DISCUSSION OF SELECTED OKLAHOMA SUPREME COURT CASES:

ANCIENT PROBATES, DEFAULT JUDGMENTS & REFORMATION OF DEEDS

Presented For the:
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COMMENTS BY SUPREME COURT JUSTICE NOMA D. GURICH

PANEL PRESENTATION BY:

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THE HONORABLE JUSTICE NOMA GURICH

Noma D. Gurich has served as a Justice on the Supreme Court of Oklahoma since February 15, 2011. She has been a member of the Oklahoma judiciary for 29 years. She is currently serving as Vice Chief Justice. Justice Gurich was born in South Bend, Indiana. She received a bachelor's degree Magna Cum Laude in political science in 1975 from Indiana State University. She earned her Juris Doctorate from the University Of Oklahoma College Of Law in 1978. She has been honored as distinguished alumnus by Indiana State, her high school and was inducted into the University of Oklahoma College of Law Order of the Owl Hall of Fame in 2016. After ten years as a litigator in the private practice of law in Oklahoma City, she was appointed to the Oklahoma Workers' Compensation Court where she served from 1988 to 1998, including 4 years as Presiding Judge. She was appointed and elected to serve as a District Judge in Oklahoma County from 1998 to 2011, where she also served as Presiding Administrative Judge for two years. She also served as the Presiding Judge of two Multi-County Grand Juries. She has the distinction of being appointed to judicial office by four governors. Justice Gurich was honored by the Oklahoma Bar Association Women in Law Section with a Mona Salyer Lambird Spotlight Award in 2003. She was named the 2011 Judge of the Year by the Oklahoma Chapter of the American Board of Trial Advocates. She has been honored by The Journal Record Woman of the Year program three times and inducted into the Journal Record Woman of the Year Circle of Excellence. She received a 2013 Byliner Award by the OKC Association of Women in Communications, and a 2013 Valuable Volunteer Award by the Foundation for Oklahoma City Public Schools. She is a graduate of the 2016 Salt & Light Leadership Training Class 8. Justice Gurich is a member of the OU College of Law Board of Visitors. Since 1998, she has been a member of the Kiwanis Club of Oklahoma. Justice Gurich is the Kiwanis Advisor for the Southeast High School (OKC) Key Club. Justice Gurich is an active member of St. Luke's United Methodist Church where she is a volunteer Mobile Meals driver and TV camera operator. She has also participated in mission trips to Russia and Alaska.

DALE L. ASTLE

Dale L. Astle is a commercial real estate attorney and serves as outside legal counsel for Bluestem Escrow and Title, LLC, Tulsa, Oklahoma. He received an Associate of Science degree from Northern Oklahoma College, a Bachelor of Science degree from Oklahoma State University and a Juris Doctor degree from University of Oklahoma College of Law.

He is past president of the Oklahoma Land Title Association and is a member of the Tulsa County Bar Association, the Oklahoma Bar Association and the Tulsa Title and Probate Lawyers Association. He is a fellow in the American College of Real Estate Lawyers. He is past chairman of the Real Property Law Section of the Oklahoma Bar Association and has been a continuously active member of the Title Examination Standards Committee of the Oklahoma Bar for 38 years.

Dale was selected for inclusion in "Oklahoma Super Lawyers" and "Chambers USA". He has also served as a member of the Executive Committee of the Abstractors and Title Insurance Agents Section of the American Land Title Association and as chairman of the ALTA Public Relations Committee.

He is a frequent presenter in seminars and educational conferences, has taught Real Estate Transactions as an adjunct professor at the University of Tulsa College of Law and has written numerous articles covering various topics related to real estate law and Oklahoma land titles.

He is the author of "***Equal Credit Opportunity Act – New Compliance Requirements***", Volume 48, Oklahoma Bar Journal, Number 3, "***An Analysis of the Evolution of Oklahoma Real Property Law Relating to Lis Pendens and Judgment Liens***", Volume 32, Oklahoma Law Review, Number 4, "***Homestead Rights Relating To Purchase Money Mortgages***", Volume 63, Oklahoma Bar Journal, Number 37, "***Title Insurance***", Vernon's Oklahoma Forms 2d, Real Estate, "***Official Conveyances and Antecedent Records***," Patton and Palomar on Land Titles, Third Edition and "***Transfer-on-Death Deeds in Oklahoma***", Volume 82, Oklahoma Bar Journal, Number 651.

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State Univ. of N.Y. at Stony Brook [M.S. (Urban and Policy Sciences) 1974]; &
Oklahoma City University [J.D. (Law) 1978].

PRACTICE: Oil/Gas & Real Property Title Litigation (Curative; Appeals; Expert Consultant/Witness)
Oil/Gas & Surface Title Opinions
Mediations and Arbitrations
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MEMBERSHIPS/POSITIONS:
OBA Title Examination Standards Committee (Co- & Chairperson: 1988-Present);
OBA Nat'l T.E.S. Resource Center (Director: 1989 - Present);
OBA Real Property Law Section (current member, former Chairperson);
OBA Mineral Law Section (current member)
OKC Real Property Lawyers Assn. (current member, former President);
OKC Mineral Law Society (current member);
Kiwanis (Downtown OKC Club--member and former President); and
BSA: *Vice Chair & Chair, Baden-Powell Dist., Last Frontier Council (2000-2007); former Cub master, Pack 5, & Asst. Scout Master, Troop 193, All Souls Episcopal Church*

SPECIAL EXPERIENCE: Court-appointed Receiver for Senator Gene Stipes' 5 Abstract Companies in SE Oklahoma;
Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" (1982 - Present), & "Oil & Gas Title Examination" (2015);
Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor and Contributing Author;
Basye on Clearing Land Titles, Author: Pocket Part Update (1998 – 2000); Contributing Author: (2001 - 2015);
Oklahoma Bar Review faculty: "Real Property" (1998 - 2003);
Chairman: OBA/OLTA Uniform Abstract Certif. Committee (1982);
In-House Counsel: LTOC & AFLTICO/AGT/Old Republic (1979-1981);
Urban Planner: OCAP, DECA & ODOT (1974-1979).

SELECTED PUBLICATIONS:
"Constructive Notice: Oklahoma's Hybrid System Affecting Surface and Mineral Interests", 80 OBJ 40 (January 2018)
"The Oklahoma Marketable Record Title Act ("AKA The Re-Recording Act"): An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies", 87 OBJ 27, (October 15, 2015)
"Marketable Record Title: A Deed Which Conveys Only the Grantor's 'Right, Title and Interest' Can Be A 'Root of Title'", 85 OBJ 1104 (May 17, 2014)

SPECIAL HONORS: Super Lawyers - Oklahoma 2017 & 2018: Real Estate
Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
Okla. Bar Assn. 1990 Earl Sneed *Continuing Legal Education Award*;
Okla. Bar Assn. 1990 Golden Gavel Award: *Title Exam. Standards Committee*

SCOTT WILLIAM McEACHIN

Scott McEachin is a sole practitioner in Tulsa, Oklahoma. His practice is limited, almost exclusively, to oil and gas title examination. He received a Bachelor of Arts degree in History and Political Science from the University of California at Santa Barbara and a Juris Doctor degree from the University of Oklahoma College of Law.

Mr. McEachin has been an attorney with Apco Oil Corporation in Oklahoma City and with Hondo Oil and Gas Company in Roswell, New Mexico. He was affiliated with several law firms before beginning his private practice in 1992.

He is a member of the Real Property Section of the Oklahoma Bar Association, and he served as its Chair in 1989. He is a member of the Title Examination Standards Committee.

I. SUMMARY OF CASE HOLDINGS

A. REFORMATION OF DEEDS
(Dale Astle)

A. 1. CALVERT v. SWINFORD (2016 OK 100)
[see 2016 OK 104 and 2016 OK 105, below]

GENERAL TOPIC:

Abstractor's negligence and deed reformation.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR NEGLIGENCE BY AN ABSTRACTOR CONDUCTING A CLOSING AND USING AN INCORRECT DEED (FAILING TO EXCLUDE MINERALS PER CONTRACT) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION, AND IS NOT FROM DISCOVERY.

FACTS:

Two sisters had a sales contract for real property providing that the minerals were to be reserved to the grantors. Their attorney prepared a deed which he claims included such reservation. The title company which checked the title sent a packet to the sisters to review and sign, and return. The sisters signed all of the documents including the deed, without the reservation of minerals, and returned them to the abstracting company, which then conducted the closing (without the sisters being present), and filed the deed in the land records. The sisters did not receive a copy of the filed deed. 12 years later, the sisters noticed the error and sued the grantees, their attorney and the abstract company.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on negligence (2 years -- 12 O.S. §95(A)(3)) and on reformation of conveyances (5 years -- 12 O.S. §95(A)(12). The argument that the statute of limitations should be tolled until the injured party learned of the error was rejected, because the grantors read and signed the deed which omitted the mineral reservation, and more importantly the deed was constructive notice upon its filing in the land records.

COURT OF CIVIL APPEALS RULING:

[NONE—the Supreme Court retained the case]

SUPREME COURT RULING: The trial court was affirmed.

A. 2. CALVERT v. SWINFORD (2016 OK 104)
[see 2016 OK 100 above, and 2016 OK 105, below]

GENERAL TOPIC:

Attorney's negligence and deed reformation.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR NEGLIGENCE BY AN ATTORNEY IN PREPARATION OF A DEED (FAILING TO EXCLUDE MINERALS PER CONTRACT) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION, AND IS NOT FROM DISCOVERY.

FACTS:

Two sisters had a sales contract for real property providing that the minerals were to be reserved to the grantors. Their attorney prepared a deed which he claims included such reservation. The title company which checked the title sent a packet to the sisters to review and sign, and return. The sisters signed all of the documents including the deed, without the reservation of minerals, and returned them to the abstracting company, which then conducted the closing (without the sisters being present), and filed the deed in the land records. The sisters did not receive a copy of the filed deed. 12 years later, the sisters noticed the error and sued the grantees, their attorney and the abstract company.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on negligence (2 years -- 12 O.S. §95(A)(3)) and on reformation of conveyances (5 years -- 12 O.S. §95(A)(12). The argument that the statute of limitations should be tolled until the injured party learned of the error was rejected, because the grantors read and signed the deed which omitted the mineral reservation, and more importantly the deed was constructive notice upon its filing in the land records.

COURT OF CIVIL APPEALS RULING:

[NONE—the Supreme Court retained the case]

SUPREME COURT RULING: The trial court was affirmed.

A. 3. CALVERT v. SWINFORD (2016 OK 105)
[see 2016 OK 100 and 2016 OK 104, above]

GENERAL TOPIC

Deed reformation against grantee.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR REFORMATION OF A DEED AGAINST THE GRANTEE (FAILING TO EXCLUDE MINERALS PER CONTRACT) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION, AND IS NOT FROM DISCOVERY.

FACTS:

Two sisters had a sales contract for real property providing that the minerals were to be reserved to the grantors. Their attorney prepared a deed which he claims included such reservation. The title company which checked the title sent a packet to the sisters to review and sign, and return. The sisters signed all of the documents including the deed, without the reservation of minerals, and returned them to the abstracting company, which then conducted the closing (without the sisters being present), and filed the deed in the land records. The sisters did not receive a copy of the filed deed. 12 years later, the sisters noticed the error and sued the grantees, their attorney and the abstract company.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on reformation of conveyances (5 years—12 O.S. §95(A)(12). The argument that the statute of limitations should be tolled until the injured party learned of the error was rejected, because the grantors read and signed the deed which omitted the mineral reservation, and more importantly the deed was constructive notice upon its filing in the land records.

COURT OF CIVIL APPEALS RULING:

[NONE—the Supreme Court retained the case]

SUPREME COURT RULING: The trial court was affirmed.

A. 4. SCOTT v. PETERS (2016 OK 108)

GENERAL TOPIC:

Deed reformation against grantee.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR REFORMATION OF A DEED AGAINST THE GRANTEE (FAILING TO EXCLUDE MINERALS PER CONTRACT) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION, AND IS NOT FROM DISCOVERY.

FACTS:

Grantor/plaintiff had a sales contract for real property providing that the minerals were to be reserved to the grantors. The deed did not reserve the minerals. Later, the grantor/plaintiff again deeded the same land to a third party, without reserving the minerals. The third party conveyed such lands again to a "fourth" party, who then conveyed to the original grantee, when such original grantee demanded such deed. Such grantee signed a mineral lease. All of these deeds were promptly filed in the land records. The original grantor, more than 5 years after he (the original grantor) conveyed the same land to the third party, sued his original grantee, to quiet the title to the minerals.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on reformation of conveyances (5 years -- 12 O.S. §95(A)(12)) because the grantor had notice upon the filing of the deed. The argument that the statute of limitations should be tolled until the injured party realized the error was rejected. The grantor included an argument claiming that the 15 year adverse possession statute should apply, but that argument was rejected. Summary judgment was granted to the original grantee.

COURT OF CIVIL APPEALS RULING:

[NONE -- the Supreme Court retained the case]

SUPREME COURT RULING:

The trial court was affirmed (unanimously), relying on the three Calvert cases.

It is heartening that the Supreme Court stated in the concluding paragraph 19:

"If this were not the case, real property transactions across the state could be set aside at almost any time which could leave all real property transactions unsettled indefinitely. Accordingly, we had that, notice imposed on the grantor by the filing of the deed with the county clerk precludes this action as untimely."

A. 5. DAVIS v. REASNOR (COCA Case No. 114,596)*

GENERAL TOPIC:

Reformation of deed

SPECIFIC TOPIC:

When does the statute of limitations begin to run for enforcement of a partition order involving a mutual mistake of fact resulting in recording of a tenant-in-common deed form rather than a joint tenancy deed form required by the partition order?

HOLDING:

THE STATUTE OF LIMITATIONS FOR MUTUAL MISTAKE BEGINS TO RUN ON THE DATE WHEN THE LEGAL EFFECT OF THE MISTAKE BECAME QUESTIONED OR DISPUTED, WHICH, IN THIS CASE, WAS THE DATE THE PARTIES DISCOVERED THAT THE DEED DID NOT CONFORM TO THE PARTITION ORDER

FACTS

A partition order was entered in 1998 involving real property in Pittsburg and Haskell counties. The order directed that the parties were to execute quit claim deeds in joint tenancy form. The actual deeds, recorded in 2001 and 2004, were to the grantees as tenants-in-common.
In 2013, the parties discovered that the recorded deeds were not joint tenancy forms.
In 2015, a motion was filed seeking to enforce the partition order to require the deeds to be executed in joint tenancy form.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run. The court noted that an action to reform a deed, pursuant to Title 12 O.S. § 93(1), must be brought within five years following the date of recording of the deed.

COURT OF CIVIL APPEALS RULING:

The COCA reversed the trial court and remanded with directions for execution of corrected deeds conforming with the partition order or to file and record the partition order. The appellate court pointed out that the parties were operating under a mutual mistake of fact regarding the terms of the deeds. Consequently, the statute of limitations began to run when the legal effect of the mutual mistake became questioned or disputed.

* Summary prepared by Dale Astle

B. DEFAULT JUDGMENT (Kraettli Q. Epperson)

B. 1. SCHWEIGERT V. SCWEIGERT, 2015 OK 20, 348 P.3d 696

GENERAL TOPIC:

Default judgment motion and hearing.

SPECIFIC TOPIC:

Under what circumstances is a Motion, a Hearing and Notice of a Hearing required, before taking a default judgment, when no Appearance or Answer is filed?

HOLDING:

BEFORE A DEFAULT JUDGMENT IS GRANTED THERE MUST ALWAYS BE A MOTION AND HEARING, "WHEN THE ADVERSE PARTY FAILS TO FILE AN ANSWER OR AN ENTRY OF APPEARANCE, BUT PHYSICALLY APPEARS AT A HEARING" AND, IF THE DEFENDANT'S ADDRESS IS KNOWN, THERE MUST BE NOTICE GIVEN.

FACTS:

1. Mother sued for divorce, seeking temporary and permanent custody of two minor children, with supervised visitation with father.

2. Father was personally served ("at CeeDee's County Store in Dustin, Oklahoma"), but did not file an entry of appearance, or an Answer.

3. Father did appear at the hearing on the application for a temporary order.

4. The temporary order was filed one year after the hearing.

5. The temporary order acknowledged that the father "appear[ed] in person and pro se at the hearing."

6. The record fails to show a copy of the filed temporary order was sent to the father, or that he had a chance to contest its contents before it was filed.

7. Default hearing on the final order was set by minute order on the court docket without mother filing a Motion.

8. Mother did not give notice to father of the default hearing on the final order, and nothing in the record states that his address was unknown.

9. District Court held a hearing on the final order by default without father's attendance.

10. On the day of hearing, the trial court granted the divorce, and awarded custody of minor children to mother with supervised visitation with father, and awarded $283.01 per month to mother for child support from father.

11. Two years later, father filed a motion to vacate the divorce decree.

TRIAL COURT RULING:

1. Trial court denied father's Motion to Vacate which asserted fraud and lack of due process.

2. Trial court found father had not filed an entry of appearance as required by 12 O.S. §2005.2.A. ("Every party to any civil proceeding in the district courts shall file an entry of appearance by counsel or personally as an unrepresented party…").

3. Trial court held such failure exempted mother from filing a Motion and from giving father notice of the hearing for default judgment resulting in issuance of the final order.

COURT OF CIVIL APPEALS RULING:

1. COCA affirmed Trial Court denial of Motion to Vacate.

2. Father filed Petition for Certiorari, and Cert was granted.

SUPREME COURT RULING:

1. "The dispositive question is whether a party must file a Motion for Default and give the adverse party notice under Rule 10 of the Rules of the District Courts (12 O.S. 2011 Ch.2, app. (Rule 10)), when the adverse party fails to file an answer or an entry of appearance, but physically appears at a hearing."

2. "We answer in the affirmative."

3. Review of a trial court's decision to vacate or to refuse to vacate a judgment is based on abuse of discretion.

4. Factors to consider when deciding whether to issue an order to vacate or to refuse to vacate a default judgment are (1) the rule is that default judgments are disfavored, (2) the goal is to promote justice, and (3) refusing to vacate a default judgment requires a stronger showing of abuse of discretion, than an order vacating a default judgment.

5. This default judgment impacted a fundamental right -- a parent's right to the companionship, custody and management of his child.

6. The trial court's decision of the proper application of Rule 10 to undisputed facts is an unmixed question of law, and, therefore, will be reversed if error.

7. Father was asserting an "irregularity" in the proceedings due to mother's failure to file a motion for default, and failing to give father notice of the hearing on the motion. (12 O.S. §651(1), 1031(3))

8. Mother responded (a) that she did not have the father's address, and (b) that both parties were remarried; mother failed to prove on appeal these two matters were presented to the trial court, and, therefore, both arguments were denied when raised on appeal for the first time.

9. Mother asserts that father's failure to "file an entry of appearance" meant he was in default and no motions or notice of any hearings were needed; thereby allowing mother to take a default judgment without a motion and without notice of such hearing.

10. Rule 10 provides:

> "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. If the addresses of both the party and his attorney are unknown, the motion for default judgment may be heard and a default judgment rendered after the motion has been regularly set on the motion and demurrer docket. It shall be noted on the motion whether notice was given to the attorney of the party in default, to the party in default, or because their addresses are unknown, to neither. Once a party or an attorney provides an email address for service in a specific case in accordance with the Rules for Electronic Filing in the Oklahoma Courts, the provided email address shall serve as the appropriate address for purposes of notice as required by this rule, unless the filer is informed that the electronic transmission failed. *See* Rules for Electronic Filing in Oklahoma Courts. 2012 OK 61"
>
> "Notice of taking default is not required where the defaulting party has not made an appearance…"

11. The court held (¶ 14):

> "Because Section 2005.2 was not adopted, and therefore did not exist, until after Rule 10, Rule 10's language of making an appearance cannot be limited to filing an entry of appearance pursuant to Section 2005.2."
>
> [AUTHOR'S NOTE: There is no authority offered (e.g., constitutional infirmity) for this decision to ignore applicable statutory authority. It is, perhaps, more logical to conclude that the later legislative enactment of the statute superceded and repealed the earlier "lesser" court-adopted rule!]

12. The "Conclusion" held (¶ 16):

> "Mother's failure to file a motion for default and give notice to Father pursuant to Rule 10 after Father had appeared at the hearing for temporary order was an irregularity in the proceeding. The district court erred in denying Father's motion

to vacate the divorce decree. The district court's order denying the motion to vacate is reversed and the cause is remanded to the district court. On remand, the district court is directed to revisit the motion to vacate in light of this opinion. The Court of Civil Appeals' opinion is vacated."

13. This dicta was included (§15):

> *"This [Rule 10] language mandates that a motion must be filed in all instances, even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore. Mother's failure was an irregularity in the proceedings that left the district court without means of determining whether she was required to give notice, and, if so, whether the notice conformed to due process prerequisites of entering judgment."*

* * * * * * * * * * * * * * * * * * * *

[AUTHOR'S COMMENTS AND QUESTIONS:

1. *If the statute (12 O.S. §2005.2) provides the party "shall file an appearance", in order to entitle the defaulting party to a motion, a hearing and a notice of this hearing, before a default judgment is granted, can the courts ignore such specific later legislative dictate and follow its own earlier lesser requirement?*

2. *While it is clear that if a defendant appears at a hearing in person, he cannot deny service, what logic transforms such limitation on the Defendant into a limitation on the Plaintiff, when the Plaintiff seeks a default judgment? In other words, if a written entry and/or answer is required by statute, how can a verbal one be sufficient?*

3. *This language, in ¶ 15, appears to be dicta and unnecessary and, in fact, contrary to the explicit holding:*

   > *"This [Rule 10] language mandates that a motion must be filed in all instances, even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore. Mother's failure was an irregularity in the proceedings that left the district court without means of determining whether she was required to give notice, and, if so, whether the notice conformed to due process prerequisites of entering judgment."*

4. *If the defaulting party has "made" a physical appearance, but has not "filed" an entry of appearance or other pleading, what is the defaulting party entitled to receive: (A) Motion for default and/or (B) Hearing on such Motion, and/or (C) Notice of such Hearing?*

5. *If the original Summons and Petition were served personally -- as occurred in Schweigert -- but the pro se defendant's address is unknown, must the motion for default also be served personally? Or by publication? Or not at all?*

6. *If the original Summons and Petition were served personally, and the pro se Defendant's address is known, must the Motion for Default also be served personally? Or by certified/return receipt requested? Or by publication? Or not at all?*

7. *Is this holding of Schweigert limited to this category of special proceeding, known as a divorce? (But see the collection action case: Asset Acceptance v. Pham, 2018 OK CIV APP 26, 415 P.3d 47)]*

B. 2. ASSET ACCEPTANCE v. PHAM, 2018 OK CIV APP 26, 415 P.3d 47

GENERAL TOPIC:

Default judgment motion and hearing.

SPECIFIC TOPIC:

Under what circumstances is a Motion, a Hearing and Notice of a Hearing required, before taking a default judgment, when no Appearance or Answer is filed?

HOLDING:

BEFORE A DEFAULT JUDGMENT IS GRANTED THERE MUST ALWAYS BE A MOTION AND HEARING, "EVEN WHEN A PARTY FAILS TO MAKE AN APPEARANCE," AND, IF THE DEFENDANT'S ADDRESS IS KNOWN, THERE MUST BE NOTICE GIVEN.

FACTS:

Defendant used a credit card to purchase an entertainment unit. It was damaged in delivery and the remaining amount due of $1,894.98 was reduced unilaterally by the buyer by $245.00 to $1,649.98, which smaller amount was timely paid. Lender's assignee filed suit to collect the unpaid portion, claiming that $1,325.47 was due on the original amount. The summons provided that an answer was due in 35 days (to accommodate the FDCPA), and that:

> *"You have been sued by the above-named plaintiff, and you are directed to file a written answer to the attached petition in the office of the court clerk of CLEVELAND County[,] located at, District Court of Cleveland County 200 South Peters Avenue, Norman, OK 73069-6070, within thirty-five (35) days after service of this summons upon you exclusive of the day of service. Within the same time, a copy of your Answer must be delivered or mailed to the attorney for the Plaintiff. Failure to respond, in writing, within thirty-five (35) days, will result in default judgment being entered against you.*
>
> ***No request will be made to the Court for a Judgment in this case until the expiration of 35 days after your receipt of this Petition and Summons. If you dispute the debt and/or request the name and address of the original creditor in writing within the 35-day period that begins with the receipt of the Petition and Summons, all collection efforts, including our proceeding with this lawsuit, will cease until we respond as required by law." (Emphasis in original)***

Defendant never filed an Appearance or an Answer. Defendant (pro se) exchanged correspondence with lender's counsel disputing the debt. The last correspondence was a letter from Defendant asking for lender's counsel to explain lender's figures. Plaintiff did not respond but took an ex parte Default Judgment. Plaintiff promptly sent a copy of the Default

Judgment to the Defendant. When the Plaintiff sought garnishment of the Defendant's wages, Defendant filed a Motion to Vacate.

TRIAL COURT RULING:

Along with its Motion to Vacate, Defendant filed an Answer and Counter Claim. Plaintiff's Motion to Dismiss Defendant's Answer and Counter Claim was apparently dismissed as being untimely. After the parties briefed the issues, the court denied the Defendant's Motion to Vacate, holding:

> *"That the Defendants have not shown any grounds [irregularity] under 12 O.S.2011, § 1031 whereby [the] Court should and can vacate this judgment."*

COURT OF CIVIL APPEALS RULING:

Based on the language of Schweigert v. Schweigert, 2015 OK 20, 348 P.3d 696 the COCA held:

> *"Rule 10's requirement for filing a motion and giving notice is applicable any time a party appears before a court, whether by filing a document or physically participating in a hearing. Rule 10 provides not only that a motion must be filed and notice given to a party who has appeared, but that the motion must be filed even if no notice was required. Rule 10 expressly provides:*
>
> > *If the addresses of both the party and his attorney are unknown, the **motion** for default judgment may be heard [at a hearing] and a default judgment rendered after the **motion** has been regularly set on the motion and demurrer docket. It shall be noted on the **motion** whether notice was given to the attorney of the party in default, to the party in default or because their addresses are unknown to neither."*
>
> *"(Emphasis added. [by COCA]) **This language mandates that a motion must be filed in all instances, even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore.** Mother's failure was an irregularity in the proceedings that left the district court without means of determining whether she was required to give notice, and, if so, whether the notice conformed to due process prerequisites of entering judgment."*
>
> "Schweigert v. Schweigert 2015 OK 20, ¶15, 348 P.3d 696 (emphasis added [bolding by COCA])."

The COCA found that, in addition, as another ground for requiring the Plaintiff to file a Motion and to give the Defendant a Hearing and a Notice of Hearing, the COCA found that the altered summons made it clear that a notice of the Plaintiff's intent to resume the legal proceeding was promised!

Therefore, in the absence of a Motion, and a Hearing and a Notice of the Motion and Hearing, there was an inexcusable irregularity in taking the Default Judgment, contrary to 12 O.S. § 1031(3).

[AUTHOR'S COMMENTS:

1. *The COCA quotes the unnecessary and misleading dicta from Schweigert v. Schweigert, which states: "this language [Rule 10] mandates that a motion must be filed in all instances, even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore".*

2. *This COCA decision adopts this dicta from Schweigert and holds that the meaning of Rule 10 (although Rule 10 is inconsistent with this later-adopted 12 O.S. § 2056) requires a Motion, a Hearing, and (if the Defendant's address is known) notice of the Motion and Hearing, even if no "appearance" has been either "filed" or "physically" made.*

3. *While a Defendant is barred from denying service, if he physically appears at a hearing, there is no logical reason offered to support the use of this physical appearance by the Defendant to punish the Plaintiff by ignoring the statutory requirement for the Defendant to file an entry or face the consequences -- meaning a Default Judgment will be granted without further notice.]*

Oklahoma County District Court Rule 16
(Effective January 27, 2017 & June 12, 2018; with changes underlined and bold):

RULE NO. 16 DEFAULT JUDGMENT

A. Judgment in a case, (except family and domestic cases) in which service has been made, but in which there has been no appearance, may be taken at any time after the answer date before the assigned judge.

The following documents shall be provided to the assigned judge at the time the journal entry of default judgment is presented for signature:

1. **Motion to Default Judgment. All Motions for Default Judgment must state the following**:
   a. **Whether the defaulting party has filed any pleading/document;**
   b. **Whether the defaulting party has appeared in open court; and**
   c. **What notice was given, and, if none were given, the reason therefore.**
2. Proof of service;
3. Servicemember's affidavit in accordance with the Servicemember's Civil Relief Act of
   2003 and Department of Defense Status Report in all civil cases involving individuals;
4. Proof of breach of last payment;
5. Copy of the contract, mortgage, note or account;
6. Amount of debt, principle and interest;
7. Assignments, if applicable; and
8. Any other item specifically requested by the assigned judge.

B. If the assigned judge is absent at the time fixed in the notice to take default judgment, the matter shall stand continued to the next motion day of the Court over which said judge presided, or it may be heard or continued by another judge in the absence or inability of the assigned judge to hear it.

C. ANCIENT PROBATES
(Scott McEachin)

C. BEBOUT v. EWELL (2017 OK 22, 392 P.3d 699)

GENERAL TOPIC:

Void probate decree.

SPECIFIC TOPIC:

Is it constitutionally required that the Final Account be mailed to all heirs, or is Notice of the Hearing on such Final Account being mailed sufficient?

HOLDING:

WHERE PRETERMITTED MINOR HEIRS RECEIVE NOTICE OF THE FILING OF A FINAL ACCOUNT AND A HEARING THEREON IN A PROBATE, AND THEY FAIL TO LOCATE AND REVIEW SUCH FINAL ACCOUNT, AND DO NOT ATTEND THE HEARING, AND THEY WAIT MORE THAN ONE YEAR AFTER REACHING MAJORITY TO FILE A CHALLENGE, SUCH CHALLENGE IS TOO LATE, EVEN IF THE DECREE CONTAINED AN ERROR OF LAW (FAILING TO APPPOINT AN ATTORNEY FOR MINORS AND FAILING TO PROVIDE FOR OMITTED PRETERMITTED HEIRS). BOOTH IS DISTINGUISHED.

FACTS:

The probate court distributed the estate's assets according to the terms of the will, to the daughter and granddaughter, with no mention in the will or in the decree about two omitted grandsons (pretermitted heirs). The two grandsons received a copy of the Notice for Hearing of Final Account, but did not receive a copy of such Final Account. Such Final Account was available in the court file. The two grandsons were minors, although one reached majority just before the final decree was filed. The two grandsons filed an action 32 years later (probably a quiet title action) to have the probate decree deemed void for lack of due process notice and to have their interests confirmed. They also argued that the probate court errored by not appointing attorneys for them as minors.

TRIAL COURT RULING:

The trial court agreed that the probate decree was void on its face for lack of evidence that the final account was sent to the two grandsons.

COURT OF CIVIL APPEALS RULING:

The court of civil appeals affirmed the trial court.

SUPREME COURT RULING:

The Supreme Court vacated the COCA and reversed the trial court, and remanded it to the trial court to issue a decision against the two grandsons. The Supreme Court said the Notice

of the Hearing on the Final Account should have prompted them (inquiry notice) to review the Final Account which was on file, and which gave them constructive notice. The two grandsons countered with the holding in the Booth case, which ruled that an old probate decree was void on its face when the pretermitted heirs did not receive a copy of the Final Account. However, in this pending case, Booth was distinguished on its facts by saying that if the heirs in Booth (two brothers) had made the effort to review the Final Account such knowledge would still not have advised them that they were being omitted from the distribution because the Final Account showed them -- pursuant to the will --each receiving their 1/3 share, along with the sister/personal representative getting 1/3. However, at the hearing to confirm the Final Account the Booth court directed that such distribution to the three heirs would occur but only after the fees of the attorneys and personal representative and the costs of administration had been paid. Such costs would have exhausted the estate, so the court conveyed the land (the only asset) to the sister as her personal representative fees. In addition, the Supreme Court rejected the two minor grandsons' argument that the probate judge's failure to appoint attorney for them rendered the decree void.

Also, the Supreme Court concluded the Bebout opinion by saying:

> "*Because the final distribution of an estate could deprive interested persons of certain protected property interests, it is of the utmost importance that constitutionally sufficient notice be provided to such persons. Of no less importance, however, is the stability of the law in connection with real property and titles to lands in this state.*"

II. ACTUAL CASES