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After

OBERGEFELL

THE SUPREME COURT RULING SETTLED THE ISSUE OF MARRIAGE EQUALITY—WHILE UNSETTLING OTHER LEGAL MATTERS

BY G.M. FILISKO

PHOTOGRAPH BY WAYNE SLEZAK





The word *patchwork* may be the best way to describe the layers of laws that governed the relationships of same-sex couples before June 26, 2015, the day the U.S. Supreme Court recognized a constitutional right to marriage for gay couples in *Obergefell v. Hodges*.

Robert Stanley, a partner at the family law firm of Jaffe and Clemens in Beverly Hills, California, has personally navigated that patchwork. When he moved to California about 10 years ago from Georgia, he went from a state with no legal status for same-sex couples to one with domestic partnership status. Shortly after the California Supreme Court's ruling that recognized same-sex marriage went into effect—in mid-June 2008—Stanley and his partner got married.

Then the state's voters approved Proposition 8, the constitutional ban on same-sex marriage. That left Stanley's marriage legal but prevented additional same-sex couples from marrying. Challenges to Prop 8 sprouted, and same-sex marriages again became permissible under state law in 2013.

California was hardly the only state flopping around like a beached fish when it came to the legal status of same-sex couples. *Obergefell* brought a conclusive end to that thrashing, and in the first four months after the decision, 96,000 same-sex couples married, according to the

Williams Institute at the University of California at Los Angeles School of Law. Those unions added an estimated \$813 million to state and local economies and \$52 million in state and local sales tax revenue.

However, *Obergefell* didn't foreclose debate on the multitude of legal issues that arise from marriage.

"I felt that once there was some U.S. Supreme Court case or national recognition of marriage that didn't have any loopholes, everything would be fixed," Stanley recalls. "But *Obergefell* didn't change the fact that existing relationships have been through a roller coaster of legal possibilities, and all those things are playing into cases at dissolution time."

It's not just during breakups that these issues are emerging. They're surfacing when babies are born or adopted, when spouses pass away, and when all the other life events that affect families take place.

"Marriage isn't for everybody, and getting married creates a whole new set of rights and also responsibilities," says Allen Tullar, chair of the matrimonial and family law group at Gross McGinley in Allentown, Pennsylvania. "The things you have to think about are whether you need a prenuptial agreement, what marital property is, and issues like spousal support and alimony. That's all uncharted territory."

In the year since *Obergefell*, courts have begun resolving these issues, though some answers are

as yet elusive. For instance, how to divide property accrued during a long-term relationship of a same-sex couple divorcing after only a year of marriage? And what happens when a party asserts rights under federal or state religious freedom laws to decline to engage in activities for or related to parties in same-sex marriages?

"I think *Obergefell* was wrongly decided, and I'd welcome the overturning of that decision," says Jeremy Tedesco, senior counsel for the Scottsdale, Arizona-based Alliance Defending Freedom and director of its Center for Conscience Initiatives. "But the question for the nation is: Now that it's decided and the prospect of it being overturned isn't very likely, what are we going to do?"

COMPLIANCE IS THE RULE

Most states are working to implement *Obergefell* with few hiccups. That's the assessment of Cathy Sakimura, family law director at the National Center for Lesbian Rights in San Francisco, who says there's been "mostly compliance" with the decision. But that's not to say there are no contested issues.

"I had predicted—and I don't know how many people were paying attention—that a lot of states were going to, of course, allow same-sex couples to get married, but that there would be issues that would follow from that about what their marriage would mean for other laws," notes Douglas

NeJaime, a UCLA law professor and faculty director of the Williams Institute, which researches sexual orientation law and public policy.

Some of the questions arising today center around what may seem like administrative issues, such as which names appear on birth or death certificates. Last August, the National Center for Lesbian Rights filed suit to force Florida to issue birth certificates naming both parties in a same-sex marriage as parents of children born during the union. Florida officials have also declined to include a same-sex spouse on death certificates.

“Of course, death certificates were the issue in *Obergefell*,” Sakimura says. “So to think naming a same-sex spouse on a death certificate wouldn’t be required—that’s shocking.”

However, whom to include on such state records is much more than an administrative issue. When it involves the presumption of parentage, it serves as the foundation for a lifetime of parenting rights and responsibilities. In most states, parentage presumptions flow from the woman who gives birth to a child, with her husband presumed to be the child’s legal father.

NeJaime contends that the marital parentage presumption is currently the biggest unresolved issue stemming from *Obergefell*. “In states like California, Massachusetts and others, it’s clear the presumption does apply,” he says. “It had also been litigated in some states like Iowa before *Obergefell*. But in a lot of other states, where state governments are relatively hostile to same-sex marriage, they’re refusing to apply those presumptions to same-sex couples. They’re refusing to issue birth certificates that list both women as parents. That’s happened in Arkansas, Florida, Indiana and Wisconsin.”

That same-sex couples should get identical parentage presumptions as those of opposite-sex couples seems to NeJaime a “clear and natural result” of *Obergefell*. But he admits the question is complicated because courts have for decades grappled with determining whether parentage is a function of biology or who’s actually parenting a child. Statutes don’t help

ROBERT STANLEY



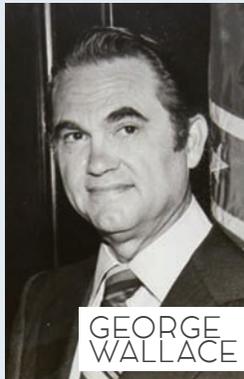
WHEN RULINGS DON'T END THE RUCKUS

Stories highlighting pockets of resistance to *Obergefell*—North Carolina and Mississippi come to mind—have been big news. But scholars say today's backlash is downright tepid compared to the response to other controversial U.S. Supreme Court opinions.

"After *Brown v. Board of Education*, they were blowing things up," says Seth Kreimer, a professor at the University of Pennsylvania Law School in Philadelphia. "There was the mobilization of every resource at the state's disposal in some states. There was private violence. There was public violence. There's been nothing on that level with *Obergefell*."

It was nearly 10 years after *Brown*, in 1963, when Alabama Gov. George Wallace bellowed, "I say segregation now, segregation tomorrow, segregation forever!" As it was then, Alabama is at the forefront of opposition. Three days after the *Obergefell* ruling was published, the state's chief justice, Roy Moore, declared that probate judges in his state weren't to issue marriage licenses to same-sex couples until his court dealt with its previous ban on such marriages. More recently, in early May, Moore was suspended after the Alabama Judicial Inquiry Commission filed a complaint charging that he had "abused his authority" by continuing to oppose same-sex marriage.

However, cases directly disregarding the holding in *Obergefell* are being resolved without much fanfare. On March 4, the Alabama Supreme Court dismissed petitions by a probate judge and religious groups seeking to compel the state to enforce its ban on same-sex marriage. On March 7, the U.S. Supreme Court unanimously and, without signing its opinion, reversed an Alabama high court decision refusing to recognize a same-sex adoption from Georgia.



OTHER UPROAR

That's a stark contrast to the aftermath of other highly contentious opinions. "Resistance to Supreme Court decisions that challenge deeply ingrained social patterns isn't at all uncommon," Kreimer says.

After *Engel v. Vitale* and *Abington School District v. Schempp*, 1962 and 1963 opinions that prohibited prayer in public schools, Kreimer notes, there were efforts to amend the U.S. Constitution.

"There were thousands of school districts that ignored the decisions and held school prayer for decades," adds Michael Klarman, a constitutional scholar at Harvard Law School. "Abortion would be another example where there was massively greater resistance. ... Opponents have been doing things like trying to shut down abortion clinics and getting spousal permission. You still see it today with Texas trying to shut clinics down with ambulatory surgical center requirements."

One thing that's missing today, Klarman asserts, is fiery opposition leaders willing to risk their own freedom.

"I don't think the resistance can survive very long because you're going to be subject to a federal injunction and you'll go to jail—and I don't see a lot of people doing that," he says. "Resistance is longer lasting when you have politicians encouraging it."

Given the history of discord, Kreimer is surprised by how quickly *Obergefell* has been accepted. "The opponents are no longer speaking in terms of resisting the legality of same-sex relationships," he says. "One of the things that strikes me, taking the broad historical view, is how relatively mild this resistance is compared to desegregation, abortion rights or school prayer."

when they include terms such as *natural father* or *biological father*.

"Does that mean what it says?" asks NeJaime. "In California, courts have said natural parent means legal parent. In other states, natural means biological. The argument in response is that while that might be true, nobody asks heterosexual couples who the father of children born during their relationship is. When there's a sperm donor, nobody asks if it's the husband's sperm."

"States haven't used the biological definition of parenthood, so it doesn't seem like they can apply such a definition to exclude lesbian couples the right to the marital presumption of parentage."

Varying state laws portend state-by-state challenges, and there may not be uniformity anytime soon.

"It'll have to be recognized individually in each state, and it'll be a long time before there's clarity," Sakimura predicts. "For that reason, we're recommending same-sex couples having children do an adoption or get a judgment of parentage, which is available in many states."

This issue may also be resolved at different paces for different-gendered couples. Because parentage presumptions flow from women, NeJaime says cases with male couples could present more challenges.

"For male couples, there's no woman from whom to provide parentage," he explains. "It's an interesting question of how courts will deal with same-sex parentage with male couples. That'll be decided at a later time."

DIVORCE WOES

Dissolution cases are also fertile ground for legal debates. Stanley says that, post-*Obergefell*, if couples haven't taken advantage of marriage, they have a weak argument when making marital-type claims. "I think that's frankly for the better," he notes.

On the other hand, courts may see more parties making marital claims by relying on the assertion that long-term relationships should be recognized as common-law marriages.

"One issue that has been coming up is common-law marriage in common-law-marriage states, where the facts that led to the common-law marriage arose before *Obergefell*," explains Sakimura. "Cases in Pennsylvania, Texas and Utah have been resolved favorably. Courts have essentially said, 'Yes, we do have to recognize common-law marriages.' It's a bigger issue than in

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just those states because all states recognize others' common-law marriages." The matter is still being litigated in the context of divorce cases in different areas of Texas, where the issue has been resolved favorably in cases involving the estate of a deceased spouse.

Recognition of common-law relationships doesn't only affect dissolutions. It can arise in a variety of contexts, such as a surviving spouse seeking to become the administrator of an estate and to inherit. Sakimura expects most states to recognize common-law marriage in those circumstances, but she admits there may be holdouts—Alabama for one.

"It does seem like that case may not be successful because of the political climate," Sakimura says. "It depends on the state."

Elizabeth Schwartz, who heads a Miami Beach firm bearing her name that specializes in family law and mediation, is seeing dissolution issues that are exceptionally messy, and she believes resolving them will be case- and judge-specific.

Schwartz has lots of clients who've been together for many years but are now breaking up. One couple in an acrimonious divorce was together for 32 years and married for three.

The default position for some judges may be that theirs was a short-term marriage, though the couple was together nearly three decades before Florida law permitted them to marry.

"You have to ask the court to think expansively about what this relationship is and to use principles of equity and fairness," says Schwartz. "As the lawyer who handles these cases, it makes me nervous to see precedents on either side because they're so case-specific. In one case, I'll have the guy who manages the domestic sphere, and he'd be rewarded zero after four years of marriage. In another case, I represent the monied spouse, and the couple didn't get married when they could have, so that client might not want to have marital rights imputed. There are a lot of gray areas with these cases."

When children are involved, answers can be equally challenging. Schwartz represents a woman who's fighting for parental rights for one of the children born during her now-defunct relationship. Before 2010, Florida law didn't permit both parties in a same-sex couple to be named as a child's legal parents. When the law changed that year, Schwartz's client didn't move to adopt the child.

"She just figured everything would be OK, so she didn't solidify her relationship to one of her children," Schwartz explains. "They married three years after they had that child, and they still never took any protective measures. Now my client's fighting for that child. The lawyer for her ex is saying, 'You didn't do an adoption, and you don't have any legal right to that child.'"

Schwartz says she knows of many similar stories. "What we're seeing is a combination of the effects of marriage coming too late and generally misinformation," she says. "A lot of folks think, 'Oh, I got married; therefore, I now have parental rights over that biological child my partner already has.' This is nothing new. Everybody gay and straight trusts their partner—that's why divorce lawyers make money. But certainly these issues are unique and so thorny that there's not one answer as to how this would play out."

Some lawyers aren't helping achieve legal consistency, adds Schwartz. It makes her "crazy beyond crazy" when lawyers—particularly members of the lesbian, gay, bisexual and transgender community—take advantage of the legal opacity to make arguments that belie the facts

CATHY SAKIMURA



of a couple's relationship.

"I can't even keep my composure with the degree to which people in our community are making homophobic arguments," she fumes. "There's the argument: 'Look, the kid wasn't adopted by you, and we weren't married.' The kid wasn't adopted because they couldn't do an adoption! And they weren't married because they couldn't get married! Yes, we have a duty to zealously advocate for our clients, but we also have to make ethical arguments we can live with from a moral perspective.

"With heterosexual divorce, the law is more settled," says Schwartz. "There's still a degree to which gay divorce exists in the wild, wild West. There are still questions of the date of the marriage, parental rights and the lack of a biological connection. And you could just land in front of the wrong judge."

ISSUES ON THE HORIZON

Lawyers are also envisioning questions nobody has yet raised. States will have to determine what to do with pre-marriage-equality laws intended to provide same-sex couples benefits similar to those within marriage. "If your state offers some status other than marriage to same-sex couples," Stanley notes, "the question is whether it now should offer that other status to opposite-sex couples."

Take California, where domestic partnerships are still available, Stanley says, but only to same-sex couples and opposite-sex couples in which one of the parties is 62 or older. Stanley believes the state could opt to eliminate domestic partnerships altogether because it's consistent with the reasoning of *Obergefell*. Unless that happens, parties who can't take advantage of the status may challenge its inconsistent application.

"I feel like at this point that [the inconsistency is] unconstitutional," Stanley says. "It's a status not being offered to younger, opposite-sex couples. I haven't seen that challenged yet. One way or the other, it's going to have to be corrected."

Domestic partner benefits will also likely be re-evaluated by businesses, with some eliminating them altogether, Tullar predicts. "It seems to me they'd be able to do that without any blowback that they were discriminating against the LGBT community as long as they made it clear they weren't going to permit any employee to sign a partner up for benefits," he states. "Marriage would be a prerequisite. I've not seen that happen yet."

NeJaime is worried about another business-related issue that he admits seems mundane, but that could seriously harm those unaware of the risk: Many states and municipalities don't have laws that prohibit discrimination on the basis of sexual orientation.

"One thing we're spending a lot of resources on is anti-discrimination laws," he notes. "In a lot of states, a same-sex couple might get married, and that could out them to their employer. Or they might seek spousal benefits, which could also out them. In many states, they could be fired. But also in many states,

they're not going to have a claim on the basis of sexual orientation because the state doesn't have that law.

"We've been talking a lot about resistance to *Obergefell*. But a major issue in furthering what *Obergefell* does is to enact anti-discrimination laws, which will be a very long campaign, I think."

WHOSE LIBERTY?

Obergefell didn't just trigger legal questions; it also triggered new laws. The American Civil Liberties Union notes that by the end of April, nearly 200 anti-LGBT bills had been introduced in 32 states.

The most difficult to predict may be so-called religious liberty or religious freedom laws. The substance of such laws varies from state to state, with some providing safe haven only for discrete groups.

The most publicly discussed versions of these laws, passed in North Carolina and Mississippi, have stirred not only LGBT outrage but cancellation of business plans and rock concerts, as well as DOJ threats to withdraw federal school funding.

The laws typically come about as a defense against a claim of discrimination. That means that in many states they're not even necessary, because there are no anti-discrimination laws protecting the LGBT community.

"If there isn't any anti-discrimination law that requires business, institutions or individuals to provide jobs, services or housing to members of the LGBT community, then you don't have a conflict," explains Alan Brownstein, a professor emeritus at the University of California at Davis School of Law. "You don't have to raise a religious liberty defense because there's no obligation to provide those services in the first place."

According to the ACLU, 17 states and the District of Columbia have anti-discrimination laws that include sexual orientation, and five states provide more limited anti-discrimination protections. "There, we can have a conflict between those laws and businesses, institutions and individuals who argue that complying with those requirements would



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violate their religious conscience," Brownstein says.

That's where Tedesco from the Alliance Defending Freedom has been devoting much of his attention, working on behalf of clients who argue their religious beliefs preclude them from participating in activities that intersect with same-sex marriage.

"Business owners are asked to create and disseminate expression related to same-sex marriage; and where our clients don't agree with the message and decline, they get sued under sexual orientation laws," he explains. "Our cases involve free speech, free expression and the free exercise of religion. The basic principle involved in these cases is that you have a right to be free from compelled speech."

If Tedesco's clients are denied their First Amendment rights, he argues, there's no way to prevent that right from being taken from other Americans in circumstances unrelated to marriage.

"The conscience principle applies across the board," Tedesco says. "The culture at the moment—that says if you're opposed to redefining marriage, you must be silenced or pushed out of a job—isn't the one we want in America because it can be turned around on other people."

Brownstein says there really isn't much settled law that would highlight how these issues would be resolved. NeJaime agrees and suggests state lawmakers may have

to come up with solutions.

That's possible, says Tedesco. But he has yet to see legislation both sides could live with.

"A lot of the secular-left groups that are advancing the issue on the other side are saying, 'We won't accept any religious exemptions,'" he insists. "Thankfully, constitutional rights aren't subject to a vote. So if they violate my rights, I go to court. And I'm not too secure in the legislatures' ability to resolve this issue."

For these debates to be settled, Brownstein believes both sides need to recognize their opponents are acting on deeply held beliefs—though he recognizes that's hard to envision happening today.

"I see both sides of the debate, and I take the position that urges a middle ground," he says. "Part of what's holding things up, I think, is that there are two groups of people, each of which thinks the other side is engaging in wrongful conduct."

"It would be helpful if people recognized that if we're going to live in a free society where there's liberty and there are rights for everybody, you have the right to act wrongly in the eyes of other people,"

he says. "But whether we get there ..."

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