# OKLAHOMA FAMILY LAW

## CASES AND MATERIALS

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**ROBERT G. SPECTOR**
GLENN R. WATSON CHAIR
AND
CENTENNIAL PROFESSOR OF LAW
UNIVERSITY OF OKLAHOMA COLLEGE OF LAW

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For Carolyn

“The light of my life and the length of my days.”

# PREFACE

The substance of family law, and its practice, has changed radically over the last two decades. Once upon a time, the subject of family law was concerned primarily with the question of when a divorce could be granted and what state could properly grant it. Problems of property division, alimony and child support were minor issues that took little time. Custody of children was normally given to their mothers and fathers received reasonable visitation. The entire area was one that was governed by local state law with little intrusion by the federal government.

Today the focus family law has totally shifted. The decision of whether to grant a divorce has little importance to the family law practitioner. Rather, the emphasis is on the economic consequences of divorce. The family lawyer must be familiar with such diverse areas as pension analysis, taxation and bankruptcy. Children are no longer routinely placed with their mothers and, therefore, knowledge of child psychology as well as child abuse and neglect is essential for a family law practice. New areas such as the relationship between tort and family law continue to develop. Along with these changes, the federal government has also assumed an active role, particularly in the area of child support. The emphasis on welfare reform has produced radical changes in the way child support is determined and enforced. Indeed, the entire area of child support is now federally dictated.

Some areas have assumed new importance. For years the law of marriage was summarily treated as a simple prelude to a discussion of divorce. Today, the question of a status relationship for same-sex couples is a major public policy issue, with over 20% of the states authorizing marriage or a civil union for same-sex couples. Most of the other states have rejected such a status relationship by statute and, in many cases, by constitutional amendment. The interstate movement of these couples has become the family law issue of our times.

This book is designed for the Oklahoma law student and lawyer. It provides an introduction to Oklahoma family law and covers most problems that family law attorneys face in their practice. Therefore whenever an Oklahoma case addresses a family law issue, it is used. Cases from other states are used to present alternative solutions to a problem or, to illustrate a solution if there is no Oklahoma case on point. It is my hope that this casebook will prove useful to you in your practice. The case materials are current through July 2011 and the statutes through the 2011 legislative session.

Robert G. Spector
Norman, Oklahoma
July 2011

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# CHAPTER 1. MARRIAGE

## A. RESTRICTIONS ON WHO CAN MARRY

### *1. The Traditional Restrictions: Bigamy*

**WHITNEY**
**v.**
**WHITNEY**
1942 OK 268, 134 P.2d 357

BAYLESS, JUSTICE.

Mary P. Whitney sued Wayne Whitney in the district court for a divorce, and other appropriate relief with respect to their minor children and property. She alleged that

> on October 1, 1928, plaintiff and defendant were married in Oklahoma City and ever since that date have been husband and wife.

The ground for divorce was extreme cruelty. Whitney filed an answer wherein (1) he denied the marriage in Oklahoma City; (2) he set out in detail his marriage to another woman in 1913, and asserted that marriage had never been dissolved; (3) and by reason of the marriage existing between him and another woman, he was incapable in 1928, of contracting a marriage with plaintiff.

During the trial the fact that Whitney had a living wife in 1928 and was still bound in matrimony to her at the time of the trial became so obvious that plaintiff asked and was given permission to amend her petition to allege as ground for divorce that Whitney had a former wife alive at the time of the subsequent marriage. 12 O.S. § 1271(1).

At the close of the hearing plaintiff was granted a divorce from Whitney on the ground that he had a living wife at the time he married plaintiff in 1928. The matter of settlement of property rights and the custody of the children was deferred, and settled at a later hearing.

The appeal involves all of the issues disposed of by the trial court. However, it is proper to say at this point that no contest is presented to us concerning the children. * * *

Whitney contends first that the alleged marriage with plaintiff is bigamous and void. This is correct. The Constitution of Oklahoma, Art. 1, § 2 says: "Polygamous or plural marriages are forever prohibited." At the time plaintiff and Whitney undertook to establish a marital status he was a married man, having a wife from whom he was not divorced and to whom he was bound in a legal marriage, and therefore he was incapable of entering into a contract of marriage with plaintiff.

Considerable discussion is indulged by the parties as to whether, since it is admitted there was no ceremonial marriage, there was a common law marriage, and cases are cited from this and other jurisdictions setting out the elements to a common law marriage.

We think this is beside the point. Common law marriages are valid in Oklahoma. * * * Where the prescribed essentials are shown a common law marriage is as valid as one based on a license and ceremony.

But, if one of the parties to a so-called common law marriage has a living spouse of an undissolved marriage, the common law marriage attempted is as polygamous and plural and, therefore, as void as a ceremonial marriage attempted under the same circumstances.

Plaintiff argues that because the first ground for divorce in our statutes, 12 O.S. 1941 § 1271(1), the one relied on by her, is the existence of a valid prior marriage as to one or both of the parties, the Legislature has thereby invested the attempted subsequent marriage with some validity and sanctity, the effect of which is to give our courts power to adjust the so called marital rights and other incidents thereto.

Plaintiff has furnished us with a memorandum calling attention to the statutes of several states (Arkansas, Colorado, Florida, Illinois, Mississippi, Ohio and Kansas) providing for divorce on the ground of an existing marital relation at the time of the subsequent marriage, and decisions from several states discussing the legislative power, and the tendency of the courts to further such a policy, to deal less harshly with plural marriage than was customary at common law. * * *

The statute just cited was first put into effect in Oklahoma prior to statehood, Stat. 1893, § 4543, and was adopted from Kansas. After statehood the statute was carried forward and now reads as it did prior to statehood. But whatever were its connotations prior to statehood, and granting it may have been construed to lend support to plaintiff's argument, it ceased to have any meaning contrary to the fundamental policy of our State as expressed in Art. 1, § 2, Constitution of Oklahoma. With the adoption of our constitution any validity, or any sanctity theretofore accorded the subsequent marriage in cases of bigamous or plural marriages ceased, and such bigamous or plural marriages when attempted are void and wholly ineffectual to create a marital status or any of the legal incidents that usually flow therefrom as between the parties. * * *

A search has not shown that any of the states, whose statutes are cited in the memorandum, have a constitutional prohibition against plural marriages as we have. The Legislatures of those states are free to establish the public policy thereon, and may accord any status or privileges to the parties to a plural marriage that seems desirable. We think this makes the problem in those states sufficiently different from the problem in this state as to deprive the statutes and decisions cited of any analogous value to the issue in Oklahoma.

We are impressed by what is said in 18 R.C.L. 441, § 69:

> A marriage void in its inception does not require the sentence, decree or judgment of any court to restore the parties to their original rights or to make the marriage void, 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.

The legislature has the power and ought to provide for a judicial declaration of the void nature of the subsequent marriage.

We do not think it beyond the power of the Legislature to adopt the mechanics of the divorce action as a method for the courts to determine the issue of fact and law, that a marriage is plural and void, and it probably does not matter that the decree or judgment is called divorce rather than annulment. *Whitebird v. Luckey*, 180 Okl. 1, 67 P.2d 775. But the power in the Legislature to provide for such a judicial determination and the use of the term "divorce" as applied thereto can-

not have the effect of adopting the philosophy underlying divorce as applied to the dissolution of a valid marriage so as to carry with it the power to adjust rights as though a valid marriage was being dissolved. Many incidents attach to divorce in the dissolution of a valid marriage, such as allowances pendente lite, separate maintenance, permanent alimony, custody and support of children and division of property on the basis of matters implied from joining in lawful wedlock, and are countenanced by equity or provided by statute.

Where there is no marriage there can be no allowance pendente lite. *Baker v. Carter*, 180 Okl. 7, 68 P.2d 85.

When the marriage is void there can be no alimony, no dower, courtesy or interest in property equivalent thereto. *Krauter v. Krauter*, 79 Okl. 30, 190 P. 1088 and *Whitebird v. Luckey*, 180 Okl. 1, 67 P.2d 775.

Insofar then as our divorce statute is concerned, when the court has determined that one or both of the parties to a marriage were incapable of contracting the marriage because of being then bound in a valid marriage, it has exhausted the Legislative power conferred on it, and it cannot assume to exercise the other powers inherent or statutory in a divorce relating to valid marriages. *Whitebird v. Luckey, supra*.

The trial court was correct in determining that the relation of the parties to each other should be stated by a judgment determining that Whitney was a married man in 1928, and at all times up to the rendition of the judgment, and therefore incapable of marrying plaintiff, and in granting to her an order or judgment that neither was bound to the other.

The trial court undertook to adjust the property rights of the parties as though there was some sort of a marriage that vested the court with the powers stated by statute in rendering a divorce following a legal marriage.

We are of the opinion that when it conclusively appears, as herein, or is adjudged on competent evidence that the relation of husband and wife never existed legally, the statutory power to adjust property rights, 12 O.S. 1941 § 1278, has no application, but that the power to adjust such rights is equitable. *See Krauter v. Krauter, supra, and Tingley v. Tingley*, 179 Okl. 201, 64 P.2d 865.

The matter of adjustment of property rights between a man and a woman involved in a bigamous marriage has frequently engaged the attention of the courts, . . . 75 A.L.R. 733. . . . For purposes of classification the relation of the parties is likened to that of partnership, and while in earlier cases there was a desiring to question whether the man and woman should be treated as partners with respect to their property rights, the later cases seem to approach closer agreement on this issue and to recognize that it is probably an easier settlement of a difficult problem to regard the parties to a bigamous marriage as partners with respect to their property rights arising during the cohabitation. We have said it is a quasi partnership. *Krauter v. Krauter, supra.*

This brings us then to the contention made by Whitney, that after this litigation arose the parties entered into a written contract adjusting and settling their property rights and such contract is binding on the court.

Following the rule applicable to partnerships generally, we think this is correct. It is elemental that partners may dissolve their relationship by contract, and may adjust, settle and dispose of the property rights thereby . . . ; and, in the absence of an attack thereon by either of the parties on any of the recognized grounds for rescission, the contract will be enforced by the courts. No such attack is made upon the contract that calls for rescission.

The plaintiff took the position that the contract entered into was for the purpose of adjusting the differences between the parties and to permit the reconciliation between them and we gather from what is said in her brief that they lived together after the contract had been executed. In support of this position the plaintiff *cites Hale v. Hale*, 40 Okl. 101, 135 P. 1143, and other Oklahoma cases to the effect that a contract made between a husband and wife in a divorce proceeding in settlement of differences between them is nullified by the reconciliation and resumption of the marital relation. We suppose that the trial court adopted this view and seems to have assumed that because the litigation was not terminated the contract was destroyed by the reconciliation, or the plaintiff was free to repudiate because not wholly executed, and that thereby the contract ceased to be effective for any purpose. We think this view of the matter is erroneous. Plaintiff and Whitney were not husband and wife. The rule announced in *Hale v. Hale, supra*, applies to parties who are legally husband and wife. These parties were not legally married and at the time the contract was entered into each of them knew that there was a serious question of its validity and they were not eligible to reconcile themselves and resume the marital relation with the effect of thereby rendering ineffective a contract entered into. They were with respect to their property partners and were free to deal with each other as such. Until such time as an attack is made on the contract on any of the recognized grounds, the contract must stand. Therefore with the record before us as it is, the trial court erred in treating the contract as not binding and not assuming to adjust the property rights of the parties.

* * * *

WELCH, C.J., and RILEY, OSBORN, HURST, and DAVIDSON, JJ., concur.

CORN, V.C.J., and GIBSON, J., dissent.

ARNOLD, JUSTICE (dissenting).

* * * *

Courts of enquiry may entertain suits to adjudge the nullity of any void contract, so unquestionably the plaintiff in this action might have maintained a suit in equity to nullify the purported contract of marriage. However, the remedy of divorce was also available. The legislature had the unquestioned power to authorize the bringing of such an action in our divorce courts, which are creatures of our legislative body, and authorize divorcement on the ground of the incapability of one of the parties by reason of the existence of a living spouse. This it did by 12 O.S. 1941 § 1271-(1), wherein is provided, as a ground for divorce "when either of the parties had a former husband or wife living at the time of the subsequent marriage." * * * I cannot believe the legislature intended to do a useless thing. There are good reasons why the legislature so authorized such a person, while it failed to authorize the bringing of a divorce action in any other case where the contract was void *ab initio*. The family is the most sacred of all institutions and its preservation and integrity, and the welfare of children are matters of very vital public concern. The legislature evidently knew, as I know, that a party to a marriage contract might be, while wholly innocent of any wrongdoing, imposed upon grossly by the other party in the manner as contended by the plaintiff herein. Knowledge of a living spouse of a party to a marriage contract might easily be unknown to the other contracting party and such a fact easily be fraudulently undisclosed or covered up. Such a defrauded party to such a void marriage, if innocent of any wrongdoing or knowledge thereof, would morally be entitled to the same protection, rights, and privileges as one who was lawfully married, . . .

* * * *

---

**Notes & Questions**

1. 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. *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.").

2. Should Mr. Whitney be estopped from denying his marriage to Mrs. Whitney? *See* the conflicting opinions of *Sutton v. Sutton*, 143 S.W.3d 759 (Mo. Ct. App. 2004) and *Falk v. Falk*, 2005 WL 127077 (Tenn. Ct. App. 2005).

3. The following note appeared recently on a family law listserv for attorneys:

> Female client walks into the office saying she wants to get a divorce from husband #4 to marry guy #5. Attorney asks about previous marriages, client replies:
>
> She married husband # 1 in the early 1970, divorced him (not remember when) and marries husband #2 early 1980. She thinks she divorced husband #2 but not clear about the facts. She then goes and marries husband #3 in the late 1980. She is almost positive that another legal services agency divorced her from husband #3 and then marries husband # 4 in early 2000.
>
> Attorney goes to the clerk's office of the county and searches for divorce judgment. The only judgment of divorce found is for husband #1. There is no divorce judgments found for husband #2 or # 3. Client also expresses a wish that if it was found that she was married still to husband #2 then she does not want to divorce him and will not marry guy #5. (It appears husband #2 is the only one that has a decent job).
>
> QUESTION: What should be done about husband #3 and #4? Should the marriages to #3 and #4 be declared void? Was it bigamy if she lacks mens rea?

What advise do you have for this lawyer?

4. Plural marriages are prohibited in every state. Freedom-of-religion objections concerning Mormons were overruled in *Reynolds v. United States*, 98 U.S. 145 (1878) and *Utah v. Green*, 99 P.3d 820 (Utah 2004). Privacy objections to banning plural marriage have also been rejected. *Bronson v. Swenson*, 2005 WL 1310482 (D. Utah 2005) (unpublished, text in Westlaw).

5. A number of plural marriage households secretly exist in Arizona, New Mexico, Idaho, Nevada, Montana and Utah. How immoral are such homes? Should the children of such households be taken away from their parents? The State of Utah has done so. *See State ex rel. Utah v. Black,* 283 P.2d 887 (Utah 1955). However, the Utah Supreme Court has held that it was error for a trial court to base an award of custody solely on the fact that the mother was involved in a polygamous relationship. *Sanderson v. Tyson,* 739 P.2d 623 (Utah 1987).

6. Bigamy is criminally proscribed in all states. *See* 21 O.S. §§ 881-884 (2001). The penalty is five years in prison. Anyone who knowingly marries a person who is still married to a third person can be punished by a sentence of from one to five years in prison or by a fine of $500.

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### *2. The Constitutional Question*

**ZABLOCKI**
**v.**
**REDHAIL**
434 U.S. 374
(1978)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of a Wisconsin statute, WIS. STAT. § 245.10(1),(4),(5), which provides that members of a certain class of Wisconsin residents may not marry within the State or elsewhere, without first obtaining a court order granting permission to marry. The class is defined by the statute to include any "Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment." The statute specifies that court permission cannot be granted unless the marriage applicant submits proof of compliance with the support obligation and, in addition, demonstrates that the children covered by the support order "are not likely thereafter to become public charges." No marriage license may lawfully be issued in Wisconsin to a person covered by the statute, except upon court order; any marriage entered into without compliance with § 245.10 is declared void; and persons acquiring marriage licenses in violation of the section are subject to criminal penalties.

After being denied a marriage license because of his failure to comply with § 245.10, appellee brought this class action challenging the statute as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and seeking declaratory and injunctive relief. The United States District Court for the Eastern District of Wisconsin held the statute unconstitutional under the Equal Protection Clause and enjoined its enforcement. We now affirm.

I

Appellee Redhail is a Wisconsin resident who, under the terms of § 245.10, is unable to enter into a lawful marriage in Wisconsin or elsewhere so long as he maintains his Wisconsin residency. The facts are as follows. In January, 1972, when appellee was a minor and a high school student, a paternity action was instituted against him in Milwaukee County Court, alleging that he was the father of a baby girl born out of wedlock on July 5, 1971. After he appeared and admitted that he was the father, the court entered an order on May 12, 1972, adjudging appellee the father and ordering him to pay $109 per month as support for the child until she reached 18 years of age. From May 1972 until August 1974, appellee was unemployed and indigent, and consequently was unable to make any support payments.

On September 27, 1974, appellee filed an application for a marriage license with appellant Zablocki, the County Clerk of Milwaukee County, and a few days later the application was denied on the sole ground that appellee had not obtained a court order granting him permission to marry, as required by § 245.10. Although appellee did not petition a state court thereafter, it is stipulated that he would not be able to satisfy either of the statutory prerequisites for an order granting him permission to marry. First, he had not satisfied his support obligations to his illegitimate child, and as of December 1974 there was an arrearage in excess of $3,700. Second, the child had been a public charge since her birth, receiving benefits under the Aid to Families with Dependent Chil-

dren program. It is stipulated that the child's benefit payments were such that she would have been a public charge even if appellee had been current in his support payments.

On December 24, 1974, appellee filed his complaint in the District Court, on behalf of himself and the class of all Wisconsin residents who had been refused a marriage license pursuant to § 245.10(1) by one of the county clerks in Wisconsin. Zablocki was named as the defendant, individually and as representative of a class consisting of all county clerks in the State. The complaint alleged, among other things, that appellee and the woman he desired to marry were expecting a child in March 1975 and wished to be lawfully married before that time. * * *

* * * *

II

* * * *

* * * Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that "critical examination" of the state interests advanced in support of the classification is required. * * *

The leading decision of this Court on the right to marry is *Loving v. Virginia*, 388 U.S. 1 (1967). In that case, an interracial couple who had been convicted of violating Virginia's miscegenation laws challenged the statutory scheme on both equal protection and due process grounds. The Court's opinion could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. * * * But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry. * * *

Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals. Long ago, in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court characterized marriage as "the most important relation in life," and as "the foundation of the family and society, without which there would be neither civilization nor progress, . . ." * * *

More recent decisions [such as *Griswold v. Connecticut*] have established that the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause. * * *

* * * *

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings. . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subject to rigorous scrutiny. To the contrary, reasonable regulations that do not signifi-

cantly interfere with decisions to enter into the marital relationship may legitimately be imposed. *See Califano v. Jobst*, p. 47; n. 12, *infra* [434 U.S. 47]. The statutory classification at issue here, however clearly does interfere directly and substantially with the right to marry.

Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order, and marriages contracted in violation of the statute are both void and punishable as criminal offenses. Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.[12]

III

When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. * * * Appellant asserts that two interests are served by the challenged statute: the permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody children is protected. We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained.

There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish a mechanism whereby persons with support obligations to children from prior marriages could be counseled before they entered into new material relationships and incurred further support obligations. Court permission to marry was to be required, but apparently permission was automatically to be granted after counseling was completed. The statute actually enacted, however, does not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court, and thus it can hardly be justified as a means for ensuring counseling of the persons within its coverage. Even assuming that counseling does take place—a fact as to which there is no evidence in the record—this interest cannot support the withholding of court permission to marry once counseling is completed.

With regard to safeguarding the welfare of the out-of-custody children, appellant's brief does not make clear the connection between the State's interest and the statute's requirements. At argument, appellant's counsel suggested that, since permission to marry cannot be granted unless the applicant shows that he has satisfied his court-determined support obligations to the prior chil-

[12] The directness and substantiality of the interference with the freedom to marry distinguish the instant case from Califano v. Jobst, 434 U.S. 47. In *Jobst* we upheld sections of the Social Security Act providing, *inter alia*, for termination of a dependent child's benefits upon marriage to an individual not entitled to benefits under the Act. As the opinion for the Court expressly noted, the rule terminating benefits upon marriage was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage." The Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and—notwithstanding our Brother Rehnquist's imaginative recasting of the case—there was no evidence that the laws significantly discouraged, let alone made "practically impossible," any marriages. Indeed the provisions had not deterred the individual who challenged the statute from getting married, even though he and his wife were both disabled.

dren and that those children will not become public charges, the statute provides incentive for the applicant to make support payments to his children. TR. OF ORAL ARG. 17-20. This "collection device" rationale cannot justify the statute's broad infringement on the right to marry.

First, with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective as the instant statute's and yet do not impinge upon the right to marry. Under Wisconsin law, whether the children are from a prior marriage or were born out of wedlock, court-determined support obligations may be enforced directly via wage assignments, civil contempt proceedings, and criminal penalties. And, if the State believes that parents of children out of their custody should be responsible for ensuring that those children do not become public charges, this interest can be achieved by adjusting the criteria used for determining the amounts to be paid under their support orders.

There is also some suggestion that § 245.10 protects the ability of marriage applicants to meet support obligations to prior children by preventing the applicants from incurring new support obligations. But the challenged provisions of § 245.10 are grossly underinclusive with respect to this purpose, since they do not limit in any way financial commitments by the applicant other than those arising out of the contemplated marriage. The statutory classification is substantially overinclusive as well: Given the possibility that the new spouse will actually better the applicant's financial situation by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy their prior support obligations. And, although it is true that the applicant will incur support obligations to any children born during the contemplated marriage, preventing the marriage may only result in the children being born out of wedlock, as in fact occurred in appellee's case. Since the support obligation is the same whether the child is born in or out of wedlock, the net result of preventing the marriage is more illegitimate children.

The statutory classification created by §§ 245.10(1), (4), (5) thus cannot be justified by the interests advanced in support of it. The judgment of the District Court is accordingly,

AFFIRMED.

REHNQUIST, JUSTICE (dissenting).

* * * *

* * * I would view this legislative judgment in the light of the traditional presumption of validity. I think under the Equal Protection Clause the statute only need pass the "rational basis test," . . . and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective. . . . The statute so viewed is a permissible exercise of the state's power to regulate family life and to assure the support of minor children, despite its possible imprecision in the extreme cases envisioned in the other opinions.

* * * Because of the limited amount of funds available for the support of needy children, the State has an exceptionally strong interest in securing as much support as their parents are able to pay. Nor does the extent of the burden imposed by this statute so differentiate it from that considered in *Jobst* as to warrant a different result. In the case of some applicants, this statute makes the proposed marriage legally impossible for financial reasons; in a similar number of extreme cases, the Social Security Act makes the proposed marriage practically impossible for the same reasons.

I cannot conclude that such a difference justifies the application of a heightened standard of review to the statute in question here. In short, I conclude that the statute despite its imperfections, is sufficiently rational to satisfy the demands of the Fourteenth Amendment.

* * * *

I would reverse the judgment of the District Court.

---

**Notes & Questions: Due Process Restrictions on State Marriage Regulations**

1. *Loving v. Virginia*, 388 U.S. 1 (1967), referred to in *Zablocki*, struck down the Virginia statute prohibiting marriages between persons of different races. Oklahoma prohibited miscegenation when the *Loving* case was decided. *See* 43 O.S. §§ 14, 15, 16 (1961) (repealed). The Oklahoma Supreme Court sustained the constitutionality of the interracial prohibition just one year before *Loving* was decided. *See Jones v. Lorenzen*, 1965 OK 185, 441 P.2d 986 (Okla. 1965).

2. What is the long term effect of the *Zablocki* decision? How many of the traditional restrictions on marriage can survive a constitutional attack? Or, does *Zablocki* only apply to new restrictions on the right to get married?

A Missouri prison regulation prohibited inmates from marrying unless the prison superintendent, after finding that there are compelling reasons, approves the marriage. Generally, only the birth of a child or pregnancy was considered a compelling reason. The state attempted to justify the regulation by security concerns. The prison contended that the regulations prohibited love triangles in prisons and, with regard to female prisoners, encouraged self-reliance. Are these two interests sufficient to sustain the regulation? *See Turner v. Safley*, 482 U.S. 78 (1987), where the Court relying on *Zablocki* struck down the regulations. JUSTICE O'CONNOR discussed the purposes of marriage in the following terms:

> We disagree with petitioners that *Zablocki* does not apply to prison inmates. It is well settled that a prison inmate retains those rights that are not inconsistent with his status as prisoner or with the legitimate objectives of the corrections system. The right to marry like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates, and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriage are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits, property rights, and other, less tangible benefits. These incidents of marriage, like the religious and personal aspects of the marriage commitment are unaffected by the fact of confinement or the pursuit of legitimate corrections goals. *Turner* at 95, 96.

Do you agree with JUSTICE O'CONNOR?

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### *3. The Traditional Restrictions: Incest*

**CATALANO**
**v.**
**CATALANO**
170 A.2d 726
(Conn. 1961)

MURPHY, JUSTICE.

The plaintiff appealed to the Superior Court from the action of the Probate Court denying her application for a widow's allowance for support from the estate of Fred Catalano. * * *

. . . Fred Catalano, a widower and citizen of this state, was married on December 8, 1951, in Italy to the plaintiff, his niece, an Italian subject. Such a marriage was prohibited by § 87 of the Italian Civil Code, but since the parties obtained a legal dispensation for the marriage from the Italian government, it was valid in Italy. Fred returned to this country. The plaintiff remained in Italy until 1956, when she joined Fred and they came to Hartford, where they lived as husband and wife until his death in 1958. A son was born to the couple. The plaintiff claims to be the surviving spouse of the decedent and, as such, entitled to an allowance for support. . . .

The determination of the question propounded depends on the interrelation and judicial interpretation of our statutes, . . . * * *

* * * *

It is the generally accepted view that a marriage valid where the ceremony is performed is valid everywhere. * * * There are, however, certain exceptions to that rule, including one which regards as invalid incestuous marriages between persons so closely related that their marriage is contrary to the strong policy of the domicil though valid where celebrated. RESTATEMENT, CONFLICT OF LAWS § 132(b). That exception may be expressed in terms of a statute or by necessary implication. * * *

To determine whether the marriage in the instant case is contrary to the public policy of this state, it is only necessary to consider that marriages between uncle and niece have been interdicted and declared void continuously since 1702 and that ever since then it has been a crime for such kindred to either marry or carnally know each other. At the time of the plaintiff's marriage in 1951, the penalty for incest was, and it has continued to be, imprisonment in the state prison for not more than ten years. * * * This relatively high penalty clearly reflects the strong public policy of this state. We cannot completely disregard the import and intent of our statutory law and engage in judicial legislation. The marriage of the plaintiff and Fred Catalano, though valid in Italy under its laws, was not valid in Connecticut because it contravened the public policy of this state. * * * The plaintiff therefore cannot qualify . . . as the surviving spouse of Fred Catalano.

* * * *

MELLITZ, JUSTICE (dissenting).

We are dealing here with the marriage status of a woman who was validly married at the place of her domicil and who, so far as the record discloses was entirely innocent of any intent to evade the laws of Connecticut. * * * There is no suggestion anywhere in the record that at the time of

the marriage she intended to come to America, that the parties had any intention of coming to live in Connecticut, or that the marriage was entered into in Italy for the purpose of evading the laws of Connecticut. If a marriage status resulting from a valid marriage, such as the one here, is to be destroyed, the issue bastardized, and the relations of the parties branded as illicit, it should follow only from an explicit public policy which compels such harsh consequences to ensue from a marriage entered into under the circumstances disclosed here.

The cases cited in the majority which deal with the question we have here are all cases where the parties went to a foreign state to evade the law of the domicil and the marriage celebrated in the foreign state was refused recognition in the place of their domicil when they returned to live there after the marriage. * * *

The provisions [of our statutes], prohibiting marriage within specified degree of consanguinity, apply only to marriages celebrated in Connecticut and are not given extraterritorial operation. . . . * * *

* * * Mrs. Catalano was innocent of any intent to violate our laws, and she is entitled to have recognition here of her marriage status, with all of the rights flowing from that status. The following from the opinion in *Pierce v. Pierce*, 58 Wash. 622, 109 P. 45, expresses what I conceive to be the correct view in the situation here. "We know of no public policy which will warrant a court in annulling a marriage between competent parties if there be any evidence to sustain it and especially so where it appears that the parties have consummated the marriage, a child has been born, and the offending party has been openly acknowledged as a spouse. It will not be done unless it appears that the parties willfully went beyond the jurisdiction of the courts of this state to avoid and defy our laws. It is not clear that they did so in this case."

* * * *

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**Notes & Questions: Problems of Incest**

1. All states prohibit marriages between brother and sister, parent and child, aunt and nephew. A few states permit marriages between uncle and niece when allowed by the religion of the contracting parties.

2. Twenty states and the District of Columbia permit marriages between first cousins. In Oklahoma such marriages are prohibited. However, 43 O.S. § 2 (2001) contains an exception for marriages of first cousins performed in states that recognize such marriages. Texas allows first cousins to marry. Is there any justification for the continued ban on first cousin marriages?

3. What is the rationale for extending the incest ban to first cousins? Consider the following excerpt from Sharon Begley, *Kissing Cousins*, NEWSWEEK, December 30, 2008:

> A good way not to win friends in an immigrant community is to blame its high rate of birth defects on the practice of cousin marriages. That's what British environment minister Phil Woolas did in February, blaming birth defects in children in the UK's Pakistani community on marriages between first cousins. "If you have a child with your cousin, the likelihood is there will be a genetic problem," he told the Sunday Times. That belief is reflected in laws in 31 U.S. states that either bar cousin marriage entirely or permit it only if the couple undergoes genetic counseling or cannot have kids.

> But in a paper in the journal PLoS Biology, Hamish Spencer of New Zealand's University of Otago and Diane Paul of Harvard's Museum of Comparative Zoology argue that the genetic risk to children born of cousin marriages is much less than widely believed.
>
> Risk is in the eye of the beholder, of course. But in 2002 an expert panel convened by the National Society of Genetic Counselors found that the risks of a first-cousin marriage are about 1.7% to 2% above the background risk for congenital defects and 4.4% above background (which is vanishingly low to begin with) for dying in childhood.
>
> Whether 2% and 4% seem like a big extra risk or a piddling one probably depends on how much you want to marry your cousin, but Spencer concludes that "neither the scientific nor social assumptions behind [anti-cousin-marriage laws] stand up to close scrutiny. Women over the age of 40 have a similar risk of having children with birth defects and no one is suggesting they should be prevented from reproducing. People with Huntington's disease or other autosomal dominant disorders have a 50 per cent risk of transmitting the underlying genes to offspring and they are not barred either."
>
> And what of the belief that humans have an incest-avoidance gene that keeps people from lusting after their cousins? None has ever been found. And if avoiding incest with a cousin is part of human nature, as some evolutionary psychologists contend, then an awful lot of humans haven't noticed. In Turkey and Morocco, first-cousin marriages account for 22% of all marriages, and second-cousin marriages for another 29%, finds demographer Georges Reniers of the University of Ghent. Cousin marriages are similarly common among China's majority Han ethnic group and in the Middle East and sub-Sahara Africa."

So what is the rationale for banning incestuous marriage? Do you think any rationale can be constitutionally justified in light of the *Zablocki* case? Colorado held its incest ban unconstitutional as applied to a case where a woman with one child, a daughter, married a man with one child, a son, and the daughter and the son wished to marry. *See Isreal v. Allen*, 577 P.2d 762 (Colo. 1978).

4. Is there any reason for prohibiting marriages between people related by affinity? Suppose in Oklahoma a man marries a woman with a daughter from an earlier marriage. If they are divorced two years later, can the man marry the woman's daughter? *See* 43 O.S. § 2 (2001). How should the language be construed? *See also Bagnardi v. Hartnett*, 366 N.Y.S.2d 89 (N.Y. Sup. Ct. 1975), *Missouri ex rel. Meisner v. Giles*, 747 S.W.2d 757 (Mo. Ct. App. 1987) *and Rhodes v. McAfee*, 457 S.W.2d 522 (Tenn. 1970).

5. Should criminal incest statutes be treated differently than marriage incest statutes? *See* 21 O.S. § 885 (2001). THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE, § 230.2 (1980), applies the criminal incest provision to people related by affinity. The comment to the section notes:

> The inclusion of adopted children reflects the conclusion that the incest law properly serves the function of protecting the nuclear family and that the concept of adoption seeks to duplicate, insofar as possible, the structure of the natural family. Adoption agencies, courts, and other participants in the process try to insure that the artificial family will mirror a natural family not only in definition of legal relationship but also in the emotional content and social significance of those relationships.

6. In this country, marriage, divorce, and other family regulations are primarily a matter of state law. State statutes regulating the marriage and divorce process differ radically. Thus, many people find that the law governing their family relations changes as they move from state to state. The resulting problems form an essential part of the Family Law course and practice.

7. The typical rule for multi-state marriage is set out in RESTATEMENT (SECOND) CONFLICT OF LAWS § 283 (1971):

> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage.
>
> (2) A marriage which satisfied the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

Do you suppose there is much difficulty applying this section? Is not the validity of marriage an area where the rules should be firm and not subject to argument?

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### *4. The Traditional Restrictions: Age*

**WHITE**
**v.**
**MCGEE**
1931 OK 280, 299 P. 222

CLARK, V.C.J.

This action was commenced in the district court of Oklahoma county by plaintiffs in error, Samuel K. White and Nellie E. White, against defendants in error, Reece E. McGee, Marland Pipe Line Company, Marland Oil Company of Oklahoma, and the Marland Refining Company, corporations, for damages for the death of their son, James Leo White, and allege that James Leo White died without issue or lawful wife; that plaintiffs in error are his sole and only heirs at law; that no administrator of the estate of James Leo White is or has been appointed, and that said deceased's estate has not been administered; that a purported marriage was attempted between James Leo White, their son, and one Elizabeth Mae Wentworth, and that the same was unlawful, for the reason that the said James Leo White was under the age of 18 years at that time, being only 17 years of age, and the said Elizabeth Mae Wentworth was only 15 years of age at the said time, and that the consent of the parents to said marriage was not obtained either orally or in writing; that James Leo White and Elizabeth Mae Wentworth did not live together at the time of his death, and had been separate and apart for some time prior thereof, and that he had wholly abandoned and refused to live with and support her; that, because of the nonage of the parties, said attempted marriage was not lawful and is expressly prohibited and forbidden by law; and that the said attempted marriage was made within the state of Oklahoma, and in violation of its statutes, and that she was not his lawful wife.

On December 2, 1927, by leave of court first had, Elizabeth Mae White filed motion for leave to intervene in said cause, asking that she be made a party defendant, and alleging that she was the lawful wife of James Leo White, deceased, and is the lawful widow and heir at law of James Leo

White, and that the petition of plaintiffs below, plaintiffs in error here, attacks the validity of the marriage of James Leo White and herself, and therefore she is a proper party defendant.

Thereafter Elizabeth Mae White, by Floyd C. Wentworth, her father and next friend, as intervener, filed a demurrer in said cause alleging that the petition failed to state facts sufficient to constitute a cause of action.

Thereafter the plaintiffs in error filed a motion to strike intervener's petition and plea, alleging that the same is unlawful and fails to show that petitioner has or claims an interest in the controversy adverse to the plaintiffs' rights, or that she is a necessary party to the complete determination of the action, and that the petition is unverified, that intervener has at this time a cause of action pending, involving the same subject-matter and against the same defendants, and that a full determination of the present action would not prejudice her rights in her own action, and that she is interjecting herself in this action against the will or consent of both plaintiffs in error and defendants in error.

The court overruled said motion to strike, and made said intervener a party defendant.

The general demurrer of intervener was sustained, and plaintiffs in error refused to plead further. Judgment was entered for defendants below, and the petition of plaintiffs below was dismissed. Motion for new trial was filed and overruled. Plaintiffs in error bring the cause here for review.

* * * *

The next contention of plaintiffs in error is:

> 2. Where alleged wife was a minor, aged 15, at the time of marriage, and alleged husband 17 years and no issue of such marriage, Has the surviving infant the right under our law to sue for wrongful death of the other or does this right go to the next of kin, and did the court err in sustaining intervenor's demurrer.

Section 825, C.O.S. 1921, provides:

> In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this State, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow. * * *

Under the above section, a widow is the proper person to bring actions of this kind where there is no personal representative. *See C., R. I. & P. Ry. Co. v. Owens*, 78 Okl. 50, 186 P. 1092; *Id.*, 78 Okl. 114, 189 P. 171.

The next question to be determined is whether or not Elizabeth Mae White is the lawful widow of James Leo White.

Section 7490, C.O.S. 1921, provides:

> Any unmarried male of the age of twenty-one years or upwards, or any unmarried female of the age of eighteen years or upward and not otherwise disqualified, is capable of contracting and consenting to marriage; but no female under the age of eighteen years and no male under the age of twenty-one years shall enter into the marriage relation, nor shall any license issue therefor, except upon the consent and authority expressly given, either in person or in writing, by a parent or guardian, and if such consent be given in writing, the written instrument must be acknowledged before some officer authorized to take acknowledgments of deeds, and every male under the age of eighteen years, and every female under the age of fifteen years are expressly forbidden and prohibited from entering

> into the marriage relation: Provided, that this section shall not be construed to prevent the courts from authorizing the marriage of persons under the ages herein mentioned, in settlement of suits for seduction or bastardy, when such marriage would not be incestuous under this chapter.

In construing this section in connection with the penal statutes for marriage of persons under the ages set forth in the above section, this court held that such marriage is voidable only, and not void. *See Hunt v. Hunt*, 23 Okl. 490, 100 P. 541.

In the opinion, this court said, after reviewing the decisions from other states:

> The rule to be gathered from all of the foregoing cases of this character is that, notwithstanding the statute may penalize those who solemnize or those who enter into marriage contrary to statutory authority, the marriage itself is not void unless the statute itself so makes it, and hence in the case at bar, although the marriage was expressly forbidden and prohibited, it was voidable, and not void. While marriage is a personal relation arising out of a civil contract, it differs to such an extent from all other contracts in its consequences to the parties and to the public that the rule that prohibited and penalized contracts are void does not apply thereto. * * * This conclusion on our part necessarily establishes the proposition that the relation entered into between these parties constituted them husband and wife.

In the case of *Hunt v. Hunt, supra*, the male was 16 and the female 14 years of age.

Plaintiffs in error's only contention as to the marriage being unlawful was on account of the nonage of the parties. No questions were raised which would bring the marriage under the statutes with reference to void marriages.

Void marriages are defined by section 7489, C.O.S. 1921, as follows:

> 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, or second cousins, are declared to be incestuous, illegal and void, and are expressly prohibited.

Such marriages are illegal and void, as defined in section 7489, *supra*, but this statute does not apply in the case at bar. In the case at bar the parties were husband and wife, and the marriage was merely voidable and not void.

The cases cited by plaintiffs in error relate to void marriages and not to voidable marriages.

The marriage entered into between Elizabeth Mae Wentworth and James Leo White on account of nonage was voidable and not void, and, said relation being in existence at the time of the death of the said James Leo White, left Elizabeth Mae White his surviving widow, and as such, in the absence of a personal representative of his estate, could maintain an action for his wrongful death, and plaintiffs in error are without authority to maintain such action, and the court did not err in sustaining intervener's demurrer to the plaintiffs in error's petition.

Judgment of the trial court is affirmed.

LESTER, C.J., and RILEY, HEFNER, CULLISON, SWINDALL, ANDREWS, and KORNEGAY, JJ., concur. MCNEILL, J., disqualified, not participating.

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**Notes & Questions**

1. The census bureau reports that 5.5% of Oklahoma teens are married. This is one of the highest rates in the country. Oklahoma's teen pregnancy rate is 12th-highest nationally, only a slight improvement from a decade earlier, according to the National Centers for Disease Control and Prevention (CDC). CDC figures show that in 2000, the Oklahoma pregnancy rate of women ages 15 to 19 was 60.1 births per 1,000. For those 18 to 19, the rate was 99.8 births per 1,000. In 1991, Oklahoma ranked 13th nationally with a rate of 72.1 births per 1,000 for women ages 15 to 19. For ages 18 and 19, it was 115.6 births per 1,000. The national rate in 2000 was 48.5 births per 1,000 for the 15 to 19 age group and 79.2 births per 1,000 for those 18 and 19, the CDC said. The state with the highest teen pregnancy rate in the nation is Mississippi, which had 72 births per 1,000 women ages 15 to 19. In Washington, D.C., the rate was 80.7 per 1,000 women in that age bracket. Do any of these statistics explain Oklahoma's high divorce rate?

2. In a rather startling decision, the Colorado Court of Appeals recently held that a twelve-year-old girl had a valid common law marriage, because when the legislature changed the age of consent for ceremonial marriages, it never changed the common law age of consent for common law marriages. *In re J.M.H.*, 143 P.3d 1116 (Colo. Ct. App. 2006). In Oklahoma the age for marriage is eighteen. Persons between sixteen and eighteen can be married with parental consent. *See* 43 O.S. § 3 (2001). The divorce rate for people who marry before the age of eighteen is extremely high. Is this a constitutionally valid reason for raising the marriage age to 21, 25, etc.?

The U.S. Census Bureau reports that in three states—Arkansas, Utah and Oklahoma—women married the youngest, at an average age of 24. For men in those states, the average age was 26. In the northeastern states of New York, Rhode Island and Massachusetts, men and women waited about four years longer to marry. Education also appeared to influence the age of marriage. In states with higher numbers of college-educated adults, couples tended to wed at older ages, while the opposite was true in states with lower education levels. A smaller share of Americans, however, are walking down the aisle, continuing a 50-year trend, the study said. The U.S. Census Bureau's 2008 American Community Survey showed 52 percent of men and 48 percent of women older than 15 are married.

Nevada, Maine and Oklahoma have the highest percentage of divorced adults. Arkansas and Oklahoma have the highest rates of people who have walked down the aisle at least three times.

3. A marriage license for people who wish to marry under the age of eighteen with parental consent must be on file for three days prior to the performance of the marriage. 43 O.S. § 5(C). Should people under the age of eighteen who wish to marry be required to have marital counseling? If a couple seeking a marriage license successfully completes a premarital counseling program conducted by a health care professional or an official representative of a religious institution, they will be charged a reduced fee for a marriage license. 43 O.S. §5.1

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**Notes & Questions: The Void and Voidable Distinction**

Suppose two people marry at age fifteen and live together for fifty years before one dies. Is the survivor entitled to the benefits usually afforded the survivor of a marriage? Could the marriage be annulled? At any time?

Annulment is an action to declare the invalidity of a particular union at its inception. Divorce, by comparison, is an action to legally terminate a valid marriage as of a specific date after the union is in existence. Despite the simplicity of this conceptual framework, our legal treatment of annulment has created considerable confusion.

The distinction between void and voidable unions is of considerable importance in most jurisdictions. Generally considered void is an attempted incestuous marriage, or one involving a person who is still married to a third person. Under the purist approach a void marriage needs no formal judicial action or declaration to establish its invalidity. The void marriage can be attacked by third persons, and may be challenged even after the death of the parties. In states that recognize the void marriage concept in this "pure" form, courts nevertheless entertain annulment actions in order to accord certainty to wealth transactions.

A voidable marriage typically reflects encroachment on some lesser public policy concern. It can be ratified by the parties' conduct after removal of the legal impediment that made it vulnerable. Unless the voidable marriage is judicially annulled in timely fashion, it becomes a valid union from its inception. If it is annulled, the marriage is deemed void *ab initio*. Voidable marriages are generally those entered into in violation of many of the procedural rules regulating marriage. Age restrictions vary from state to state. In Oklahoma a marriage that violates the age restrictions becomes a common law marriage if the parties continue the marriage relationship after removal of the age impediment.

Marriages can also be annulled for a variety of defects relating to the personal relationship of the parties before marriage (i.e. fraud). In this day and age with divorce being available for practically any reason, the action for annulment has fallen into disuse.

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### *5. The Traditional Restrictions: Mental Capacity*

**HOUSER**
**v.**
**HOUSER**

#57,134 (Ok. Ct. Civ. App. 1984) (unpublished), *certiorari denied*, 55 O.B.J. 2552 (Okla. 1984)

ROBINSON, JUDGE.

The single issue in this case is whether Everett B. Houser (decedent) was competent when he entered into a marriage contract with Appellant. If he was, Appellant is a surviving spouse and entitled to appointment as his Administratrix, if not, Ruby Proctor as one of the heirs of decedent is entitled to Letters of Administration with Appellant being denied her intestate wife's share of decedent's estate.

Oklahoma defines marriage in 43 O.S. 1981 § 1 as:

> A personal 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.

Consent of the parties to a contract must be free, mutual and communicated by each other. 15 O.S. 1981 § 51. Consent involves a "voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another. It supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of the powers." BLACK'S LAW DICTIONARY 276 (5th ed. 1979). In the present case we find there was no such free mutual consent and the deceased was not capable of knowingly entering into a contract.

Decedent was an 83 year old man who had severe emphysema requiring oxygen frequently. On April 8, 1980, his female live in companion of 40 years, apparently his common law wife, died. Testimony revealed that this was an extremely traumatic event for decedent. Apparently a few days before decedent's common law wife died, Appellant appeared on the scene offering her help and sympathy. At that time decedent was being cared for by a nurse. After decedent's common law wife died, the nurse ceased to be employed by decedent and Appellant began caring for him. Approximately one month and a half later Appellant married decedent on May 22, 1980. Decedent expired February 16, 1981; about nine months after his marriage. In the period between those two events decedent caused two annulment proceedings to be started and virtually all of decedent's savings, $40,000, were withdrawn and spent by Appellant. The annulment proceedings were never completed because of a written request to abandon the same, apparently signed by decedent. One of the attorneys, who decedent requested to file an annulment, testified that deceased "was very absent-minded. It took at least 30 minutes for him to understand who I was." One witness characterized decedent as a "sick, senile, old man." There was testimony that decedent was extremely volatile and would curse and threaten various people around him frequently. The nurse that took care of decedent prior to Appellant's appearance on the scene testified that Appellant had told her that she planned to marry decedent for his money. This witness was present when Appellant came to decedent's home on May 21, 1980. The nurse testified that "she (Appellant) went into the bedroom, got him up by the arms and pulled him up and told him she was taking him out to get a haircut." Actually, Appellant took decedent to get a blood test and a marriage license, not a haircut. The witness further testified that when decedent returned with Appellant, decedent had missed his medicine and was near collapse from fatigue. Further, decedent was not sure where he had been or what he had done, although he thought he had been to get a blood test. Further testimony revealed that decedent had called the police on one occasion to have Appellant removed from his home.

A deputy court clerk testified that she was present when Appellant brought decedent to the courthouse to get the marriage license and stated "I really don't think he knew what he was doing." Finally, decedent's personal attorney who saw him frequently, arranged for nurses, paid decedent's bills and managed decedent and his common law wife's business affairs, testified that in his opinion "I don't believe he was competent."

Appellant and decedent were married by a minister who was a friend of Appellant's and was witnessed by friends of Appellant.

Appellant's witness, decedent's barber, testified that he cut decedent's hair approximately once a month and decedent knew what he was there for and was, in his opinion, mentally competent. One of decedent's renters testified that he saw decedent once a month to deliver a rent check

and believed "he was in his right mind." The minister who married Appellant and decedent testified that he was competent on the date of the marriage, however, he had only talked with decedent on approximately two or three occasions. Finally, decedent's personal physician testified that "several days before his death, I was introduced by him to his wife, one Louise McClendon Houser. He appeared to be in good spirits at that time and mentally competent." This testimony, however, was right before decedent's death and is not relevant to decedent's competency at the time of his marriage.

The State of Oklahoma has a legitimate interest in the marital status of parties. *Ross v. Bryant*, 90 Okl. 300, 217 P. 364 (1923). Here the clear weight of the evidence shows decedent did not freely and mutually consent to enter this marriage contract and was not legally competent to contract. 15. O.S. 1981 § 1. We therefore agree with the trial court's determination that "E.B. Houser was not competent to enter into a marriage contract and such marriage is held to be invalid."

Lastly, pursuant to Appellee's request we grant Appellee's their appellate costs and attorney fees for the defense of this action.

AFFIRMED.

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**Questions**

1. Is the "marriage" in *Houser* void or voidable? If the latter, should a collateral attack have been permitted? Is 43 O.S. § 128 (2001) applicable?

2. Is the problem in Houser likely to arise more in the future? Yes, according to the Wall Street Journal:

Unholy Matrimony: How to Fight Back
By KELLY GREENE
WALL STREET JOURNAL, page B8

It is difficult enough to entrust an elderly parent's care to someone you hire. But what do you do when that worker secretly marries their charge—and claims a chunk of your inheritance?

Although no one tracks the numbers of such marriages, lawyers who handle estate-related litigation say they are seeing increasing numbers of "predatory unions," as life spans increase and dementia becomes more common.

"Let's face it—baby boomers are heading into old age," says Susan Slater-Jansen, an estate-planning attorney at Kurzman Eisenberg Corbin & Lever in White Plains, N.Y. "It's going to be an increasing problem."

What's worse, it is virtually impossible for children to challenge the property consequences of a parent getting married once the parent dies, says Terry Turnipseed, an associate law professor at Syracuse University, who has studied "deathbed marriages" and analyzed state laws.

How could families be duped into not knowing their own parents had married? In one case, an adult daughter left her elderly father in the care of a longtime friend while she took a short vacation. In one week, the friend married the father, started transferring as-

sets into joint accounts and named herself his pension beneficiary. The children learned of the marriage a month later. When they confronted their father, he recalled nothing about it.

In another case, a hired caretaker secretly married her charge of nine years about a year before his death. She told his children about it the day before his funeral.

In most states, the inheritance rights of widows and widowers trump any estate plan—even if the new spouse wasn't named in the will, and even if the marriage took place shortly before the death of someone unable to recall a few days later that they said "I do."

The only way many state courts can fix things is to annul a marriage after death. Typically the only person who has legal standing to sue is the surviving spouse, "who of course has no incentive whatsoever to annul the marriage," Mr. Turnipseed says.

But in a few states, courts and lawmakers are starting to make it easier to unwind a twilight union. Florida closed a loophole last year by enacting a law that gives heirs and others the legal standing to challenge any marriage—even after a spouse's death—on the grounds of fraud, duress or undue influence.

Florida's statute found a way around the big legal concern: that state laws could be challenged as messing with the constitutional right to marriage, says Samantha Weissbluth, an estate litigator with Foley & Lardner in Chicago. "It doesn't narrow any existing right to marry; it severs marriage from its usual property consequences in certain circumstances," she says.

In New York, an appeals court last year ruled in favor of the families of two men with dementia who had secretly married outside caregivers before their deaths, by denying their surviving spouses a share of the dead men's assets.

"The spouses were deemed to be committing fraud because the decedents didn't have the capacity to know what they were doing," Ms. Slater-Jansen says.

But until more state legislatures and courts take action, families need to watch out when employing caregivers. Distance often exacerbates the problem. It is tough to supervise workers in a parent's home from afar. Before you hire anyone, extensive background checks are crucial, along with making sure any paid caregivers are bonded and insured, says Patricia Maisano, chief executive of Ikor USA in Kennett Square, Pa., which provides case-management and advocacy services for elderly and disabled clients.

Ask the aide to consent to a background check and provide a Social Security number if he or she hasn't been screened or formally trained, she says. Don't hire anyone who refuses. You may want to hire a geriatric-care manager to keep an eye on home health-care aides.

If you do sense that your parent is developing a relationship with an aide, don't keep it to yourself. Tell your family, and your parent, about your concerns. The worst thing the child and parent could do is to quit speaking to each other, says John Morken, a partner at Farrell Fritz in Uniondale, N.Y.

If your parent is diagnosed with dementia, one defense against fraud is a durable power of attorney—a legal arrangement that helps older people turn over management of their finances to a family member or others—assuming he or she can still execute one. If used, it is a good idea to require all of the adult children's consent for transactions over a certain

dollar amount. That way, you can make sure that no one in the family falls sway to the hired help—or takes advantage of the situation himself, says Ms. Slater-Jansen.

Another defense: having your parent put their assets in a trust. If the assets involved are worth less than $5 million—and you set it up this year or next, when there is no gift tax on that amount—make the trust irrevocable, meaning it can't be unwound during the parent's lifetime. If you use a revocable trust, make sure the paid caregiver doesn't know about it, she says.

Many parents, though, are suspicious of their own children's attempts to help them. If your parents refused to shield their assets in advance, and you worry that a deathbed marriage is looming, there is one more step that may make sense: Going to court to have a parent ruled as lacking the capacity to tie the knot.

Can a conservator, who was appointed because a person lacks capacity to make responsible decisions concerning their health and welfare, prevent a ward from contracting a marriage? *See In re Mikulanec*, 356 N.W.2d 683 (Minn. 1984).

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### *6. The Traditional Restrictions: Same Sex*

**MATTER OF NASH AND BARR**
2003 WL 23097095
(Ohio Ct. App. 2003)
(unpublished; text in Westlaw)

Background

Parties, one of whom was a post-operative female-to-male transsexual, applied for marriage license. The Court of Common Pleas, Trumbull County, Probate Division, No.2002 MLA 0834, denied the motion because the application had failed to disclose transsexual's prior marriage. The parties appealed. While appeal was pending, the parties filed a second application, disclosing the marriage and subsequent divorce. The Court of Common Pleas denied the application. The parties appealed, and the two appeals were consolidated.

DIANE V. GRENDELL, J.

This matter arises from two separate appeals. First, Jacob B. Nash ("Nash") and Erin A. Barr ("Barr"), a female, (together "the applicants") appeal the September 20, 2002 judgment entry of the Trumbull County Court of Common Pleas, Probate Division, denying their application for a marriage license. The applicants further appeal the November 25, 2002 judgment entry of the Trumbull County Court of Common Pleas, Probate Division, denying their second application for a marriage license. For the reasons set forth below, we affirm the decisions of the trial court in this matter.

Nash was born Pamela Ann McAloney, a female, on November 17, 1964, in Massachusetts. At that time, Massachusetts issued a birth certificate designating Nash's sex as female. Nash's birth certificate was subsequently amended to reflect a change in name to Pamela Ann Nash following Nash's adoption.

Nash eventually married Michael Stephen Michalak. On May 6, 1998, Nash and Michalak were divorced in Massachusetts. Nash relocated to Warren, Ohio, in April 1999. Nash applied for a legal name change from Pamela Ann Nash to Jacob Benjamin Nash with the Trumbull County Court of Common Pleas on December 30, 1999. A copy of Nash's then current Massachusetts birth certificate designating Nash as female was submitted along with the application for name change. Nash's application for name change was granted on July 5, 2000.

Soon thereafter, application to amend Nash's Massachusetts birth certificate to reflect a change in sex designation from female to male was made to the City Clerk of Fitchburg, Massachusetts. Along with the application, Nash submitted a copy of the entry granting the name change and a letter from Dr. Samuel Detwiler, Nash's family physician, indicating that Nash had undergone gender reassignment surgery. An amended birth certificate in the name of Jacob Benjamin Nash with a designation as a male was issued on April 25, 2002. Nash subsequently obtained an amended Ohio driver's license changing the sex designation from female to male.

On August 2, 2002, the applicants applied for a marriage license. In the application, the applicants failed to declare Nash's former marriage. Upon a search of the court's records, the court noticed the previous court entry granting Nash's name change from Pamela Ann Nash to Jacob Benjamin Nash. When Nash returned to pick up the marriage license, Nash was informed that the license would not issue.

The matter subsequently was set for an evidentiary hearing on September 5, 2002. Prior to the hearing, the applicants submitted an unsigned amended application for a marriage license to the court indicating that Nash was previously married.

The applicants testified at the evidentiary hearing that the failure to indicate Nash's previous marriage was a mere oversight. The trial court, however, found that the applicants' "explanation that they forgot the previous marriage and divorce when they completed the original application lacks credibility." The trial court further found that the applicants' "omission of [Nash's previous marriage] was intentional and made with the purpose of misleading the court." Thus, the trial court ordered "that the marriage license of Jacob B. Nash and Erin A. Barr shall not issue as the statements regarding the previous marriage are false."

The applicants timely appealed the trial court's decision. On October 2, 2002, and during the pendency of the appeal, the applicants submitted a second application for a marriage license properly disclosing Nash's previous marriage. An evidentiary hearing was set for November 5, 2002. Nash claims to be a post-operative female-to-male transsexual. Upon the advice of counsel, however, Nash refused to answer any of the trial court's questions pertaining to Nash's sex reassignment surgeries. Nash's attorney argued that these questions were irrelevant because of Nash's designation as male on the amended Massachusetts birth certificate.

The trial court found that "the refusal of Jacob B. Nash to permit the Court to make reasonable inquiry permitted by prevents the court from determining if the requirements for a marriage license have been met under the Ohio statutes." Thus, the trial court denied the applicant's second application for a marriage license. Again, the applicants timely appealed the trial court's decision.

The applicants raise the following assignments of error in this consolidated appeal:

> [1.] The trial court erred in holding appellant's application for a marriage license to a higher evidentiary standard than the standard to which it holds other applications, thereby denying appellants equal protection of the laws under the United States Constitution and the Constitution of the State of Ohio.

[2.] The trial court erred in refusing to give full faith and credit to Jacob Nash's valid, corrected Massachusetts birth certificate when he presented it in support of appellants' application for a marriage license.

In their first assignment of error, the applicants argue that the trial court violated their Fourteenth Amendment guarantee of equal protection by requiring from Nash more than a driver's license, which the applicants claim "is usually dispositive proof of a person's identity, age and sex."

The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." "[E]qual protection analysis requires strict scrutiny of legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement v. Murgia* (1976), 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520. Otherwise, the classification is subject to rational basis analysis, i.e. whether there exists some rational relationship to a legitimate governmental interest.

Although transsexuals do not constitute a suspect class, *Holloway v. Arthur Anderson & Co.* (C.A.9 1977), 566 F.2d 659, 663, the right to marry has long been recognized as a fundamental right. *See Zablocki v. Redhail* (1978), 434 U.S. 374, 383-384, 98 S.Ct. 673, 54 L.Ed.2d 618. "[N]ot . . . every state regulation which relates in any way to the incidents of or prerequisites for marriage[, however,] must be subject to rigorous scrutiny." "[R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."

[The Ohio marriage statute] is a reasonable regulation that does not significantly interfere with decisions to enter into the marital relationship and, thus, for purposes of equal protection analysis, the statute is entitled to examination under the rational basis standard. States possess a legitimate interest in protecting the institute of marriage within its borders. *See* Section 1738C, Title 28 U.S. Code. [The statute's] requirements are, at least, rationally related to further that legitimate interest by insuring that no legal impediments to a proposed marriage exist.

Moreover, the statute, as applied to the applicants, does not violate their equal protection rights. In applying an equal protection analysis, states "must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill* (1997), 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834, *citing Plyler v. Doe* (1982), 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786. Thus, "a law that is applicable to all persons under like circumstances and does not subject individuals to an arbitrary exercise of power does not violate an individual's right to equal protection." *Shockey v. Winfield* (1994), 97 Ohio App.3d 409, 412, 646 N.E.2d 911.

The probate court has exclusive jurisdiction to grant marriage licenses, R.C. 2101.24(A)(1)(f), and possesses "plenary power . . . to dispose fully of any matter that is properly before the court. . . ." R.C. 2101.24(C). When processing a marriage license application, "[i]f the probate judge is satisfied that there is no legal impediment and if one or both of the parties are present, the probate judge shall grant the marriage license." R.C. 3101.05(A). Thus, although a marriage license will normally issue based upon the sworn license application and submission of proper identification, when evidence arises that indicates the possible existence of a legal impediment to the marriage or raises a question regarding an applicant's identification, the court can do what is reasonable and necessary under the circumstances to quell the court's concerns and properly dispose of the matter.

In this case, the court, through a cursory search of its records, discovered evidence that raised a question about the identification and sexual designation of Nash. Thus, when the court required

further information from Nash and conducted an evidentiary hearing on the matter, it violated neither of the applicants' equal protection rights. Rather, it was treating like cases alike and unlike cases accordingly. The court cannot be expected to turn a blind eye to evidence that comes before it that could possibly foreclose the issuance of a marriage license. Rather, the court is permitted to proceed with the case accordingly, including requiring additional information or conducting an evidentiary hearing on the matter.

Moreover, in the face of the evidence before the court, the court was not only permitted to require additional information from Nash, as well as conduct an evidentiary hearing on the matter, it was required to do what was necessary to insure that the issuance of the marriage license was proper and valid. In other words, this case was not the usual case and the court was required to treat this case accordingly. In doing so, the applicants' equal protection rights were not violated.

The applicants' first assignment of error is, therefore, overruled.

In their second assignment of error, the applicants argue that Nash's amended Massachusetts birth certificate designating Nash a male was entitled to full faith and credit as a public act or record of another state. The applicants further argue that there is no public policy in Ohio prohibiting a transsexual from changing the sex designation on his or her birth certificate or from marrying a member of his or her biological sex.

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Section 1, Article IV, United States Constitution. Congress has prescribed that another state's records "shall have the same full faith and credit in every court and office within the United States . . . *as they have by law or usage in the courts or offices of the State . . . from which they are taken.*" Sections 1738, 1739, Title 28, U.S. Code (emphasis added). Thus, Ohio courts must give the same effect to records from Massachusetts as that record would be given by Massachusetts courts themselves. *See Holzemer v. Urbanski,* 86 Ohio St.3d 129, 136.

Although Massachusetts permits a post-operative transsexual to amend his or her original birth certificate to "reflect the newly acquired sex," Mass. Gen. Laws, Chapter 46, Section 13(e), "[t]he record . . . relative to birth . . . shall be prima facie evidence of the facts recorded . . . ." Mass. Gen. Laws, Chapter 46, Section 19. A birth certificate submitted as evidence in a Massachusetts court is, therefore, not conclusive proof of the facts recorded therein, but is only prima facie evidence of those facts.

In this case, the amended birth certificate submitted by Nash as evidence of his sex was rebutted by the evidence already in possession of the trial court, to wit, Nash's original birth certificate designating Nash's sex as female. Thus, the trial court gave Nash's amended Massachusetts birth certificate the proper full faith and credit, prima facie evidence of the facts contained therein.

Moreover, since each state retains some attributes of sovereignty and, thus, may enact its own laws and, in effect, define its own public policy, *see Pacific Emp. Ins. Co. v. Indus. Accident Comm.* (1939), 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940; *Bhd. of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific RR. Co.* (1968), 393 U.S. 129, 142, 89 S.Ct. 323, 21 L.Ed.2d 289 ("policy decisions are for the state legislature") (citation omitted); *Kassel v. Consol. Freightways Corp.* (1981), 450 U.S. 662, 691, 101 S.Ct. 1309, 67 L.Ed.2d 580 (REHNQUIST, J., dissenting) ("forming public policy [is a] function[ ] which . . . [was] left by the Framers of the Constitution to state legislators"), the full faith and credit clause is not violated when granting full faith and credit to another state's records would violate the public policy of the state applying the other state's records. *See Nevada v. Hall* (1979), 440 U.S. 410, 422, 99 S.Ct. 1182, 59 L.Ed.2d

416; *Pink v. A.A.A. Highway Express, Inc.* (1941), 314 U.S. 201, 210, 62 S.Ct. 241, 86 L.Ed. 152; *Atlantic Fin. Co. v. Fisher* (1962), 173 Ohio St. 387, 389, 183 N.E.2d 135; *Gibson v. Bolner* (1956), 165 Ohio St. 357, 361, 135 N.E.2d 353.

Ohio, like most states, has a clear public policy that authorizes and recognizes marriages only between members of the opposite sex. *See* Am.Sub.H.B. No. 272 ("Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state."); R.C. 3101.01 (designating that only "male persons . . . and female persons . . . may be joined in marriage"). In fact, the pertinent language of R.C. 3101.01 designating that "male persons . . . and female persons . . . may be joined in marriage" has not changed since the original statute was enacted as part of the General Code.

In addition, public policy in Ohio concerning changes to birth certificates is to allow a court to "correct Errors/Mistakes Only on the original birth record," and not changes in the sexual designation when the original designation was correct. *See* http://www.odh.state.oh.us/VitStats/la--correct.htm (visited Sept. 4, 2003) (emphasis sic) (the official website of Ohio Department of Health, which pursuant to R.C. 3705.02 has the authority to "adopt rules as necessary to insure that this state shall have a complete and accurate registration of vital statistics"). Even if Ohio permitted changes to the sexual designation as noted on the original birth certificate, this would not affect the clear public policy authorizing and recognizing only marriages between members of the opposite sex.

"[W]hen words are not defined in a statute they are to be given their common and ordinary meaning absent a contrary legislative intent." A female is defined as "the sex that produces ova or bears young," while a male is defined as "the sex that has organs to produce spermatozoa for fertilizing ova." WEBSTER'S II NEW COLLEGE DICTIONARY (1999). Thus, the "words . . . 'male,' and 'female' in everyday understanding do not encompass transsexuals." *In re Estate of Gardiner* (Kan. 2002), 273 Kan. 191, 42 P.3d 120, 135. Further, since "words [that] are employed in a statute which had at the time a well-known meaning . . . are presumed to have been used in that sense unless the context compels to the contrary," *Standard Oil Co. v. United States* (1911), 221 U.S. 1, 59, 31 S.Ct. 502, 55 L.Ed. 619, and since the statutory language in question was enacted in the early 1900s, without change, it cannot be argued that the term "male," as used at that time, included a female-to-male post-operative transsexual.

Thus, this court agrees with the court in *Ladrach* that "if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals" to marry someone who has the same biological sex as the transsexual, it is the responsibility of the legislature to make the necessary statutory changes to reflect this change in public policy. 32 Ohio Misc.2d at 10, 513 N.E.2d 828. Moreover, as JUSTICE LUNDBERG STRATTON expressed concern about in her dissent in *Bicknell,* courts should not, by judicial legislation, place a "stamp of state approval" on any act that "is directly contrary to the state's position against same-sex . . . marriages." 96 Ohio St.3d 76, at ¶ 20, 771 N.E.2d 846 ("By our decision today, we have judicially read into a statute an interpretation that I do not believe the General Assembly intended. Allowing unmarried couples, whether homosexual or heterosexual, to legally assume the same last name with the stamp of state approval is directly contrary to the state's position against same-sex and common-law marriages, neither of which Ohio recognizes. This is a social policy decision that should clearly be made by the General Assembly after full public debate and discourse, not by judicial legislation."). JUSTICE LUNDBERG STRATTON's concern in *Bicknell* is amplified in this case because, in permitting

this marriage to proceed, we would be placing our "stamp of state approval" on an actual marriage that is directly contrary to Ohio's public policy on same-sex marriages, rather than approving a name change that only would give the intimation of a same-sex marriage, as was the case in *Bicknell.* Thus, this would start us down the slippery slope to judicially legislating same-sex marriages, an area within the purview of the legislature alone.

Further, it has been over 15 years since the decision in *Ladrach* was announced and over 12 years since the decision in *Gajovski* was announced. In that time, the legislature amended R.C. 3101.01 four times without changing the relevant language designating that only "male persons . . . and female persons . . . may be joined in marriage." "A reenactment of legislation, without modification after judicial interpretation, is further indication of implied legislative approval of such interpretation." *Seeley v. Expert, Inc.* (1971), 26 Ohio St.2d 61, 72-73, 269 N.E.2d 121. Since the legislature has not changed the pertinent wording of R.C. 3101.01, even in light of the *Gajovski* and *Ladrach* decisions, and has remained silent regarding the issue of sexual designation of a post-operative transsexual, this court is loath to expand the statutory designation of individuals who may marry through judicial legislation. *Gardiner,* 42 P.3d at 136 ("We view the legislative silence to indicate that transsexuals are not included. If the legislature intended to include transsexuals, it could have been a simple matter to have done so.").

After an extensive review of the case law throughout the country, other courts faced with the issue of a transsexual's sex designation have come to similar conclusions. In *Gardiner,* 42 P.3d at 136-137, the Supreme Court of Kansas stated:

> [T]he legislature clearly viewed 'opposite sex' in the narrow traditional sense. The legislature has declared that the public policy of this state is to recognize only the traditional marriage between 'two parties who are of the opposite sex,' and all other marriages are against public policy and void. We cannot ignore what the legislature has declared to be the public policy of this state. Our responsibility is to interpret *K.S.A 2001 Supp. 23-101* and not to rewrite it. That is for the legislature to do if it so desires. If the legislature wishes to change public policy, it is free to do so; we are not. To conclude that [the post-operative male-to-female transsexual] is of the opposite sex of [the deceased male] would require that we rewrite *K.S.A.2001 Supp. 23-101.*
>
> Finally, we recognize that [the post-operative male-to-female transsexual] has traveled a long and difficult road. [The post-operative male-to-female transsexual] has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, [the post-operative male-to-female transsexual] remains a transsexual, and a male for purposes of marriage under *K.S.A.2001 Supp. 23-101.* We are not blind to the stress and pain experienced by one who is born a male and perceives oneself as a female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal. However, the validity of [the post-operative male-to-female transsexual's] marriage to [the deceased male] is a question of public policy to be addressed by the legislature and not by this court.

Similarly, in *Littleton v. Prange* (Tex. App. 1999), 9 S.W.3d 223, 230-231, the Fourth District Court of Appeals of Texas stated:

> "In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals.
>
> * * * *

> It would be intellectually possible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex. Littleton has suggested we do so, perhaps using surgical removal of the male genitalia as the test. As was pointed out by Littleton's counsel, 'amputation is a pretty important step.' Indeed it is. But this court has no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature.
>
> We recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores. Such matters though are beyond this court's consideration. Our mandate is, as the court recognized in *Ladrach,* to interpret the statutes of the state and prior judicial decisions. This mandate is deceptively simplistic in this case: Texas statutes do not allow same-sex marriages, and prior judicial decisions are few.

Finally, in *Ulane v. Eastern Airlines, Inc.* (C.A.7 1984), 742 F.2d 1081, 1086-1087, the United States Court of Appeals for the Seventh District stated:

> In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. *See Gunnison v. Commissioner,* 461 F.2d 796, 499 (7th Cir. 1972) (it is for the legislature, not the courts, to expand the class of people protected by a statute). This we must not and will not do.
>
> Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term 'sex' as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word 'sex' as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof. If Congress believes transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.
>
> * * * *
>
> [I]f the term sex as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."
>
> Like the courts in *Ladrach, Gardiner, Littleton,* and *Ulane,* we must emphasize that any change to Ohio's public policy concerning transsexuals and marriage or expanding the definition of male and female in R.C. 3101.01 to permit a post-operative transsexual to marry someone who has the same biological sex as the transsexual must come from the legislature. Since the Ohio legislature clearly has neither changed the public policy regarding marriages and transsexuals, as expressed in R.C. 3101.01 and interpreted in *Gajovski* and *Ladrach,* nor expanded the definition of male or female beyond their common and traditional interpretations, a marriage between a post-operative female-to-male transsexual and a biological female is void as against public policy. *See Gajovski,* 81 Ohio

App.3d at 13, 610 N.E.2d 431 ("Ohio law permits marriage only between members of the opposite sex. . . . This requirement applies even in a situation where one party has obtained such gender status by means of transsexual surgery; in the contemplation of Ohio jurisprudence, one's gender at birth is one's gender throughout life.") (citations omitted); *Ladrach,* 32 Ohio Misc.2d at 10, 513 N.E.2d 828 ("there is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male to female transsexual person and a male person"). Thus, the trial court was not required to grant full faith and credit to Nash's amended Massachusetts birth certificate because to do so would infringe on clear Ohio public policy against same-sex marriages.

For these reasons, the applicants' second assignment of error is without merit.

Since, based upon the holding above, the issuance of a marriage license to the applicants would violate clear Ohio public policy, there is no need for this court to examine whether the applicants' rights were violated when the first application for a marriage license was declined for the applicants' failure to declare Nash's previous marriage. Regardless of whether the failure to declare Nash's prior marriage was sufficient to deny the first application, any marriage license issued by the court would have been void as against public policy.

For the foregoing reasons, we conclude that the trial court did not violate the applicants' equal protection rights when denying issuance of their marriage license. We further conclude that the trial court was not required to give full faith and credit to Nash's Massachusetts birth certificate because to do so would violate clear Ohio public policy. Thus, we hold that the applicants' assignments of error are without merit. The decision of the Trumbull County Court of Common Pleas, Probate Division, is affirmed.

DONALD R. FORD, P.J., concurring.

While I concur in the conclusion of the majority with respect to appellants' assignments of error, it appears that the majority opinion does not expressly address the specific focus of appellants' argument under their second assignment of error to the effect, "that there is neither a judicially nor legislatively expressed public policy in Ohio prohibiting a transsexual born in Ohio from changing the sex designation on his or her birth certificate or, for that matter, prohibiting a transsexual from marrying in his or her new sex," as it bears on the issue of full faith and credit. *In re Ladrach; Gibson v. Bolner.*

This writer is in accord with appellants' contention on this point. However, appellants' syllogism does not necessarily and automatically invoke the conclusion that ergo there is no public policy on this issue that can be gleaned from a penetrating analysis of the legislative history of the Ohio statutes that have established the criteria for the issuance of a marriage license. Although existing case law on the question in Ohio is, indeed, most sparse, vis-á-vis, *In re Ladrach;* and while other limited judicial pronouncements are tangential, like *In re Bicknell* and *Gajovski,* they provide an important degree of relevance. When those authorities are read in conjunction with the pertinent statutory provisions, a predicate is provided to ascertain a definite public policy in Ohio that does not sanction and approve of transsexual marriage by one whose sexual identity is transformed from that of birth to the opposite gender by medical techniques to another individual of the opposite sexual label which condition is congenital in that regard.

I do believe the majority has provided that type of presentation in concluding that there is a discernable public policy on this subject in Ohio. Additionally, I share the Supreme Court of Kansas' sensitivity in *Gardiner* for those who feel most compelled to seek the opposite sexual gender.

I also agree with the majority, with the rationale in *Gardiner,* and the Texas *Littleton* case that these precise issues fit more appropriately in the legislative rather than the judicial cauldron as to whether this policy should be stayed or changed.

In any event, the result reached by the majority remains the same even if Ohio's public policy determination is the product of inductive reasoning.

JUDITH A. CHRISTLEY, J., dissenting.

Establishing public policy is complicated business. Throughout this country's history, federal and state governments have passed various laws grounded in concerns over what should be done to save people from themselves.

For example, we have a plethora of paternalistic legislation and judicial decision making based on "indisputable" natural law and thinly veiled religious dogma that portrays women and other folk as fragile and somewhat moronic creatures incapable of protecting or thinking for themselves.

In *Muller v. Oregon* (1908), 208 U.S. 412, 421-422, 28 S.Ct. 324, 52 L.Ed. 551, the United States Supreme Court noted the following:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious.
>
> * * * *
>
> Still again, history discloses the fact that woman has always been dependent upon man. . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. . . . Even though all restrictions on political, personal and contractual rights were taken away, . . . it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. . . ."

Laws against miscegenation were judicially supported as efforts to preserve racial integrity and to "prevent the corruption of blood[.]" *Loving v. Virginia* (1967), 388 U.S. 1, 7, 87 S.Ct. 1817, 18 L.Ed.2d 1010. Slavery and other civil inequities were defended on the basis that "negroes" were inferior to whites. *See, generally*, *Scott v. Sanford* (1857), 60 U.S. 393, 407, 19 How. 393, 15 L.Ed. 691 (observing that because African-Americans had "been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; . . . the negro might justly and lawfully be reduced to slavery for his benefit."); *Plessy v. Ferguson* (1896), 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (upholding the "separate but equal" doctrine").

The establishment of our current civil rights legislation required that we rethink the long established history and origins of our prejudices. Without exception, the continuation of those prejudices was defended in the name of natural law, the God-given order of things, and because it had always been that way. Then, as today, the defenders of the status quo always seemed to have God's lips to their ears.

Not all of these decisions are a hundred years old or older. It was only recently that the Supreme Court of Ohio invalidated the criminal statute that prohibited homosexual, but not heterosexual, importuning. *State v. Thompson,* 95 Ohio St.3d 264, *2002-Ohio-2124,* syllabus. Moreover, it was only in the last thirty years that the United States Supreme Court held that a requirement forcing pregnant teachers in the Cleveland school system to take maternity leave without pay beginning five months before the expected birth of the child was unconstitutional. *Cleveland Bd. of Edn. v. LaFleur* (1974), 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (also noting that some of the considerations underlying the leave policy were to save pregnant teachers from embarrassment of giggling schoolchildren, women "began to show" at the end of the fourth month of pregnancy, and to insulate schoolchildren from the sight of conspicuously pregnant women).

I understand that it is not always appropriate to apply modern sensibilities to prior decisions. That being said, certain questions are so obvious, and certain results are so clearly wrong, that we must look back and, like Dr. Phil, wonder "What were they thinking?"

A person reading the above examples of legislation and judicial decision making would be appalled at the generalizations and outright ignorance used by courts and legislatures to justify obviously unconstitutional laws. Today, however, the majority holds that, in an effort to protect the institution of marriage, a transgender person may not marry someone belonging to that person's original gender classification. In doing so, it claims to be protecting the sanctity of marriage. My question to them is "What is the danger?" How is anything harmed by allowing those, who by accident of birth do not fit neatly into the category of male or female, from enjoying the same civil rights that "correct sex" citizens enjoy? The state's "interest" in protecting the sanctity of marriage in this manner is totally suspect. I would hope that the General Assembly and the courts would have better things to do with their time than to manufacture ways to polarize and alienate significant portions of our citizenry when there is no need.

For these reasons, and as a matter of public policy, I respectfully dissent.

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**O'DARLING**
**v.**
**O'DARLING**
2008 OK 71, 188 P.3d 137

HARGRAVE, JUSTICE.

Appellant and Appellee were purportedly married in Toronto, Canada on December 16, 2002. Appellant filed her Petition for Dissolution of Marriage on July 18, 2006, in Tulsa County. The Petition and Summons were properly served on Appellee on July 25, 2006. The Appellee failed to file a response. Appellant filed a Motion for Default which was set for hearing on the 20th day of November 2006. Prior to the hearing, Appellee filed a Waiver of Summons and Time to Plead and signed the Decree of Dissolution of Marriage.

On November 13, 2006, Appellant appeared with her attorney before the trial court judge. Appellant gave testimony about jurisdiction and division of property and debts. Appellant informed the trial court that she and the Appellee were married in Canada. The fact that the marriage was between two women was not mentioned at this hearing. The style of the case did not indicate that the marriage was between two women. The notary's signature block on the waiver referred to the signor as he/she and Petition for Dissolution of Marriage referred to the Petitioner

as "him." The trial court granted the dissolution of marriage and signed the Decree of Dissolution of Marriage on November 13, 2006.

Sometime after November 14, 2006, the trial court was contacted by a reporter from the Tulsa World concerning allegations that a dissolution of marriage had been granted to persons of the same gender. The trial court confirmed this by contacting the office of the plaintiff's attorney. On November 20, 2006, the trial court entered a Minute Order vacating the Decree of Dissolution of Marriage and dismissing the Petition for Dissolution of Marriage. The Minute Order was formalized in an Order and filed on January 17, 2007.

Appellant now claims she was denied the right of due process granted by the United States Constitution. She argues that she should have been given notice and an opportunity to present evidence and arguments to the trial court about the legality of her foreign marriage. She alleges that the trial court abused its discretion and violated her basic fundamental due process rights by dismissing the Petition for Dissolution of Marriage and vacating the Decree of Dissolution of Marriage without notice and the opportunity to be heard.

THE TRIAL COURT PROPERLY VACATED THE DECREE OF DISSOLUTION OF MARRIAGE BUT ERRED IN DISMISSING THE PETITION FOR DISSOLUTION OF MARRIAGE

12 O.S. 2001 § 1031.1 states that:

> A court may correct, open, modify or vacate a judgment, decree, or appealable order on its own initiative not later than thirty (30) days after the judgment, decree or appealable order prepared in conformance with Section 696.3 of this title has been filed with the court clerk. Notice of the court's action shall be given as directed by the court to all affected parties.

12 O.S. 2001 § 1031 states:

> The district court shall have power to vacate or modify its own judgments or orders within the times prescribed hereafter:
>
> (3) For mistake, neglect or omission of the clerk or irregularity in obtaining a judgment or order;
>
> (4) For fraud, practiced by the successful party, in obtaining a judgment or order;

The court has power to vacate when the successful party acted improperly to obtain the decree or there was irregularity in obtaining the judgment. 12 O.S. 2001 § 1031. In *Stepp v. Stepp*, 1998 OK 18 ¶ 9, 995 P.2d 722, this Court observed:

> In *Shepp v. Hess*, 1989 OK 28 ¶ 7, 770 P.2d 34, we held that trial courts acting under § 1031.1 retain "plenary control over their terminal decisions." Under § 1031 trial judges enjoy "a very wide and extended discretion that has been described as 'almost unlimited' " *Shepp* at ¶ 9 quoting from *Morgan v. Phillips Petroleum*, 1949 OK ___, 212 P.2d 663.

Appellant now complains that she was denied due process as she was not given notice and the opportunity to set forth facts that would entitle her to relief. In the present matter, Appellant was in attendance at the purported divorce hearing. Neither Appellant nor her counsel, acting as an officer of the court, gave notice to the bench that the purported marriage was one between two women. 5 O.S. Ch. 1 App 3-A, Rule 3.3(a) states that:

> A lawyer shall not knowingly:

> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

In the present matter the parties and attorney failed to disclose controlling legal authority regarding same-sex marriage in Oklahoma. Disclosure that the purported marriage was between two women was not made, and it was not until contacted by the local paper, that the trial court discovered this information. An Oklahoma trial court may "correct, open, modify, or vacate" a decree on its own initiative within thirty days after issuance of the decree. 12 O.S. 2001 § 1031.1. The court has power to vacate when the successful party acted improperly to obtain the decree or if there was irregularity in obtaining the decree. 12 O.S. 2001 § 1031. Such actions are shown in the facts in the present matter. However, the trial court erred by dismissing the Petition for Dissolution of Marriage without giving the petitioner notice and a right to be heard.

In *Heiman v. Atlantic Richfield Co.*, 1991 OK 22, 807 P.2d 257, the trial court gave notice of its disposition docket by publication only. The parties had no actual notice to inform them of the docket. Neither party appeared and the case was dismissed by the trial court. We held at ¶7:

> The Due Process Clause of the Fourteenth Amendment inexorably commands that "prior to an action which will affect an interest in . . . property . . . a State must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " Applying this sine qua non requirement of due process, we hold today that the statutorily authorized publication notice was not sufficient to inform the plaintiffs and defendants of the disposition-docket setting.

We further held in that matter:

> We note that while published notice of the disposition docket appears authorized by statute, if the setting to take place may result in an end-of-the-line order—one marking an event dispositive of or terminating the litigation—personal notice is required, whether it be effected by personal service or by mail.

In the present matter, O'Darling was never given personal notice of the possibility of an end-of-the-line order dismissing her lawsuit. The trial court was acting within its statutory power in vacating the Decree of Dissolution of Marriage, however, before dismissing the lawsuit outright, the parties must be given personal notice, as the purported divorce affected the property interests of the parties.

On remand, we instruct the trial court to conduct a hearing, after notice is given to the parties and the Oklahoma Attorney General's office, allowing Petitioner to argue if there exists facts that would entitle her to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957); *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 569, 107 S.Ct. 1410, 1417 n.15, 94 L.Ed. 2d 563 (1987). The Oklahoma Attorney General's office shall be given notice if any State Constitutional issue is to be addressed.

The order of the trial court is affirmed in part, reversed in part, and remanded with instructions.

WINCHESTER, C.J., EDMONDSON, V.C.J., HARGRAVE, OPALA, KAUGER, WATT, TAYLOR, COLBERT, JJ. concur.

REIF, J. concur in result.

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**Notes & Questions: Problems of Transsexual and Same Sex Marriages**

1. On remand the trial court refused to allow Ms. O'Darling to amend her petition because she was unable to provide proof of the Canadian marriage. The court then concluded it did not have subject matter jurisdiction to proceed further. The Court of Civil Appeals affirmed in an unpublished opinion. *O'Darling v. O'Darling*, #106,732 (Ok. Ct. Civ. App. 2010). Certiorari is still pending as of the date of this book. If Ms. O'Darling could provide proof of the Canadian marriage, should the court be able to grant Ms. O'Darling an annulment? Should the court treat her in the same way it treated Mrs. Whitney? In other words, should the court grant her a division of property under the quasi-partnership theory?

Should a same-sex couple validly married in another state be able to obtain a divorce in Oklahoma. Yes, said the Wyoming Supreme Court. In *Christiansen v. Christiansen*, 2011 WL 2176486 (Wyo. 2011), the court said that:

> recognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role.

2. With regard to transsexual marriages *see e.g. Kantaras v. Kantaras*, 884 So.2d 155 (Fla. Ct. App. 2004) (marriage between a female to male transsexual and another female is void); *Marriage of Simmons*, 825 N.E.2d 303 (Ill. Ct. App. 2005) (same). There are cases to the contrary. *See M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204, *cert. denied* 71 N.J. 345, 364 A.2d 1076 (1976). In that case a husband and wife were divorcing, and the issue was support and maintenance. The husband argued that he should not have to pay support to his wife because she was a male, making the marriage void. The issue before the court was whether the marriage of a post-operative male-to-female transsexual and a male was a lawful marriage between a man and a woman. The court found that it was a valid marriage. The court found that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." Since the court found that the wife's gender and genitalia were no longer "discordant" and had been harmonized by medical treatment, the court held that the wife was a female at the time of her marriage and that her husband, then, was obligated to support her.

3. English decisions that a persons gender is determined at birth have been overruled by the European Court of Human Rights. *I. v. United Kingdom*, [2002] 2 FLR 518; *Goodwin v. United Kingdom*, [2002] 2 FLR 487. *See also K.B. v. Nat'l Heal Service Pensions Agency*, 2003 ECJ 9, where the European Court of Justice arrived at the same conclusion.

4. If gender is determined at birth, according to Texas, Kansas, Ohio, Illinois, and Florida, then what is your opinion of the following:

NEW YORK TIMES, September 7, 2000 Section A p. 22:

> San Antonio, Sept. 6 (AP)—A woman and a transsexual who was born a man obtained a marriage license today, taking advantage of a court ruling that defines sex only by chromosomes.
>
> The couple, Jessica Wicks and Robin Manhart Wicks, who took Jessica's surname this year, were allowed to pay $36 to get a license, even though they consider themselves a same-sex couple. Had Jessica Wicks been born a woman, their marriage, set for Sept. 16, would be illegal under state law.
>
> But because of a state appeals court ruling that said chromosomes, not genitals, determine sex, the two will be able to wed.

Or, see the following:

> RENO, Nev.—Danielle Pauline Severson takes female hormones, dresses and acts like a woman and plans to have sex reassignment surgery so she physically looks like a woman.
>
> Yet the pre-operative transgender female, who was born Dana Paul Severson, will have to tie the knot to a woman in California.
>
> After being jilted by officials in Nevada—which bills itself as the wedding capital of the world—Severson and Rebecca Love were granted a marriage license Wednesday by officials in Severson's hometown of Redding, Calif.
>
> While both states prohibit same-sex marriage, officials in California said the two qualified for the license because Severson's birth certificate lists her as a man. But officials in Nevada nixed the request, saying they consider Severson a woman because that's what her driver's license says.
>
> "I just wish all these states would come up with one law for everybody," Severson said. "Why should I not be allowed to get married? Why should I be lonely the rest of my life?

Do you agree? Should there just be one law for everyone?

5. Potential marriages between persons of the same gender have been the subject of extensive discussion in recent years. The debate began with the decision in the Hawaii case of *Behr v. Lewin*, 852 P.2d 44 (Haw. 1993). That court did not authorize marriages between people of the same gender, however, it did rule that a statute restricting marriage to people of different genders implicated the Hawaii Constitution's "Equal Rights" Amendment. Therefore, the burden was on the state to show that the restriction constituted a compelling state interest. It remanded the case for trial. On remand a Hawaiian circuit court did determine that the state's ban on same sex marriage was unconstitutional. *Baehr v. Milke*, 1996 WL 694235 (Hawaii Cir. Ct. 1st Cir, Dec. 3, 1996). Ultimately, Hawaii passed a referendum amending their constitution to authorize the legislature to restrict marriage to people of different genders. The Hawaii Supreme Court said that this amendment took the statute out of the ambit of the state constitution's equal protection clause and therefore mooted the case. *Baehr v. Milke*, 994 P.2d 566 (Haw. 1999). No marriages between people of the same gender were ever authorized by Hawaii.

The same thing occurred in Alaska. An Alaskan trial court determined that the state could not validly limit marriages to a man and a woman. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct., Feb. 27, 1998). The voters then amended the Alaska Constitution.

6. *Further State Developments*. The major case in the United States involving same-sex marriages came from Massachusetts which held that the state's ban on same-sex marriage could not survive a constitutional challenge under the state constitution. *Goodridge v. Department of Public*

*Health*, 798 N.E.2d 941 (Mass. 2003). Marriages in Massachusetts used to be only available to couples who would be allowed to marry in their state of residence. This followed the European model where couples are only allowed to marry where one of them is a habitual resident. However, in 2008 Massachusetts repealed the restriction and couples of other states may now marry in Massachusetts.

Same-sex marriages are also available in Connecticut, District of Columbia, New Hampshire, Vermont, and Iowa. *See Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). California also determined that same-sex couples should be allowed to marry. *See In re Marriage Cases*, 183 P.3d 384 (2008). However, the result was overturned in the 2008 election. The California Supreme Court held the referendum result was valid, however, those marriages contracted between the time of the court's decision and the election continued to be valid. *Strauss v. Horton*, 207 P.3d 48, (Cal. 2009). Maine voters overturned a statute that allowed same-sex couples to marry.

7. *An Alternative Model?* An alternative model to same-sex marriage is the civil union or domestic partnership. This model was pioneered in Denmark and is an alternative status relationship to marriage for same-sex couples. Couples in a civil union have all the rights and responsibilities of married couples. *See e.g.*, Peter Lødrup, *Registered Partnership in Norway*, INT'L SURVEY OF FAM. L. 387 (1994); Linda Nielson, *Family Right and "Registered Partnership" in Denmark*, 4 INT'L J.L. & FAM. 4, 297-307 (1990).

This concept was picked up in *State v. Baker*, 744 A.2d 864 (Vt. 1999), where the court held that the exclusion of same-sex couples from the benefits and protections incident to marriage under state law violated the Vermont Constitution. The court gave the Vermont legislature a choice: either legalize same-sex marriage or provide for "domestic partnerships" which would have the same benefits as marriage. The Vermont legislature subsequently passed a bill creating a "civil union" for couples of the same gender which gave them the same rights as married couples. Vt. Stat. Ann. tit 18 § 5160 (2000). In 2009 the Vermont legislature voted to allow same-sex marriage and repealed its civil union statutes. Domestic partnerships are also available to same-sex couples in Delaware, Illinois, Hawaii, New Jersey, Nevada, California, Washington and Oregon. The California version confers all the rights and obligations of marriage on same-sex couples except the right to file a joint income tax return. The California statute was upheld against a challenge that it violated the state's "little DOMA" statute. *Knight v. Sacramento County Superior Court*, 26 Cal. Rptr. 3d 387 (Cal. Ct. App. 2005). In *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) the Supreme Court of New Jersey determined that limited marriage to a man and a woman also violated the New Jersey Constitution. It gave the legislature 180 days to either include same-sex couples under the marriage statutes or to enact civil union laws. The legislature chose the latter approach.

In other states challenges to marriages statutes have not been successful. *See e.g., Hernandez v. Robles*, 821 N.Y.S.2d 770 (N.Y. 2006); *Anderson v. King County*, 138 P.3d 963 (Wash. 2006); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

8. *The Backlash*. During the period of time between the *Behr* decision and the passage of the referendum, there was a considerable public controversy over whether other states would have to recognize Hawaiian marriages under the Full Faith and Credit Clause of the United States. The answer to this question was quite clearly in the negative. Marriage may be a public act but it is not a judgment of a court in the same way that dissolution of marriage is a court judgment. Therefore, the restrictive rules concerning when one state may disregard a judgment of another state, such as a divorce or dissolution of marriage judgment, are not applicable. States have long had the ability to choose to apply their own law in their own court system whenever their policy re-

quires it. *See e.g. Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (holding that the forum state can apply its own law rather than the law of another state, provided it has a "significant contact or other significant aggregation of contacts" with the parties and the occurrence or transaction to which it is applying its own law). With respect to judgments however, the rules are very restrictive concerning when one state may refuse to respect the judgment of another state. *See Fauntleroy v. Lum*, 210 U .S. 230 (1908).

In response to the public controversy Congress passed the "Defense of Marriage Act" Publ. L. No. 104-199, 110 Stat. 2419 (1996) (codified in 1 U.S.C. § 7). The statute provides that:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such State, territory, possession or tribe, or a right or claim arising from such marriage.

Another section of the same statute requires that for purposes of federal law, a marriage may only be between a man and a woman, regardless of the law of any individual state. 1 U.S.C. § 7. DOMA has been challenged and upheld in *Wilson v. Ake*, 345 F.Supp.2d 1298 (M.D. Fla. 2005). Oklahoma is one of 40 states that have enacted a "little-DOMA" statute. See 43 O.S. § 3.1. These statutes vary considerably from state-to-state. All of them prohibit recognition of same-sex marriages from other states. Some purport to apply to civil unions as well.

9. In response to the *Goodridge* decision many states have amended their constitutions to define marriage as being only between a man and a woman. *See* 33 FAM L. REP. (BNA) 1023 (2006). The Oklahoma Constitution was amended by voters in 2004, as follows:

> A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
>
> B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
>
> C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Does this amendment apply to domestic partnerships? In *Bishop v. Oklahoma ex rel Edmonson*, 457 F. Supp.2d 1239 (N.D. Okla. 2006) the court determined that a couple who had entered into a domestic partnership in Vermont did not have standing to challenge the amendment or Oklahoma's mini-DOMA statute because the amendment and the statute prohibit the recognition of same-sex marriages and not domestic partnerships. The court also ruled that the couple, who also entered into a marriage in Canada, did not have standing to challenge the constitutionality of DOMA because that statute only applies to recognition of marriages from other states.

10. The interstate effect of this development is the family law issue of our times. Consider four types of fact patterns.

First, assume that a couple from a state which prohibits same-sex status relationships travel to a state which allows them to enter into a civil union or a same-sex marriage and returns home. Should that status relationship be recognized in the home state? The Connecticut Court of Appeals, in a case prior to the enactment of the Connecticut civil union statute, held that trial courts do not have jurisdiction to dissolve in Connecticut a Vermont civil union. *Rosengarten v. Downes*, 802 A.2d 170 (Conn. Ct. App. 2002). New York has refused to allow a Vermont domes-

tic partner to sue for wrongful death under the same circumstances. *Langan v. St. Vincent's Hospital*, 802 N.Y.S.2d 476 (App. Div. 2005).

However, other New York cases have determined that a Canadian marriage between two New York residents of the same gender was entitled to be recognized in New York and therefore a community college did discriminate on the basis sexual orientation when it denied spousal health care benefits to the couple. The appellate panel noted specifically that New York had never enacted a "little-DOMA" law. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (App. Div. 2008). A New York trial court, in a divorce action arising out of a same-sex marriage entered into in Canada, held that the best interests of the children warranted granting custodial rights to the non-biological, non-adoptive mother, since the biological mother held out the non-biological mother as a parent to the world and children; the children were given the non-biological mother's last name; birth announcements presented the non-biological mother as a parent of the children. The extended families of each party were encouraged to treat the non-biological mother as a parent. Additionally, the biological mother accepted health insurance and financial contributions from the non-biological mother for the children. *Beth R. v. Donna M.*, 853 N.Y.S.2d.

Second, assume the same-sex couple has not attempted to evade the law of any state which prohibits same-sex relationships, but rather, has entered into the relationship in the state where they were habitual residents or domiciliaries. Thereafter, either the couple, or one of them, moves to a state which does not recognize such relationships. For example, a lesbian couple enters into a civil union in Vermont. They then conceive a child via artificial insemination. The civil union is dissolved in Vermont and one of the couple is ordered to pay child support. When that person moves to Oklahoma, should Oklahoma recognize the child support judgment? Or, suppose that one member of a Massachusetts same-sex marriage obtains a wrongful death judgment for the wrongful killing of their partner. When the defendant moves to Oklahoma, should the wrongful death judgment be recognized.

Third, suppose a same-sex couple has a domestic partnership in California and is raising a child that is biologically related to only one of them. The biological mother takes the child on a trip to another state that does not recognize domestic partnerships. While there the mother and child are seriously injured in an automobile accident. As soon as the other domestic partner learns of this, she gets onto an airplane and soon arrives at the hospital. The hospital has a policy that only "family members" can visit. Is the domestic partner a family member?

Fourth, suppose a member of a Massachusetts same-sex marriage dies and owns land in Oklahoma. Should Oklahoma recognize the same-sex marriage for purposes of intestate succession when the Massachusetts couple has never even been to Oklahoma?

11. Internationally, same-sex marriages are now valid in South Africa, *Fourie & Bonthuys v. Director of Home Affairs*, 31 FAM. L. REP. (BNA 1068 (S. Afr. Sup. Ct. App. 2004), Canada, *Reference re Same-Sex Marriage*, 31 FAM. L. REP. (BNA) 1092 (Can. 2004), Argentina, Mexico, Belgium, The Netherlands, Spain, Norway, Portugal, Sweden, and Nepal. Many European countries recognize domestic partnerships. See the exhaustive treatment by I CURRY-SUMNER, ALL'S WELL THAT ENDS UP REGISTERED (2005).

12. JUSTICE ROBERT JACKSON once opined that "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married, and, if so, to whom. *Estin v. Estin*, 334 U.S. 541,553 (Jackson, J., dissenting). Do you agree with him? If so, how do your propose to achieve this goal?

**Notes & Questions: Other Restrictions and Incentives on Marriage**

1. Private restraints on marriage in wills or contracts have been made illegal in many states. *See* 15 O.S. § 220 (2001) (Every contract in restraint of the marriage of any person, other than a minor, is void.) Should this statute apply only to a total restraint? Would a partial restraint be acceptable?

2. This chapter has focused on state restrictions on who may marry. Sometimes state laws have put pressure on unwilling parties to marry. *See* 43 O.S. § 3 (2001).

3. Breach of promise actions are almost extinct. Historically, breach of promise actions forced people into unwanted matrimony, but they are no longer much of a threat. Over half of the states have abolished the action and many of the rest have severely restricted the damages recoverable. Traditionally, the damages were measured by the lost lifestyle the person would have had if the marriage had occurred. However, with divorce available on a no-fault basis, it is cheaper to marry and divorce the person to whom the promise was made. While Oklahoma provides in 23 O.S. § 40 (2001) that the damages in breach of promise actions shall be left to the sound discretion of the jury, there has not been a reported case in 50 years. *See Roberts v. Van Cleve*, 1951 OK 251, 237 P.2d 892 (plaintiff recovers $25,000).

## B. FRAUD AND THE MARRIAGE RELATIONSHIP

**SEIRAFI-POUR**
**v.**
**BAGHERINASSAB**
2008 OK CIV APP 98, 197 P.3d 1097

Opinion on Remand by Jane P. Wiseman, Judge.

Masoumeh Bagherinassab (Appellant) appeals from an order of the trial court, which annulled her marriage to Mohammad Ali Seirafi-Pour (Appellee). The issue on appeal is whether the trial court's decision that the parties' marriage had been procured by fraud practiced by Appellant is supported by the evidence. We find that the trial court's decision to annul the marriage due to fraud is supported by the evidence and affirm.

FACTS AND PROCEDURAL BACKGROUND

Appellee and Appellant were married in Iran on August 29, 2002, and again in a ceremony in the United States on February 22, 2003. Prior to the Iranian ceremony, Appellee entered into a prenuptial agreement with Appellant's family regarding the dowry he would pay upon Appellant's demand. Appellee claims that Appellant orally promised him she would never make demand for the dowry.

The parties returned to the United States together in December 2002 after Appellant secured a visa. Appellee testified that Appellant left him just a few days after returning to the U.S. They reconciled shortly thereafter and then separated again in April 2003 for approximately four months. In September, Appellant returned to Iran to visit her family. While she was out of the country, Appellee filed for divorce in Iran and also filed for annulment in Oklahoma.

At trial, Appellee testified that Appellant constantly ridiculed him and refused to consummate their relationship through sexual intercourse, all of which was denied by Appellant. After two days of testimony, the trial court found that Appellee established by clear and convincing evidence that Appellant fraudulently induced him into the alleged marriage, granted Appellee an annulment, and refused to enforce the premarital agreement regarding the dowry claimed by Appellant.

On appeal, Appellant claims that the trial court erred in refusing to enforce the prenuptial agreement and in relying on contradictory testimony to find that Appellee proved by clear and convincing evidence that Appellant fraudulently induced him into the marriage.

After completion of briefing on appeal, Appellee filed a motion to dismiss the appeal claiming Appellant had remarried, thus making the appeal moot. Appellant failed to respond to the motion, and this Court granted Appellee's motion to dismiss. The dismissal, based on *Davis v. Flint*, 1928 OK 34, 265 P. 101, stated that Appellant "cannot accept the benefits of the judgment and recognize its validity without waiving her right to pursue the appeal of that judgment." We subsequently denied Appellant's motion to reconsider or vacate the dismissal.

Appellant then petitioned the Oklahoma Supreme Court for certiorari claiming the appeal was not moot because she was not asking for her marriage to be reinstated but rather for the judgment to be recast from one for an annulment to one for a divorce and for the enforcement of the prenuptial agreement. In her petition, Appellant cited cases that prove an exception to the Davis rule, stating that an appellant does not waive the right to appeal in situations where the appellant could

receive a more favorable judgment but not a less favorable one. She asserted that "[i]t is possible for her to obtain a more favorable judgment, insofar as having the judgment for annulment transmuted into a decree of divorce will grant her contractual and property rights that may provide her with some assets, but it is not possible to obtain a worse outcome than what she is appealing." The Supreme Court granted certiorari, vacated this Court's order of dismissal, and remanded "for a consideration of the record and briefs."

STANDARD OF REVIEW

A trial court's power to annul a marriage is based in equity. *See Brooks v. Sanders*, 2008 OK CIV APP 66, ¶ 18, 190 P.3d 357, 360; *see also In re Mo-se-che-he's Estate*, 1940 OK 453, 107 P.2d 999 ("A District Court, under its broad, general equity jurisdiction conferred by the Constitution, has power and jurisdiction to annul a marriage . . . ."). "In an equity case this court will examine the whole record and will reverse the judgment of the trial court if found to be against the clear weight of the evidence or contrary to established principles of equity." *Mayfair Bldg. Co. v. S & L Enters., Inc.*, 1971 OK 42, ¶ 4, 483 P.2d 1137, 1138-39.

ANALYSIS

Appellant asserts that the trial court committed reversible error in deciding that she fraudulently induced Appellee into marriage. The question before this Court is whether Appellee presented sufficient evidence to the trial court to support his fraud claim.

The trial court cited cases involving "green card" fraud when it announced its decision to annul the marriage. "[I]f an alien marries a citizen of this country for the only purpose of entering the United States, and without any intention of assuming the duties and responsibilities of the marriage, in a proper case an annulment may be decreed." *Kurys v. Kurys*, 209 A.2d 526, 528 (Conn. Super. Ct. 1965). In *Miller v. Miller*, 1998 OK 24, ¶ 42, 956 P.2d 887, 903, the Oklahoma Supreme Court stated, "Misrepresentations which have been found to go to the essence of the marital relationship, generally in an action for annulment, include . . . concealment of the fact that one party married the other for the sole purpose of obtaining a 'green card' from the Immigration Department." The Supreme Court cited a California case in support of its position on "green card" misrepresentation, *Rabie v. Rabie*, 115 Cal.Rptr. 594 (Cal. Ct. App. 1974).

In *Rabie*, the California court upheld an annulment that had been sought by an American appellant against her Iranian husband. The evidence before the court showed that the husband had spent time looking for a woman to marry him in order to secure a green card and that he married the plaintiff even though "he possessed a very low opinion of her." *Id.* at 597. The marriage quickly disintegrated after the husband received his green card. *Id.* The Court of Appeal found that the trial court did not abuse its discretion in granting the annulment. The court found that there was substantial evidence that the defendant husband never intended to fulfill any of his marital duties to his wife, "especially the duties to remain faithful to [her] and to remain married to her." *Id.* It stated, "Where fraud is so grievous that it places the injured party in an intolerable relationship, it robs the marital contract of all validity." *Id.*

Another California Court of Appeal also addressed the issue of fraudulent inducement to marry involving a "green card" in *Liu v. Liu*, 242 Cal.Rptr. 649 (Cal. Ct. App. 1987). In *Liu*, husband met wife, a citizen of Taiwan, in Taiwan after wife's sister had arranged for the parties to meet. *Id.* at 651. Husband traveled to Taiwan again approximately eight months later and married wife in a civil ceremony. *Id.* Husband returned home to the United States, but wife was not able to join him for several months until after she obtained a visa. *Id.* Wife refused to have sexual relations with husband and moved to a separate bedroom only four days after moving into husband's home. *Id.* Within a month, husband asked for a separation, and then later served wife with a peti-

tion for annulment. *Id.* Husband testified that he never had sexual relations with wife during the marriage. *Id.* Wife asserted that the marriage had been consummated and tried to introduce "newly discovered evidence" to that effect in a motion for new trial. *Id.* at 655.

The Court upheld the trial court's decision that husband's consent to marry was obtained by fraud. The Court stated, "An annulment may be had for fraud where a wife harbors a secret intention at the time of the marriage not to engage in sexual relations with her husband." *Id.* at 656. The Court found ample evidence to support the trial court's conclusion that the wife did not intend to engage in sexual relations with the husband. *Id.* The Court stated the following:

> First, respondent testified that he never had sexual relations with appellant. (*See Lamberti v. Lamberti* (1969) 272 Cal.App.2d 482, 485, 77 Cal.Rptr. 430 [annulment of an unconsummated marriage may be secured more readily than one where the parties have cohabited as husband and wife].) Secondly, there is evidence here that appellant had an ulterior motive for entering into the marriage: namely, to obtain a green card to allow her to reside in the United States. Finally, the rapidity with which the marriage deteriorated after appellant arrived in the United States also supports the trial court's findings.

*Id.*

In the present case, the trial court found the circumstances remarkably parallel to the *Liu* case. The evidence reveals that before Appellant met Appellee, she applied for a student visa to come to the United States, but her application was denied. Appellee proposed to Appellant only two weeks after meeting her in person in Iran. Appellee also testified that after the two were married and her visa was approved, Appellant came home with him. During the flight home, Appellee claims that Appellant started complaining about his age, his appearance, and the way he walks. After they got off the plane, they went to Appellant's sister's home. Appellee claims that Appellant did not want to go home with him but wanted to stay at her sister's home. Appellee claims that he had to persuade her to go home with him. Appellant received her "green card" in the mail, then left Appellee only nine days after she arrived in the United States. Appellant stayed at her sister's home for three days, and Appellee and his mother had to go to the sister's home to try to convince Appellant to return to Appellee's home.

In February 2003, the parties had a wedding ceremony and reception. Appellee testified that the parties never consummated the marriage. He claims that he asked Appellant to have sex with him, but she refused. Appellee claims that Appellant left his home again on April 16, 2003, and stayed at her sister's home until August 12, 2003.

After returning home, Appellant spent a lot of time "chatting" on the internet. When she returned to Iran in late September 2003, Appellee hired a computer forensic recovery specialist to install software on the computer that Appellant had been using. The software recovered logs of several chats that appeared to have taken place between Appellant and an individual with the screen name "Pentagon 666 2000." Appellee claims that upon reading the chat logs, he concluded that the person Appellant was chatting with was her boyfriend and that he lived in Iran. The recovery specialist testified that he also recovered web cam images of Appellant, one of which showed Appellant partially undressed.

One of Appellant's co-workers, testifying on behalf of Appellee, stated the following: "Well, I just asked [Appellant] if she was married or single, and she said single." Appellee's sister testified that Appellee confided in her that he did not have a sexual relationship with Appellant.

Appellant claims that she had sexual intercourse with Appellee and denied that she married Appellee to obtain a green card. She claimed that Appellee told her not to come home after she

went to her sister's house in April 2003. She denied chatting on the internet with anyone named Pentagon 666 2000. She claimed that she loved Appellee.

The trial court stated that it found Appellee "far more credible" and found "inconsistencies on the part of" Appellant. It found Appellee's demeanor to be "reassuring" and Appellant's "to be less reassuring."

"The trial court is entitled to choose which testimony to believe as the judge has the advantage over this Court in observing the behavior and demeanor of the witnesses. The court's judgment need not rest upon uncontradicted evidence." *Mueggenborg v. Walling*, 1992 OK 121, ¶ 7, 836 P.2d 112, 114. The trial court is "in the best position to evaluate the demeanor of the witnesses and to gauge the credibility of the evidence," and we will defer "to the conclusions it reaches concerning those witnesses and that evidence." *Beale v. Beale*, 2003 OK CIV APP 90, ¶ 6, 78 P.3d 973, 975.

The relief sought by Appellee in the form of an annulment is based on a claim of fraud. "Fraud is never presumed, but must be proven by clear and convincing evidence." *Tice v. Tice*, 1983 OK 108, ¶ 8, 672 P.2d 1168, 1171. The testimony of the parties conflicted on the issue of whether Appellant fraudulently induced Appellee to marry her. "When fraud is properly alleged by one party and denied by the other party, the existence or non-existence of fraud becomes a question of fact." *Id.* The trial court found that the facts supported Appellee's contention that Appellant fraudulently induced him into the marriage. After reviewing the record on appeal, we find no basis on which to conclude that this determination is against the clear weight of the evidence. We therefore affirm the decision of the trial court.

Appellant also contends that the trial court erred in refusing to enforce the parties' marriage contract which contained a provision for a dowry. "An annulment is said to 'relate back' and erase the marriage and all its implications from the outset." *Liu*, 242 Cal.Rptr. at 657. When consent to a marriage agreement has been procured by fraud and the marriage is therefore annulled, contract law precludes the enforcement of such an agreement. The trial court's finding of fraud is not against the clear weight of the evidence, nor does it violate established principles of equity. Such a finding erases the marriage, and with it, the right to any benefits under the contract. Having concluded that the marriage should be annulled, the trial court was correct in refusing to enforce the dowry provision.

Appellee asks this court to award him appeal-related attorney fees.[1] We find that Appellee should bear his own attorney fees for this appeal. *See Stepp v. Stepp*, 1998 OK 18, ¶ 20, 955 P.2d 722, 727 (holding parties responsible for their own appeal-related attorneys' fees).

CONCLUSION

We find that the trial court's decision to annul the marriage at issue based on fraudulent inducement is supported by the evidence and further find no error in its refusal to enforce Appellant's dowry claim under the marriage contract. Accordingly, we affirm the decision of the trial court.

AFFIRMED.

GOODMAN, P.J., and FISCHER, J., concur.

[1] [Footnote omitted.]

### Notes & Questions: Annulments

1. There is a noticeable division in judicial attitudes regarding annulment for fraud. The evaluation of whether a particular fraud goes to the essence of the marriage may proceed either in terms of (a) the special nature of marriage, e.g., having children is an essential ingredient of marriage (or at least it used to be), whereas the presence or absence of money is not, so that a misrepresentation as to wealth cannot be a basis for annulment, or (b) the defrauded party's perception in terms of a reliance test, i.e., would he or she have entered into this marriage contract absent the fraud? The latter is obviously the looser test.

2. The only Oklahoma annulment statute is 43 O.S. § 128 (2001), which relates to avoiding marriages of incompetents. Nonetheless, the Oklahoma Supreme Court has authorized annulments for all cases involving void and voidable marriages, including fraud. *See Kildoo v. Kildoo*, 1989 OK 6, 767 P.2d 884.

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**TICE**
**v.**
**TICE**
1983 OK 108, 672 P.2d 1168

HODGES, JUSTICE.

The question presented is whether a person who induces another to marry by the oral promise to reimburse any lost alimony in the event of a subsequent divorce is liable to pay alimony awarded under a previous divorce decree.

Evalyn (appellee-wife) and Charles Tice (appellant-husband) were married in Las Vegas, Nevada on December 31, 1979. Previously, Evalyn had received an alimony award from her first husband of $72,000. The divorce decree provided that the alimony would terminate upon her death or remarriage. At the time of her marriage to Charles, there was $44,500 remaining to be paid. On July 18, 1980, Evalyn filed a divorce petition alleging that Charles had orally agreed to indemnify her for the alimony which she would lose as a result of their marriage; and that this promise was made as an inducement for the marriage. The trial court severed the two causes of action. A divorce was granted, and the action based on the indemnification agreement was set for jury trial which was waived by Evalyn. The trial judge made factual findings that: as an inducement to marriage Charles promised to indemnify Evalyn; in reliance upon this promise Evalyn promised to marry him; and that Charles did not intend to fulfill his promise.

The facts were disputed. According to Evalyn, numerous proposals of marriage were made to her before she accepted. Confronted with the forfeiture of her right to the alimony payments from her former husband, she told Charles in the latter part of October, 1979, that she "couldn't afford to give up" her alimony. Charles assured her that he could make a "good living" and that she would not need the alimony. Evalyn responded that if the marriage did not work out, she could not live on her salary as a secretary. Evalyn testified that Charles told her he would give it to her if she married him. She told Charles the certainty of forfeiting the right to alimony was the only reason she would not accept his proposal. Charles told her he would put $45,000 in escrow, the

amount which she would have received had she not remarried. Evalyn testified this was the only reason she married Charles.

Charles denied that he had ever promised to indemnify Evalyn for any loss resulting from the marriage. His testimony was that: both parties had been previously married; Evalyn told him of her right to alimony as a result of the termination of her prior marriage; he disclosed his financial obligations and indebtedness to her; Evalyn knew his economic conditions would not warrant the payment of $45,000; and the first time Evalyn ever mentioned indemnity of the lost alimony was when she first threatened divorce. The court ordered Charles to pay $41,900 to Evalyn to compensate her for the alimony which was terminated when she married him.

It is argued on appeal that the evidence presented was insufficient to warrant judgment for Evalyn; the alleged antenuptial agreement was not reduced to writing nor fraudulently induced, and that even if a contract existed it was a contract of guaranty which must be in writing.

The dispositive issues are whether Charles fraudulently induced Evalyn to marry him, and if the promise must be in writing. The statute of frauds requires that an agreement made upon consideration of marriage, other than mutual promises to marry must be in writing to be enforceable.[1] Evalyn testified at trial that Charles promised to reimburse her for any loss from the previous divorce decree. She stated that she would not have married Charles had he refused to make the promise and that it was the only reason she married him. This testimony established that the sole consideration for the agreement was the marriage of the parties.

Under the facts of this case, because the agreement is not in writing, Evalyn may only recover if Charles fraudulently induced her to marry him by promising to compensate her for her losses.[2] Marriage is a personal relation which arises from a civil contract, and which requires the voluntary consent of parties who have the legal capacity to contract. It is a present agreement to be husband and wife and to assume all rights and duties of the marital relationship.[3] A common law duty to perform with skill, care, reasonable expediency and faithfulness accompanies every contract. Insofar as property interests are concerned, marriage is founded on business principles in which utmost good faith is required from all parties, and fraud in the inducement of a marriage is the subject of judicial cognizance.[5] Actionable fraud consists of a false material representation made as a positive assertion which is known either to be false, or made recklessly without knowledge of the truth, with the intention that it be acted upon, and which is relied upon by a party to his/her detriment. Fraud can be predicated upon a promise to do a thing in the future when the promisor's intent is otherwise. The basis of fraudulent misrepresentation is the creation of a false impression and damage sustained as a natural and probable consequence of the act charged.

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[1] Title 15 O.S. 1981 § 136 provides in pertinent part:

> "The following contracts are invalid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:
>
> * * * *
>
> (3) An agreement upon consideration of marriage, other than a mutual promise to marry."

*See also* Byers v. Byers, 618 P.2d 930,933 (Okla. 1980); Stanley v. Madison, 11 Okl. 288, 66 P. 280 (1901).

[2] Sellers v. Sellers, 428 P.2d 230,240 (Okla. 1967); Scriviner v. Scriviner, 207 Okl. 225, 248 P.2d 1045,1046 (1952); Whitney v. Whitney, 194 Okl. 361, 151 P.2d 583 (1941); In re Cantrell's Estate, 154 Kan. 545, 119 P.2d 483 (1942); Mashundashey v. Mashundashey, 189 Okl. 60, 113 P.2d 190 (1941).

[3] *See* Title 43 O.S. 1981 § 1; Williams v. Williams, 543 P.2d 1401,1403 (Okla. 1976); Beach v. Beach, 160 Iowa 346, 141 N.W. 921-22 (1913).

[5] *Beach v. Beach, supra*, note 3.

The fraudulent representation need not be the sole inducement which causes a party to take the action from which the injury ensued. The key is that without the representation the party would not have acted. The liability for misrepresentation depends upon whether the person relying thereon was in fact deceived, not whether an ordinarily prudent person should have been misled.

Fraud is never presumed, but must be proven by clear and convincing evidence. Evalyn had the burden of proving that the promise was made, and that Charles did not intend to perform the promise. The testimony of the parties to this action is in conflict. When fraud is properly alleged by one party and denied by the other party, the existence or non-existence of fraud becomes a question of fact. The trial court specifically found that: a party to a marriage should not suffer detriment because of the fraud of the other party. Charles promised to indemnify Evalyn for any loss of alimony which she might suffer as the result of the marriage as an inducement to the marriage; in reliance upon his promise, she agreed to marry him; and that Charles did not intend to fulfill his promise. The factual findings will not be disturbed on appeal by this Court if there is any evidence reasonably tending to support the verdict. The testimony supports the trial court's conclusion that Charles fraudulently induced Evalyn to marry him.

AFFIRMED

BARNES, C.J., and IRWIN, HARGRAVE, OPALA and WILSON JJ., concur.

SIMMS, V.C.J., and LAVENDER and DOOLIN, JJ., dissent.

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**MILLER**
**v.**
**MILLER**
1998 OK 24, 956 P.2d 887

OPALA, JUSTICE.

* * * .*

Jimmy D. Miller ("Jimmy") sued his former wife, Judy A. Miller ("Judy") and her parents, Bill and Nora Hall ("Judy's parents") for damages and equitable relief based on the theories of fraud, intentional infliction of emotional distress, and quantum meruit. He alleges in his petition that for the purpose of inducing him to marry Judy, defendants in 1980 knowingly misrepresented to him that she was pregnant with his child, and continued to perpetrate this fraud against him for the next fifteen years for the purpose of causing him to perform the duties of husband and father. He further alleges that after carrying out this fraud for almost fifteen years and permitting him to develop a loving parent-child relationship, Judy and her parents suddenly and unexpectedly pulled the proverbial rug out from under him by revealing to the child that Jimmy was not in fact her father. Jimmy alleges that the defendants then further undermined his bond with the child by encouraging her to develop a relationship with her "real father" and her "real family."

The defendants responded with a motion to dismiss the petition for failure to state a cause of action. The trial judge granted defendants' motion, and plaintiff appealed. The Court of Civil Appeals, Division No. 1, affirmed the order of the trial court, holding that the theory of intentional infliction of emotional distress because the acts complained of fail to meet the minimum degree of outrageousness necessary to state, prima facie, a claim for intentional infliction of emotional dis-

tress. We disagree and hold that plaintiff's petition states a claim for fraud and intentional infliction of emotional distress . * * *

## I

## THE ANATOMY OF LITIGATION

Jimmy D. Miller and Judy A. Hall were dating in the early months of 1980. Jimmy was seventeen years old and Judy was fifteen. According to Jimmy, in March of 1980, Judy and her parents, Bill and Nora Hall, informed him that Judy was pregnant, that the child was his, and that the child could only be his inasmuch as Judy had not had sexual relations with any man other than Jimmy. Relying on these representations, Jimmy married Judy on October 24, 1980, and they proceeded to live as husband and wife for nearly five years.

The child Judy was carrying at the time of her marriage to Jimmy, subsequently named A, was born on December 29, 1980. During their nearly five-year marriage, Jimmy, together with Judy, raised the child as his own, never disputing her legitimacy, believing at all times that the little girl was his biological child. Jimmy and Judy divorced in 1985. The divorce decree recites that Jimmy and Judy are the parents of a minor child named A. Jimmy alleges that Judy made that recitation to the court in the divorce proceeding, knowing it to be false. The court ordered Jimmy to pay child support for A in the amount of One Hundred Fifty Dollars ($150.00) per month beginning on August 1, 1985. Jimmy alleges that he has faithfully paid that amount as ordered. He was granted joint, but not primary, custody of A and has maintained a continuous parent-child relationship with his daughter since the divorce.

In early 1995, when A was approximately fifteen years old, she decided she no longer wanted to live with her mother. She moved into Jimmy's home. According to Jimmy, in January, 1996, almost one year after coming to live with her father, A informed him that when she had originally expressed a desire to live with him, her mother and her grandparents, Bill and Nora Hall, had told her that Jimmy was not her real father and had urged her to "get to know her 'real' family." According to Jimmy, A told him that her mother and grandparents had identified her real father, had introduced her to members of her "real family," had given photographs of A to members of this "real family", and had stated to her that there was nothing either she or Jimmy could do about it. Jimmy states that A's revelations in January, 1996 were the first notice he had that Judy and her parents had deceived him in 1980 as to his paternity of the child Judy was then carrying. Jimmy and A underwent that very month a paternity test, which verified that Jimmy was not A's biological father.

Jimmy filed his petition on March 8, 1996, approximately two months after first learning that his paternity of A was being denied by his ex-wife and her parents. *For his first theory of recovery*, Jimmy alleges that he was fraudulently induced to marry Judy in 1980 by the knowing misrepresentations of Judy and her parents that he was the father, and that he was the only man who could possibly be the father, of the child with whom she was then pregnant because she had not had sexual intercourse with any other man. Relying on these allegedly knowing misrepresentations, Jimmy married Judy and took on the responsibilities of husband and father. * * *

*For his second theory of recovery*, Jimmy alleges that the defendants' marriage-inducing misrepresentations, the cruel paternity hoax perpetrated against him for fifteen years, the callous revelation of this hoax to him through A, and the effort to undermine his bond with A amount to extreme and outrageous conduct, causing him severe emotional distress. For the tort of intentional infliction of emotional distress, Jimmy seeks damages against all defendants.

[The court held that as the legal father of the child, Jimmy was not entitled to reimbursement of child support.]

* * * *

**V**

**PLAINTIFF'S PETITION STATES A CLAIM BASED ON THE THEORY OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

* * * .*

It is the trial court's responsibility initially to act as gatekeeper: to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the standards. Only when it is found that reasonable people would differ in an assessment of this central issue may the tort of intentional infliction of emotional distress be submitted to the jury.

The trial court did not specifically address in this case the issue of the outrageousness of defendants' conduct when it dismissed plaintiff's action for failure to state a claim. The parties' briefs below were limited to arguments addressing the statutory and preclusion bar and did not discuss outrageousness or any other aspect of the tort of intentional infliction of emotional distress. The Court of Civil Appeals upheld the trial court's dismissal of Jimmy's theory of intentional infliction of emotional distress because, in its view, the defendants' conduct failed to cross the threshold degree of outrageousness necessary to proceed with this tort. We disagree and hold that plaintiff has stated sufficient facts upon which reasonable people could conclude that defendants' conduct was indeed extreme and outrageous.

The Court of Civil Appeals described the behavior complained of as "confessing a fifteen year lie and revealing the identity of . . . [A's] biological father." This rather cold and lifeless characterization of defendants' conduct fails to take into account much of what plaintiff alleges, including (1) the telling of a premarital falsehood going to the heart of the marital and parental relationship, a falsehood which was implicitly repeated every day until the defendants decided the falsehood was no longer useful to them, (2) causing the plaintiff to develop a parental relationship with a child, believing that child to be his biological offspring, and then causing plaintiff to learn that the child was not biologically his own, (3) using the plaintiff to fulfill the emotional, physical, and financial obligations of a husband for almost five years and of a father for fifteen years, knowing that these obligations were not really his, (4) undermining the plaintiff's relationship to his child, first by gratuitously revealing to the child that plaintiff, the man she knew as her father, was not in fact biologically related to her, and then by attempting to establish and foster a parental relationship between the child and another man whom the defendants identified as A's "real father", and his family, (5) failing to reveal the truth to the plaintiff in the divorce action, resulting in plaintiff joining in a legal document acknowledging his parental relationship to A, (6) failing to reveal the truth to the court in the divorce action, thereby showing contempt for the judicial system and making the divorce court an unwitting accomplice to fraud, (7) causing the plaintiff to suffer from the knowledge that he had been hoodwinked and used, and (8) boasting that nothing could be done about their fraud.

Whether plaintiff can prove these allegations, as well as prove the other elements of the tort and whether a jury would in fact find such conduct extreme and outrageous are questions about which we express no opinion. We need only consider whether the allegations of defendants' conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the § 46 standards. We believe they may reasonably be so regarded. That rational people might differ as to whether plaintiff's allegations may reasonably be regarded as outrageous is demonstrated by the

split decision in this case by the Court of Civil Appeals. Where reasonable people may differ on this issue, the threshold has been crossed and dismissal is improper.

## VI

## PLAINTIFF STATES A CLAIM FOR FRAUDULENT INDUCEMENT TO MARRY

An action for damages for fraudulent inducement to marry has been recognized in Oklahoma with respect to both void and valid marriages. *Tice v. Tice*, 1983 OK 108, 672 P.2d 1168; *Whitney v. Whitney*, 194 Okl. 361, 151 P.2d 583 (1944). Like other fraud-based actions, a claim for fraudulent inducement to marry must allege all the elements of common law fraud. These are: 1) a false material representation, 2) made as a positive assertion which is either known to be false, or made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied upon by a party to that party's detriment. The requirement that the false representation be material is easily met where the person misrepresents that he or she has the capacity to marry when in fact he or she lacks such capacity, as in the case of bigamy. We have held in that circumstance that the marriage is void and that the injured party can have the marriage annulled or can seek a divorce and damages for fraud.

The only case decided by this court in which a party has alleged fraudulent inducement into a valid marriage is *Tice v. Tice*, in which we held that a husband's alleged breach of a prenuptial oral promise to reimburse any lost alimony which the wife would have received under a previous divorce decree had she not remarried entitled the wife to recover damages to compensate her for the lost alimony. The court stated that insofar as property interests are concerned, marriage is founded on business principles, and marital fraud affecting a plaintiff's property interests should be treated no differently than fraud in any other context. While the court in *Tice* did not explicitly discuss the materiality of the fraudulent promise in that case, implicit in its holding is the principle that a misrepresentation affecting property interests which induces a party to marry can be a material misrepresentation. This court has never had occasion to consider the materiality of a misrepresentation made to induce a party to enter into a valid marriage, which affects an interest other than a party's property interest. The present case presents this issue.

We hold that a misrepresentation inducing one to enter into a valid marriage must go to the essential ingredients of the marriage in order to sustain a finding of materiality sufficient to support a cause of action for fraudulent inducement to marry. This is a necessary restriction. Every premarital representation of boundless affection, eternal love, and endless commitment cannot be allowed to give rise to an action for fraud when a marriage breaks down, and love and commitment prove unenduring. Limiting materiality to those representations which go to the essence of the marital relationship will avoid misuse of the judicial system to avenge hurt feelings and disappointed dreams.

The question here is whether the defendants' misrepresentation concerning plaintiff's paternity is material. Does it go to the essence of the marital relationship? In this regard, it is useful to consider those cases in which an annulment has been granted based upon a claim of fraudulent inducement to marry. These cases are instructive because they deal with whether a fraud is sufficiently material to vitiate the marriage contract. If a claim of fraud is sufficient to support an annulment, then it ought to be sufficient to support an action for damages where an annulment is unavailable because the marriage has already been dissolved by divorce.

Misrepresentations which have been found to go to the essence of the marital relationship, generally in an action for annulment, 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