

Marriage for All

The legal impact of *Obergefell v. Hodges* in Texas.

BY ELIZABETH BRENNER

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 Anthony Kennedy,
*Obergefell v. Hodges*¹

On June 26, 2015, the U.S. Supreme Court extended marriage equality nationwide. The decision, *Obergefell v. Hodges*, addressed two questions: whether the 14th 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. In doing so, it not only issued a directive to states requiring the issuance of marriage licenses to same-sex couples but also 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. *Obergefell*, who married his partner of more than 20 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 11 years ago, Massachusetts became the first state in the country to authorize same-sex marriage.² In 2013, the U.S. Supreme Court ruled unconstitutional a portion of the federal Defense of Marriage Act that prohibited federal recognition of lawfully performed same-sex marriages.³ The ruling, *United States v. Windsor*, extended most federal benefits to same-sex couples who were legally married in states recognizing marriage equality.

Same-sex marriage is new to Texas and to much of the rest of the country; thus, much remains to be decided and resolved. It will largely fall to lawyers, judges, and legislators to address the consequent legal unknowns. This article discusses some of the impacts of the monumental ruling.

Family Law

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—from automatic inheritance rights to homestead protections—that were previously granted only to opposite-sex couples, fundamental questions about the marital relationship remain to be determined.

For starters, is the *Obergefell* ruling prospective or retroactive? For many couples, the answer to this question will determine when the marital relationship began. This will, in turn, impact determinations of separate and community property with respect to same-sex couples. It is also relevant to determinations of benefits such as pensions and Social Security.

This question becomes even more complex 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.⁴ Is it possible for a couple to meet these criteria when Texas prohibited their marriage? This question is already before the Travis County Probate Court. In February, Travis County Judge Guy Herman ruled that Texas's same-sex marriage ban was unconstitutional, allowing the court to further consider whether a Travis County woman was informally married to her deceased partner.

Parent-Child Relationships

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

Texas law presumes a man is the father of the child if he is married to the mother when the child is born.⁵ This marital presumption could also be applied to married lesbian couples. The question, however, is whether Texas courts will treat same-sex couples as they do opposite-sex couples. Other states addressing this issue differ in their approach. In May, the Massachusetts Supreme Judicial Court found that the presumption applied to a lesbian couple who was married at the time of the birth of the child.⁶ Less than two weeks later, a New York court ruled that the presumption was inapplicable because of the lack of a biological relationship between the nonbirth mother and the child.⁷ Until such issues are resolved in Texas, a nonbiological 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.⁸ For gestational agreements to be valid, the law requires for the intended parents to be married.⁹ 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.

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 and Medical Leave Act or Employee Retirement Income Security Act. Prior to *Obergefell*, the U.S. Department of Labor extended these protections to all same-sex married couples regardless of state of domicile.¹⁰

Texas still allows discrimination in employment and public accommodations based on sexual orientation or gender identity. *Obergefell* did not address Title VII of the Civil Rights Act or employment discrimination. However, less than one month following the *Obergefell* decision, the Equal Employment Opportunity Commission ruled that workplace discrimination based on sexual orientation is sex discrimination under Title VII and is therefore prohibited under federal law.¹¹

Religious Objection to Same-Sex Marriage

Immediately following the *Obergefell* ruling, a handful of Texas county clerks 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 some concerns, most experts agree that the First Amendment pro-

hibits discrimination based on sexual orientation in public accommodations. Texas does not have such a policy, nor does federal law.

hibits discrimination based on sexual orientation in public accommodations. Texas does not have such a policy, nor does federal law.

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. **TBJ**

On the other hand, when an individual acts in an official capacity on behalf of a governmental entity, such as a county clerk, he or she must comply with the law regardless of individual religious views. Several Texas county clerks, including Hood County Clerk Katie Lang, were sued following the *Obergefell* decision for failure to issue licenses to same-sex couples. Lang issued the marriage license shortly after the suit was filed. 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 Colorado¹³ and Oregon,¹⁴ 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.¹⁵ 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.¹⁶ Colorado and Oregon law pro-

hibits discrimination based on sexual orientation in public accommodations. Texas does not have such a policy, nor does federal law.

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. **TBJ**

Notes

1. *Obergefell v. Hodges*, — U.S. —, 135 S.Ct. 1039, 190 L.Ed.2d 908 (2015).
2. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).
3. *United States v. Windsor*, — U.S. —, 133 S.Ct. 2675, 2691, 186 L.Ed.2d 808 (2013).
4. Tex. Fam. Code Ann. CODE ANN. §2.401(a)(West 2006).
5. V.T.C.A., Family Code §160.204(a)(2).
6. *Minor, In re Adoption of*, 471 Mass. 373, 29 N.E.3d 830 (2015).
7. *Paczkowski v. Paczkowski*, 128 A.D. 3d 968 (2015).
8. See Tex. Fam. Code Ann. §160.754 (West 2014).
9. *Id.*
10. <http://www.dol.gov/whd/fmla/spouse/>; <http://www.dol.gov/ebsa/newsroom/tr13-04.html>.
11. <http://www.eeoc.gov/decisions/0120133080.pdf>.
12. SB 2065, 84th Legislative Session (Texas 2015).
13. *Craig v. Masterpiece Cakeshop, Inc.*, 2015 WL 4760453 (2015).
14. <http://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf>.
15. *Id.*
16. *Craig v. Masterpiece Cakeshop, Inc.*, 2015 WL 4760453 (2015).



ELIZABETH BRENNER

is of counsel at Burns Anderson Jure & Brenner in Austin. Her practice includes estate planning, probate, and guardianship. She can be reached at ebrenner@bajb.com.



CLASSIFIED ADVERTISING

*Place your ad today in the
Texas Bar Journal for fast results!*

Place your ad today to rent or lease, sell your
law library, look for a job, or hire a lawyer.

For more information, call (800) 204-2222, ext. 1834.