Case No. DF-104107

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

C. O'DARLING,

Appellant/Petitioner,

v.

S. O'DARLING,

Appellee/Respondent.

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION, IN RESPONSE TO BRIEF IN CHIEF OF APPELLANT

Supporting affirmance

Appeal from Tulsa County District Court, Honorable Judge Michael Zacharius

Case No. FD-2006-2820

CONCERNING AN APPEAL FROM AN ORDER VACATING DECREE OF DISSOLUTION OF MARRIAGE AND DISMISSING PETITION FOR DISSOLUTION OF MARRIAGE

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ARGUMENT

Neither the United States nor any of the individual states, including Oklahoma, are obligated to recognize a Canadian same-sex marriage under the Agreement Between the Government of the United States of America and the Government of Canada with Respect to Social Security, U.S.-Can., Mar. 11, 1981, 35 U.S.T. 3403 (hereinafter Social Security Agreement). Even though the United States and Canada have agreed to the Social Security Agreement which contains the term "spouse's allowance" in Chapter 2, Article IX, and even though "spouse" is not defined in the agreement, Oklahoma is not required to recognize a same-sex marriage from Canada under the Supremacy Clause of the United States Constitution. A proper construction of the Social Security Agreement demonstrates that Oklahoma cannot be bound by Canada's definition of marriage under the Social Security Agreement.

I. OKLAHOMA IS NOT REQUIRED TO RECOGNIZE CANADIAN SAME-SEX MARRIAGES BECAUSE THE TEXT, THE SURROUNDING CONTEXT, AND THE PROPER CONSTRUCTION OF THE TERM "SPOUSE" DEMONSTRATES THAT ONLY HETEROSEXUAL MARRIAGE WAS IN VIEW.

A. First, Oklahoma is not Required to Recognize Canadian Same-Sex Marriages Because the *Text* and the *Surrounding Context* of the Term "Spouse" Demonstrates That Only Heterosexual Marriage Was in View.

To interpret the Social Security Agreement, this Court must "begin with the text of the agreement and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) (internal quotations and citations omitted) *quoting Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988). Though the term "spouse" is used nine times in the Social Security Agreement (see below), the United States

and Canada did not find it necessary to include "spouse" in the definition section in Article I. *See* Social Security Agreement, art. I.

Article VI uses the term "spouse" in each of its first four paragraphs, which are contained within the "Provisions of Coverage" section of Part II of the agreement. Social Security Agreement, art. VI. In each of those paragraphs the term "spouse" is used relating to the determination of whether the person receives benefits under Canada's Old Age Security Act. *Id.* The term "spouse" was unambiguous in 1984 (see below, section, B. 2.). Any possible current ambiguity in the term is not grounds for a *post hoc* altering of the plain meaning of the agreement.

Additionally, Articles IX and X, which are contained within Chapter 2, Part III: "Provisions Applicable to Canada," refer to a "spouse's allowance" five times. The "spouse's allowance" is derived from Part II.1 of Canada's Old Age Security Act and has nothing to do with the United States recognizing Canadian same-sex marriage. Rather, these articles require the totalization of periods of residence in the United States and Canada to determine whether a spouse qualifies for the spouse's allowance to be paid by Canada.

Nonetheless, since the Social Security Agreement does not define the term "spouse," should this Court decide that the term "spouse" is ambiguous, "[o]ther general rules of construction may be brought to bear on difficult or ambiguous passages." *Eastern Airlines, Inc.*, 499 U.S. at 535; *quoting Volkswagenwerk*, 486 U.S. at 700. This brief will now show how, under those rules, Oklahoma is not obligated by the Supremacy Clause to recognize Canadian same-sex marriage.

B. Second, Oklahoma is not Required to Recognize Canadian Same-Sex Marriages Because the *History and Negotiations* and *the Practical Construction of the Parties* of the Term "Spouse" Demonstrates That Only Heterosexual Marriage Was in View.

When the Social Security Agreement is properly construed, the state of Oklahoma is not required to recognize Canadian same-sex marriages. In order to understand the meaning of "spouse" in the Social Security Agreement, this Court must look "to the history of the agreement, the negotiations, and the practical construction adopted by the parties." *Eastern Airlines, Inc.*, 499 U.S. at 535. Thus, the Social Security Agreement can be understood by viewing official correspondence from President Reagan, annotations and comments made by the executive branch on the agreement, and the recent history of American and Canadian policy regarding same-sex marriage.

1. Oklahoma is not required to recognize Canadian same-sex marriages because the *history and negotiations* demonstrates that only heterosexual marriage was in view.

According to official correspondence to Congress from President Reagan, the purpose of this totalization agreement is to

> provide for limited coordination between the United States and foreign social security systems to overcome the problems of gaps in protection, and of dual coverage and taxation for workers who move from one country to the other.

H.R. Doc. No. 98-165, at iii (1984). The "limited coordination" of which President Reagan spoke, clearly concerns only Social Security coverage in the United States and Canada; it does not extend to settling competing definitions of marriage.

When President Reagan transmitted the Agreement to Congress he included annotations and comments that the executive branch, including the Secretary of State and the Secretary of Health and Human Services, in commending the Agreement. These documents,

explaining the Social Security Agreement, stated that the agreement was

> intended to eliminate dual coverage by continuing the worker's social security coverage and taxation under the system of the country to whose economy he has the more direct connection and exempting him from coverage and taxation under the other country's system.

H.R. Doc. No. 98-165, at 8 (1984). If the executive branch contemplated that one nation should be bound by the other's competing definition of marriage, the annotations and comments for Articles VI, IX, and X would surely explain this. But no such explanation exists, since the Social Security Agreement was not intended to subordinate one nation under the sovereignty of another regarding marriage law.

2. Oklahoma is not required to recognize Canadian same-sex marriages because the *practical construction* of the parties demonstrates that only heterosexual marriage was in view.

In determining whether the Social Security Agreement requires Oklahoma to recognize Canadian same-sex marriages, this Court should follow the guidance of United States Supreme Court decisions interpreting ambiguous terms in international agreements.[1] The definition of a significant term in an agreement was precisely the question that the Supreme Court faced in *Eastern Airlines*. At issue was whether airlines could be sued, under the Warsaw Convention, for damages for mental distress that did not originate from physical injuries. *499 U.S.* at 536 (citing Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000). The Court concluded that as a matter of definition the disputed text did not, in fact, include claims for mental distress. *Id.* at 544. The Court, however, did not stop there, but it considered what other signatories of the Convention had decided about this question. *Id.* at 550. The only other nation that had

[1] As noted earlier, Amicus does not actually believe that the term "spouse" is ambiguous, nonetheless this argument is presented to demonstrate that Appellant's argument fails even if the this Court should consider the term ambiguous.

addressed the question under the agreement was Israel, through its Supreme Court. That Court had found that recent changes in the airline industry and "Anglo-American and Israeli law" should allow for damages based solely for mental distress. *Id.* at 551. The *Eastern Airlines* Court did not however, find the Supreme Court of Israel's analysis persuasive. While the Court noted that the Israeli court's decision deserved deference, it held that it could not follow it since there was still no evidence that the drafters of the agreement intended the text to include damages for mental distress that did not arise from physical injuries. *Id.*

Similarly here, this Court is faced with deciding what two sovereign countries meant when they included a specific term in an agreement. In 1984, when the Social Security Agreement was drafted the term "spouse" was not ambiguous to either country. In fact, as will be discussed in the following paragraph, ten years after the Agreement was formed, Canada still defined the term "spouse" to mean a heterosexual couple in a marital relationship. It was not until 2002, when Canada began redefining marriage that any ambiguity arguably existed about the term "spouse." Just like the *Eastern Airlines* Court, this Court should not be bound by recent changes in the laws of signatory countries, but should rather look at what the drafting parties meant *when they entered into* the Social Security Agreement.

In recent years Canadian common law and the Civil Marriage Act of Canada (which controls the qualifications for marriage) have changed. However in 1995, the Supreme Court of Canada held that restricting the definition of spouse in the Old Age Security Act to heterosexual couples did not violate its Charter of Rights and Freedoms. *Egan v. Canada*, [1995] 2 S.C.R. 513 (Can.). Even ten years after the Social Security Agreement was formed, Canada still considered the term "spouse" to be limited to the traditional definition of a

heterosexual marriage. Then, in two of the three cases that drove the Canadian Parliament to enact same-sex marriage in 2005, the Canadian courts held that it violated the Charter of Rights to prohibit homosexual couples to marry, while acknowledging that the Supreme Court of Canada had already upheld the restriction in its decision in *Egan*. *See Halpern v. Canada*, [2002] 60 O.R.3d 321 (Can.); *Barbeau et al. v. British Columbia*, [2003] 225 D.L.R. (4th) 472 (Can.); Civil Marriage Act, S.C. 2005, c. 33, s. 4 (Can.). (The third case, *Hendricks v. Quebec*, [2004] 238 D.L.R. (4th) 577 (Can.), did not mention *Egan*.). This change in public policy eighteen years after the Social Security Agreement does not suggest that the United States is bound by the Agreement to recognize Canada's new definition of marriage because, as was discussed above in the *Eastern Airlines* case, it is the context in which the agreement was drafted, not subsequent changes in the law, that controls the interpretation of an agreement.

A final example of practical construction made by the parties is that the United States Social Security Administration has even interacted with the change of the term "spouse" in Canada when it issued a publication with a two-column comparison of the two countries' benefits and eligibility requirement under the Agreement. International Programs, Social Security Administration, Social Security Administration Publication #05-10198, Totalization Agreement With Canada, Part IV (2007) http://www.ssa.gov/international/Agreement_ Pamphlets/canada.html#monthly. This table, reproduced in part below, compares the benefits that spouses receive from a worker's social security benefits. The United States' column simply refers to the benefits that a spouse is entitled to. The Social Security Administration had to clarify the relationships under the Canadian column because of Canada's recognition of same-sex marriages. The Table had to state that a common-law

partner included a same-sex partner. [2] The Social Security Administration did not need to further define "spouse" because the United States does not recognize *any* same–sex partners– either those from a solemnized marriage or a common law marriage-as spouses.

Table 1

Family benefits to dependents of retired or disabled people	
United States	Canada
Spouse-Full benefit at full retirement age or at any age if caring for worker's entitled child under age 16 (or disabled before age 22). Reduced benefit as early as age 62 if not caring for a child.	**Spouse-** **OAS-**An allowance is paid to the spouse or common-law partner (whether of the same or different sex who have lived together for at least one year) of an OAS pensioner when the couple has little or no income. The spouse or common-law partner must be age 60-64 and the OAS beneficiary must also be receiving GIS. The allowance is payable outside Canada for only 6 months following the month of departure from Canada. **CPP-**No provision for benefits. However, under certain conditions, retirement pensions can be shared by married spouses if they are not legally separated. **QPP-**Same as CPP.

This same distinction between the different treatments of the term "common-law partner" can be seen again in the Table twice under "Survivors Benefits for Widows and Widowers." *Id.* Thus, the "practical construction" of the Social Security Administration undercuts the assertion that the Agreement requires recognition of Canadian same-sex marriages by the United States or any of the states.

[2] Interestingly, when the *Egan* Court issued its decision, the Old Age Security Act did not refer to common-law partners, but rather to common law marriage. *Egan*, [1995] 2 S.C.R. at 536 (Can.).

CONCLUSION

Therefore, based on a proper construction of the Social Security Agreement, based upon the text, context, history and negotiations, and practical constructions of the parties, the United States is not required to recognize same-sex couples with a marriage from Canada as married. Reviewing the definition of the term "spouse" at the time the Agreement was entered into, and ten years afterwards, no ambiguity existed. Furthermore, the Social Security Administration has stated that the change in Canadian law will have no affect on its application of Social Security. Therefore, it is beyond the reasonable application of the Social Security Agreement to bind one nation to the other's definition of marriage.

For the foregoing reasons, this Court should affirm the trial court's refusal to grant the divorce.

Respectfully submitted,

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CERTIFICATE OF MAILING

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