Marriage for All: The Impact of *Obergefell vs. Hodges* in Texas

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"As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society…. laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter." Justice Kennedy, *Obergefell v. Hodges*[1]

On June 26th of this year, the United States Supreme Court extended marriage equality nationwide. The decision, *Obergefell v. Hodges*, addressed two questions: whether the Fourteenth Amendment requires states to license same-sex marriage, and whether a state must recognize a lawful same-sex marriage performed in another state. The court answered both questions in the affirmative, finding prohibitions on same-sex marriage to violate principles of equal protection and the fundamental right to marriage.[2] In doing so, the court not only issued a directive to states requiring the issuance of marriage licenses to same-sex couples, but articulated a much broader principle: the constitutional guarantees of liberty, equal protection, and equal dignity extend to gay and lesbian people.

The case arose out of four consolidated cases challenging state refusal to recognize same-sex marriage in Michigan, Kentucky, Tennessee, and Ohio. Mr. Obergefell, who married his partner of over twenty years in Maryland, sued the state of Ohio for prohibiting him from being listed on his husband's death certificate as his surviving spouse.

Just eleven years ago, Massachusetts became the first state in the country to authorize same-sex marriage.[3] In 2013, the United States Supreme Court ruled unconstitutional a portion of the federal Defense of Marriage Act (DOMA) prohibiting federal recognition of lawfully performed same-sex marriages.[4] The ruling, *Windsor v. United States*, extended most federal benefits to same-sex couples who were legally married in states recognizing marriage equality. The 2013 Supreme Court case left intact Section 2 of DOMA, authorizing states to refuse to recognize lawful same-sex marriages performed in other states. What resulted was a patchwork of federal and state rights and recognition, determined by the state in which the couple resided. Before the *Obergefell* decision, thirteen states still prohibited same-sex marriage, including Texas.

Because same-sex marriage is new to Texas, and largely new to the rest of the country, much remains to be decided and resolved. It will fall to lawyers, judges, and legislators to address the consequent legal unknowns. The purpose of this article is to highlight some of the consequences of this monumental ruling. Each of the issues addressed below could be an article unto itself. The ruling's potential impact on transgender rights will not be addressed in this article.

Family Law

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[1] *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 190 L.Ed.2d 908 (2015).

[2] *Id*.

[3] *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

[4] *United States v. Windsor*, —— U.S. ——, 133 S.Ct. 2675, 2691, 186 L.Ed.2d 808 (2013).

Marriage

Perhaps the most obvious impact for attorneys and their clients is in the realm of family law. While same-sex couples can now access numerous state benefits formerly granted only to opposite sex couples – from automatic inheritance rights to homestead protections -- fundamental questions about the marital relationship remain to be determined.

To begin with, is the *Obergefell* ruling prospective or retroactive? This question becomes even more complicated in the case of an alleged common law or informal marriage. For a common law marriage to be valid in Texas, the couple must (1) agree to be married; (2) represent themselves as married to others; and (3) live together as a married couple in Texas.[5] Could a couple meet these criteria during a time when their marital relationship was a legal impossibility? For example, can a couple reside together as spouses in Texas when they did not and could not have legal status as spouses? Or, does *Obergefell* mean that laws prohibiting same-sex marriage *never* had constitutional validity? In late June, a federal court allowed a party to proceed on a wrongful death claim as the common law surviving spouse of her same-sex partner.[6] The question was also before the Travis County probate court. In February 2015, Travis County Judge Guy Herman ruled Texas' same-sex marriage ban was unconstitutional, allowing the court to further consider whether a Travis county woman was informally married to her deceased partner.[7] Judge Herman later approved a settlement agreement recognizing the informal marriage of the two women.

As the *Powell* case demonstrates, the answer to this question has implications for the purpose of inheritance. For couples going through a divorce, whether *Obergefell* applies retroactively could determine when the marital relationship began. This will, in turn, impact determinations of separate and community property. It is also relevant to determinations of benefits such as pension and social security.

Parent-Child Relationships

Adoption

Thousands of same-sex couples raise children in Texas. *Obergefell* does not immediately change the necessity for adoption in order to secure the parental rights of the non-biological parent.

Texas law presumes a man is the father of the child if he is married to the mother when the child is born.[8] This marital presumption could also be applied to married lesbian couples. The question, however, is whether Texas courts will treat same-sex couples the same as opposite-sex couples. Other states addressing this issue differ in their approach. In May of this year, the Massachusetts Supreme Judicial Court found the presumption applied to a lesbian couple who were married at the time of the birth of the child.[9] Less than two weeks later, a New York court ruled the presumption was inapplicable

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[5] Tex. Fam. Code Ann. CODE ANN. § 2.401(a)(West 2006).
[6] *Shirley Ranolls, Individually and as Representative of the Estate of April Dawn Ranolls vs. Adam Dewling, Tankstar USA, Inc., Rogers Cartage Co., and Bulk Logistics, Inc.*, Civil Action No. 1:15-cv-111.
[7] *Estate of Stella Marie Powell*, Cause No. C-1-PB-14-001695.
[8] V.T.C.A., Family Code § 160.204(a)(2).
[9] *Minor, In re Adoption of*, 471 Mass. 373, 29 N.E. 3d 830 (2015).

because of the lack of a biological relationship between the non-birth mother and the child.[10] Until such issues are resolved in Texas, a non-biological parent should not rely on the marital presumption, but should continue to adopt to secure the legal parent-child relationship.

Assisted Reproduction

Under Texas law, "each intended parent" may enter into a gestational agreement to have a child through assisted reproduction.[11] For gestational agreements to be valid, the law requires for the intended parents to be married.[12] Now that same-sex couples may wed, this presumably allows same-sex couples – male or female - to enter into gestational agreements with a third party.

Vital Records

Prior to the *Obergefell* ruling, state law prohibited the issuance of accurate vital records. For example, birth certificates could not identify both legal parents if they were the same sex. Facing contempt charges and a federal lawsuit in August 2015, Texas Attorney General Ken Paxton finally revised state policies for vital records to be consistent with the United States Supreme Court decision. The lawsuit was prompted by the state's refusal to issue death certificates for same-sex couples that correctly identify the marital status of the surviving spouse.

The revised policy authorizes the issuance of a death certificate with the correct information on the marital status of the decedent.[13] The new policy also applies to birth certificates. In the case of lesbian couples, parents married at the time of birth will both be listed on the birth certificate at birth.[14] Couples who married in another state when the child was born, but prior to the issuance of the new policy, will be able to amend the birth certificate to list both individuals as parents.[15] Same-sex couples who adopt will be able to obtain a supplementary birth certificate that accurately lists both individuals as parents.[16]

Employment

Same-sex couples no longer have to leave the state to marry in order to access benefits and protections obtainable by other married couples under the Family Medical Leave Act (FMLA) or Employee Retirement Income Security Act (ERISA). Prior to *Obergefell*, the U.S. Department of Labor extended these protections to all same-sex married couples regardless of state of domicile.[17]

The state of Texas still allows discrimination in employment and public accommodations based on sexual orientation and gender identity. While many larger cities and counties in Texas have local

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[10] *Paczkowski v. Paczkowski*, 128 A.D. 3d 968 (2015).
[11] *See* Tex. Fam. Code Ann. § 160.754 (West 2014).
[12] *Id*.
[13] "Revised Policies and Procedures, Vital Records Requests From Married Same-Sex Couples," Texas Department of State Health Services (Rev. 8/24/15).
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] http://www.dol.gov/whd/fmla/spouse/;http://www.dol.gov/ebsa/newsroom/tr13-04.html.

ordinances prohibiting such discrimination,[18] these laws arguably don't have the enforcement power of a state law.

Obergefell did not address employment discrimination or Title VII of the Civil Rights Act. However, less than one month following the *Obergefell* decision, the Equal Employment Opportunity Commission (EEOC) ruled that workplace discrimination based on sexual orientation is sex discrimination under Title VII, and therefore prohibited under federal law.[19] Since EEOC rules are not binding on courts or private employers, it remains to be seen whether federal judges will apply EEOC's interpretation of Title VII.

Religious Objection to Same-Sex Marriage

Immediately following the *Obergefell* ruling, a handful of Texas county clerk's refused to issue marriage licenses, some citing conflicts with their religion. At least one county clerk resigned. Attorney General Ken Paxton issued a statement indicating that county clerks, their employees, and judges may, in some circumstances, refuse to issue marriage licenses to same-sex couples based on religious objections.

Despite concerns expressed by some, most experts agree that the First Amendment protects decisions of clergy to marry – whether that marriage involves interfaith couples or same-sex couples. Moreover, the Texas Legislature enacted a bill this legislative session which reaffirms the right of clergy to refuse to perform a marriage that would "violate a sincerely held religious belief."[20]

On the other hand, when an individual acts in her official capacity on behalf of a governmental entity, such as a county clerk, she must comply with the law regardless of individual religious views. Several Texas county clerks were sued following the *Obergefell* decision for failure to issue licenses to same-sex couples, including Hood County Clerk, Katie Lang. Lang issued the marriage license shortly after the suit was filed. As of this writing, Irion County is the only remaining county in Texas that still refuses to issue a marriage license to a same-sex couple.

Litigation may inevitably arise as other entities, such as private businesses, seek religious exemptions from providing services to same-sex couples. For example, in two separate cases in Colorado[21] and Oregon,[22] bakeries refused to serve same-sex couples because of religious objections to their marriage. The Oregon bakery was ordered to pay a fine after the couple filed a complaint with the Oregon Bureau of Labor and Industries.[23] A Colorado appeals court affirmed the Colorado Civil Rights Commission's decision finding the cake shop to have violated the state's anti-discrimination law. Colorado and Oregon law prohibit discrimination based on sexual orientation in public accommodations. As stated above, Texas does not have a statewide policy prohibiting discrimination based on sexual orientation, and local ordinances lack the enforcement power of a statewide policy. While federal nondiscrimination legislation is under consideration by Congress, federal law presently has no such protections.

Future Constitutional Claims

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[18] The Houston ordinance, the Houston Equal Rights Ordinance (HERO), passed by Houston's City Council in 2014, is suspended pending a November 2015 ballot election.
[19] http://www.eeoc.gov/decisions/0120133080.pdf.
[20] SB 2065, 84th Legislative Session (Texas 2015).
[21] *Craig v. Masterpiece Cakeshop, Inc.,* 2015 WL 4760453 (2015).-
[22] http://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf.
[23] *Id*.

Obergefell's reliance on the Equal Protection Clause has implications for some of these remaining civil rights issues. While Justice Kennedy failed to articulate any particular legal standard about the level of scrutiny to be used in analyzing related equal protections claims, one could argue that perhaps heightened scrutiny is unnecessary. *Obergefell* is one of several Supreme Court decisions finding that exclusions solely on the basis of sexual orientation are unconstitutional.[24]

While *Obergefell* marks the beginning of nationally recognized same-sex marriage, it is by no means the end of the legal discussion. Much remains to be resolved, but the principles of fairness and equal dignity guiding the *Obergefell* decision will undoubtedly shape the outcome of litigation to come.

[24] *See Lawrence v. Texas*, 539 U. S. 558 (2003); *United States v. Windsor* ––– U.S. ———, 133 S.Ct. 2675, 2691, 186 L.Ed.2d 808 (2013).