property of the parties, and the defendant consents to such modification, and the court, without objection on the part of the defendant, decrees a division of the jointly acquired property, such judgment, as to the settlement of property rights, is not void as beyond the power of the court, and the subsequent reconciliation of the parties does not affect their property rights under the judgment.
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> We perceive no substantial distinction in cases where, although grounds for divorce are established, the right to a divorce is waived or relinquished, and in cases where, although a divorce is sought, it is denied by the trial court.

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[163] According to one case, a respondent in a legal separation action may cross-petition for divorce even though the respondent has not met the durational residency requirement for divorce. Haynes v. Haynes, 1942 OK 197, 126 P.2d 65.

[164] 1929 OK 346, 282 P. 335.

[165] Spradling v. Spradling, 1919 OK 23, 181 P. 148.

[166] Although early cases on this issue were unclear, the court in Woodroof v. Barrington, 1947 OK 247, 184 P.2d 771, authorized courts to divide property in cases where a divorce was not sought as well as those in which the court denied the divorce.

[167] *See e.g.*, Clay v. Sun River Min. Co., 302 F.2d 599 (10th Cir. 1962).

[168] 1947 OK 247, 184 P.2d 771.

> Whether in such cases the divorce is not sought by the parties, or whether it is sought, but not granted by the trial court, their situation, in so far as the right to the division of the property is concerned, is identical. We think that section 1275 applies to all such cases where a divorce is not granted, and that in such cases whether or not jointly acquired property should be divided is left to the sound discretion of the trial court. It would be inconsistent with reason and justice to hold that where a divorce is refused by the trial court the jointly acquired property may be divided, but that where the right to divorce is waived or renounced by the parties the court is without power to divide the jointly acquired property, although the evidence shows good cause for such division.

More recently the Court of Civil Appeals has established rules for when a property division is appropriate in a legal separation case.[169] It would be appropriate when:

1. The action has been initiated and concluded as a divorce case, including an action where one party counter-petitions for a divorce.

2. The action was initiated as a divorce case, but concluded as a separate maintenance decree.

3. The action was initiated as a separate maintenance action and concluded as such where:

   a. One or both parties ask for a property division; and

   b. The grounds for a divorce are established although a divorce is not granted, and the likelihood of reconciliation is remote.

Where the case falls within one of these three situations the property division from the separate maintenance decree is binding in a subsequent divorce between the parties.

An order for support alimony issued in a legal separation case is to be set at a particular amount per month without an end date.[170] The rule from divorce cases that alimony must be set in a sum certain does not apply.[171] The amount may be modified at any time based on one spouse's needs and the other spouse's ability to pay.[172]

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169 Husband v. Husband, 2010 OK CIV APP 42, 233 P.3d 383.

170 Hughes v. Hughes, 1961 OK 112, 363 P.2d 155.

171 Fox v. Wiley, 1947 OK 211, 184 P.2d 782; Walker v. Walker, 1929 OK 501, 282 P. 361.

172 Hughes v. Hughes, 1961 OK 112, 363 P.2d 155.

The decree of legal separation comes to an end when the parties divorce or reconcile.[173] A legal separation is not a defense to a subsequent divorce action brought by one of the parties.[174] The parties may enter into a contract for legal separation. In the absence of fraud, a court has no power to set the agreement aside nor may the court modify the agreement in order to provide more support for one spouse.[175]

There has been only one published opinion on annulments and one on separate maintenance in the last forty-five years. With the advent of no-fault divorce, these two proceeding have become almost obsolete.

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[173] Clinton v. Clinton, 1940 OK 115, 101 P.2d 609. It does not appear that there must be any formal action by a court to declare that the legal separation decree is no long valid when the parties reconcile. The decree lapses by operation of law.

[174] Routh v. Routh, 1942 OK 371, 130 P.2d 1000; McMullen v. McMullen, 1943 OK 98, 135 P.2d 482; Lewis v. Lewis, 1913 OK 561, 135 P. 397. However, if a fault basis for the legal separation was litigated in the legal separation proceeding, it cannot be relitigated in the divorce action. Stout v. Stout, 1938 OK 233, 78 P.2d 665. Thus, the ground for divorce must arise after the legal separation proceeding.

[175] Stark v. Stark, 1939 OK 276, 91 P.2d 1064. The provisions of 43 O.S. § 134 which concern modification of alimony provisions apply only to support alimony provisions found in a divorce decree with the possible exception of § 134C on cohabitation.

Chapter 1