



BATON ROUGE BAR ASSOCIATION • JULY 21-23, 2016  
POINT CLEAR, ALABAMA • GRAND HOTEL MARRIOTT RESORT

# SAME-SEX MARRIAGE: NEW RULES / NEW LAWS

## SPEAKERS:

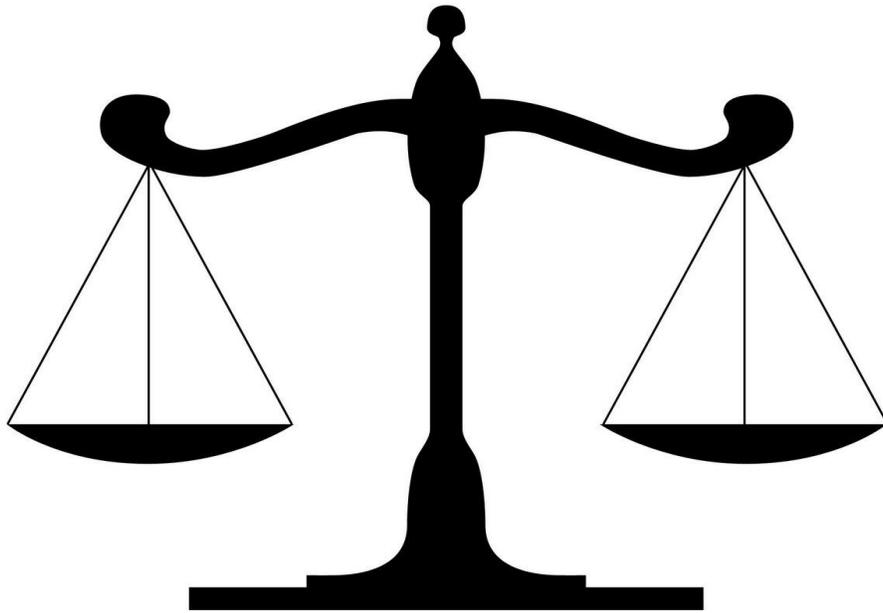
JUDGE PAM BAKER, JUDGE CHARLENE DAY, JUDGE HUNTER GREENE,  
SEN. DANIEL A. CLAITOR AND PROFESSOR ANDREA CARROLL

**FRIDAY, JULY 22, 2016 • 9 - 10 AM**

# Same-Sex Marriage: Issues and Trends

## BRBA Bench Bar Conference

July 22, 2016



Prepared by:

**Andrea B. Carroll**

**Donna W. Lee Professor of Family Law**

**& C.E. Laborde, Jr. Professor of Law**

**LSU Law Center**

**Baton Rouge, LA 70803**

**(225) 578-4254**

**acarroll@law.lsu.edu**

## Table of Contents

<b>I.</b>	<b><i>Obergefell</i> and its Impact.....</b>	<b>3</b>
<b>II.</b>	<b>Entry into the Marital Relationship .....</b>	<b>5</b>
<b>A.</b>	<b>Same-Sex Marriage.....</b>	<b>5</b>
<b>B.</b>	<b>Other Marital Relationships .....</b>	<b>7</b>
<b>III.</b>	<b>Divorce .....</b>	<b>8</b>
<b>IV.</b>	<b>Children .....</b>	<b>10</b>
<b>A.</b>	<b>Filiation .....</b>	<b>11</b>
<b>B.</b>	<b>Custody and Visitation .....</b>	<b>13</b>
<b>C.</b>	<b>Adoption.....</b>	<b>14</b>
<b>V.</b>	<b>Marital Property .....</b>	<b>16</b>
<b>A.</b>	<b>The Community Property Regime and Retroactivity.....</b>	<b>16</b>
<b>B.</b>	<b>Unintended Consequences and the Rights of Creditors .....</b>	<b>19</b>
<b>VI.</b>	<b>Spousal Support .....</b>	<b>20</b>
<b>VII.</b>	<b>Taxation .....</b>	<b>20</b>
<b>VIII.</b>	<b>Conclusion .....</b>	<b>21</b>
	<b>Appendix A: Timeline of Same-Sex Marriage Legalization .....</b>	<b>23</b>
	<b>Appendix B: Geographic Comparisons .....</b>	<b>27</b>
	<b>Appendix C: SR 143 Directing Louisiana State Law Institute to Study Same-Sex Marriage .....</b>	<b>27</b>

## I. *Obergefell* and its Impact

In June 1958, two Virginia residents drove across the Potomac River into the District of Columbia to be married.<sup>1</sup> The honeymoon for these Virginia newlyweds was, however, short-lived. In October 1958, just four months after celebrating their nuptials, a grand jury in Caroline County, Virginia, where they maintained their marital domicile, indicted the lovers, as their marriage violated Virginia criminal statutes. These two Virginia lovers were, of course, the Lovings. And their fight to have their convictions under Virginia’s antimiscegenation statute overturned led the Supreme Court of the United States to declare that to “deny this fundamental freedom [to marry] on so unsupportable a basis as...racial classification...[is] so directly subversive of the principle of equality at the heart of the Fourteenth Amendment ... as to deprive all the State’s citizens of liberty without due process of law” and “[that] the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.” The Supreme Court’s landmark decision in *Loving v. Virginia* stripped the 16 remaining states with civil or criminal prohibitions against interracial marriage of the authority to enforce those laws, thereby redefining the concept of marriage for a significant portion of the United States.<sup>2</sup>

In July 2013, two Ohio residents flew across the Cumberland Gap to Baltimore, Maryland and were married.<sup>3</sup> Much like the Lovings, their honeymoon was also short-lived, ending with the death of one of the spouses – John Arthur – a mere three months after the nuptials.<sup>4</sup> When the surviving spouse – James Obergefell – sought to be listed as such on his spouse’s Ohio death certificate, he was denied that right under Ohio law. Obergefell’s fight to have his name listed on his late spouse’s death certificate (consolidated with the cases of 13 other same-sex couples) led the Supreme Court of the United States to declare that “same-sex couples may exercise the fundamental right to marry in all States...[and] that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”<sup>5</sup> The Supreme Court’s decision in *Obergefell v. Hodges* stripped the 14 remaining states with prohibitions against same-sex marriage of the authority to enforce those laws, thereby redefining the concept of marriage for a significant portion of the United States.<sup>6</sup>

Neither the *Loving* nor the *Obergefell* decision can be examined in a vacuum. Both decisions seem, in large part, to represent the culmination of a gradual, incremental paradigm shift in society’s view of the marriage relationship. (See Appendix A for a timeline describing that shift.) With regard to interracial marriage, for instance, prohibitions on interracial sexual activity and marriage in (what would be) the United States first began to appear during the colonial period,

---

<sup>1</sup> *Loving v. Virginia*, 388 U.S. 1, 2, (1967).

<sup>2</sup> JOHN DEWITT GREGORY & JOANNA L. GROSSMAN, *The Legacy of Loving*, 51 HOW. L.J. 15, 15-16 (2007).

<sup>3</sup> SANDRA SOBIERAJ WESTFALL, *Grieving Husband in Landmark Gay Marriage Case Carried Beloved’s Ashes with Him for Supreme Court Arguments*, PEOPLE (2015), <http://www.people.com/article/jim-obergefell-center-supreme-court-gay-marriage-case-carried-husbands-ashes-court-for-historic-arguments>.

<sup>4</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594-95 (2015).

<sup>5</sup> *Id.* at 2607-08.

<sup>6</sup> NORA KELLY AND BRIAN RESNICK, *What Are States With Same-Sex Marriage Bans Doing Now?*, NATIONAL JOURNAL (2015), <http://www.nationaljournal.com/politics/what-are-states-with-same-sex-marriage-bans-doing-now-20150626>.

and reached their peak in 1913, when 42 of the then-48 states had laws banning or creating impediments to interracial marriage.<sup>7</sup> Laws against interracial marriage (so-called antimiscegenation laws) were so commonplace and accepted in the U.S. that it was not 1948 that the first successful challenge to such a law successful.<sup>8</sup> More importantly, although many writs were sought and denied before *Loving* was decided, it was only after the majority of states had gradually abandoned their antimiscegenation statutes that the Supreme Court stepping in and sounded the death knell for these marriage prohibitions.<sup>9</sup> The decision in *Loving* was reflective of a growing acceptance of interracial marriage by society at large, which continued to grow after the decision struck down legal prohibitions against such marriages.<sup>10</sup> It is important to note, however, that though societal acceptance of such unions did grow in the wake of the *Loving* decision. This “acceptance,” however, has come quite slowly. In 1998, 31 years after *Loving* was decided, public approval of interracial marriages stood at 64%. Even in 2013, interracial marriages were approved by only 87% of the American public. Societal attitudes certainly change over time, then. But the change is slow, and does not always swiftly accompany a change in the law.

In many ways, the rise and fall of prohibitions on same-sex marriage parallels that of the antimiscegenation statutes. Before 1993, only seven states had laws defining the marital relationship as one between a man and a woman.<sup>11</sup> It was not until the Hawaii Supreme Court heard a case challenging a Hawaiian restriction on the issuance of marriage licenses to same-sex couples that the issue truly entered the public consciousness.<sup>12</sup> In the aftermath of the Hawaii Supreme Court ruling that such restrictions were unconstitutional unless the state could show a “compelling reason” for them, the legislatures of 32 states (among them Hawaii) adopted laws defining marriage as a relationship between a man and a woman.<sup>13</sup> This trend continued until, by the year 2000, 40 states had statutory or constitutional restrictions (or both) limiting marriage to opposite-sex couples.<sup>14</sup>

This tide began to turn in 2000, when the legislature of Vermont, though continuing to restrict “marriage” to opposite-sex couples, began recognizing same-sex civil unions. These civil unions went the beyond the benefits of “domestic partnerships” that had been previously afforded in some other states. Vermont’s civil unions provided almost identical benefits as “marriage,” but without the marriage designation. In 2004, Massachusetts became the first state to issue marriage licenses to same-sex couples, as a result of a decision of that state’s high court, finding bans on same-sex marriage unconstitutional. After the watershed decision in Massachusetts, the number of states permitting same-sex marriage (either through legislative action or judicial decision) grew little by little over the years.

---

<sup>7</sup> REBECCA SCHATSCHNEIDER, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimiscegenation*, 14 TEMP. POL. & CIV. RTS. L. REV. 285, 287 (2004).

<sup>8</sup> *Id.* at 288. See also *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

<sup>9</sup> WILLIAM N. ESKRIDGE JR., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1089 (2015).

<sup>10</sup> Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP (2013), <http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx>.

<sup>11</sup> *Same-Sex Marriage Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>.

<sup>12</sup> SONDREA JOY KING, *Ya’ll Cain’t Do That Here: Will Texas Recognize Same-Sex Marriages Validly Contracted in Other States?*, 2 TEX. WESLEYAN L. REV. 515, 520 (1996).

<sup>13</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES.

<sup>14</sup> *Id.*

By early 2015, on the eve of the *Obergefell* decision, only 13 of the United States (and three of its territories) still restricted marriage to opposite-sex couples.<sup>15</sup> (See Appendix B for a comparison to other countries' treatment of the issue.) The *Obergefell* decision is, much like the *Loving* decision (disseminated by the court 48 years earlier, to the very day), reflective of a paradigm shift in the societal definition of marriage. In 1996, only 26% of Americans believed that same-sex marriages should be permitted, a number which, post-*Obergefell*, has risen to 58%.<sup>16</sup>

Now that same-sex marriage has come to Louisiana's shores, the focus must change. What happens now that same-sex marriages performed in other states must be recognized and honored in Louisiana? What happens now that same-sex marriage is permitted even within Louisiana's borders? As officers of the court, as legislators, as practitioners, how do we reconcile the new reality of same-sex marriage with the existing family law regime of Louisiana? What impact will this paradigm shift have on child custody, parental authority, assisted reproduction, or any of the other areas of the law which are so intimately intertwined with the marital relationship?

Of course, the answers to these questions remain largely a mystery as Louisiana moves through this new frontier. Still, some questions have been answered in other jurisdictions where same-sex marriage has been legal for longer, providing us at least some guidance. What follows is a survey and examination of some issues that have arisen in the family law domain in the wake of the legalization of same-sex marriage, and an examination of issues that may be looming on the horizon.

The Louisiana legislature failed to act to address any of the difficult questions raised by *Obergefell* in the 2016 legislative session. However, it did pass Senate Resolution 143, asking the Louisiana State Law Institute to study and make recommendations to the legislature in the form of proposed legislation for revisions of Louisiana laws regarding families, community property, successions, property, and the like. (See Appendix C.) The Law Institute has already begun that work, and it is likely that legislators will be forced to tackle a bill proposing changes to Louisiana law in light of *Obergefell* in the 2017 legislative session.

## II. Entry into the Marital Relationship

### A. Same-Sex Marriage

*Obergefell* is now the law of the land. Still, not all same-sex couples across the United States have had equal opportunity to contract a marriage.<sup>17</sup> A number of public officials

---

<sup>15</sup> *Id.*

<sup>16</sup> JUSTIN MCCARTHY, *U.S. Support for Gay Marriage Stable After High Court Ruling*, GALLUP (July 17, 2015), <http://www.gallup.com/poll/184217/support-gay-marriage-stable-high-court-ruling.aspx/>.

<sup>17</sup> RYAN NOBLES, LINH TRAN & LAURA LY, *Despite Supreme Court Ruling, Same Sex Marriage Conflicts Continue*, CNN (August 20, 2015), <http://www.cnn.com/2015/08/17/us/same-sex-marriage-battles-across-america/index.html>.

responsible for issuing marriage licenses have resigned to avoid being forced to issue them.<sup>18</sup> Others have refused to issue them, in defiance of the law.<sup>19</sup>

Of particular note is the case of the Rowan County, Kentucky clerk Kim Davis who argued that issuing marriage licenses to same-sex couples would infringe upon her religious freedom,<sup>20</sup> even after having been previously ordered by a federal judge to issue the licenses.<sup>21</sup> Ms. Davis managed to grab the headlines and the attention of the national media, but she was not the only clerk in Kentucky refusing to grant marriage licenses to same-sex couples,<sup>22</sup> and other clerks in other jurisdictions did the same.<sup>23</sup> Indeed, the argument for refusing to grant licenses on religious grounds even found support from the Attorney General of Texas who, in a formal opinion, stated that clerks had the right to refuse to issue same-sex marriage licenses if doing so would conflict with their religious beliefs.<sup>24</sup>

Still, the “religious freedom argument” did not prevail. The United States Supreme Court declined (without comment) Kim Davis’ petition for relief.<sup>25</sup> Ms. Davis languished in jail for a time for violating a federal judge’s order,<sup>26</sup> eventually being released with the stipulation that she “not interfere in any way directly or indirectly, with the efforts of her deputy clerks to issue marriage licenses to all legally eligible couples.”<sup>27</sup> Ms. Davis’ crusade has largely faded from the headlines, although she did briefly return to the public eye when it was revealed that she had met with the Pope.<sup>28</sup>

---

<sup>18</sup> TOD STARNES, *‘I am a follower of Christ’: County clerk resigns rather than issue gay marriage licenses*, FOX NEWS OPINION (July 01, 2015), <http://www.foxnews.com/opinion/2015/07/01/am-follower-christ-county-clerk-resigns-rather-than-issue-gay-marriage-licenses.html>.

<sup>19</sup> SARAH KAPLAN AND JAMES HIGDON, *The defiant Kim Davis, the Ky. Clerk who refuses to issue gay marriage licenses*, THE WASHINGTON POST (September 2, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/09/02/meet-kim-davis-the-ky-clerk-who-defying-the-supreme-court-refuses-to-issue-gay-marriage-licenses/>.

<sup>20</sup> PETE WILLIAMS, GABE GUTIERREZ & JON SCHUPPE, *Kentucky Clerk Asks Judge, Again, for a Way Out of Gay-Marriage Order*, NBC NEWS (9/2/2015), <http://www.nbcnews.com/news/us-news/kentucky-clerk-asks-judge-way-out-gay-marriage-order-n420446>.

<sup>21</sup> JAMES HIGDON, *Kentucky Clerk Ordered to Court After Refusing to Issue Gay-Marriage Licenses*, THE WASHINGTON POST (September 2, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/09/01/will-kentucky-clerk-kim-davis-issue-gay-marriage-licenses-after-supreme-court-ruling/>.

<sup>22</sup> *Id.*

<sup>23</sup> *Texas Couple to Sue After Clerk Refuses to Issue Marriage License*, KXAN NEWS/AP (July 2, 2015), <http://kxan.com/2015/07/02/texas-couple-to-sue-after-clerk-refuses-to-issue-marriage-license/>.

<sup>24</sup> SAM FRIZELL, *Texas Attorney General Defies Same-Sex Marriage Ruling*, TIME (June 29, 2015), <http://time.com/3939652/texas-attorney-general-same-sex-marriage/>.

<sup>25</sup> RICHARD WOLF, *Supreme Court Says Kentucky Clerk Can’t Deny Same-Sex Marriage Licenses*, USA TODAY (August 31, 2015), <http://www.usatoday.com/story/news/2015/08/31/supreme-court-gay-marriage-licenses/71463760/>.

<sup>26</sup> ELIZA COLLINS, *Defiant Kentucky Clerk Remains Jailed After Rejecting Deal*, POLITICO (September 3, 2015), <http://www.politico.com/story/2015/09/kim-davis-jail-213307>.

<sup>27</sup> ZACH FORD, *Kim Davis Released From Jail, With Conditions*, THINKPROGRESS.ORG (September 8, 2015), <http://thinkprogress.org/lgbt/2015/09/08/3699360/kim-davis-released/>.

<sup>28</sup> JIM YARDLEY AND LAURIE GOODSTEIN, *Pope Francis Met With Kim Davis, Kentucky County Clerk, in Washington*, THE NEW YORK TIMES (September 30, 2015), [http://www.nytimes.com/2015/09/30/us/county-clerk-kim-davis-who-denied-gay-couples-visited-pope.html?\\_r=0](http://www.nytimes.com/2015/09/30/us/county-clerk-kim-davis-who-denied-gay-couples-visited-pope.html?_r=0).

Closer to home, many in the executive branch resisted effectuating *Obergefell* for as long as possible. But as a result of U.S. District Court Judge Martin Feldman’s June ruling, all Louisiana parishes began and have continued issuing same-sex marriage licenses.<sup>29</sup> Red River Parish Clerk of Court Stuart Shaw delayed issuing same-sex marriage licenses, arguing religious objection. His office subsequently made accommodations to issue them, making same-sex marriage licenses available in all of Louisiana’s parishes.<sup>30</sup>

Further, in the 2016 legislative session, the proposed “Pastor Protection Act” which was intended to safeguard clergy who refuse to perform same-sex marriages was voted down in committee.<sup>31</sup>

## **B. Other Marital Relationships**

The *Obergefell* decision’s impact on same-sex marriage is relatively clear even to the most casual of observers. But the decision also raises interesting questions as to whether the right to marry must extend to other groups currently prohibited from perfecting valid marriages. In the wake of *Obergefell*, many other prohibitions on marriage are already coming under scrutiny.

In August, 2015, the Seventh Circuit Court of Appeals, citing *Obergefell*, overturned a federal judge’s ruling upholding the Indiana Department of Corrections’ (IDOC) denial of the application to marry of an inmate and a former correctional employee.<sup>32</sup> The application had been denied based upon longstanding IDOC and facility rules prohibiting staff and inmates from having “personal contact with an offender...beyond that necessary for the proper supervision and treatment of the offender” and prohibiting former employees from “[visiting] an offender who has been housed in the same facility in which the ex-employee was employed and who was incarcerated at the facility during the time the ex-employee was employed there.”<sup>33</sup> The Seventh Circuit held that the IDOC had failed to demonstrate significant “penological interests” to justify an impingement on the prisoner’s *Obergefell*-articulated constitutional right to marry.<sup>34</sup>

Perhaps more significantly, many fear the effect of *Obergefell* on bans of polygamous marriage.<sup>35</sup> Kody Brown and his four wives, stars of the television reality show “Sister Wives,” are currently fighting an appeal by the Utah Attorney General of a federal court decision which

---

<sup>29</sup> MARINA FANG, *Bobby Jindal Gives Up Last Stand Against Gay Marriage Licenses in Louisiana*, THE HUFFINGTON POST (July 2, 2015), [http://www.huffingtonpost.com/2015/07/02/bobby-jindal-marriage-equality\\_n\\_7718088.html](http://www.huffingtonpost.com/2015/07/02/bobby-jindal-marriage-equality_n_7718088.html).

<sup>30</sup> EMILY LANE, *Last Clerk in Louisiana Blocking Same-Sex Marriage Licenses Has Religious Objection*, THE TIMES-PICAYUNE (June 30, 2015), [http://www.nola.com/politics/index.ssf/2015/06/gay\\_marriage\\_louisiana\\_red\\_riv.html](http://www.nola.com/politics/index.ssf/2015/06/gay_marriage_louisiana_red_riv.html).

<sup>31</sup> REBEKAH ALLEN, *Louisiana Senate Committee Kills Pastor Protection Act Intended to Safeguard Clergy Who Deny Gay Marriages*, THE ADVOCATE (June 11, 2016), <http://theadvocate.com/news/15888083-172/pastor-protection-act-killed-by-senate-committee>.

<sup>32</sup> *Riker v. Lemmon*, No. 14-2910, 2015 WL 4863586, at \*1 (7th Cir. Aug. 14, 2015).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*4-\*8.

<sup>35</sup> LINDSAY WHITEHURST, *‘Sister Wives’ Cite Same-Sex Marriage Ruling in Court Battle Over Utah Polygamy Law*, US NEWS & WORLD REPORT (August 27, 2015), <http://www.usnews.com/news/entertainment/articles/2015/08/27/sister-wives-cite-gay-marriage-ruling-in-polygamy-case>.

struck down part of Utah’s law banning polygamy.<sup>36</sup> In their appellate briefs, the Browns have asserted that Utah’s prohibition of their marriage is unconstitutional, citing *Obergefell*.<sup>37</sup> The case came before the United States Court of Appeals for the Tenth Circuit in 2016. It was believed that the Tenth Circuit’s decision would have a wide-ranging impact, as all fifty states currently have laws prohibiting polygamous marriage.<sup>38</sup> However, prior the rendering of a decision by the Tenth Circuit Court of Appeals, the county prosecutor announced that he would only seek enforcement of Utah’s anti-polygamy law against those who had induced their partner into a polygamous marriage through misrepresentation and not against persons who had voluntarily entered into such a marriage.<sup>39</sup> The Tenth Circuit determined that this rendered the appellants’ claim moot, as they did not face a credible threat of prosecution.<sup>40</sup> They thereafter dismissed the case without ever reaching the question of the constitutionality of Utah’s anti-polygamy law.<sup>41</sup>

Under Louisiana law, specifically, marriage is still prohibited to some parties based upon their identity or status. Louisiana prohibits both bigamous/polygamous marriage<sup>42</sup> and first-cousin marriages.<sup>43</sup> It remains to be seen whether these prohibitions can survive *Obergefell*. Of particular interest is Louisiana’s ban on first-cousin marriage. Only a minority of states continue to retain such a ban (in contrast to the universally recognized prohibition on polygamy).<sup>44</sup> Bans on both same-sex and interracial marriage met their final judicial doom only when they continued to exist and be enforced in a minority of states. Will Louisiana’s prohibition on first-cousin marriage be the next to fall?

### III. Divorce

The notion of same-sex divorce is new to Louisiana. Of course, states that have permitted same-sex marriage for years are no strangers to same-sex divorce.<sup>45</sup> Same-sex spouses often faced difficulty in obtaining a divorce in states which prohibited or did not recognize their marriages validly perfected elsewhere.<sup>46</sup> Denials of the right to divorce in these states were generally predicated on the proposition that the prohibiting state lacked subject-matter jurisdiction over the divorce, given the state’s ban on same-sex marriages.<sup>47</sup> After *Obergefell*, states may no longer

---

<sup>36</sup> *Id.* See also *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

<sup>37</sup> BROWN, ET AL V. BUHMAN, 14-4117.

<sup>38</sup> ADAM WINKLER, *Are Polygamy Bans Unconstitutional?*, *Huffington Post* (December 16, 2013), [http://www.huffingtonpost.com/adam-winkler/are-polygamy-bans-unconst\\_b\\_4454076.html](http://www.huffingtonpost.com/adam-winkler/are-polygamy-bans-unconst_b_4454076.html).

<sup>39</sup> *Brown v. Buhman*, No. 14-4117, 2016 WL 2848510, at \*13 (10<sup>th</sup> Cir. May 13, 2016).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> La. C.C. art. 94; La. C.C. art. 88.

<sup>43</sup> La. C.C. art. 90.

<sup>44</sup> *State Laws Regarding Marriages Between First Cousins*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/state-laws-regarding-marriages-between-first-cousi.aspx>.

<sup>45</sup> ANDREW GELMAN, *Same-Sex Divorce Rate Not As Low As It Seemed*, THE WASHINGTON POST (December 15, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/12/15/same-sex-divorce-rate-not-as-low-as-it-seemed/>.

<sup>46</sup> COLLEEN MCNICHOLS RAMAIS, *‘til Death Do You Part...and This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013, 1014 (2010).

<sup>47</sup> *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010), *cause dismissed* (June 19, 2015).

refuse to recognize same-sex marriages; these subject matter jurisdiction defenses can no longer prevail.

In Mississippi, a same-sex divorce petition which had been denied based on Mississippi's ban on same-sex marriage has worked its way toward a post-*Obergefell* conclusion.<sup>48</sup> Lauren Beth Czekala-Chatham and Dana Ann Melancon were both residents of DeSoto County, Mississippi when they traveled to San Francisco, California, in the summer of 2008, to wed.<sup>49</sup> Two years after marrying, the relationship between the two soured and Czekala-Chatham sought a divorce in Mississippi. In 2013, Mississippi Chancery Judge Mitchell Lundy Jr. refused to grant the divorce, holding that the state of Mississippi could not grant a divorce when the state did not recognize the validity of their marriage. The case worked its way through the Mississippi court system, and finally reached the Mississippi Supreme Court in July of 2015.<sup>50</sup> Though he had initially filed a brief in support of the Chancery judge's decision, in the wake of *Obergefell*, Mississippi Attorney General Jim Hood asked the Mississippi Supreme Court to remand the case, thereby opening the door for the couple to obtain a divorce.<sup>51</sup> The Mississippi Supreme Court, by a 5 to 4 vote, remanded the case.<sup>52</sup>

Texas has also already seen its first same-sex divorce.<sup>53</sup> Jennifer Gasca and Stephanie Clifford, who were married in New Hampshire in 2010, were granted a divorce by District Court Judge Mike Herrera in El Paso on June 29, 2015, after they had met the six-month divorce residency requirement.<sup>54</sup>

Louisiana actually saw its first same-sex divorce two hours before its first same-sex marriage. Anna Wellman and Stephanie Baus (domiciled in New Orleans) were married in Massachusetts in 2009.<sup>55</sup> They filed for divorce in Orleans Parish Civil District Court on June 26, 2015. Their divorce became official on June 29, 2015, after a proceeding which lasted just minutes. Wellman and Baus, who had been living separate and apart for five years, had already divided their property and amicably decided upon a custody arrangement for their (now-college age) child. The amicable parting among this pair spared the court the difficult job of unpacking difficult community property questions that will be presented in the same-sex marriage context. But those questions will arise, and they will need to be addressed by the courts and legislature of

---

<sup>48</sup> ERYN TAYLOR AND CAITLIN ALEXANDER, *Mississippi Supreme Court Could Soon Issue Ruling In Same-Sex Divorce Case*, WREG MEMPHIS (July 1, 2015), <http://wreg.com/2015/07/01/mississippi-supreme-court-could-soon-issue-ruling-in-same-sex-divorce-case/>.

<sup>49</sup> LILA SHAPIRO, *More And More Gay People Can Get Married...But Can They Divorce?*, THE HUFFINGTON POST (December 5, 2013), [http://www.huffingtonpost.com/2013/12/05/gay-divorce\\_n\\_4393257.html](http://www.huffingtonpost.com/2013/12/05/gay-divorce_n_4393257.html).

<sup>50</sup> JACK ELLIOTT JR., *Mississippi AG: Let Same-Sex Couple Divorce*, THE CLARION-LEDGER (July 3, 2015), <http://www.clarionledger.com/story/news/2015/07/03/mississippi-ag-jim-hood-grant-same-sex-divorce/29671099/>.

<sup>51</sup> *Id.*

<sup>52</sup> JEFF AMY & EMILY WAGSTER PETTUS, *Mississippi High Court Grants Same-Sex Divorce; 2 Justices Question US Supreme Court Ruling*, US NEWS/AP (November 5, 2015), [http://www.usnews.com/news/us/articles/2015/11/05/mississippi-supreme-court-narrowly-grants-same-sex-divorce;Czekala-Chatham.v.State.ex.rel.Hood,No.2014-CA-00008-SCT,2015WL10985118,at\\*1\(Miss.Nov.5,2015\).](http://www.usnews.com/news/us/articles/2015/11/05/mississippi-supreme-court-narrowly-grants-same-sex-divorce;Czekala-Chatham.v.State.ex.rel.Hood,No.2014-CA-00008-SCT,2015WL10985118,at*1(Miss.Nov.5,2015).)

<sup>53</sup> *Texas, Mississippi Try First Same-Sex Divorce Cases*, SIMPLY JUSTICE (July 10, 2015), <http://www.simplyjustice.com/blog/texas-mississippi-try-first-same-sex-divorce-cases>.

<sup>54</sup> *Id.*

<sup>55</sup> ANDY GRIMM, *First Same-Sex Divorce in New Orleans Comes Before First Marriage*, NOLA.COM (July 01, 2015), [http://www.nola.com/politics/index.ssf/2015/06/orleans\\_parish\\_granted\\_states.html](http://www.nola.com/politics/index.ssf/2015/06/orleans_parish_granted_states.html).

Louisiana as both same-sex marriage and same-sex divorce become more commonplace statewide.<sup>56</sup>

The impact of the *Obergefell* decision and increasing recognition of LGBT rights has also recently had an impact on grounds for divorce. In June of 2016, the Delaware legislature voted to strike both “homosexuality” and “lesbianism” from the definition of marital misconduct serving as grounds for a divorce.<sup>57</sup> Such a change is not necessary in Louisiana, as the grounds for a fault-based divorce in Louisiana recognize only “adultery” as a ground and do not specify the particular form of sexual activity.<sup>58</sup>

## IV. Children

In 2011, the American Bar Association’s Family Law Section estimated that there were roughly four million gay and lesbian parents in the United States, raising eight to ten million children, a number which has likely only risen as same-sex relationships, marriages, and parenting have gained ever wider social acceptance.<sup>59</sup> These children must be cared for, raised, disciplined, and educated, all under family law regimes which, given their heteronormative focus, often leave their same-sex parents in a sort of limbo in regard to their parental authority and rights.

Because same-sex spouses have not generally had any legal relationship with their non-biological children (absent adoption), some same-sex partners have resorted to so-called “parenting agreements,” which purport to spell out the legal responsibility to and authority over the child of the non-legally recognized same-sex parent.<sup>60</sup> In Louisiana, these parental agreements are not completely unheard of, but they are most often confected post-divorce, to resolve disputes over parenting.<sup>61</sup> Of course, many couples do not perfect such an agreement, and make no plans to govern in the event of a demise of the relationship. And even when same-sex couples do engage in this advance planning, their wishes are often not respected. These types of agreements are occasionally recognized by courts.<sup>62</sup> But their enforceability is highly questionable, as parents’ rights to contract extrajudicially for many child-related issues is limited. The result is a body of law that leaves the non-biological parent in many same-sex couples out in the cold, often to the detriment of the child involved.

---

<sup>56</sup> See SARAH PAGONES, *Adoptions, Birth Certificates, Successions, Divorce Decrees Next Big Topics for Same-Sex Marriage in Louisiana*, THE NEW ORLEANS ADVOCATE (2015), <http://www.theneworleansadvocate.com/news/12786384-65/same-sex-marriage-ruling-spurs-revision>.

<sup>57</sup> RANDALL CHASE, *Delaware Bill Strikes Homosexuality As Marital Misconduct*, SANTA CRUZ SENTINEL/AP (June 10, 2016), <http://www.santacruzsentinel.com/general-news/20160610/delaware-bill-strikes-homosexuality-as-marital-misconduct>.

<sup>58</sup> LA. CIV. CODE ANN. art. 103. See also *Adams v. Adams*, 357 So. 2d 881 (La. Ct. App.), writ denied sub nom. *Adams v. Adams*, 359 So. 2d 1309 (La. 1978).

<sup>59</sup> DEMIAN, *Parenting Options for Same-Sex Couples in the U.S., Partners Task Force for Gay & Lesbian Couples* (April 7, 2011), <http://www.buddybuddy.com/parent.html>.

<sup>60</sup> *Legal Issues for Same-Sex Parents*, OUTFRONT MINNESOTA, <https://outfront.org/library/legal/parenting>

<sup>61</sup> See e.g. *Erika Lay DONEGAN v. David DONEGAN*, 2006 WL 4005036 (La. Dist. Ct.), 1.

<sup>62</sup> See *St. Mary v. Damon*, 309 P.3d 1027, 1036 (2013); *Frazier v. Goudschaal*, 296 Kan. 730, 731-32 (2013).

## A. Filiation

For children born during a same-sex marriage, an even more complex web of issues arises. The traditional mechanism for establishing the paternity of a child (and thus the rights and obligations flowing between parent and child) has been a series of presumptions largely resting on the heterosexual marriage relationship.<sup>63</sup> Children who were born of a woman were assumed to be the biological children of that woman and were presumed to be the biological children of the woman's husband.<sup>64</sup> This legal presumption generally establishes filiation between the father and the child, and no further legal steps are necessary to perfect the legal parent-child relationship.

Though this traditional marital presumption as a means of determining paternity of a child has lost some of its strength with advances in science (paternity testing, IVF, egg donation, surrogacy, etc.) it remains the law of the land in most of the United States and it remains the method by which the vast majority of legal paternity is established.<sup>65</sup> This method of determining legal parentage also makes it a near impossibility for two same-sex spouses to both become the legally recognized parents of their children, absent some sort of legal maneuver like adoption.

Some states have accomplished the filiation of children in these situations through the granting of rights to "de-facto parents" or "psychological parents," thereby providing an end-run to the traditional biological method of establishing filiation.<sup>66</sup>

Louisiana has flatly refused (despite repeated bills in the legislation to accomplish the goal) to recognize any form of de-facto or psychological parenting rights. The State adheres very tightly to the presumption that the husband of the mother is the father of the child.<sup>67</sup> But absent prompt legislative change, the day has come when our courts will have to begin to reconcile the traditional law of filiation with the new and present reality of same-sex marriage in Louisiana.

Other states have already been forced to confront the constitutionality of their filiation statutes. The Oregon Court of Appeals held that the longstanding presumption that the husband of the mother is the father of a child born during the marriage does not unconstitutionally discriminate against same-sex couples. Noting that the presumption is based on biology, the court held that the presumption simply cannot have any application in the same sex-context.<sup>68</sup>

Other filiative presumptions, however, may have to be extended to same-sex couples, lest they be deemed unconstitutional. Many states, for instance, presume the husband of a mother to

---

<sup>63</sup> GAGE RALEY, *The Paternity Establishment Theory of Marriage and Its Ramifications for Same-Sex Marriage Constitutional Claims*, 19 VA. J. SOC. POL'Y L. 133, 135 (2011).

<sup>64</sup> For a detailed discussion of presumption of paternity please see JACINTA M. TESTA, *Finishing Off Forced Fatherhood: Does It Really Matter If Blood or DNA Evidence Can Rebut the Presumption of Paternity?*, 108 PENN. ST. L. REV. 1295 (2004).

<sup>65</sup> See SHELLY ANN KAMEL, *Partitioning Paternity: The German Approach to A Disjuncture Between Genetic and Legal Paternity with Implications for American Courts*, 11 SAN DIEGO INT'L L.J. 509, 512 (2010).

<sup>66</sup> LESLIE J. HARRIS, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 472-73 (2012).

<sup>67</sup> RACHEL L. KOVACH, *Sorry Daddy-Your Time Is Up: Rebutting the Presumption of Paternity in Louisiana*, 56 LOY. L. REV. 651, 651-52 (2010).

<sup>68</sup> *Shineovich v. Kemp*, 214 P.3d 29 (Or. App. 2009).

be the father of a child born by assisted reproduction if he consented to the use of assisted reproduction. Louisiana has just such a provision. Civil Code article 188 provides that “the husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented.”<sup>69</sup> This legislation, in contrast to the “husband of the mother” presumption of paternity, does not rest on biology at all. In fact, it may well be that the husband of the mother who consented to the use of assisted reproduction is not, in fact, the biological father of the child. Still, he is presumed as such under this statutory presumption. The language of most of those statutes – like Louisiana’s – creates a paternal presumption only, and applies, facially, only in the context of a marriage between a man and a woman. Nonetheless, an Oregon court has found that the statute must be applied to same-sex couples as well, and that its failure to be extended in that manner is unconstitutional.<sup>70</sup> New York, Massachusetts, California, and Connecticut have held similarly.<sup>71</sup>

It remains to be seen how many of these filiation issues will be resolved in Louisiana. But other states’ experiences certainly provide some guidance. Even prior to the *Obergefell* decision (or legalization of same-sex marriage in their specific jurisdictions) some states had recognized a duty of same-sex spouses to provide support for children after the break-up of their relationship, even in the absences of a valid marriage.<sup>72</sup> Now that same-sex marriage is legal nationwide, child support issues will need to be resolved in tandem with child custody and parental authority issues.

If the definition of parenthood continues along purely biological lines, continued uncertainty will exist for same-sex married couples and their children. Their rights, obligations, and the very legal status of their families, will be uncertain. Absent swift legislative intervention to address these issues, the courts will face the tall task of sorting through these issues to develop equitable modifications to the family law regimes of the states to accommodate these newly legitimized family structures.

---

<sup>69</sup> LA. CIV. CODE ANN. art. 188.

<sup>70</sup> *Shineovich v. Kemp*, 214 P.3d 29 (Or. App. 2009).

<sup>71</sup> EUGENE VOLOKH, *Child of Lesbian Married Couple Presumed to be Child of (now ex-)Spouse as well as of Birth Mother*, THE WASHINGTON POST (5/14/2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/14/child-of-lesbian-married-couple-presumed-to-be-child-of-now-ex-spouse-as-well-as-of-birth-mother/>; see also *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845, 861 (Sup. Ct. 2014); *Debra H. v. Janice R.*, 14 N.Y.3d 576, 600 (2010); *Della Corte v. Ramirez*, 81 Mass. App. Ct. 906, 961 N.E.2d 601 (2012) (reading the word “husband” as to not exclude same-sex spouses in regard to statutory paternity presumptions for children conceived via IVF); *S.Y. v. S.B.*, 201 Cal. App. 4<sup>th</sup> 1023, 1036, 134 Cal. Rptr. 3d 1, 12 (2012); *Barse v. Pasternak*, No. HHBFA124030541S, 2015 WL 600973, at \*4 (Conn. Super. Ct. Jan. 16, 2015); ALEXANDRA EISMAN, *The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York*, 19 CARDOZO J.L. & GENDER 579, 580 (2013).

<sup>72</sup> See NATHAN KOPPEL, *Same-Sex Partners In New York Can Be Liable for Child Support*, THE WALL STREET JOURNAL (August 5, 2010), <http://blogs.wsj.com/law/2010/08/05/same-sex-partners-in-new-york-can-be-liable-for-child-support/>; Richard Gonzales, Court: Same-Sex Couples Must Provide Child Support, NPR (August 23, 2005), <http://www.npr.org/templates/story/story.php?storyId=4811333>.

## B. Custody and Visitation

One area of the law in which there has long been great confusion for same-sex couples was in the realm of child custody.<sup>73</sup> States (sometimes even those recognizing same-sex marriage) very often treat a same-sex spouse who is not the biological or adoptive parent of the child as a third-party lacking any legal basis or standing for an assertion of custody or visitation rights.<sup>74</sup>

As recently as September of 2015, a Maryland appellate court denied custody and visitation rights to a lesbian woman who sought visitation with her former spouse's biological children.<sup>75</sup> One of the children had been born prior to the couple's marriage. The other was born during the marriage. As the petitioner was neither the adoptive nor biological parent of the children, the court determined that, under Maryland law, she had no rights vis-à-vis the children. A challenge to similar restrictions on the custody and visitation rights of non-birth, non-adoptive "parents" is currently working its way through the New York court system.<sup>76</sup>

Most states hold as Maryland does.<sup>77</sup> For children born to one of the spouses prior to the same-sex marriage who are not adopted by the other spouse, this denial of visitation rights is akin to the denial of visitation rights to stepparents who do not legally adopt the children of their spouse. Indeed, only about a dozen states provide for visitation/custody rights for nonadoptive stepparents.<sup>78</sup> The matter is substantially complicated, however, by the fact that in many states (at least before *Obergefell*), adoption by a same-sex stepparent is (or was) not permitted. As a result, stepparents who may have had a strong reciprocal bond with the child of their same-sex spouse were often prevented from legally formalizing those bonds.<sup>79</sup>

One might argue that the problem, in the event of a divorce, can be handled through Louisiana's visitation statutes. Louisiana does provide for stepparent visitation rights in "extraordinary" circumstances," and those provisions may be applied to provide visitation rights. Of course, without adoption, all of the other rights and duties associated with parenthood cannot be assured absent an adoption proceeding.<sup>80</sup>

Of, perhaps, paramount importance is the determination of child custody after the death of a same-sex spouse. In Louisiana, upon the death of either parent, the tutor of minor children is the surviving spouse if the minor children are the biological children of both parents<sup>81</sup> or have been adopted by their biological parent's spouse.<sup>82</sup> However, if Louisiana continues to define legal

---

<sup>73</sup> LEAH C. BATTAGLIOLI, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U. L. REV. 1235 (2005).

<sup>74</sup> 80 A.L.R. 5th 1 (Originally published in 2000).

<sup>75</sup> *Woman Denied Child Custody, Visitation After Same-Sex Divorce*, NEWSER (September 2, 2015), <http://www.newser.com/story/212279/woman-denied-child-custody-visitation-after-same-sex-divorce.html>.

<sup>76</sup> JOSH STASHENKO, *Judges Wrestle With Definition of Parenthood at Argument*, NEW YORK LAW JOURNAL (June 6, 2016), <http://www.newyorklawjournal.com/this-weeks-news/id=1202759296406/Judges-Wrestle-With-Definition-of-Parenthood-at-Argument?mcode=1202615036097&curindex=9&slreturn=20160511152623>.

<sup>77</sup> *See, e.g., A.C. v. N.J.*, 1 N.E.3d 685 (Ind. Ct. App. 2013).

<sup>78</sup> 2 Kan. Law & Prac., Family Law § 13:11.

<sup>79</sup> A.L.R. 6th (Originally published in 2000).

<sup>80</sup> Child Custody Prac. & Proc. § 7:14.

<sup>81</sup> La. C.C. art. 250.

<sup>82</sup> *See Succession of Haley*, 49 La. Ann. 709, 22 So. 251 (1897).

parenthood with reference to biology-based presumptions, a same-sex spouse who is not biologically related to the child and who has not adopted the child (as they are legally prevented from doing so), would not become the child's tutor upon the death of the biological parent, even if the child is born during the marriage. It is not at all difficult to imagine a situation in which an individual a child recognizes psychologically and emotionally as a parent as no legal right to act as such, even in the wake of the death of the other parent. Absent appointment of a tutor by will,<sup>83</sup> surviving same-sex spouses may find themselves in a precarious legal situation as to the children of the relationship under current Louisiana law. Legislative action to remedy this is imperative and should be undertaken forthwith, but, of course, the likelihood that the Louisiana legislature will promptly and progressively address these issues, is slim.

### C. Adoption

Individuals in same-sex relationships, in an effort to circumvent the law's failure to recognize the legitimacy of their bonds with the children of their partner/spouse, have often turned to adoption to legally legitimize the parent-child relationship.<sup>84</sup> Before *Obergefell*, however, they often found themselves wholly unable to utilize a state's formal adoption scheme, regardless of the significance of the bond they shared with the children, and regardless of their marriage to the child's biological parent. In the past, laws prohibiting same-sex couples from adopting (either together, or as stepparents or second parents) have been largely predicated on a theory that a household with two parental figures of the same gender is an unhealthy environment for children to be reared in, a theory which has now been statistically debunked.<sup>85</sup>

The problem is a significant one. Nearly 400,000 children currently live in foster care in the United States. More than one hundred thousand of those kids are currently eligible for adoption, yet have not found permanent families.<sup>86</sup> The incredible need to find families for children in foster care certainly militates in favor of removing any remaining barriers to adoption by same-sex couples.<sup>87</sup> Nonetheless, most states, at least before *Obergefell*, failed to permit these adoptions.

Historically, the most notorious state prohibition on same-sex adoption came out of Florida.<sup>88</sup> Though not officially repealed until 2015, Florida's law prohibiting adoption by gay individuals and couples was ruled unconstitutional in 2010.<sup>89</sup> *Florida Dept. of Children & Families v. Adoption of X.X.G.*, involved an attempt by a gay man who had been serving as foster parent to two children to adopt them after their biological parents' rights were terminated for severe

---

<sup>83</sup> La. C.C. art. 257.

<sup>84</sup> *Same Sex Adoptions*, MOORE & HUNT, ATTORNEYS, <http://www.mooreandhunt.com/Adoption/Same-Sex-Adoptions.shtml>.

<sup>85</sup> RICH BARLOW, *Gay Parents As Good As Straight Ones*, BU TODAY (April 11, 2013), <http://www.bu.edu/today/2013/gay-parents-as-good-as-straight-ones/>.

<sup>86</sup> *Facts and Statistics*, CONGRESSIONAL COALITION ON ADOPTION INSTITUTE, [http://ccainstitute.org/index.php?option=com\\_content&view=category&id=25&layout=blog&Itemid=43](http://ccainstitute.org/index.php?option=com_content&view=category&id=25&layout=blog&Itemid=43)

<sup>87</sup> *LGBT Adoption Advantages*, LIFELONG ADOPTIONS, <http://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-advantages>.

<sup>88</sup> HAYLEY MILLER, *Florida Ends 38-Year-Old Ban on Adoption by Same-Sex Couples*, HUMAN RIGHTS CAMPAIGN (June 12, 2015), <http://www.hrc.org/blog/entry/florida-ends-38-year-old-ban-on-adoption-by-same-sex-couples>

<sup>89</sup> *Florida Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79, 92 (Fla. Dist. Ct. App. 3d 2010).

neglect.<sup>90</sup> It was undisputed that the prospective adoptive father had been and was a fit parent and that the children had thrived in his custody. The Florida appellate court there determined that Florida's blanket prohibition on the adoption of children by gays was without rational basis and violated the Due Process Clause.

By the time *Obergefell* was decided, only Mississippi expressly prohibited any form of adoption by same-sex couples,<sup>91</sup> though this express ban was challenged in federal court by the Campaign for Southern Equality on behalf of four Mississippi same-sex couples.<sup>92</sup> The ban was ultimately lifted.<sup>93</sup> But many other states – including Louisiana – accomplished the same result by permitting only unmarried individuals and married couples to adopt.<sup>94</sup> Indeed, in this state, both unmarried same-sex couples and unmarried heterosexual couples alike have found themselves unable to participate in the adoption of a child.”

This effective prohibition on adoption by same-sex couples in Louisiana has led same-sex couples desiring to parent a child to have one of the intended parents adopt the child as a single individual, while both parents participate equally in the de-facto parenting of the child. But under this arrangement, the non-adoptive parent has no actual legal connection, no legal rights or duties, to the child. “This long-standing rule has proven poor for children, as they are deprived of a second parent from whom to receive financial support and inheritance, not to mention all of the non-financial duties associated with legal parentage.”<sup>95</sup>

In light of the Louisiana Supreme Court's July 2015 decision in *Costanza v. Caldwell*, in which the court, following *Obergefell*, held those provisions of the Louisiana constitution, Civil Code, and other state laws restricting marriage to heterosexuals unconstitutional, same-sex *married* couples should now enjoy the right to adopt in the state of Louisiana, as “the State of Louisiana may not bar same-sex couples from the civil effects of marriage on the same terms accorded to opposite-sex couples.”<sup>96</sup> The Alabama Supreme Court has also recently ruled on a same-sex adoption issue, reversing its prior refusal to recognize a lesbian couple's Georgia adoption of one partner's children by the other.<sup>97</sup> Although new judicial decisions, and perhaps even legislation, will be required to fully effectuate the change, Louisiana now has no legal basis on which to deny couples the right to adopt children, in the wake of the court's ruling.

---

<sup>90</sup> *Id.* at 82.

<sup>91</sup> *LGBT Adoption Statistics*, LIFELONG ADOPTIONS, <http://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics>.

<sup>92</sup> ROYCE SWAYZE, *Same-Sex Couples Sue over Miss. Adoption Ban*, THE CLARION-LEDGER (August 13, 2015), <http://www.clarionledger.com/story/news/2015/08/12/sex-couples-sue-miss-adoption-ban/31586827/>.

<sup>93</sup> Federal Judge Lifts Mississippi Ban on Adoption by Same-Sex Couples, LA Times/AP (March 31, 2016), <http://www.latimes.com/nation/la-na-mississippi-same-sex-adoption-20160331-story.html>.

<sup>94</sup> ANDREA B. CARROLL AND CHRISTOPHER K. ODINET, *Marriage Equality Comes to Louisiana... Now What?*, THE ADVOCATE (July 6, 2015), <http://theadvocate.com/news/opinion/12750682-171/guest-column-marriage-equality-comes>.

<sup>95</sup> *Id.*

<sup>96</sup> *Costanza v. Caldwell*, 2014-2090 (La. 7/7/15), 167 So. 3d 619, 621.

<sup>97</sup> *Ex parte E.L.*, No. 1140595, 2016 WL 3040901 (Ala. May 27, 2016); *Lesbian Adoption Ruling Reversed by Alabama Supreme Court*, LA TIMES/AP (May 27, 2016), <http://www.latimes.com/nation/la-na-alabama-adoption-reversed-20160527-snap-story.html>.

This change in Louisiana law may have an impact beyond the realm of same-sex marriage. Heterosexual couples may be impacted, sometimes significantly, as well. Louisiana courts have long been reluctant to recognize any “second parent” relationship when a single parent adopts a child, largely out of fear that it would necessitate allowing adoption by same-sex couples. Now that this fear is moot, Louisiana could, and should, move toward more freely accepting second parent adoptions, and recognizing legal rights and duties of the many players involved in a child’s life. Whether this change will come to pass is, of course, not a foregone conclusion. But in this arena, the effects of *Obergefell* may extend well beyond the same-sex marriage arena.

Even prior to the *Obergefell* decision, the changing national definition of marriage has begun to have an impact on adoption services across the country. Some states, possibly in anticipation of legalized same-sex marriage passed, or attempted to pass, statutes allowing adoption agencies to refuse to place children with same-sex couples based upon the organizations religious beliefs or purposes.<sup>98</sup> Though adoption agencies which receive state and federal funds must comply with federal laws against discrimination,<sup>99</sup> in the absence of a statute permitting it, it is unclear as to whether a purely private adoption agency could continue to discriminate against same-sex couples in regard to child placement. As legalization of same-sex marriage became more common place and states began demanding that they either place children with same-sex couples or ceases operating as a public adoption provider, a number of diocese of the Catholic Church have ceased providing adoption services entirely.<sup>100</sup> As regulation of adoption agencies and their levels of interconnectedness to the state varies considerable across jurisdictions,<sup>101</sup> it is difficult to ascertain what the full impact of the *Obergefell* decision will on adoption services in the United States, though it is certain to be a significant one.

## V. Marital Property

### A. The Community Property Regime and Retroactivity

Perhaps one of the most significant lingering questions in the wake of *Obergefell* is the impact of the apparent retroactivity of the Court’s decision. As in many other instances in which the high court has struck down a law as violative of a protected right, if a right exists under the Constitution, then it has always existed. If a law is unconstitutional, it has always been unconstitutional.

---

<sup>98</sup> See MARGIE MENZEL, *Bill Letting Private Agencies Refuse Gay Adoption Advances*, THE LEDGER (April 2, 2015), <http://www.theledger.com/article/20150402/politics/150409843>; KATHLEEN GRAY, *ACLU May Challenge Newly-Signed Law on Adoption by Gays*, DETROIT FREE PRESS (June 11, 2015), <http://www.freep.com/story/news/politics/2015/06/11/snyder-michigan-same-sex-adoption-religious/71062938/>.

<sup>99</sup> *Protection from Discrimination in Child Welfare Activities*, U.S. DEPT. OF HEALTH & HUMAN SERVICES, <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/>.

<sup>100</sup> JOSEPH R. LAPLANTE, *Tough Times for Catholic Adoption Agencies*, OSV NEWSWEEKLY (May 7, 2014), <https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/ArticleID/14666/Tough-times-for-Catholic-adoption-agencies.aspx>.

<sup>101</sup> *Independent-Private Adoptions*, AMERICAN ACADEMY OF ADOPTION ATTORNEYS, <http://www.adoptionattorneys.org/aaa/adopting-parents/independent-private-adoption>.

The issue of retroactivity of constitutional law decisions has had quite a stormy history in U.S. Supreme Court jurisprudence.<sup>102</sup> Justice Scalia,<sup>103</sup> for instance, has advocated for a strict retroactivity approach to constitutional decisions, but others, from Justice O'Connor<sup>104</sup> to Justice Frankfurter,<sup>105</sup> have advanced the view that common sense considerations demand a more flexible approach that might often lead to selective prospectivity. Nevertheless, recent case law has indicated a trend toward more retroactivity, even in the face of efforts by Congress to change such results.<sup>106</sup>

Under strict retroactivity theory, same-sex couples validly married under the laws of one state but domiciled in a non-recognition state have been living under a marital property regime from the date of the marriage. This means that many of the acts these individuals may have taken with respect to property and many of the transactions they may have entered into relative to that property must now satisfy a multitude of legal rules that were most assuredly not anticipated by the parties at the time of the transaction.

If *Obergefell* is ultimately given retroactive effect, it will result in the automatic vesting of property rights across the patrimonies of both spouses. Up until now, many same-sex couples across the United States were unable to avail themselves of the marital property regimes that opposite-sex spouses so frequently take for granted. Indeed, same-sex couples very often engaged in a great deal of property and estate planning maneuvers that would normally be relegated to only the wealthiest and most sophisticated of couples so as to work around the unavailability of default marital property rules. It has been quite common for same-sex couples, who heretofore could not wed, to execute various legal documents ranging from wills and powers-of-attorney to various trust and corporate instruments in order to effectuate a marriage-like regime. These couples—often married by all outward appearances—were required to engage in a complicated and expensive series of legal transactions in order to ensure that their rights and duties vis-à-vis each other were arranged so as to give legal effect to their non-legal union.

Because of the probing analysis in which same-sex couples were forced to engage in order to undertake these legal transactions, they often made decisions that diverged from what the normal marital property rules might otherwise provide. Indeed, a wealthy partner might prefer that the couple not be subjected to community property or to spousal support obligations in the event of a split. Similarly, an individual who might enjoy the benefits of supplemental security or other welfare programs might desire to avoid having his assets combined with those of his partner, lest he be disqualified from government assistance. Due to the same-sex couple's inability to avail themselves of the marital property regimes of their home states, careful and often surprisingly complex planning often became an inherent part of many same-sex relationships.<sup>107</sup>

---

<sup>102</sup> See 1 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 1:9 (3rd ed.) (analyzing the progression of the retroactivity debate in Supreme Court jurisprudence).

<sup>103</sup> *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 548–49 (1991) (Scalia, J. concurring).

<sup>104</sup> See *Harper v. Va. Dept. of Transp.*, 509 U.S. 86, 117 (1993) (O'Connor, J., dissenting).

<sup>105</sup> *Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring).

<sup>106</sup> See RICH, *supra* note 2 § 1:9 (explaining the Court's invalidation by an attempt of Congress to open the door to litigants when the Court had, in a prior case, upheld a truncated statute of limitations for securities fraud).

<sup>107</sup> See generally Deborah L. Jacobs, *Married, With Complications*, FORBES, Aug. 3, 2011.

But now many same-sex couples, who were married under the laws of one state but live in a state that had not recognized their union, will likely be surprised to find that some or all of their legal arrangements are rendered less effective or even void. Indeed, there are a host of issues that arise in the context of marital property when it comes to equitable distribution that might diverge a great deal from the desires and expectations of many same-sex couples. For instance, in at least some states, educational degrees and professional licenses are considered to be marital property and thus subject to valuation and distribution upon termination of the marriage.<sup>108</sup> Moreover, the marital property law of many states allows a spouse to select either to take whatever is devised by the decedent spouse under a will, or instead select a statutorily set share—usually around one-half—of all the property that a decedent spouse owned at the time of death.<sup>109</sup> As a result, for a spouse who had carefully engaged in the process of will-making it might come as quite an unexpected surprise to learn that her wishes could be so easily set aside.

The law of community property, which operates in Louisiana and eight other states, presents additional complexities. Community property law is based on the notion that married persons become an economic unit to which each makes valuable contributions. Under this theory, ownership, acquisition, disposition, management, and control over the property of the spouses become subject to a strict set of rules. The mixing of community property with separate property, for example, can be particularly complicated. One of the spouses might have purchased a home prior to the marriage using a mortgage loan. Once married, that spouse's earnings constitute community property, and the home, once considered separate property, can either suddenly become community property or trigger a number of reimbursement rights when community earnings are used to pay the debt service on that mortgage loan.<sup>110</sup>

Prior to the legalization of same-sex marriage, attempts by same-sex partners to seek support from their former partner after the dissolution of a long-term relationship were not unheard of.<sup>111</sup> Prior to recognition of the application of any property regime between same-sex partners or any right to support between the partners, it was often incumbent upon long-term same sex partners to establish a contractual relationship between themselves to deal with their commonly acquired property and their obligations to one another post-breakup.<sup>112</sup> Post-*Obergefell*, same-sex married couples are now clearly entitled (really obligated) to participate in the property regimes of the states in which they are domiciled (unless the laws of that state permit them to contractually opt-out of the standard regime and they choose to do so) and are almost certainly entitled to support (under the proper conditions) after a divorce, but serious questions remain as to how laws on property division and spousal support (previously enacted to protect the perceived weaker party in a more gender-biased time in our nation's history) will apply to the same-sex couple.

---

<sup>108</sup> See, e.g., N.Y. DOM. REL. LAW § 236(B)(5)(d)(7) (2015); see also *O'Brien v. O'Brien*, 489 N.E. 2d 712 (N.Y. 1985); *Elkus v. Elkus*, 572 N.Y.S. 2d 901 (N.Y. App. Div. 1991).

<sup>109</sup> See UNIF. PROBATE CODE & 2-201(a) (2015).

<sup>110</sup> See Richard W. Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 44 WASH. L. REV. 379 (1969) (discussing the reimbursement theory); see also WILLIAM A. REPPY & CYNTHIA SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 9 (2000) (discussing the buy-into-title theory).

<sup>111</sup> See *Van Brunt v. Rauschenberg*, 799 F. Supp. 1467 (S.D.N.Y. 1992) (though the court artfully avoids mention the true nature of the parties relationship, Van Brunt was in effect seeking support through alternative claims from the famous artist Robert Rauschenberg after their long-term relationship).

<sup>112</sup> MARTHA M. ERTMAN, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1154-55 (1996).

## B. Unintended Consequences and the Rights of Creditors

If marital property rules were to be imposed on same-sex spouses retroactively, a significant portion of those affected would likely find themselves dissatisfied. Most of us think of the application of marital property rules as a natural consequence that flows from the perfection of the marital union, and we assume that marital property rules are intuitive, equitable, and reflect a default law that most couples would select had they given significant thought to the question. In fact, they are anything but. When it comes to spouses' interaction with creditors, in particular, American marital property regimes can be particularly undesirable. And for those spouses who assumed they would not be governed such rules, the effects can be quite unexpected.

In the states governed by separate property regimes, marriage has only minor effects when it comes to the property available for seizure by the creditors of one of the spouses. Creditors seize the property of their debtors alone and, with a few narrow exceptions, marriage does not affect the creditor's position. Not so for the thirty percent of the American population governed by regimes of community property.<sup>113</sup> In these states, creditors have heavily increased access to seizable property, simply because their debtors make the choice to marry. The effect is so extreme that the reigning property regime in these states has even been described as a creditor collection device.<sup>114</sup>

For debts incurred during an existing marriage, most community property states (including Louisiana) provide for the seizure not only of the debtor spouse's property, but also of the couple's community property, even if that property is acquired by the non-debtor spouse.<sup>115</sup> The result is a sheer windfall to creditors; lending to married persons in a community property jurisdiction gives the creditor access to vastly greater stores of property than that which would be available when a debt is incurred by an unmarried individual. Worse still, in Louisiana, even the *premarital* debts of one spouse can be satisfied from the entirety of the community property, including the non-debtor spouse's wages.<sup>116</sup> The marriage of a debtor spouse domiciled in a community property regime is nothing short of a dream for creditors. Of course, it can be a nightmare for the spouses themselves.

It has been well-accepted for decades now that prospective spouses know relatively little about the default marital property rules that will govern upon their marriage.<sup>117</sup> Few individuals would likely wish, for instance, to have their wages garnished for their spouses' premarital credit card debt. Yet this is precisely the result that obtains in some community property states.

Savvy heterosexual couples have long had the ability to reject the application of such undesirable consequences by matrimonial agreement. After all, default marital property rules

---

<sup>113</sup> See United States Census, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010, available at <http://www.census.gov/popest/data/state/totals/2014/tables/NST-EST2014-01.xls> (As of the 2010 Census, the total U.S. population was 308,745,538. Of that number, 92,063,744 individuals reside in one of the nine community property states.).

<sup>114</sup> See Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1 (2007).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> See Carolyn J. Frantz, *Should the Rules of Marital Property be Normative?*, 2004 U. CHI. LEGAL F. 265, 276 (2004).

should be just that—rules that apply in the absence of any agreement between the parties. The trouble is that same-sex spouses who perfected a valid marriage in advance of *Obergefell*, and who are domiciled in a non-recognition state, simply had no equivalent opportunity. The vehicle through which couples renounce marital property regimes, namely matrimonial agreements, was not available to them. And even if it were, same-sex couples certainly could not be saddled with the burden of having to execute a null contract, anticipating that a decision like *Obergefell* would one day be rendered that might give that contract effect. Parties to a same-sex marriage perfected in advance of *Obergefell* but living in a non-recognition state, then, simply did not have opportunities equivalent to those afforded to heterosexual couples to opt out of the default marital property regime.

In that light, the creditor-friendly effects of many marital property regimes become all the more offensive. And if *Obergefell* is ultimately given retroactive effect, the consequences for many same-sex couples—who would suffer substantially increased liability for their partners’ debts, without fair warning—would be very troubling.

## VI. Spousal Support

Laws on spousal support were originally established to provide maintenance to women upon divorce at a time when women were far less likely to successfully enter the workforce than their male spouses.<sup>118</sup> Though the statutes now explicitly focus on the financial need of one party rather than gender, awards of spousal support are often not made in a gender-neutral manner.<sup>119</sup> Indeed, in Louisiana, as with the other 49 states, spousal support for men, though it is becoming more common, is still so rare as to be remarkable.<sup>120</sup> Though many American jurisdictions, including Louisiana, have taken affirmative steps to eliminate gender bias in their legal systems,<sup>121</sup> it is still a pervasive problem.<sup>122</sup> This gender bias, and biases that may exist toward same-sex couples in general, may have substantial impact on how spousal support awards are made in same-sex divorces.

## VII. Taxation

As same-sex marriage became a reality, across the United States, questions quickly arose as to how same-sex marriages would be treated by the IRS.<sup>123</sup> The 1996 Defense of Marriage Act

---

<sup>118</sup> ANN LACQUER ESTIN, *The Case for Maintenance Reform*, COLO. LAW., January 1994, at 53,54.

<sup>119</sup> *Id.*

<sup>120</sup> HILARY STOUT, *The Controversial Rise in Manimony*, MARIE CLAIRE (April 19, 2011), <http://www.marieclaire.com/career-advice/tips/a5996/women-paying-alimony/>.

<sup>121</sup> See e.g. The Final Gender Fairness Report, MONT. LAW., May 2008, at 5.

<sup>122</sup> AMRIT K. SIDHU, *More Gender Fairness Needed in Law*, MONT. LAW., NOVEMBER 1999 (discussing the impact of gender discrimination in the law and efforts to minimize it).

<sup>123</sup> *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes; Ruling Provides- Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples*, IRS (August 29, 2015), <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes%3B-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>.

(DOMA) defined the terms “marriage” and “spouse” along traditional lines, thereby preventing same-sex couples in valid, legally-recognized marriages from sharing in the same federal tax benefits as heterosexual married couples.<sup>124</sup> However, DOMA and its provisions were overturned by the United States Supreme Court in the *Windsor* case in 2013,<sup>125</sup> paving the way for a ruling by the IRS recognizing same-sex marriages for tax purposes.<sup>126</sup> Most tax experts believe that the Supreme Court’s decision in *Obergefell* means that “state tax reporting and withholding for all employees in same-sex marriages who live in states that did not previously recognize their marriages [must be adjusted].”<sup>127</sup> Though the overall implications of *Obergefell* are relatively small given the transition that already occurred after the *Windsor* decision, there are some more specific, technical areas of tax law which may be impacted by the decision.<sup>128</sup>

In the wake of the post-*Windsor* change in IRS policy, the Louisiana Department of Revenue announced that, despite the ruling by the IRS, same-sex married couples in Louisiana would still be required to file their state income taxes as single filer.<sup>129</sup> This presented myriad problems for same-sex married couples, as the Louisiana individual income tax liability is based upon information used on the taxpayer’s federal income tax return. Louisiana’s same-sex spouses were therefore required to “cobble together a bogus single-filer federal return and then use those numbers to calculate their individual Louisiana income tax liability.”<sup>130</sup> “The complexities of this dubious process have been problematic for individuals and businesses alike.”<sup>131</sup> Uncertainty reigned as to how much an employer should withhold in state income taxes for their employees in relation to the granting of same-sex spousal benefits. After the decision in *Obergefell*, however, the filing of state income taxes should become more straightforward for same-sex spouses. Rather than having to cobble together a fictitious individual return, they will now be able to base their Louisiana tax liability on their actual federal return. However, to fully effectuate these changes it will be necessary for the Louisiana Department of Revenue to update their forms to come into compliance with the new law of the land. The Louisiana Department of Revenue has indicated that it will take steps to comply with the decision in *Obergefell*.<sup>132</sup>

## VIII. Conclusion

Though the legal landscape of family law remains somewhat uncertain after the *Obergefell* decision, what is certain is that Louisiana has entered into a new frontier. The upcoming years will be a time of dynamic change for the family law of Louisiana and though some of those changes

---

<sup>124</sup> 1 U.S.C.A. § 7 (West)

<sup>125</sup> See *United States v. Windsor*, 133 S.Ct. 2675 (2013).

<sup>126</sup> See *supra* n.94.

<sup>127</sup> CAROL V. CALHOUN, *State Taxes and Married Same-Sex Couples Before Obergefell (sic)*, EMPLOYEE BENEFITS LEGAL RESOURCE SITE (June 26, 2015), <http://benefitsattorney.com/charts/state-taxes-and-married-same-sex-couples/>.

<sup>128</sup> For a nuanced examination of how *Obergefell* may impact tax law in the United States please see PAUL CARON, *Seto: The Tax Implications of Obergefell v. Hodges*, TAXPROFBLOG (June 26, 2015), [http://taxprof.typepad.com/taxprof\\_blog/2015/06/seto-the-tax-implications-of-obergefell-v-hodges.html](http://taxprof.typepad.com/taxprof_blog/2015/06/seto-the-tax-implications-of-obergefell-v-hodges.html)

<sup>129</sup> See *supra* n.109.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *LDR Issues Guidance on Administration of Taxes for Same-Sex Marriage*, LOUISIANA DEPARTMENT OF REVENUE PRESS RELEASES (July 2, 2015), <http://revenue.louisiana.gov/NewsAndPublications/PressReleaseDetails/411>.

may be difficult to effect, they also provide for an opportunity to make fundamental, necessary changes to our family law regime, and to make it more equitable and better adapted to the dynamics of the modern family.

Since *Obergefell*, the pendulum has appeared to swing in favor of greater rights for the LGBT community in Louisiana. Shortly after taking office, Louisiana Governor John Bel Edwards signed an executive order banning discrimination based on sexual orientation and gender identity by state agencies, boards and contractors.<sup>133</sup> Under this executive order, state contracts will be required to contain anti-discrimination provisions as well.<sup>134</sup> Additionally, Governor Edwards rescinded his predecessor's executive order which purported to provide protections to people who oppose same-sex marriage.<sup>135</sup> Furthermore, Governor Edwards has issued a proclamation declaring June "LGBT Pride Month" in Louisiana.<sup>136</sup> However, the Louisiana Attorney General has expressed the opinion that Governor Edwards' executive orders are unenforceable, indicating that continued opposition to LGBT rights persists in many layers of Louisiana state government.<sup>137</sup>

State family law regimes have always been required to change along with social norms. And now that the post-*Obergefell* definition of marriage has ceased to be one bound up in the gender identification of the participants, many gender distinctions and biases which previously developed in the law are of little value. A complete overhaul of the family law regime of Louisiana (and the other states) is advisable, not only to accommodate now-permitted same-sex marriages, but also to integrate these newly-legal marriages into the totality of the family law regime (e.g., by dropping the gender-specific language in family law statutes, redefining parentage, and the like).

All players in the legal system must become involved in the effort. Failure to take affirmative legislative action in an expedited fashion will only cause confusion during this federally mandated transition into a new legal landscape in the field of family law. The Louisiana legislature will no doubt be hesitant to act, and the voice of Louisiana lawyers will be more important than ever in forcing that action.

---

<sup>133</sup> *Louisiana Governor Issues Order Banning LGBT Discrimination*, LOS ANGELES TIMES/AP (April 13, 2016), <http://www.latimes.com/nation/nationnow/la-na-louisiana-lgbt-discrimination-20160413-story.html>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> ELIZABETH CRISP, *Governor Edwards Declares June as 'LGBT Pride Month' in Louisiana*, THE ADVOCATE (June 11, 2016), <http://theadvocate.com/news/politics/16068392-123/governor-edwards-declares-june-as-lgbt-pride-month-in-louisiana>.

<sup>137</sup> JULIA O'DONOGHUE, *John Bel Edwards' LGBT Protections Can't Be Enforced: Attorney General*, NOLA.COM (May 25, 2016), [http://www.nola.com/politics/index.ssf/2016/05/attorney\\_general\\_john\\_bel\\_edwa.html](http://www.nola.com/politics/index.ssf/2016/05/attorney_general_john_bel_edwa.html).

## Appendix A: Timeline of Same-Sex Marriage Legalization<sup>138</sup>

- 1/1/1973: Maryland becomes the first state to pass a statute specifically banning marriage between same-sex couples. The majority of states follow Maryland in passing these types of specific prohibitions.
- 11/9/1973: Kentucky Court of Appeals rules in *Jones v. Hallahan* that same-sex couples may not marry.
- 5/20/1974: The Court of Appeals of Washington denies the case of two men who challenged the denial of the freedom to marry.
- 4/21/1975: The County Clerk of Boulder County Colorado begins issuing marriage licenses to same-sex couples as there was nothing in Colorado law preventing her from doing so. The federal courts rule that Colorado law only recognizes marriages between a man and woman only, in 1982 the 9<sup>th</sup> Circuit Court of Appeals agrees.
- 5/5/1993: The Hawaii Supreme Court rules in *Baehr v. Lewin* that denying marriage to same-sex couples violates the Equal Protection Clause of the Hawaii Constitution.
- 9/21/1996: President Bill Clinton signs DOMA, defining marriage as a union between a man and a woman for federal purposes.
- 11/3/1998: The Hawaiian Constitution is amended to restrict marriage to a union between a man and a woman.
- 9/22/1999: California becomes the first state to allow for domestic partnerships for same-sex couples.
- 12/20/1999: The Vermont Supreme Court rules that same-sex couples must be treated equally to heterosexual married couples. The Vermont legislature responds by establishing civil unions.
- 11/7/2000: Nebraska voters pass a ballot initiative which constitutionally prohibits the state from respecting any form of family status or recognition for same-sex couples. Following, 27 other states pass similar amendments.
- 11/18/2003: The Massachusetts Supreme Court holds that the state constitution mandates the freedom to marry for same-sex couples. The court later reaffirms its decision holding that no separate mechanism, such as civil unions, would sufficiently protect same-sex couples.
- 5/17/2004: Massachusetts becomes the first state in the United States in which same-sex couples may legally marry.
- 1/19/2005: The Louisiana Supreme Court reinstates a ban on marriage between same-sex couples, bringing the number of states with constitutional bans to 17.
- 4/20/2005: Connecticut legalizes civil unions for same-sex couples.
- 9/6/2005: The California legislature passes a freedom to marry bill which is vetoed by the governor of the state.
- 11/8/2005: Proposition 2 is passed in Texas, constitutionally excluding same-sex couples from marrying.
- 10/25/2006: The New Jersey Supreme Court unanimously rules that same-sex couples are entitled to all state-level spousal right and responsibilities, suggesting that the state either allow same-sex couples to marry or pass a law allowing for civil unions. The New

---

<sup>138</sup> <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage>

Jersey legislature declines to legalize same-sex marriage but does make provisions for civil unions.

- 4/21/2007: Washington State (quickly followed by Oregon and New Hampshire) passes a domestic partnership bill.
- 5/15/2008: The California Supreme Court determines that a state statute excluding same-sex couples from marriage is unconstitutional. In response, opponents to same-sex marriage get Proposition 8 qualified for the November ballot, while couples begin marrying on June 16<sup>th</sup>.
- 5/22/2008: Maryland legalizes domestic partnerships for same-sex couples.
- 10/10/2008: The Connecticut Supreme Court holds that same-sex couple have the right to marry. The law takes effect retroactively to October 1<sup>st</sup>, permitting all same-sex couples the ability to marry and converting all existing civil unions between same-sex couples in the state into marriages.
- 11/2/2008: Proposition 8 is passed in California stripping away same-sex couples right to marry. Similar amendments are passed in Florida and Arizona.
- 4/3/2009: Per an Iowa Supreme Court decision, same-sex marriage becomes legal in Iowa.
- 4/7/2009: Vermont, through legislative action, legalizes same-sex marriage.
- 5/6/2009: Maine, through legislative action, legalizes same-sex marriage.
- 5/26/2009: The California Supreme Court rules that same-sex marriages that occurred before the passage of Proposition 8 are valid.
- 5/31/2008: Nevada approves a broad domestic partnership bill over the governor's veto. Wisconsin follows with a less expansive domestic partnership bill.
- 6/3/2009: New Hampshire, through legislative action, legalizes same-sex marriage.
- 11/3/2009: Voters in Maine pass a ballot measure to overturn the freedom of same-sex couples to marry in Maine.
- 12/18/2009: The District of Columbia legalizes same-sex marriage.
- 8/2010: CNN release the first nationwide poll showing majority support for same-sex marriage.
- 8/4/2010: The U.S. District Court of Northern California declares Proposition 8 unconstitutional.
- 1/31/2011: Illinois passes a law allowing for domestic partnerships. Later Hawaii, Delaware, and Rhode Island follow suit.
- 2/23/2011: The Obama administration declares that it will no longer defend DOMA from challenges in court.
- 6/24/2011: Through legislative action, the state of New York legalizes same-sex marriage. This marked the first time that a Republican-led legislative chamber passes a law legalizing same-sex marriage.
- 1/26/2012: Maine places a ballot initiative on the November ballot which will legalize same sex-marriage while also protecting religious freedom.
- 2/7/2012: The 9<sup>th</sup> Circuit Court of Appeals upholds the N.D.'s ruling that Proposition 8 violates the U.S. Constitution.
- 2/13/2012: Through legislative action, Washington legalizes same-sex marriage.
- 2/16/2012: The New Jersey legislature passes a bill legalizing gay marriage which is vetoed by the governor.
- 3/1/2012: Maryland, through legislative action, legalizes same-sex marriage.

- 5/8/2012: North Carolina passes a constitutional amendment prohibiting same-sex marriage.
- 11/6/2012: In Maine, Maryland, and Washington, voters defeat ballot measures to reverse the legalization of same-sex marriage in those states. In Minnesota, voters reject an anti-same-sex marriage constitutional amendment.
- 4/24/2013: Rhode Island, by legislative action, legalizes same-sex marriage.
- 5/7/2013: By legislative action, Delaware legalizes same-sex marriage.
- 5/14/2013: Minnesota, by legislative action, legalizes same-sex marriage.
- 6/26/2013: The United States Supreme Court overturns Section 3 of DOMA in the *Windsor* case and upholds the lower court's ruling on Proposition 8.
- 10/21/2013: Per a judicial ruling, same-sex marriages begin in New Jersey.
- 11/13/2013: Hawaii legalizes same-sex marriage through legislative action.
- 11/20/2013: Illinois legalizes same-sex marriage through legislative action.
- 12/19/2013: The New Mexico Supreme Court affirms the freedom to marry in every county of the state, effectively legalizing same-sex marriage in the state.
- 12/20/2013: A district court judge declares the laws prohibiting same-sex couples from marrying in Utah are unconstitutional.
- 1/14/2014: A U.S. district court judge issues a ruling in favor of same-sex marriage in Oklahoma.
- 2/12/2014: A U.S. district court judge in Kentucky issues a ruling order in that the state respect the marriages of same-sex couples legally performed in other states. The Attorney General of Kentucky declines to appeal.
- 2/13/2014: A U.S. district court judge in Virginia issues a ruling in favor of same-sex marriage. The ruling is stayed even through both the governor and attorney general of Virginia stated that they would no longer defend laws prohibiting same-sex marriage.
- 3/12/2014: A federal judge in Michigan rules in favor of same-sex marriage. Same-sex marriages are performed legally until the ruling is stayed pending an appeal.
- 4/14/2014: A federal judge in Ohio order the state to begin respecting same-sex marriages performed legally in other jurisdictions.
- An Arkansas Circuit Court Judge strikes down the state's ban on same-sex marriage. The decision takes effect immediately and over 400 same-sex couples marry before the Arkansas Supreme Court stays the ruling pending the state's appeal.
- 5/13/2014: A U.S. Magistrate issues a ruling striking down the state's ban on same-sex marriage. The ruling is stayed pending appeal.
- 5/19/2014: A U.S. district judge issues a ruling striking down Oregon's ban on same-sex marriage. The ruling takes effect immediately the parties with standing refuse to appeal. Same-sex marriage becomes legal in Oregon.
- 5/20/2014: A U.S. district judge in Pennsylvania strikes down that state's ban on same-sex marriage. The ruling took effect immediately and the state declined to appeal thereby legalizing same-sex marriage in Pennsylvania.
- 6/6/2014: A U.S. district judge strikes down Wisconsin's ban on same-sex marriage. The ruling takes effect immediately and for approximately 11 days same-sex couples have the right to marry in Wisconsin. The decision is thereafter stayed pending appeal to the 7<sup>th</sup> Circuit,
- 6/25/2014: The U.S. Court of Appeals for the 10<sup>th</sup> Circuit upholds the ruling striking down Utah's same-sex marriage ban, the ruling is put on hold pending an attempt by the

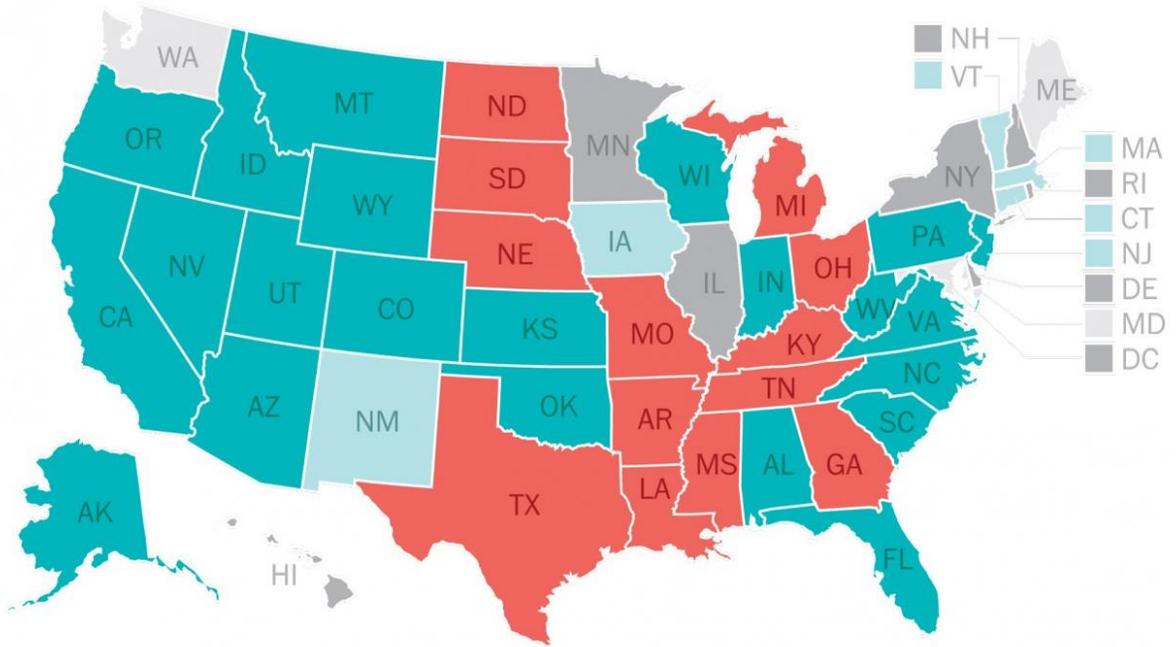
defense to see certiorari. On the same day a U.S. District Court judge in Indiana strikes down that state's same-sex marriage ban and couples begin marrying that afternoon.

- 7/18/2014: The 10<sup>th</sup> Circuit again affirms same-sex marriage this time in Oklahoma. The ruling is put on hold pending further action from the U.S. Supreme Court.
- 7/28/2014: The 4<sup>th</sup> Circuit rules in favor of same-sex marriage, the ruling is stayed by the U.S. Supreme Court.
- 8/3/2014: A federal judge in Louisiana becomes the first in over a year to uphold a ban on same-sex marriage, the ruling was appealed to the 5<sup>th</sup> Circuit Court of Appeals.
- 8/4/2014: The 7<sup>th</sup> Circuit rules in favor of same-sex marriage, the ruling is stayed by the U.S. Supreme Court.
- 10/6/2014: The U.S. Supreme Court denies review in five different marriage cases clearing the way for the lower court rulings to stand. The move effectively brings the number of states which permit same-sex marriage to 30.
- 10/7/2014: The 9<sup>th</sup> Circuit rules in favor of same-sex marriage, the ruling takes effect immediately.
- 11/6/2014: The 6<sup>th</sup> Circuit reverses 6 pro-same-sex marriage lower court rulings out of Kentucky, Michigan, Ohio, and Tennessee.
- 11/25/2014: A U.S. district court judge rules in favor of the freedom to marry in Arkansas, declaring the state's constitutional amendment prohibiting it to be unconstitutional. A similar ruling occurs that same day in Mississippi.
- 6/6/2015: A stay on an August 2014 federal ruling legalizing same-sex marriage in Florida expires.
- 12/12/2015: A U.S. district judge rules in favor of same-sex marriage in South Dakota.
- 12/16/2015: The U.S. Supreme Court grants review.
- 12/23/2015: A U.S. district judge rules in favor of same-sex marriage in Alabama. Alabama's request for a stay is denied.
- 2/9/2015: The Alabama Supreme Court instruct all clerks to stop issuing marriage licenses to same-sex couples.
- 6/8/2015: A same-sex couple in Guam is denied a marriage license. They sue and win.
- 6/26/2015: The United States Supreme Court rules in favor of same-sex marriage in *Obergefell v. Hodges*, striking down same-sex marriage bans in the 13 remaining states.

## Appendix B: Geographic Comparisons

### The State of Same-Sex Marriage In Advance of *Obergefell*

- Not permitted      Permitted through:      ● Federal courts      ● Legislative action  
● State court action      ● Voter referendum



Note: A previous version of this map incorrectly classified how same-sex marriage was legalized in New Jersey.

Source: Freedom to Marry

THE WASHINGTON POST



## Appendix C: SR 143 (2016), asking Louisiana State Law Institute to Study Same-Sex Marriage Issues

2016 Regular Session

ENROLLED SENATE RESOLUTION NO. 143

BY SENATOR MORRELL

### A RESOLUTION

To urge and request the Marriage-Persons Committee of the Louisiana State Law Institute to study, and the Louisiana State Law Institute to make, annual comprehensive and ongoing recommendations to the Legislature regarding state law post *Obergefell v. Hodges*, including but not limited to recommendations in the form of proposed legislation for revisions to laws governing families, persons, community property, successions, immovable property, the rights of third parties, procedure, and the stability and validity of transactions.

WHEREAS, in *Obergefell v. Hodges*, the United States Supreme Court in 2015 held that state bans on same-sex marriage violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and further recognized that there was no lawful basis to uphold so-called "recognition bans" purporting to ban the recognition of same-sex marriages performed under the laws of other states; and

WHEREAS, in state cases such as *Costanza v. Caldwell* the Louisiana Supreme Court discussed the effects of *Obergefell* and pointed out that the United States Supreme Court's interpretation of the federal constitution is final and binding upon all of the courts of Louisiana, and further that *Obergefell* compels the conclusion that the state of Louisiana may not bar same-sex couples from the civil effects of marriage on the same terms accorded to opposite-sex couples; and

WHEREAS, in a preliminary report to the Legislature concerning same-sex marriage dated March 16, 2016, the Marriage-Persons Committee of the Louisiana State Law Institute pointed out that these rulings have immediately and significantly impacted many areas of Louisiana law and have further immediately made invalid and inaccurate and outdated the present language of numerous existing statutory provisions, including constitutional provisions and laws governing the rights of individuals, family law, maternity, paternity, community property, debt and other obligations of spouses, transactions involving immovable property, successions, procedure, and the rights and settled expectations of third parties under existing law; and

WHEREAS, an additional significant concern noted by the report was the potential retroactive application of the effects of *Obergefell* and the impact of such retroactive application upon marital relationships, community property, successions, and the rights of third parties, including buyers of immovable property and creditors alike; and

WHEREAS, in light of these rulings and issues, the study and development of comprehensive and ongoing revisions to numerous existing provisions of Louisiana law is necessary in order to enact statutory language that reduces legal uncertainty, promotes the orderly administration of justice, provides protections to persons and stability to family relationships and property regimes, and prevents problematic judicial action and interpretation of law adversely impacting families and innocent third parties; and

WHEREAS, the Marriage-Persons Committee of the Louisiana State Law Institute should conduct such a study and the Louisiana State Law Institute should prepare, on an annual basis, comprehensive and ongoing recommendations in the form and content of substantive legislation to revise existing provisions, or enact new provisions, of Louisiana law in order to address these issues.

THEREFORE, BE IT RESOLVED that the Senate of the Legislature of Louisiana does hereby urge and request the Marriage-Persons Committee of the Louisiana State Law Institute to study, and the Louisiana State Law Institute to make, annual comprehensive and ongoing recommendations to the Legislature regarding state law post *Obergefell v. Hodges*, including but not limited to recommendations in the form of proposed legislation for revisions to laws governing family relations, community property, successions, immovable property, the rights of third parties, procedure, and the stability and validity of transactions.

BE IT FURTHER RESOLVED that, at least forty-five days prior to the convening of each regular legislative session, the Louisiana State Law Institute shall report its findings and recommendations in the form of proposed legislation to the Legislature of Louisiana.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.