



IN RE THE MARRIAGE OF JONES

2024 OK CIV APP 12

Case Number: 117025

Decided: 03/15/2023

Mandate Issued: 04/11/2024

DIVISION IV



THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION IV

Cite as: 2024 OK CIV APP 12, ___ P.3d ___

IN RE THE MARRIAGE OF:

ALBERTA ROSE JONES, Petitioner/Appellant,

v.

DONALD DAVID JONES, Respondent/Appellee.

APPEAL FROM THE DISTRICT COURT OF
LINCOLN COUNTY, OKLAHOMA

HONORABLE GEORGE BUTNER, TRIAL JUDGE

AFFIRMED

Anita F. Sanders, ANITA F. SANDERS LAW FIRM, Oklahoma City, Oklahoma, for Petitioner/Appellant

Shanda L. Adams, JUSTICE LEGAL TEAM, PLLLP, Oklahoma City, Oklahoma, for Respondent/Appellee

JOHN F. FISCHER, JUDGE:

¶1 Alberta Rose Jones appeals various district court rulings related to and including the divorce Decree entered in this marriage dissolution action she filed against Appellee Donald David Jones. The substance of her appeal asserts that the "default decree" is void because she did not receive the required notice of the hearing when the Decree was entered. That contention is not supported by the record. Further, Alberta failed to preserve appellate review for any of the issues argued in her appellate briefing. Nonetheless, we review the Decree for fundamental error. Finding none, we affirm.

BACKGROUND

¶2 Alberta and Donald were married in 1980 in California. In 2011, the couple separated and Alberta moved to Oklahoma while Donald remained in California. In January of 2015, Alberta filed a petition for dissolution of marriage in Lincoln County, Oklahoma, and served Donald in California by certified mail. The district court granted Donald an extension of time to answer until February 24, 2015, based, in part, on Donald's representation that Alberta had agreed to his request for an extension. Donald timely filed an answer and permissive counterclaim. Alberta filed an answer to the counterclaim and the case proceeded, although slowly and contentiously.

¶3 For example, Donald filed his initial discovery request on February 26, 2015, which Alberta received on March 6, 2015. Alberta's attorney withdrew from the case and Alberta proceeded pro se. Alberta refused to answer the discovery requests despite being ordered by the court to do so on May 19, 2015, and April 27 and May 17 of 2016. On June 9, 2016, Donald filed a motion for an order sanctioning Alberta for refusing to comply with the district court's discovery orders. The matter was heard on July 5, 2016.

¶4 However, prior to that hearing, Alberta filed several matters including a statement that she had not received Donald's June 9, 2016 motion. She also filed a sworn declaration stating that she was unable to attend the July 5, 2016 hearing because she would be on vacation and was not going to change her plans. Nonetheless, Alberta did appear at the hearing according to a court minute filed in the case.¹ However, before Donald's motion was considered, the original judge assigned to the case heard and granted Alberta's motion to recuse. As a result, consideration of Donald's motion for an order sanctioning Alberta for refusing to comply with the district court's previous discovery orders was delayed. Donald's motion was finally heard on April 25, 2018.

¶5 In addition, Alberta has caused the prosecution of this case to be delayed by filing numerous motions to disqualify the judges assigned to her case. Alberta's first motion to recuse the Lincoln County judge originally assigned to this case was denied, but she was not deterred. Over the course of the next year, she filed four separate motions to recuse that judge, including the motion granted at the July 5, 2016 hearing.

¶6 In 2016, the Supreme Court assigned a district court judge sitting in Wewoka to this case. Wewoka is in Seminole County, a county adjoining Lincoln County and approximately a one-hour drive from the Lincoln County courthouse in which Alberta filed this case. Alberta filed successive motions to recuse the new judge appointed to her case, or to transfer the case to a different judge, or to change venue. Those motions were unsuccessful but delayed resolution of the case while the motions were pending.

¶7 Further, Alberta filed several motions and other documents challenging the district court's personal jurisdiction over Donald and the court's subject matter jurisdiction over the marital estate in California, despite the fact that she had voluntarily initiated this litigation in Oklahoma, and Donald had appeared without objection to the Oklahoma court's jurisdiction and had requested affirmative relief. All of Alberta's challenges to the district court's jurisdiction were denied. But, Alberta's jurisdictional challenges were so numerous and meritless that the district court, in an April 25, 2018 sanctions Order, "prohibited and enjoined" her from refileing or reasserting any claims relating to the "Jurisdiction of this Court."

¶8 On August 23, 2017, Donald filed a motion to enter the matter on the trial docket, and a motion to settle an order granting his motion for discovery sanctions. A proposed sanctions order was attached to Donald's motion. By an order signed and emailed to the parties, including Alberta, on November 13, 2017, but not filed until November 15, 2017, the district court set several matters for hearing, including Donald's motions. The hearing was set for November 30, 2017, "in the South Courtroom, Seminole County Courthouse, Wewoka, Oklahoma." The district court advised the parties that: "FAILURE TO ATTEND MAY RESULT IN THE DISMISSAL OF THE ACTION OR THE GRANTING OF A DEFAULT JUDGMENT." In addition, the court advised the parties to "be familiar with and comply with the requirements of District Court Rule 5, Rules for District Courts of Oklahoma," which governs pretrial proceedings.

¶9 Alberta and Donald appeared at the November 30 hearing. However, before proceeding to resolve the matters set for hearing, Alberta again sought removal of the district judge. The judge allowed Alberta to file a written request for the judge's recusal *instante* and to present evidence and argument in support of her motion during an *in camera* hearing. The court denied her motion and advised Alberta she had five days to appeal the denial of her motion for recusal.

¶10 Alberta did so by filing a petition with the Chief Judge of the judicial district. Alberta's petition was set for hearing on December 21, 2017, in Newkirk, Oklahoma, in the courtroom of the Chief Judge. Alberta filed a request to reschedule the hearing date complaining that she had not received ten days' advance notice of the hearing and advising the court that she would be on vacation until January 1, 2018. The Chief Judge denied Alberta's request for the recusal of the district judge assigned to her case on January 31, 2018.

¶11 In an order filed on March 1, 2018, but signed and emailed to the parties, including Alberta, on February 27, 2018, the district court noted that Alberta's most recent motion for recusal had been denied and that no appeal of that order had been filed. The court then ordered that: "all pending matters in regard to the divorce proceedings in the above-captioned case be . . . set for hearing and resolution before the undersigned Judge in the South Courtroom, 2nd floor, Seminole County Courthouse, Wewoka, OK on the 23rd day of April, 2018 at 8:30 o'clock a.m." Donald's August 23, 2017 motion to settle order on discovery sanctions and his motion to enter the case on the trial docket were again set to be resolved at the April hearing. In addition, the parties were ordered to exchange witness and exhibit lists, provide a "signed and sworn affidavit of income

and expenses," provide a list of assets and liabilities with values and recommendations regarding how they should be divided for property division, a statement of uncontested facts, and a list of disputed issues with a written recommendation for their resolution. The parties were ordered to comply "within 20 days of this date, February 27, 2018."

¶12 On April 12, 2018, Donald filed and served Defendant's Motion in Limine. The motion was mailed to Alberta by certified mail on April 11, 2018. In that motion, Donald stated that the documents that the district court ordered on February 27 to be exchanged "within 20 days" were due on March 19, 2018, but that Alberta had failed to provide any of the court-ordered documents. Donald moved "pursuant to 12 O.S. § 3227, and Rule 5(J) of the rules for the District Courts of Oklahoma" for discovery sanctions "or, in the alternative, default judgment against the Plaintiff, pursuant to 12 O.S. § 3237(B)(2)(c)." Alberta did not respond to Donald's motion.

¶13 However, on April 20, 2018, three days before the scheduled hearing, Alberta filed her "Exhibits Submitted by Plaintiff Alberta Rose Josephine Jones in Support of Her Opposition to these Proceedings and Non Participation." Although Alberta had attended the November 30, 2017 hearing in Wewoka, she stated in her April 20 filing: "Plaintiff Alberta Rose Josephine Jones will not be attending any more hearings in Wewoka, Oklahoma." The exhibits attached to Alberta's statement of non-participation were not responsive to the district court's March 1, 2018 order but reasserted her jurisdictional argument. Alberta also attached an order dismissing the lawsuit she had filed in the United States District Court for the Western District of Oklahoma, and in which she had named various defendants including Donald, his counsel and the district judge.

¶14 Alberta's federal case, CIV-17-1287-HE, was dismissed on February 21, 2018, without leave to amend for Alberta's failure to assert a colorable federal claim and failure to establish diversity of citizenship. The federal court noted the similarity of Alberta's invalid "litigation positions" in other federal litigation and her refusal to cooperate in discovery in that case. Alberta was: "advised that further pursuit of cases like this one in federal court may result in the imposition of filing restrictions or other sanctions." Alberta's appeal of this ruling to the United States Court of Appeals for the 10th Circuit was unsuccessful but continued to disrupt the divorce proceeding.

¶15 For example, at the April 23, 2018 hearing, the district court inquired as to whether the federal courts had stayed the State court proceeding. When advised that no stay had been entered, the court proceeded with the scheduled hearing. The court noted that Alberta did not appear, and had filed her April 20, 2018 notice of non-participation indicating that "she will not be present today." In a detailed, fact-specific Order granting discovery sanctions filed on April 25, 2018, the district court found that Alberta had failed to respond to Donald's discovery requests despite being ordered to do so on three occasions more than one year earlier. The court also found that by failing to comply with the court's March 1, 2018 order, Alberta did not intend to call any witnesses, other than herself, or rely on any exhibits. As a discovery sanction, the court ordered that Alberta was precluded from presenting any physical evidence and from calling any witnesses other than herself or Donald. The court struck various pleadings and prohibited Alberta, "upon penalty of contempt," from refiling or asserting "[a]ll claims relating to Jurisdiction of this Court." The district court granted Donald's request for discovery sanctions and ordered Alberta to pay \$5,100 of the \$10,000 in attorney fees Donald requested. The sanctions Order that the district court entered was essentially the order proposed by Donald and attached to his August 23, 2017 motion served on Alberta eight months earlier.

¶16 At this point in the hearing, Donald's counsel raised the issue of Alberta's default. The district court found that Alberta was in default and proceeded to hear evidence regarding the substantive issues in the divorce action. Donald, who had traveled from California to attend the hearing, was called to testify. After being sworn, Donald responded to questions from his counsel and a lengthy examination by the court, providing evidence supporting the property values and recommended property division addressed in the written exhibits he had filed in response to the district court's March 1, 2018 order. Donald's counsel offered a proposed decree consistent with Donald's evidence and the court took the matter under advisement. On April 25, 2018, the district court granted the parties a divorce and entered the Decree which is the subject of this appeal.

SCOPE OF REVIEW

¶17 Alberta filed her initial petition in error on May 18, 2018, attaching a copy of the April 25, 2018 divorce decree. In that appeal, Alberta sought review of the Decree and the April 25, 2018 sanctions Order.² However, prior to filing the May 18 petition in error, Alberta filed two motions to vacate the Decree and the April 25, 2018 sanctions Order, and a separate motion for new trial. These pleadings were filed on April 27, April 30 and May 2, 2018, respectively, all within ten days of the filing of the April 25, 2018 Decree and sanctions Order.

If a motion for new trial . . . or to . . . vacate . . . is filed by any party not later than ten (10) days after the judgment, decree or final order is filed . . . the appeal time for any party to the action shall not begin to run until the motion shall have been disposed of.

Okla.Sup.Ct.R. 1.22(c)(1), 12 O.S.2021, ch. 15, app. 1. See also 12 O.S.2021 § 990.2(A). Consequently, Alberta's May 18, 2018 petition in error, and her June 8, 2018 petition in error, were premature. See Okla.Sup.Ct.R. 1.26(c), 12 O.S.2021, ch. 15, app. 1.

¶18 The district court denied all three of Alberta's post-trial motions by an order filed on July 26, 2018. On July 10, 2018, before the district court resolved Alberta's post-trial motions, the Oklahoma Supreme Court ordered Alberta to show cause why her appeal should not be dismissed as premature. In her response, Alberta quoted from the district court's July 26, 2018 Order denying her post-trial motions. According to the Supreme Court's July 31, 2018 Order, Alberta's response satisfied the Court's inquiry as to the prematurity of her appeal, and the appeal was allowed to proceed subject to an order requiring Alberta to "file an amended petition in error . . . attaching a file-stamped, certified copy of the trial court's July 26, 2018 'Order on Pending Motions' which disposes of Appellant's motion to vacate Decree in accordance with Oklahoma Supreme Court Rule 1.25(a)." She did not.

¶19 Alberta did request an extension of time to file a new petition in error. That request was granted in an August 7, 2018 Order which provided, in part: "Appellant shall file an amended petition in error attaching all orders appealed from on or before August 20, 2018. No further extensions of time will be granted."

¶20 On August 20, 2018, Alberta filed a third petition in error, but the only order she attached and sought review of was a February 6, 2015 district court order granting Donald's motion for extension of time to respond to Alberta's initial petition for divorce. Despite being specifically ordered to do so, Alberta did not attach the district court's July 26, 2018 Order on Pending Motions which denied her post-trial motions. Nonetheless, when a litigant files a motion to vacate or a motion for new trial within ten days, as Alberta did in this case, and the motion is denied, "the moving party may appeal from the . . . ruling on the motion . . . within thirty (30) days after the filing of the order disposing of the motion." 12 O.S.2021 § 990.2(A).

¶21 However, a party is not required to appeal from the order denying a post-trial motion. *Id.* ("[T]he moving party may appeal from the judgment, decree or final order, from the ruling on the motion, or from both, in one appeal . . ."). In neither her August 20, 2018 third petition in error nor in any of her previous appellate filings has Alberta sought review of the district court's July 26, 2018 order. And, the time to appeal the district court's July 26, 2018 order has long passed. "An appeal to the Supreme Court of Oklahoma, if taken, must be commenced by filing a petition in error with the Clerk of the Supreme Court of Oklahoma within thirty (30) days from the date a judgment, decree, or appealable order . . . is filed . . ." 12 O.S.2021 § 990A(A). Any error in denying Alberta's post-trial motions has been abandoned and not preserved for review.

¶22 In her final petition, Alberta contended that she had never seen a copy of the district court's February 6, 2015 order granting Donald an extension of time to answer. She identified the issues to be raised on appeal as (1) insufficiency of service of process, (2) that she had never issued summons or served Donald with her 2015 divorce petition within 180 days, and that Donald had not issued summons for the counterclaim he filed as required by law, (3) "Fraud on the Court," and (4) no waiver of service of summons had been filed. Not only did Alberta's third petition in error completely disregard what she had twice been ordered by the Supreme Court to do, but also, this petition failed to comply with 12 O.S.2021 § 990A(F)(1) and Supreme Court Rule 1.26(c), 12 O.S.2021, ch. 15, app. 1 (governing the filing of a supplemental petition in error after the filing of a premature petition in error).

¶23 These substantial procedural defects notwithstanding, appellate review in this appeal is ultimately limited by Alberta's May 2, 2018 motion for new trial. "If a motion for new trial be filed and a new trial be denied, the movant may not, on the appeal, raise allegations of error that were available to him at the time of the filing of his motion for a new trial but were not therein asserted." 12 O.S.2021 § 991(b).

¶24 Alberta's motion for new trial asserted two purported errors: (1) the April 25, 2018 sanctions Order did not contain the attachments represented as being attached to that Order; and (2) the April 25, 2018 journal entry and Decree each contain a scrivener's error which identified Donald's counsel as the "attorneys for petitioner." Neither of these issues is addressed in Alberta's brief in chief. Consequently, Alberta has waived appellate review of the issues raised in her motion for new trial. See

Cox Okla. Telecom, L.L.C. v. State of Okla. ex rel. Okla. Corp. Comm'n, 2007 OK 55, ¶ 33, 164 P.3d 150 ("The court has on many occasions said that judicial review will not be given to issues that receive only superficial treatment in an appellate brief or to assignments of error that lack a reasoned argument or supporting authority." (footnote omitted)). "Issues . . . omitted from the brief may be deemed waived." Okla.Sup.Ct.R. 1.11(k)(1), 12 O.S.2021, ch. 15, app. 1.

¶25 As a result, Alberta has not preserved for appellate review any error she has asserted with respect to the April 25, 2018 Decree or sanctions Order. We are also precluded from reviewing any error asserted with respect to the district court's February 6, 2015 order. That is the only order Alberta sought to have reviewed in her final petition in error filed August 20, 2018. However, that petition in error was filed three-and-one-half years too late to review the February 2015 order, assuming it was reviewable if the petition had been timely filed. In addition, any error regarding granting Donald an extension of time to answer was not addressed in Alberta's brief in chief and is deemed waived. *Id.*

¶26 Without regard to Alberta's failure to preserve review of any assignment of error, an appellate court "may review claims which relate to alleged deprivations of due process of law despite a failure to preserve error." *Patterson v. Beall*, 2000 OK 92, ¶ 1, 19 P.3d 839 (citations omitted). Fundamental error remains reviewable by the appellate court even if not addressed in the appellate briefs. *Sullivan v. Forty Second West Corp.*, 1998 OK 48, ¶ 4, 961 P.2d 801. This is because fundamental error "compromises the integrity of the proceeding to such a degree that the error has a substantial effect on the rights of one or more of the parties." *Id.* ¶ 7 (citation omitted). Based on this authority, we will review Alberta's claim that she was not provided the required notice of the proceeding that resulted in the April 25, 2018 Decree and that the entry of the Decree violated her right to due process of law.

STANDARD OF REVIEW

¶27 Whether an individual's due process rights have been violated is a question of law reviewed de novo, "meaning they are subject to an appellate court's plenary, independent, and nondeferential re-examination." *Cole v. State ex rel. Dep't of Pub. Safety*, 2020 OK 67, ¶ 6, 473 P.3d 467.

ANALYSIS

¶28 We begin by noting that, during this appeal, Alberta removed the divorce action pending in the Oklahoma district court to the United States District Court for the Western District of Oklahoma, case number CIV-18-1171-HE. She notified the Supreme Court of her action which resulted in an Order filed December 7, 2018, staying further proceedings in this appeal. The federal court remanded the divorce action to the district court on December 17, 2018, finding an absence of any basis for the removal. The federal court also dismissed a second-filed action, case number CIV-18-1193, for lack of subject matter jurisdiction and failure to state a claim on which relief could be granted. Because Alberta appealed both of these rulings to the United States Court of Appeals for the 10th Circuit, the Oklahoma Supreme Court, on several occasions, continued the December 2018 stay of this appeal, directing Alberta to advise the Court of the status of the 10th Circuit appeal. In an Opinion filed June 22, 2020, the 10th Circuit affirmed the federal district court rulings, including the filing restrictions imposed by that court. Alberta did not advise the Supreme Court of the 10th Circuit's ruling, but Donald did so on September 15, 2020. The Supreme Court lifted the stay on October 16, 2020, and the appeal proceeded after a two-year delay.

¶29 In her appellate briefing, Alberta claims that the April 25, 2018 Decree, entered in her absence at the April 23, 2018 hearing, is void. Alberta's specific argument is that the Decree was entered by default and that she was not provided the required notice in advance of the hearing in which the Decree was entered in violation of her right to due process of law.³

I. Due Process

¶30 A party's due process rights are protected by the state and federal constitutions. *Flandermeyer v. Bonner*, 2006 OK 87, ¶ 9, 152 P.3d 195. "Due process requires an orderly proceeding adapted to the case in which the parties have an opportunity to be heard, and to defend, enforce and protect their rights." *Malone v. Malone*, 1979 OK 21, ¶ 4, 591 P.2d 296 (footnote omitted). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Flandermeyer*, 2006 OK 87, ¶ 10 (footnote omitted). That flexibility may require balancing a party's due process rights against a party's dilatory litigation tactics, but not "at the expense of a litigant's due process rights." *Price v. Zhang*, 2022 OK 95, ¶ 16, 521 P.3d 795.

¶31 "Due process is implicated in a divorce proceeding." *Flandermeyer*, 2006 OK 87, ¶ 9 (footnote omitted). In a divorce proceeding, "the fundamental requirement of due process of the opportunity to be heard in a meaningful time and in a meaningful manner must be satisfied." *Price*, 2022 OK 95, ¶ 11. When the district court "sets a hearing which could result in a ruling dispositive of an action," personal notice is required. *Id.* ¶ 16. "Notice is . . . a fundamental element of due process." *Cate v. Archon Oil Co. Inc.*, 1985 OK 15, ¶ 10, 695 P.2d 1352 (footnote omitted). "Due process requires personal notice of a hearing, either through personal service or mail." *Price*, 2022 OK 95, ¶ 15 (citing *Heiman v. Atlantic Richfield Co.*, 1991 OK 22, 807 P.2d 257). Specific to Alberta's argument, Rule 10 of the Rules for District Courts of Oklahoma addresses the notice required when a party seeks relief based on an opponent's default.

II. Alberta's Rule 10 Notice Argument

¶32 Alberta invokes Rule 10 by characterizing the April 25, 2018 Decree as a "default divorce decree." "A default judgment is a judgment entered against a party because of that party's failure to comply with a command imposed by law." *Powers v. Dist. Ct. of Tulsa Cnty.*, 2009 OK 91, n.6, 227 P.3d 1060. A default judgment may be entered at the request of an opposing party or by the court when authorized by law to do so.

¶33 When a party files a motion requesting a default judgment, Rule 10 governs the required notice and procedure.

In matters in default in which an appearance, general or special, has been made or a motion or pleading has been filed, default shall not be taken until a motion therefore has been filed in the case and five (5) days notice of the date of the hearing is mailed or delivered to the attorney of record for the party in default or to the party in default if he is unrepresented or his attorney's address is unknown.

Okla.Dist.Ct.R. 10, 12 O.S.2021, ch. 2, app. However, when a party has not requested that relief, the power of the district court to enter a default judgment *sua sponte* depends on the authority authorizing the court to act. *See Payne v. DeWitt*, 1999 OK 93, ¶ 9, 995 P.2d 1088 (stating that section 3237 "allows the trial court to sanction a disobedient party by dismissal of its claim or by a default judgment." (footnote omitted)).

¶34 Alberta relies solely on the notice requirement in the first paragraph of Rule 10 to argue that the Decree should be vacated. Alberta cites the Supreme Court's decisions in *Schweigert v. Schweigert*, 2015 OK 20, 348 P.3d 696, and *Velasco v. Ruiz*, 2019 OK 46, 457 P.3d 1014, in support of her contention that the Decree is void for entry without the required Rule 10 notice.

¶35 In both *Schweigert* and *Velasco*, the Court construed the notice requirements for obtaining a default judgment authorized by the first paragraph of Rule 10, "in which an appearance, general or special, has been made or a motion or pleading has been filed" As stated by the Court in *Schweigert*: "The dispositive question raised for our review is whether a party must file a motion for default and give the adverse party notice under Rule 10 of the Rules for District Courts . . . when the adverse party fails to file an answer or an entry of appearance but physically appears at a hearing." *Schweigert*, 2015 OK 20, ¶ 1. The *Velasco* Court, citing the first paragraph of Rule 10, found "troubling" the movant's failure to provide notice of the motion seeking judgment by default after the respondent filed a special appearance and objection to the court's jurisdiction. *Velasco v. Ruiz*, 2019 OK 46, ¶ 13.

¶36 In this case, Donald had filed an answer and counterclaim to which Alberta had filed an answer and the case was at issue as of March 17, 2015. Although these facts distinguish this case from *Schweigert* and *Velasco*, the distinction does not materially affect application of the holding in those cases as it relates to the Rule 10 notice issue. Nonetheless, *Schweigert* and *Velasco* are not dispositive of the notice issue in this case. Alberta contends that the Decree was entered pursuant to Donald's oral motion for a default judgment made at the April 23, 2018 hearing, which failed to comply with the notice requirements of Rule 10. If that were so, *Schweigert* and *Velasco* would control. However, Alberta's characterization of the record is wrong.

¶37 Alberta's argument ignores the fact that the district court's March 1, 2018 Order containing the notice of the April 23, 2018 hearing also ordered the parties to exchange, "within 20 days of this date, February 27, 2018," witness and exhibit lists, an affidavit of income and expenses, tax returns for the past three years, evidence of medical insurance and premium costs, a

list of monthly living expenses, a list of assets, liabilities and marital debts with the parties' recommendation as to how the marital estate should be divided, and a statement of the disputed issues with written recommendations as to how those issues should be resolved.

¶38 When Alberta chose not to comply with the court's order, Donald filed Defendant's Motion in Limine on April 12, 2018. In this motion, Donald renewed his request for discovery sanctions which were the subject of his pending August 23, 2017 motion. However, the primary focus of Donald's motion was his new request for entry of a judgment based on Alberta's most recent refusal to comply with a district court discovery order -- her total failure to comply in any respect with the court's March 1, 2018 Order. Although Donald titled his filing as a motion in limine, the "meaning and effect of an instrument filed in court depends on its contents and substance rather than on the form or title given it by the author." *Whitehorse v. Johnson*, 2007 OK 11, n.13, 156 P.3d 41. "The function of a motion in limine is to preclude introduction of prejudicial matters to the jury." *Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc.*, 1985 OK 66, ¶ 12, 713 P.2d 572 (citation omitted). In substance, Donald's April 12, 2018 motion was not a motion in limine; it was a motion for a default judgment and we treat it as such.

¶39 That motion was served on Alberta on April 11, 2018, twelve days before the April 23 hearing. In his motion, Donald advised the district court that the documents that the court ordered on February 27, 2018, to be exchanged were due on March 19, 2018, and that Alberta had failed to provide any of the court-ordered documents. For the first time, Donald moved "pursuant to 12 O.S. § 3227, and Rule 5(J) of the rules for the District Courts of Oklahoma" for a "default judgment against the Plaintiff, pursuant to 12 O.S. § 3237(B)(2)(c)."

¶40 Completely absent from Alberta's appellate briefing is any mention of Donald's April 12, 2018 written motion for default judgment, and any argument that this motion was not received prior to the five days required by Rule 10. More importantly, Alberta's appellate briefing is devoid of any argument purporting to show that she was not in default for refusing to comply with the district court's March 1, 2018 Order.

¶41 Donald's April 12, 2018 motion satisfied the notice requirements of the first paragraph of Rule 10.

III. Alberta's Default

¶42 Donald's motion for default judgment and Alberta's total disregard for three previous court orders to provide discovery are not the only bases for finding that Alberta was in default at the time of the April 23, 2018 hearing. Alberta's willful refusal to comply with the district court's March 1, 2018 order to exchange witnesses and exhibits justifies the court's action as well. Section 3237 provides:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just. Such orders may include the following:

. . .
c. an order . . . rendering a judgment by default against the disobedient party.

12 O.S.2021 § 3237(B)(2)(c). Further, the district court's March 1, 2018 order, requiring the exchange of witnesses and exhibits in advance of the hearing, is a matter generally addressed in advance of a pretrial conference. See Okla.Dist.Ct.R. 5, 12 O.S.2021, ch. 2, app. District Court Rule 5(J) provides: "Default. Failure to prepare and file a scheduling order or pretrial order, failure to appear at a conference, appearance at a conference substantially unprepared, or failure to participate in good faith may result in any of the following sanctions: . . . 4. default judgment."

¶43 Alberta has advanced no argument in her appellate briefing, nor has she cited to any portion of this record in an attempt to show that (1) she provided the discovery she had been previously ordered to provide on May 19, 2015, and April 27 and May 17 of 2016, or (2) that she was not in default of the district court's March 1, 2018 order to exchange witnesses and exhibits and other matters necessary for the preparation of the case for trial.

¶44 Finally, the Rule 10 notice requirement on which Alberta solely relies for her due process argument applies when a **party** files a motion for a default judgment. It does not apply when the district court acts independently, pursuant to its statutory authority granted in section 3237 to render a judgment against a party in default.

IV. Notice of the April 23, 2018 Hearing

¶45 Alberta does not argue that she did not receive the constitutionally required notice of the April 23, 2018 hearing which resulted in the Decree. That argument is not available to her, nor could she make such an argument. After being notified of that hearing, Alberta advised the district court that she would not attend. And, Alberta knew the purpose of that hearing and what matters would be addressed.

¶46 The court's March 1, 2018 Order set for hearing on April 23, "all pending matters in regard to the divorce proceedings" and concluded by advising the parties that "the court will issue any and all necessary orders." In effect, the March 1, 2018 Order reset for hearing the matters the district court had originally set for hearing on November 30, 2017. The November 30 hearing was set pursuant to the court's November 15, 2017 Order which also lifted a stay the court had previously granted while Alberta pursued disqualification of the district judge.

¶47 However, the matters originally set for hearing on November 30 were not heard on that date because Alberta appeared at the hearing in Wewoka and filed yet another, although ultimately unsuccessful, motion to recuse the assigned judge. Nonetheless, Alberta's filing delayed resolution of the merits of the matters set for hearing on November 30, 2017, until the April 23, 2018 hearing.

¶48 As previously discussed, the November 15, 2017 Order setting the November 30 hearing advised Alberta that: "FAILURE TO ATTEND MAY RESULT IN THE DISMISSAL OF THE ACTION OR THE GRANTING OF A DEFAULT JUDGMENT." In addition, the court directed Alberta to "be familiar with and comply with the requirements of District Court Rule 5, Rules for the District Courts of Oklahoma." The November 15 Order specifically advised Alberta that her failure to attend could result in the grant of a default judgment. But also, District Court Rule 5(J) authorizes the court to enter a default judgment when a party fails to appear at a conference, appears at a conference substantially unprepared, or fails to participate in good faith in the preparation of the case for trial. Alberta was advised as early as November 15, 2017, that her failure to appear at the April 23, 2018 hearing could result in the entry of a default judgment, and Alberta does not argue otherwise.

¶49 Yet, in her appellate briefing, Alberta claims that she "filed a motion indicating her unavailability" on April 23, 2018. This misrepresents the record. No such motion appears in this record, nor does Alberta cite to any portion of the record supporting that claim. Three days in advance of that hearing, Alberta did file a document notifying the district court that: "Plaintiff Alberta Rose Josephine Jones will not be attending any more hearings in Wewoka, Oklahoma." No explanation was provided, no conflict with her schedule was identified, and no request was made to reset the April 23 hearing to another date on which she could attend.

¶50 Even more misleading is Alberta's contention that she "had requested to participate by telephone on April 23, 2018, which the court denied in her absence." It is clear why Alberta does not cite the portion of the record where this request was made. It does not exist. Alberta had filed a Motion to Appear Telephonically on September 25, 2017, but that motion was directed to a hearing set for September 29, 2017. That hearing did not occur because Alberta filed a motion to recuse the district judge which stayed further proceedings. In its November 15, 2017 order lifting that stay, the district court correctly determined that Alberta had exhausted her efforts to remove the district judge and that her September 25, 2017 motion for telephonic participation was moot. The only explanation in this record for Alberta's absence from the April 23, 2018 hearing was best stated by the district court as: "the complete disregard that this Petitioner has for the orders of the state court."⁴

V. The April 25, 2018 Sanctions Order

¶51 We do not review the April 25, 2018 sanctions Order for fundamental error based on lack of notice because it is undisputed that Alberta received the district court's March 1, 2018 order setting "all pending matters" for hearing in Wewoka on April 23, 2018. First, in its July 26, 2018 order denying Alberta's post-trial motions, the district court found that Alberta had been properly notified of the April 23 hearing. Alberta has not sought to and cannot challenge that finding in this appeal. Second, Alberta filed a document in advance of the April 23 hearing notifying the district court that she would not be attending the hearing or "any more hearings in Wewoka, Oklahoma."

¶52 One of the "pending matters" for the April 23, 2018 hearing was Donald's August 23, 2017 motion for discovery sanctions. The district court granted that motion, imposed the requested evidentiary sanctions, prohibited Alberta from introducing evidence and essentially limited the trial of the case to the evidence submitted by Donald, subject to cross-examination by Alberta and any testimony she chose to provide. The district court did so pursuant to its authority granted in section 3237(B) of the Discovery Code:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just. Such orders may include the following:

- a. an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order,
- b. an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence

12 O.S.2021 § 3237(B)(2). The district court's statutory authority to grant the relief provided in the April 25, 2018 sanctions Order is clear and unchallenged. And, as previously discussed, Alberta failed to preserve review of any error regarding the April 25, 2018 sanctions Order, assuming there was one, an assumption we find no basis to entertain.

¶53 More importantly, Alberta's due process challenge to the April 25, 2018 Decree fails to address the significance of the April 25, 2018 sanctions Order. As a result of her repeated misconduct during the litigation, any trial held after April 23, 2018, would have only provided Alberta the opportunity to testify and cross-examine Donald regarding the value and equitable division of the marital estate. These due process opportunities are not insignificant. *See Jackson v. Indep. Sch. Dist. No. 16 of Payne Cnty.*, 1982 OK 74, ¶ 11, 648 P.2d 26 ("The purpose of any due process proceeding is to afford the opportunity to each person to present evidence and arguments in a forum which provides fair and equal justice."). And, entry of a judgment based on a party's default does not, in and of itself, prevent the party from participating in subsequent proceedings. *See also Payne v. DeWitt*, 1999 OK 93, ¶ 12, 995 P.2d 1088 ("A default declaration, imposed as a § 3237(B)(2) sanction, cannot extend beyond saddling the defendant with liability for the harm occasioned and for the imposition of punitive damages."); *Bishop v. Bishop*, 1958 OK 16, ¶ 0, 321 P.2d 416 (Syllabus 4) ("Excluding a defendant from participation in any feature of the divorce for failure to pay suit money, alimony or child support as ordered, is a denial of due process"). However, there is a difference between a court ordering that a party may not participate in a hearing and a party who expressly refuses the opportunity to participate.

¶54 At the April 23 hearing, after the district court found that Alberta was in default, there remained for determination (1) the value of the marital estate, and (2) a division of the marital property the court finds is "just and reasonable." 43 O.S.2021 § 121(B). As evident from the hearing transcript, the district court proceeded to do just that. The district court did not enter a "default divorce decree," as Alberta contends. The district court proceeded to hear Donald's evidence regarding the value of the marital estate, the parties' assets and liabilities, and Donald's proposal for an equitable division of their jointly owned property. As stated in its Journal Entry of April 23, 2018, the district court denied Donald's motion to enter as moot, found Alberta "in Default for failure to appear as Ordered on this date," and then heard "Respondent's testimony and evidence."

¶55 At the conclusion of the evidentiary portion of the April 23 hearing, the district court did not immediately enter the Decree, but took the matter under advisement and reviewed the proposed divorce decree submitted by Donald. On April 25, the district court granted the parties the divorce Alberta had first requested more than three years earlier and entered the Decree Alberta challenges in this appeal.

¶56 Despite finding Alberta was in default, the district court did not prevent Alberta from participating in the evidentiary portion of the April 23, 2018 hearing. The opposite is true. The sanctions Order specifically provides that Alberta "may not: 1. Call any witness, **other than herself and the Respondent**, to testify as to any matter before the Court in this case" (emphasis added). Alberta did not appear and testify nor did she appear and cross-examine Donald. A default judgment may be entered against a party properly served and over whom the court has jurisdiction, if the party fails to appear, or "in consequence of the evidence presented." *Choctaw Cnty. Excise Bd. v. St. Louis-San Francisco Ry. Co.*, 1969 OK 110, ¶ 11, 456 P.2d 545. The Decree was not entered because Alberta refused to appear at the hearing as ordered, "but in consequence of the evidence presented." *Id.*

¶57 It is settled law that a party may choose to forego procedural opportunities afforded by due process. *Cole v. State ex rel. Dep't of Pub. Safety*, 2020 OK 67, ¶ 16, 473 P.3d 467 (by ignoring the required procedure to request a hearing, a party "failed to avail himself of the opportunity for a hearing"). Even the constitutional requirement for notice may be waived. *Price v. Zhang*, 2022 OK 95, ¶ 11, 521 P.3d 795. "A waiver is defined as the voluntary or intentional relinquishment of a known right." *Faulkenberry v. Kansas City Southern Ry. Co.*, 1979 OK 142, ¶ 6, 602 P.2d 203 (footnote omitted).

¶58 Although the constitutional right to notice can be waived, that is not the issue here. Alberta received the required notice of the April 23, 2018 hearing. Then, she voluntarily and intentionally relinquished her right to "be heard" at the April 23 hearing by choosing not to attend. Alberta confirmed this relinquishment to the district court, in writing, on April 20, 2018, when she advised the court that she would "not be attending anymore hearings in Wewoka, Oklahoma." Due process of law requires the court to give a litigant the opportunity to be heard; it does not require the court to seize an obstructive litigant, force them into court and require them to speak. There is no basis in this record on which to conclude that the April 25, 2018 Decree resulted from fundamental error.⁵

CONCLUSION

¶59 Alberta received the constitutionally required notice of the April 23, 2018 hearing, scheduled to resolve "all pending matters." But she chose not to appear. She informed the district court in writing that she would not attend that hearing. She did not request a continuance and she did not request to participate in the April 23 hearing by telephone. She simply ignored the district court's order setting that hearing. The fact that Alberta chose not to take advantage of the opportunity to appear does not inject error into the proceeding conducted in her absence. The April 25, 2018 Decree is free from fundamental error and is affirmed.

¶60 **AFFIRMED.**

BLACKWELL, P.J., concurs in result, and WISEMAN, J., (sitting by designation), concurs.

FOOTNOTES

JOHN F. FISCHER, JUDGE:

¹ This and certain other filings discussed in this Opinion were not included in the record but are available on www.oscn.net. This Court "may review information found on Oklahoma district court appearance dockets" Okla.Sup.Ct.R. 1.1(d), 12 O.S.2021, ch. 15, app. 1.

² On May 30, 2018, the Supreme Court ordered Alberta to file an amended petition in error "attaching both the Decree and the Sanctions Order filed April 25, 2018, from which Appellant appeals." In response to this Order, Alberta filed an amended petition in error on June 8, 2018, but only attached the April 25, 2018 sanctions Order. Donald filed a motion to dismiss Alberta's appeal for failure to comply with the Supreme Court's May 30, 2018 Order. The Supreme Court denied Donald's motion prior to assignment of the appeal to this Court.

³ Alberta's brief in chief also contains an argument that California is the proper venue regarding the marital estate located in California. This issue was not raised in Alberta's May 2, 2018 motion for new trial and will not be addressed for the reasons previously discussed.

⁴ Alberta's appellate briefing refers to that portion of the April 23, 2018 hearing transcript where the district court discussed its ruling on the September 2017 motion. But Alberta takes this discussion out of context in an effort to contrive some excuse for her absence, other than her own willful disobedience of the district court's order, from the April 23 hearing.

⁵ During the course of this appeal, the parties have filed various motions and requests for relief, collateral to the issues addressed in their appellate briefing. Most of these filings have been resolved by the Supreme Court prior to assignment of the case to this Court. Four remain pending: (1) Alberta's June 21, 2018 motion for sanctions, (2) Donald's July 24, 2019 motion for sanctions, (3) Donald's request for appeal-related attorney fees and costs included in his response brief, and (4) Anita Sanders' June 30, 2021 motion to withdraw as appellate counsel for Alberta. The two sanctions motions and Anita Sanders' June 30, 2021 motion to withdraw are resolved by a separate order filed with this appeal. Donald's request for appeal-related attorney fees and costs does not satisfy the requirements of Supreme Court Rule 1.14, 12 O.S.2021, ch. 15, app. 1., and is denied without prejudice to refiling in a rule-compliant form.

Cite Name Level

None Found.

Citationizer: Table of Authority**Cite Name****Level****Oklahoma Supreme Court Cases**

Cite	Name	Level
<u>1991 OK 22, 807 P.2d 257, 62 OBJ 869,</u>	<u>Heiman v. Atlantic Richfield Co.</u>	Discussed
<u>1958 OK 16, 321 P.2d 416,</u>	<u>BISHOP v. BISHOP</u>	Discussed
<u>1969 OK 110, 456 P.2d 545,</u>	<u>CHOCTAW CO. EXCISE BD. v. ST. LOUIS-SAN FRANCISCO RY. CO.</u>	Discussed
<u>2000 OK 92, 19 P.3d 839, 71 OBJ 3016,</u>	<u>PATTERSON v. BEALL</u>	Discussed
<u>2006 OK 87, 152 P.3d 195,</u>	<u>FLANDERMEYER v. BONNER</u>	Discussed at Length
<u>2007 OK 11, 156 P.3d 41,</u>	<u>WHITEHORSE v. JOHNSON</u>	Discussed
<u>2007 OK 55, 164 P.3d 150,</u>	<u>COX OKLAHOMA TELECOM, LLC v. STATE ex rel. OKLAHOMA CORPORATION COMM'N.</u>	Discussed
<u>2009 OK 91, 227 P.3d 1060,</u>	<u>POWERS v. DISTRICT COURT OF TULSA COUNTY</u>	Discussed
<u>2015 OK 20, 348 P.3d 696,</u>	<u>SCHWEIGERT v. SCHWEIGERT</u>	Discussed at Length
<u>1979 OK 21, 591 P.2d 296,</u>	<u>MALONE v. MALONE</u>	Discussed
<u>1979 OK 142, 602 P.2d 203,</u>	<u>FAULKENBERRY v. KANSAS CITY SOUTHERN RY. CO.</u>	Discussed
<u>2019 OK 46, 457 P.3d 1014,</u>	<u>VELASCO v. RUIZ</u>	Discussed at Length
<u>2020 OK 67, 473 P.3d 467,</u>	<u>COLE v. STATE ex rel. DEPT. OF PUBLIC SAFETY</u>	Discussed at Length
<u>1999 OK 93, 995 P.2d 1088, 70 OBJ 3452,</u>	<u>Payne v. DeWitt</u>	Discussed at Length
<u>2022 OK 95, 521 P.3d 795,</u>	<u>PRICE v. ZHANG</u>	Discussed at Length
<u>1982 OK 74, 648 P.2d 26,</u>	<u>Jackson v. Independent School Dist. No. 16 of Payne County</u>	Discussed
<u>1998 OK 48, 961 P.2d 801, 69 OBJ 2135,</u>	<u>SULLIVAN v. FORTY SECOND WEST CORP.</u>	Discussed
<u>1985 OK 15, 695 P.2d 1352,</u>	<u>Cate v. Archon Oil Co., Inc.</u>	Discussed
<u>1985 OK 66, 713 P.2d 572, 56 OBJ 1795,</u>	<u>Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc.</u>	Discussed

Title 12. Civil Procedure

Cite	Name	Level
<u>12 O.S. 990A,</u>	<u>Appeal to Supreme Court of Oklahoma - Filing of Petition - Rules - Procedure - Dismissal</u>	Discussed
<u>12 O.S. 990.2,</u>	<u>Post-Trial Motions - Matters Taken Under Advisement - Costs, Attorney Fees, and Interest</u>	Discussed
<u>12 O.S. 991,</u>	<u>Right to Perfect Appeal to Supreme Court without Filing Motion for New Trial - Exemption</u>	Cited
<u>12 O.S. 3227,</u>	<u>Depositions Before Action or Pending Appeal</u>	Discussed
<u>12 O.S. 3237, 12 O.S. 3237,</u>	<u>Failure to Make or Cooperate in Discovery - Sanctions</u>	Discussed at Length

Title 43. Marriage

Cite	Name	Level
<u>43 O.S. 121,</u>	<u>Restoration of Maiden or Former Name - Alimony - Property Division</u>	Cited

