No More "Same-Sex Marriage"
Marriage Is Marriage, Period

The legal and practical implications of same-sex relationships

BY **RICHARD A. ROANE**

On June 26, 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2584; (2015), that the U.S. Constitution requires all states to recognize a marriage between two people of the same sex, and further, that all states must issue marriage licenses for same-sex couples who apply for such licenses. Associate Justice Anthony Kennedy wrote the opinion for the majority in a five-to-four ruling, finding that same-sex couples have a *fundamental* right to marry as guaranteed by both the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

For same-sex couples who were married in a jurisdiction that recognized and allowed same-sex marriage and who were living in either a recognition state or one of the 13 prohibition states, their marriages are now recognized under state law. In addition to recognizing these marriages, all states now must issue marriage licenses to same-sex couples who apply to marry. This new recognition means:

- These marriages will be recognized throughout the United States, in all states, territories, possessions, and Washington, D.C., plus the 20 (at time of writing) other countries recognizing same-sex marriage. Recognition by certain Native American tribes is restricted. (See "Native American Tribes: More Exceptions on page 14.)
- Children born during these marriages should have two legally recognized parents based on the "parental presumption," regardless of gender or biological connection.
- Family law courts should be available to same-sex married couples for resolving issues in dissolution (divorce), custody, child support, spousal support, and property division cases—literally all issues available to heterosexual couples.

Consistent tax treatment

Because same-sex marriages have been recognized at the federal level since June 2013, *United States v. Windsor*, married same-sex couples have been required to file "married-joint" or "married-separate" federal income tax returns. However, in many states that did not recognize same-sex marriage, couples have been required to file separate income tax returns for state purposes. This has created an onerous burden on married same-sex couples who had to prepare multiple tax returns, some of which would never be filed but were necessary to calculate properly their income, deductions, and taxes due based on the inconsistency of their marriage recognition or nonrecognition between their states and the Internal Revenue Service. After *Obergefell*, all same-sex married couples should be able to file state income tax returns as married filing jointly or married filing separately, which may have an impact on their state income tax burden, either positively or negatively.

Lack of civil rights protections

One problem that accompanies the freedom to marry is the lack of protections for the LGBT community under various state and federal civil rights acts. Only 22 states, plus Washington D.C., prohibit discrimination on the basis of sexual orientation, while 19 states prohibit discrimination on the basis of gender identity. The irony is that a same-sex couple can now get married on Saturday, apply for spousal health or other employee benefits on Monday, and be fired on the spot in 28 states. Without civil rights protections, LGBT individuals can be fired, evicted, or denied services at will.

- **Federal Equality Act:** On July 23, 2015, the Equality Act was introduced in Congress, expanding the Civil Rights Act of 1964, to include protections for LGBT individuals in:
  - employment,
  - housing,
  - public accommodation,
  - public education,
  - federal funding,
  - credit, and on
  - juries.

  American businesses, including Levi Strauss, Dow Chemical, Apple, IBM, Oracle, Orbitz, American Airlines, Facebook, Google, Microsoft, and General Mills immediately embraced the proposed Equality Act. Exemptions are still available in limited circumstances to allow a religious organization to make hiring and other decisions based on religious identity. However, the religious exemptions available under the Restoration of Religious Freedom Act cannot be used for carte blanche discrimination.

- **Houston Equal Rights Ordinance (HERO) Repealed:** On election day, November 3, 2015, through a ballot initiative, voters in Houston, Texas, repealed a one-year ordinance providing employment, housing, and accommodation protections for the LGBT community. Houston is now the largest U.S. city without such protections. (A pressing question is whether basic human rights should ever be put to a public vote.) In the aftermath of the HERO defeat, cities and states around the country are facing similar potential ballot measures to either block future protection laws or to repeal existing ones. This politically charged issue is dividing people within the ranks of the LGBT community in Michigan, for example, which was one of the 13 remaining prohibition states immediately preceding the Obergefell decision.

Same-sex dissolution?

The short and easy answer is that with marriage equality and the universal recognition of same-sex marriages, same-sex couples whose marriage fails *should* have the same access to family law/domestic relations courts as do heterosexual couples. However, many courts and judges may be unfamiliar with addressing the somewhat unique family creation and relationship nuances of same-sex families. Judicial bias may prevent true access to justice and equity for some of these families seeking dissolution. Same-sex couples could face insensitivity, at best, and outright hostility, at worst. Recognizing that most judges work hard every single day to know the law, keep up with new legal

Native American Tribes:

More Exceptions

Because of Native American tribal sovereignty laws, the U.S. Constitution and, by extension, the *Obergefell* decision, is not binding on Native American reservations in "Indian Country." As many as 13 of the 566 recognized Native American tribes in the United States allow same-sex marriage. ("Same Sex Marriage Isn't Law of the Land from Sea to Shining Sea," NPR Aug. 5, 2015). For example, Navajo lawmakers enacted the Dine Marriage Act, a law prohibiting same-sex marriage and refusing its recognition.

UPDATE: Nov. 30, 2015—*The Washington Post* reports that Cleo Pablo, of Arizona's Ak-Chin Indian community, filed a lawsuit to force her tribe to recognize her May 2015 marriage to her longtime partner, Tara Roy-Pablo. Her marriage is void under tribal law, disqualifying her from employee benefits covering her wife and their two children and prohibiting her from utilizing tribal housing while living with her wife. Even the tribe's own Law and Order Code Committee recommended recognition of same-sex marriages, but the council refused to follow the recommendation because of "personal beliefs of some of the members of the council."

—R.A.R.

developments, and maintain judicial neutrality while they render unbiased decisions, same-sex marriage and the inevitable dissolution of the marriage that may follow already present challenges to the courts.

In fact, many same-sex clients or potential clients seeking dissolution of their relationships do not understand that with the *Obergefell* decision they now have access to court house doors that previously were closed to them. However, there must be a marriage, for courts to assume jurisdiction to dissolve it. Unmarried same-sex couples that break up must still work through a patchwork of ADR efforts, potential custody litigation, and other civil suits to resolve their child custody, support, property, and related disputes.

Questions without immediate answers

- For spousal-support calculations, what is the duration of a same-sex marriage? Is it from the date of the inception of the relationship, which could be many years or decades ago, or from the date of marriage itself?
- Is the answer equitable for a long-term relationship where marriage was not available and the actual marriage is of very short duration?
- In a dissolution action, how will the courts exercise their equitable power when measuring the length of the marriage versus the length of the relationship?
- Will courts recognize both parents who had a role in raising the children, even though there was not a long-term marriage?
- What parentage presumptions are available for children born prior to the same-sex marriage?
- Will COBRA benefits be available to a same-sex recently divorced spouse?

The Push-back

Shortly after the U.S. Supreme Court ruling in *Obergefell*, many counties in Kansas, Idaho, Alabama, and Texas, to name a few, refused to issue marriage licenses to same-sex couples. Some elected officials and politicians were outspokenly opposed to the decision:

Mike Huckabee, former governor of Arkansas and Republican candidate for president in 2016: "This flawed, failed decision is an out-of-control act of unconstitutional judicial tyranny" ("U.S. Gay Marriage: Reaction to Ruling," BBC June 26, 2015).

Ken Paxton, Texas Attorney General, offered free legal defense for state workers who refuse to marry couples on religious grounds, calling the decision "a lawless ruling." ("US Gay Marriage: Texas Pushes Back Against Ruling," BBC June 29, 2015).

Rowan County Clerk Kim Davis refused to issue marriage licenses to any applicants, claiming that her First Amendment rights were compromised based upon her religious beliefs against homosexuality. Davis was jailed for five days before promising not to interfere with same-sex marriage license applicants in her jurisdiction.

On November 7, 2015, the newly elected governor of Kentucky announced that he would remove all county clerks' names from marriage license forms statewide in an effort to address the First Amendment violation claims of Ms. Davis. Those changes took place in January 2016. Marriage licenses are now being issued once again in Rowan County and statewide in Kentucky to all applicants, regardless of the couple's gender.

It should be noted that most, if not all, state workers, such as county clerks and other marriage license issuers, as well as judges and others authorized to perform marriages, swear an oath to uphold the Constitution of the United States and the constitution of the state in which they work. A refusal to perform their duties, in spite of Texas AG Ken Paxton's encouragement to refuse to issue licenses or to marry same-sex couples, could subject state workers to job loss for violation of their oaths. It is likely that litigation will ensue around the country as officials and government workers refuse to issue licenses or perform marriages.

— *R.A.R.*

- Must employers offer health care coverage and other benefits to families of same-sex couples?
- How will the Social Security Administration treat long-term relationships versus short-term marriages (less than the 10-year threshold in the event of divorce, or less than nine months if one spouse dies during the marriage) when looking at retirement or survivor benefits?
- How will duration of the relationship be determined for Title 2 and Medicare claims? The Social Security Administration's Program Operations Manual System (POMS) released on April 30, 2015, states:

  An applicant for spouse's benefits must meet a one-year duration-of-marriage requirement. See RS 00202.001. An applicant for surviving spouse benefits must meet a nine-month duration-of-marriage requirement. See GN 00305.100.

However, some alternatives and exceptions to the duration requirement exist.

If the claimant alleges that: (1) the relationship began as a nonmarital legal relationship (i.e., registered domestic partnership or civil union) but it was later converted to a marriage; (2) he or she had more than one nonmarital legal relationship with the NH [number holder, i.e., Social Security number holder]; or (3) he or she had a combination of one or more nonmarital legal relationships and marriages to the NH, which may in total meet the duration-of-marriage requirement, then refer the claim for a legal opinion on the duration-of-the-relationship requirement.

Note: In other words, the manner in which relationships are measured to quality for government benefits is a developing issue as various agencies transition from heterosexual marriages only to universal marriage equality and the various ways of determining relationship length. The answers to these challenging questions can drive creative lawyering, thinking outside the box, and should lead to the use of ADR to address and resolve same-sex dissolutions whenever possible.

Alternative dispute resolution (ADR)

One of the best ways to ensure an amicable approach to same-sex-marriage dissolution and related issues is to maintain control of the process. This is best accomplished through ADR—facilitative mediation or other mediation processes, collaborative law, arbitration or private judge services—in other words, anything but litigation in open court. Nevertheless, it was precisely litigation in *Loving* and *Lawrence* and *Windsor* and *Obergefell* that brought about the sweeping changes to marriage and LGBT rights.

For decades and probably centuries, and certainly before same-sex marriage developed in the United States between 2004 and 2015, same-sex couples came together and created their lives and families. They purchased homes, bore or adopted and raised children, acquired assets, and built savings and retirement plans. They divided up duties; some spouses staying at home to raise children, while others joined the workforce to support the family. When relationships broke up, there was very little legal structure to help with the dissolution process. Often, the party with more money had more power, and the other party ended up with an inequitable result. Lack of money and power translates into lack of access to legal counsel and, ultimately, lack of access to justice.

At best, a real-estate-partition action might help divide real estate that was jointly titled. Without joint title, the nontitled spouse would likely be evicted, as no more than a tenant with few rights. The nonearning spouse had no ERISA protections to ensure a share of retirement plans and some financial security for the future. A claim-

and-delivery action or other civil suit might address personal property division, and a breach-of-contract action could possibly address other broken promises.

Many states do not recognize "palimony" claims. Spouses who raised children, but have no biological or legal connection to their children, were and are routinely cut off from their children and their important parent-child relationships. With post-*Obergefell* access to the legal system, same-sex couples seeking dissolution should have the same rights as other divorcing couples to address all issues arising out of their relationships.

Stepparent or other adoption matters

Who can adopt?

- For example, in Michigan, only heterosexual single individuals or married couples can adopt—*DeBoer* pre-*Obergefell:* Michigan's adoption code precluded same-sex couples from adopting children.
- Post-*Obergefell:* Same-sex spouses can adopt (*DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

In Georgia, any adult at least 25 years old *or* married and living with a spouse can adopt. Ga. Code Ann. § 19-8-3(a). Is second-parent adoption permitted in Georgia? See *Bates v. Bates*, 317 Ga. App. 339, 341 (2012).

- **Heterosexual spouses:** A husband is presumed to be a legal father if married at the time of conception or birth of the child (in Michigan and many jurisdictions).
- **In some jurisdictions,** such as Virginia, both spouses in a married same-sex couple, giving birth in Virginia and placing both spouses' names on the birth certificate, are deemed legal parents, regardless of who gave birth.
- **Same-sex spouses:** Post-*Obergefell*, the same rationale should apply, but this is unclear and untested.
- **Safest bet:** Stepparent adoption may be wise in many jurisdictions.
- **Insurance policy** for legal rights to children.
- **In Michigan,** a couple must be married for one year before filing for stepparent adoption.

ART is a path to parenthood that many same-sex couples seek

More pushback—2015 adoption agency law in Michigan

- "The department shall not take an adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide services that conflict with, or provide services under circumstances that conflict with, the child placing agency's *sincerely held religious beliefs* contained in a written policy, statement of faith, or other document adhered to by the child placing agency." MCL 400.5a. See also MCL 710.23g-e
- Sincerely held religious beliefs.
- Faith and non-faith-based adoption agencies receive government funding.
- Timing of passage—2015, right around the time of the *Obergefell* decision.
- Query whether there will be constitutional challenges to this and other similar legislation?

What is going on in Alabama?

Nov. 16, 2015—The National Center for Lesbian Rights filed a *certiorari* petition with the U.S. Supreme Court, seeking to stay the Alabama Supreme Court's decision, *Ex parte E.L.*, No. 1140595, 2015 WL5511249 (Ala. Sept. 18, 2015), refusing to recognize her *valid Georgia second-parent adoption* of the three children, ages 12, 10, and 10, that she and her former partner were raising together. As of the date of this article, she has not seen her children for seven months. The Alabama Supreme Court's decision

in *Ex parte E.L.* is unprecedented in that it is the first time any court has refused to recognize a same-sex adoption from another state. Under the U.S. Constitution's full faith and credit clause, states are required to respect court judgments, including adoption orders issues by courts in other states. The Alabama court's decision flouts a century of precedent on the full faith and credit clause.

Why is marriage important in relation to estate planning?

For married spouses, there are 1,138 federal benefits under the U.S. Code:

- Unlimited gift and estate tax exemption for transfers between spouses;
- Ability to "port" spouse's unused estate tax exemption at first death;
- Ability to roll over IRA or 401(k) inherited from deceased spouse;
- Priority to inherit from spouse 401(k)s, 403(b)s, and other ERISA plans;
- Ability to file joint income tax returns (may or may not be financially beneficial);
- Ability to receive Social Security survivor benefits, disability, and retirement income;
- Ability to receive spousal military and other veterans benefits;
- Ability to apply for a fiancée or spousal green card if immigrating to the United States.

Example: Under Michigan marriage law, benefits include:

- Michigan real property owned by spouses jointly by the entireties is super-protected from creditors;
- Spouses have an insurable interest in each other;
- Spouses have priority to:
  - serve as personal representative of each other's estate,
  - inherit one another's estate if there is no will,
  - make funeral and burial arrangements,
  - serve as guardian or conservator upon spouse's incapacity,
  - visit each other in the hospital.

Assisted reproductive technology

Assisted reproductive technology (ART) is the technology used to achieve pregnancy in procedures such as fertility medication, artificial insemination, in vitro fertilization, and surrogacy. Given the fact that same-sex couples cannot biologically produce offspring between themselves (yet), ART is a path to parenthood that many same-sex couples seek. For more information, consult the ABA Family Law Section ART Committee at http://www.americanbar.org/groups/family_law.html or one of the national organizations listed in our bibliography on page 41.

Transgender legal issues

A rapidly developing area of the LGBT equality and civil rights movement involves transgender and gender nonconforming issues. Popular culture, including the HBO television series, *Orange Is the New Black*, about a bisexual preppy in a woman's prison, and the Emmy Award winning Netflix television series, *Transgender*, about a father of three adult children coming out as a transgender individual, are raising awareness, providing education, and changing hearts concerning transgender issues. Caitlyn Jenner's transformation and public coming out also has brought transgender issues into the news.

Transgender issues impact family law matters, whether it is a couple dissolving a marriage in connection with a coming out, or parents dealing with a transgender child, or similar legal challenges involving a transgender individual. Education, therapy, patience, open-minded judges, parents, and attorneys are all necessary

to address emerging transgender matters as they impact the families we serve. For additional resources, see our bibliography on page 41.

Conclusion

Justice Anthony Kennedy concluded his opinion in *Obergefell* with these words:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right. **FA**

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