DIVORCE, CUSTODY, AND OTHER EMERGING FAMILY LAW ISSUES AFTER OBERGEFELL

KAREN J. LANGSLEY
Langsley Law
1601 E. Cesar Chavez, Suite 105
Austin, Texas 78702
Tel: (512) 563-8727
Fax: (512) 852-4646
www.LangsleyLaw.com
klangsley@langsleylaw.com

MICHELLE MAY O'NEIL
O'Neil Wysocki, P.C.
5323 Spring Valley Road, Suite 150
Dallas, Texas 75254
Tel: (972) 852-8000
Fax: (214) 306-7830
www.OWLawyers.com
Michelle@OWLawyers.com

State Bar of Texas
THE IMPACT OF MARRIAGE EQUALITY ON TEXAS LAW
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CHAPTER 9

KAREN J. LANGSLEY

Attorney at Law, CWLS*

klangsley@langsleylaw.com

PO Box 62, Dripping Springs, TX 78620 (*mail*) **Phone**: (**512) 563-8727**

1601 E. Cesar Chavez #105, Austin, TX 78702 (*office*) **Fax: (512) 852-4646**

***Certified, Child Welfare Law Specialist, National Association of Counsel for Children**

BIOGRAPHY

Certified Child Welfare Law Specialist with practice in child welfare litigation; general family law practice in Central Texas; commitment to Continuing Legal Education as presenter and facilitator; advocacy for improvement in child welfare law including work with State Legislature, State Bar and local Bar Associations. Married to Jill Wilcox. Proud parent of Zach (University of Denver, 2014) and Kim (University of Arkansas).

PROFESSIONAL EXPERIENCE

Solo practitioner doing family law litigation in Hays, Travis, Burnet, Caldwell and Blanco counties since 2004 including appellate cases; extensive pro bono service on local and national committees with focus on LGBT family and child welfare law; teaching and writing for CLE courses in Texas

EDUCATION

J.D.., Golden Gate University (San Francisco)	*1982*
B.A., Grinnell College (Iowa)	*1978*
Mills College (Oakland, California) undergraduate work	*1976 – 1977*

ADMITTED TO PRACTICE

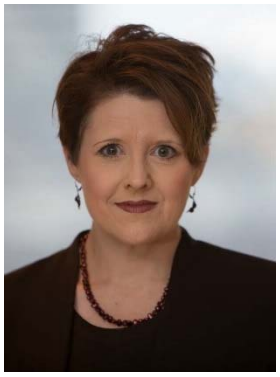
State of California (SBN 111766)	*1983*
Northern District of California	*1984*
Eastern District of California	*1986*
State of Texas (SBN 24043441)	*2004*

AFFILIATIONS

Texas State Bar Committee on Child Abuse and Neglect (*Vice-Chair, CLE Course Director*)
Supreme Court Commission on Children, Youth and Families (*member, Trial Skills committee*)
TexasBarCLE Advanced Family Law Conference (*course director, Child Welfare Track 2012-2015*)
Texas State Bar Annual Meeting (*course director, LGBT Law Section CLE 2010-2014*)
Texas State Bar LGBT Law Section *(past Chair, past Treasurer, member*)
College of the State Bar of Texas (*member since 2005*)
Austin Bar Association's Adoption Day Committee *(member since 2004*)
National Association of Counsel for Children *(member*)
Austin Bar Association's CAFA (Court Appointed Family Attorneys) Section *(former CLE Chair*)
National Center for Lesbian Rights *(member, National Family Law Advisory Council 2005-2015)*
Lambda Legal Youth in Out-of-Home Care Project *(national advisory network*)

Michelle May O'Neil

Senior Shareholder, O'Neil Wysocki, P.C.
Board Certified, Texas Family Law (TBLS)
Michelle@OWLawyers.com
Direct Dial 214-238-8221



Years of Experience

Michelle May O'Neil has 23 years' experience representing small business owners, professionals, and individuals in litigation related to family law matters such as divorce, child custody, and complex property division. Described by one lawyer as "a lethal combination of sweet-and-salty", Ms. O'Neil exudes genuine compassion for her client's difficulties, yet she can be relentless when in pursuit of a client's goals. One judge said of Ms. O'Neil, "She cannot be out-gunned, out-briefed, or out-lawyered!"

Family Law Specialist

Ms. O'Neil became a board certified family law specialist by the Texas Board of Legal Specialization in 1997 and has maintained her certification since that time. While representing clients in litigation before the trial court is an important part of her practice, Ms. O'Neil also handles appellate matters in the trial court, courts of appeals and Texas Supreme Court. Lawyers frequently consult with Ms. O'Neil on their litigation cases about specialized legal issues requiring particularized attention both at the trial court and appellate levels. This gives her a unique perspective and depth of perception that benefits both her litigation and appellate clients.

Top Lawyers in Texas and America

Ms. O'Neil has been named to the list of Texas SuperLawyers for five straight years, 2011-2015, a peer-voted honor given to only about 5% of the lawyers in the state of Texas. In 2014 and 2015, Ms. O'Neil received the special honor of being named by Texas SuperLawyers as one of the Top 50 Women Lawyers in Texas, Top 100 Lawyers in Texas, and Top 100 Lawyers in DFW. She was named one of the Best Lawyers in America for 2016 and received an "A-V" peer review rating by Martindale-Hubbell Legal Directories for the highest quality legal ability and ethical standards.

Author and Speaker

A noted author, Ms. O'Neil released her second book *Basics of Texas Divorce Law* in November 2010, with a second edition released in 2013, and a third edition expected in 2015. Her first book, *All About Texas Law and Kids*, was published in September 2009 by Texas Lawyer Press. In 2012, Ms. O'Neil co-authored the booklets *What You Need To Know About Common Law Marriage In Texas* and *Social Study Evaluations*. The State Bar of Texas and other providers of continuing education for attorneys frequently enlist Ms. O'Neil to provide instruction to attorneys on topics of her expertise in the family law arena.

Certification:

Board Certified in Family Law, Texas Board of Legal Specialization 1997, recertified 2002, 2007, 2012

Bar Admission:

State Bar of Texas, 1992
United States Supreme Court, 1999

Education:

Doctor of Jurisprudence, Baylor University School of Law, 1991
Bachelor of Business Administration, Baylor University Hankamer School of Business, 1989
Mediation Certificate, Texas Women's University, 2003

Honors:

Best Lawyers in America, Appellate Law 2016
Texas SuperLawyers, Family Law, 2011, 2012, 2013, 2014, 2015
Texas SuperLawyers Lists 2014-2015: Top 50 Women Lawyers in Texas, Top 100 Lawyers in Texas, Top 100 Lawyers in Dallas/Fort Worth area
A-V Peer Review Rating, Lexis-Nexis, Martindale Hubbell Legal Directories
Best Lawyer in Park Cities/North Dallas, Living Magazine, 2013
Annette Stewart Inn of Court, 2003 to 2015
Superb 10 rating, AVVO.com
Who's Who in America, multiple editions
Who's Who in American Law, multiple editions

Memberships:

State Bar of Texas, Family and Appellate Sections
Dallas Bar Association, Family and Appellate Sections
Texas Academy of Family Law Specialists

Publications:

Weblogs:

Dallas Texas Divorce Law Blog www.dallastxdivorce.com
Gay and Lesbian Family Law in Texas Blog www.lgbttexasfamilylaw.com

Published Books:

All About Kids and the Law in Texas, Texas Lawyer Press, 2009 (out of print).
The Basics of Texas Divorce, LuLu Press, 2010, second edition 2012, third edition expected 2015.
Common Law Marriage in Texas booklet, self-published.
Social Study Evaluation booklet, self-published.

Published Cases:

Assoun v. Gustafson, 05-14-01463-CV, pending.
Zhang v. Zhang, __ S.W.3d __ (Tex. App. – Dallas 2014, pet. pending).
In re J.F., 02-14-00324-CV, pending.
In re M.A.M., 05-14-00040-CV, pending.
Sheriff v. Moosa, 05-13-01143-CV, pending.
In re O'Donnell, 05-14-00404-CV, pending.
In re Busaleh, __ S.W.3d __ (Tex. App. – Texarkana 2014, orig. proceeding).
In re Neal, __ S.W.3d __ (Tex. App. – Dallas, orig. proceeding).
In re C.H., __ S.W.3d __ (Tex. App. – Fort Worth 2014, no pet).
In re Kinney, __ S.W.3d __, (Tex. App. – Dallas 2014, orig. proceeding).
In re Alvarez-Rivas, __ S.W.3d __, (Tex. App. – Fort Worth 2014, orig. proceeding).
In re O'Donnell, __ S.W.3d __, (Tex. App. – Dallas 2014, orig. proceeding).
Shilling v. Gough, 393 S.W.3d 555 (Tex. App. – Dallas 2013, no pet. h.).
Jablonski v. Jablonski, 2013 WL 2420646 (Tex. App. – Dallas 2013, no pet. h.).
In re Marriage of Bivins, 393 S.W.3d 893 (Tex. App. – Waco 2012, pet. denied).
***Moore v. Moore*, 383 S.W.3d 190 (Tex. App. – Dallas 2012, pet. denied). *case of first impression**
In re B.N.L.B., 375 S.W.3d 557 (Tex. App. – Dallas 2012, no pet. h.).
In re C.F.M., 360 S.W.3d 654 (Tex. App. – Dallas 2012, no pet. h.).
In re J.L.E., 2012 WL 2343901 (Tex. App. – Dallas 2012, no pet. h.).
In re Foreman, 2012 WL 2068964 (Tex. App. – Dallas 2012, orig. proceeding).
In re Wedgeworth, 2012 WL 690280 (Tex. App. – Tyler 2012, orig. proceeding).
In re McCray, 2011 WL 6152191 (Tex. App. – Dallas 2011, orig. proceeding).
Collins v. Collins, 345 S.W.3d 644 (Tex. App. – Dallas 2011, no pet.).
In re M.A.M., 346 S.W.3d 10 (Tex. App. – Dallas 2011, pet. denied).
In re Maasoumi, 339 S.W.3d 787 (Tex. App. Dallas 2011, orig. proceeding).
In re McCray, 324 S.W.3d 685 (Tex. App. – Dallas 2010, orig. proceeding).
In re McCray, 2010 WL 3193315 (Tex. App. – Dallas 2010, orig. proceeding).
Ferris v. Ferris, 2010 WL 5158444 (Tex. App. – Dallas 2010, no pet.).
In re Pinkard, 2010 WL 4723770 (Tex. App. – Dallas, 2010, pet. denied).
In re P.L.H., 324 S.W.3d 114 (Tex. App – Dallas 2010, pet. denied).
***Kee v. Kee*, 307 S.W.3d 812 (Tex. App. – Dallas 2010, pet. denied). *case of first impression**
In re D.L.S., 2010 WL 1491860 (Tex. App. – Dallas 2010, no pet. h.).
***In re M.K.S.-V.*, 301S.W.3d 460 (Tex. App. – Dallas 2009, pet. denied). *case of first impression**
In re Rosbottom, 2009 WL 1058747 (Tex. App. – Dallas 2009, dismissed).
Eberstein v. Hunter, 260 S.W.3d 626 (Tex.App.– Dallas 2008, no pet.).
In re S.C.S., 2008 WL 1973570 (Tex.App. – Dallas 2008, no pet.).
In re Mantooth, 2008 WL 1867935 (Tex.App. – Fort Worth 2008, orig. proceeding).
Kemble v. Kemble, 2008 WL 921471 (Tex.App. – Dallas 2008, no pet.).
In re Barnett, 2008 WL 820201 (Tex.App. – Fort Worth 2008, no pet.).
In re L.M.M., 247 S.W.3d 809 (Tex.App. – Dallas 2008, pet. denied).
In re Dobbins, 247 S.W.3d 394 (Tex.App. – Dallas 2008, orig. proceeding).
Wichman v. Wichman, 2008 WL 425830 (Tex.App.– Fort Worth 2008, no pet.).
Eberstein v. Eberstein, 2007 WL 416491 (Tex.App. – Dallas 2007, no pet.).
In re Rowe, 182 S.W.3d 424 (Tex.App. – Eastland 2005, orig. proceeding).

***Peck v. Peck*, 172 S.W.3d 26 (Tex.App. – Dallas 2005, pet denied). *case of first impression**
In re Dettmer, 2005 WL 768406 (Tex.App. – Dallas 2005, orig. proceeding).
Harleaux v. Harleaux, 154 S.W.3d 925 (Tex.App. – Dallas 2005, no pet.).
***In Re Dupree*, 118 S.W.3d 911 (Tex.App. – Dallas, 2003, pet. denied)(orig. proceeding). *case of first impression**
Smith v. Smith, 115 S.W.3d 303 (Tex.App. – Corpus Christi 2003, no pet.)
Valley Forge Insurance Co. v. Austin, 65 S.W.3d 371 (Tex.App. – Dallas 2002), pet. denied, 105 S.W.3d 609 (Tex. 2003).
Saenz v. The Insurance Company for the State of Pennsylvania, 66 S.W.3d 444 (Tex.App. – Waco 2001, no pet.).
Gainesville Mem. Hosp. v. Tomlinson, 48 S.W.3d 511 (Tex.App. – Ft. Worth 2001, pet. denied).
In Re Aramark Corp., 38 S.W.3d 291 (Tex.App. – Tyler 2001, orig. proceeding).
Dickens v. Willis, 957 S.W.2d 657 (Tex.App. – Austin 1997, no writ).
***Lemley v. Miller*, 932 S.W.2d 284 (Tex.App. – Austin 1996, no writ). *case of first impression**

Published Articles:

"Advice from a Divorce Lawyer: Whether or Not You Are Thinking About Getting a Divorce", Today's Dallas Woman Magazine, January 2002. "Family Law Appeals Distinguished", Appellate Advocate, Vol. XV, No. 4, Winter 2003. "Ground Rules: Annulment", Texas' Divorce Magazine, Vol. I, No. 1, Fall 2003. "Challenges and Rewards of Solo Practice", Texas Lawyer, October 2003. "Alimony/Maintenance Enforcement By Contempt", Dallas Bar Association Headnotes, April 2004. "Do You Know The New Law On AJ Appeals?", Family Law Section Report, Vol. 2007-4. "Family Law Appeals Distinguished", Family Law Section Report, Vol. 2007-4.

Presentations and Papers:

Family Law Topics:

"Discovery in Family Law Cases", Family Law Practice Seminar, University of Houston Law Foundation, September 1999. "Enforcement of Court Orders and Decrees", Family Law Practice Seminar, University of Houston Law Foundation, April 2000. "Enforcement of Court Orders and Decrees", Family Law Practice Seminar, University of Houston Law Foundation, June 2001. "Enforcement of Court Orders and Decrees", Family Law Practice Seminar, University of Houston Law Foundation, March 2003. "When Custody Is At Issue", Pro Bono Family Law Seminar, Family Law Section of the State Bar of Texas, October 2001. "Family Violence", Advanced Family Law Drafting Course, State Bar of Texas, December 2001. "Maintenance and Alimony: Why Can't I Get No Satisfaction?", Family Law Practice Seminar, University of Houston Law Foundation, June 2002. "Standards of Review in Family Law Appeals," Family Law Practice Seminar, University of Houston Law Foundation, November 2002. "Court Orders and Decrees", Family Law Boot Camp 2003, State Bar of Texas, August 2003. "Speak Now or Waive It – Preserving Error for Trial Lawyers", Advanced Family Law Course, State Bar of Texas, August 2006. "Enforcement of Court Orders and Decrees", Family Law Practice Seminar, University of Houston Law Foundation, November 2006. "Characterization, Tracing, and Other Property Issues: What Really Is Clear and Convincing Evidence Anyway?", Advanced Family Law Course, State Bar of Texas, August 2007. We Lost Now What: Perfecting the Appeal, Marriage Dissolution Course, State Bar of Texas, April 2008. Helping Your Client Deal with Debt In Divorce, 8th Annual Family Law on the Front Lines Conference, University of Texas, June 2008. "Writing the Perfect Country and Western Song:

Successful Preparation and Trial of a Texas Temporary Orders Hearing", Marriage Dissolution Boot Camp, State Bar of Texas, April 2009. "Interesting Appellate Issues", Collin County Bench Bar Conference, May 2009. "Mandamus and More", 9tth Annual Family Law on the Front Lines Conference, University of Texas, June 2009. "Winning Your Case Before You Go To Trial: Pretrial Dispositive Motions and Procedures", Advanced Family Law Conference, State Bar of Texas, August 2009. Presentation materials for TAFLS Trial Institute, Texas Academy of Family Law Specialists, February 2010. "Winning Your Case Before You Go To Trial", Collin County Bar Association, September 2010. Same-Sex Custody Issues, SMU Law School Symposium, February 2012.

Civil Litigation Topics:

"Discovery in Mid-Sized Litigation Under the New Rules: Discovery Strategy for Neither Very Large Nor Very Small Cases", Civil Discovery Under the New Rules, University of Houston Law Foundation, February 1999. "Top Ten Rules for an Effective Voir Dire", Litigation and Trial Tactics, University of Houston Law Foundation, December 1999. "Representing the Unsympathetic Party", Litigation and Trial Tactics Seminar, University of Houston Law Foundation, December 2000. "Enforcement of Court Orders and Decrees", General Practice Institute, University of Houston Law Foundation, April 2001. "Protecting Your Client's Case for Appeal (and You From Malpractice)", Advance Civil Litigation Seminar, University of Houston Law Foundation, April 2004. "Anatomy of an Appeal", Collin County Paralegal Association, November 2004. "Preservation of Error When Offering and Excluding Evidence", How to Offer and Exclude Evidence Seminar, University of Houston Law Foundation, January 2005.

Juvenile Law Topics:

"Attorney-Client Privilege Communication Issues", 13th Annual Juvenile Law Conference, Juvenile Law Section of the State Bar of Texas, February 2000.

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DIVORCE, CUSTODY, AND OTHER EMERGING FAMILY LAW ISSUES AFTER OBERGEFELL

I. INTRODUCTION

Prior to June 26, 2015 same-sex married Texans could not get divorced. The Texas Constitution, Art. I, Sec. 21 and the Texas Family Code § 6.204 prohibited recognition of any same-sex marriage by the State of Texas. No marriage, argued the Attorney General, meant no divorce (because "divorce is a benefit of marriage"). All that changed a few months ago. Performing the duty first clarified in *Marbury v. Madison*, 5 U.S. 137 (1803), the United States Supreme Court exercised its power of judicial review and struck down as unconstitutional all laws prohibiting same-sex couples to marry.

The Texas Supreme Court in 2008 noted that "Legislatures write statutes; courts construe them. *Cf.* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts.")." *Southwestern Bell Telephone Co., L.P. v. Mitchell,* 276 S.W.3d 443 (Tex.2008). The U.S. Supreme Court therefore (contrary to the allegations of "judicial activism") acted properly when it said:

> "[T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell v. Hodges,* 576 U.S. ___, 2015 U.S. LEXIS 4250 (June 26, 2015) at *41-42. And "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." *Id* at *50.

However just because a law has been found unconstitutional does not put the lid on family law in Texas (and elsewhere). To the contrary, the ruling has opened up an entire new line of inquiry, led to many discussions over dinners or happy hour get-togethers, and will likely frustrate law school graduates on bar exam questions everywhere.

Obergefell said this: marriage is marriage. But it didn't clarify when those marriages began and, therefore, when people began accruing community property or whether all children born during these marriages are presumed to have two parents if those parents are of the same gender. It didn't address people who ran around the country entering into the various permutations of civil unions, domestic partnerships *and* marriages, all of which have differing rights/duties and which may need to be dissolved before - gasp – entering into a subsequent marriage with a new partner. And because Texas is one of a handful of states with common law marriage, the diverging possibilities may indeed be endless.

II. DIVORCE

The Texas Attorney General, in its oral arguments at the first same-sex divorce cases, asserted repeatedly that "divorce is a benefit of marriage." Undoubtedly the services of the court in issuing enforceable orders dividing community property and governing custody of children did provide a benefit to couples who could not agree on these issues. But trial courts in Austin, Dallas and San Antonio – those courts that saw family disputes on the front lines and the need for couples to be divorced so they could move on with their lives – felt that granting relief to these families grew out of their powers of general jurisdiction (*see Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71 (Tex.2000) and Texas Government Code § 24.007), and set the wheels moving.

A. Wedlocked

Before June 26, 2015, same-sex couples who had been legally married in other "recognition[1]" jurisdictions could not end their marriages. Every other state in the union had residency requirements to file for divorce (for example see Texas Family Code § 6.301) and, unless at least one-half of a Texas same-sex married couple was willing to move and establish residency elsewhere, those two individuals remained "wedlocked" here at home.

This had potentially huge implications for same-sex couples who could not divorce. Although they could file SAPCRs (suits affecting the parent-child relationship) to address issues regarding their children, and could file partition actions under the property code regarding their real estate, and could file contract cases at common law regarding their other assets, they could not end the status of their marriage to one another. They could not, in good conscience, remarry.

Other problems arose: at what point does potential community property stop accruing? In subsequent relationships where children are born, what about presumed parentage of former spouses?

Obergefell, thankfully, changed the landscape of divorce in Texas. Formerly wedlocked, couples could now divorce and obtain the assistance of court orders in determining issues of parentage, custody, and

[1] For purposes of this paper, "recognition" jurisdictions include those political entities (states and countries) that legalized marriage for same-sex couples. Likewise, "nonrecognition" jurisdictions had no provision for that, or refused to allow it, or outright prohibited recognition of such marriages.

community and separate property. The case did so in one fell swoop, as noted by the 4th Court of Appeals in San Antonio:

> "In *Obergefell v. Hodges,* the Supreme Court legalized same-sex marriage in the United States. As the appeal pending before this court is based on appellant's position that the trial court erred in granting its plea to the jurisdiction because the trial court lacked jurisdiction over this same-sex divorce for the reason that same-sex marriage was unconstitutional under Texas law, it appears such a contention is now moot. Accordingly, in light of the decisions in *State v. Naylor* and *Obergefell v. Hodges,* we ORDER the appellant to file a written response in this court on or before July, 20, 2015 showing cause why this court should not dismiss the appeal as moot." *In re the Marriage of A.L.F.L.,* No. 04-14-00364-CV (Tex.App.-San Antonio, June 30, 2015) (no pet.).

B. Constitutional Challenges No More

While parties should no longer have to challenge the constitutionality of Texas laws that prohibit recognition of certain marriages, the fight against such provisions led to some unanticipated results.

In *State v. Naylor,* 330 S.W.3d 434 (Tex.App.-Austin 2011), *aff'd,* Nos. 11-0114 & 11-0222, 2015 WL 3852284 (Tex. June 19, 2015) the primary issue was not the same-sex couple's divorce; it involved the AG's untimely intervention into this lawsuit. Justice Boyd concurred "separately to emphasize a point on which everyone agrees: the State of Texas is not bound by the divorce decree at issue in this case. The underlying issues are critically important, but I agree with the Court that we cannot reach them because the State lacks standing to pursue this appeal." *State v. Naylor,* 061915 TXSC, 11-0114 Boyd Concurring Opinion at p. 1-2.

Prior to February 10, 2010 when the trial judge rendered his order in this agreed divorce, the law allowed the AG to intervene in any case in which the constitutionality of a Texas statute was at issue, pursuant to Texas Civil Practice and Remedies Code § 37.006(b). This made sense because "the State has an interest in defending its statutes from attack, and the attorney general is entitled to be heard in a suit challenging the constitutionality of a statute." *Naylor* at p. 441.

However in this case the State got involved too late. The AG's office sat through Judge Jenkins' rendition of his judgment, and filed their intervention the next day. The Third Court of Appeals found that Texas Rule of Civil Procedure 60 (the intervention statute) does not specify *when* a party should intervene but after the court renders judgment it's too late. The Court further found that the one exception - the "virtual representation doctrine" - did not apply in this case.

As a result of *Naylor,* the Legislature passed H.B. 2425 which took effect June 17, 2011 and amended Texas Government Code § 402.010 to require a court to serve notice of any constitutional challenge to any law on the AG. The Legislature again amended this statute through S.B. 392 which took effect September 1, 2013 and put the burden on any party challenging the constitutionality of a Texas statute to fill out a specific form with the Office of Court Administration and file that with the court.

C. Retroactivity of Obergefell

In finding these laws unconstitutional, the practical effect should be that the law was void *ab initio* – that is, from the beginning. Therefore Texans who married prior to *Obergefell* should be able to argue that their marriages are valid from the date in which they entered into them.

A few cases, either recently decided or currently in litigation, are helpful. A same-sex widow in Texas and a same-sex widower in Arkansas applied for lump-sum death and widow/er's retirement benefits even though their spouses died before *Obergefell* was decided. The agency originally argued that the status at death depended on the state of residence, not on the law of the state where the marriage was entered into. Lambda Legal argued that the survivors were "entitled to those benefits because the courts of the states in which their spouses were domiciled at the time of death or application were constitutionally obligated to find that these same-sex couples were legally married." In August of this year the Department of Justice agreed that the SSA would apply *Obergefell* retroactively.

In a Maine divorce case, two women married in Massachusetts before their home state recognized same-sex marriage. The parties and the trial court asked the Maine Supreme Judicial Court to certify the following question:

> "May property acquired between October 14, 2008 and December 29, 2012 by a same-sex couple married in the State of Massachusetts on October 14, 2008 be treated as marital property for the purposes of equitable division of property in a divorce action filed on January 18, 2013?" *Kinney v. Busch,* Docket No. KEN-14-456, Appellee's Brief, p. 6.

Appellee argued that their state's ban on recognition of same-sex marriage until 2012 did not mean the parties were not married in 2008; merely that in 2012 the ban was lifted. It did not change the date of the marriage that occurred in 2008.

On September 11, 2015 Maine's Supreme Judicial Court, citing *Obergefell,* declined the report, saying that the trial court "has sufficient guidance before it to answer the reported question." *Kinney, supra* "Order to Discharge as Improvidently Granted."

In a Texas case on retroactivity, Supreme Court Chief Justice Jefferson, in his dissenting (on unrelated grounds) opinion in *Southwestern Bell Telephone Co., L.P. v. Mitchell*, 276 S.W.3d 443, 450 (Tex. 2008), says "the Supreme Court explicitly overruled [the *Chevron Oil* test (outlining narrow exceptions to the rule that Supreme Court decisions apply retroactively)] as it applies to constitutional decisions and suggested that prospective application was not only wrong as to constitutional decisions, but contrary to the role of the judiciary."

He quotes *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993) which held that "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Southwestern Bell* at p. 451.

Chief Justice Jefferson points out a concurring opinion by Justice Scalia in *Harper* on the issue of retroactive versus prospective application of decisions:

> "Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis* . . . . The true traditional view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice." *Id.* at 105-106, 113 S.Ct. 2510 (Scalia, J., concurring) (emphasis omitted)." *Southwestern Bell, supra,* at p. 451.

The *Chevron* test is set out in several Texas decisions, so is worth repeating here, even though overruled now. The Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S.97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) articulated a three-part analysis for departing from the normal situation where the Court's decisions apply retroactively:

> -- First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
> -- Second, [the court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.
> -- Finally, [the court must] weig[h] the inequity imposed by retroactive application, for where a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.
>
> 404 U.S. at 106-07 (citations and quotations omitted)." *Life Partners, Inc. v. Arnold,* 464 S.W.3d 660, 58 Tex.Sup.Ct.J. 911 (Tex. 2015).

In the case of marriage equality, the three-part test would show that retroactive application of *Obergefell* is a natural conclusion: married is married. Courts and legislatures need not contort themselves in affording differing levels of benefits to same-sex couples such as parentage, property rights and family relationships. It made no sense to require married same-sex couples in Iowa to fill out five separate income tax returns (married for federal; single for state for partner 1; single for state for partner 2; single for federal for partner 1; single for federal for partner 2) just to pay their state and federal taxes. Children could at last rest easy in knowing that their parents were their parents in all 50 states.

D. Void Ab Initio

If *Obergefell* destroyed all prohibitions against same-sex marriage in a few (well, five) strokes of the pen, then what was the effect of that decision? The net result is this: it's as if those prohibitions against recognition never existed in the first place. And that concept – laws being void from their inception – carries significant implications which will no doubt lead to the next round of litigation.

The Court of Appeals in *Karenev v. State*, 258 S.W.3d 210, 213 (Tex.App.-Fort Worth 2008) (*rev'd* on other grounds 281 S.W.3d 428 (Tex.Crim.App. 2009) defined the concept of a statute that is void *ab initio*: "[I]f the statute giving rise to a prosecution is unconstitutional, it is void from its inception, is no law, confers no rights, bestows no power on anyone, and justifies no act performed under it."

Also *see Reyes v. State*, 753 S.W.2d 382, 383 (Tex.Crim.App. 1988) which clearly set out the concept that "An unconstitutional statute is void from its inception and cannot provide a basis for any right or relief. See 12 Tex.Jur.3d, Constitutional Law, § 42, at 548. . . .*In re Johnson*, 554 S.W.2d 775, 787 (Tex.App.--Corpus Christi 1977), ref. n.r.e. 569 S.W.2d 882, held that an unconstitutional statute, as a general rule, amounts to nothing and accomplishes nothing and is no

law, citing *Colden v. Alexander*, 141 Tex. 134, 171 S.W.2d 328 (1943), and *Miller v. Davis*, 136 Tex. 299, 150 S.W.2d 973 (1941). *Newson v. Starkey*, 572 S.W.2d 29 (Tex.Civ.App.--Dallas 1978), held that generally a void law is no law and confers no rights, bestows no power on anyone and justifies no act performed under it citing *Sharber v. Florence*, 131 Tex. 341, 115 S.W.2d 604 (1938). See also *Lowry v. State*, 671 S.W.2d 601 (Tex.App.--Dallas 1984), affirmed in part, reversed in part 692 S.W.2d 86 (an unconstitutional statute is void from its inception); *Fite v. King*, 718 S.W.2d 345 (Tex.App.--Dallas 1986) ref. n.r.e. (unconstitutional act confers no right, imposes no duty, and affords no protection)."

Judges will have to spend some quality time with briefs and authority in the years to come, figuring out the impact of this concept on the typical family issues: parentage, property division and status of relationships.

E. What is a Valid Marriage

1. Before June 26, 2015

Before the *Obergefell* decision, the Texas Attorney General argued that same-sex married couples in Texas could end the status of their relationship by filing suit to declare the marriage void under Texas Family Code § 6.307 ("Either party to a marriage made void by this chapter may sue to have the marriage declared void, or the court may declare the marriage void in a collateral proceeding.")

The problem with this approach is the fact that many Texas couples went to states (or one of the 21 countries) where same-sex marriage was completely valid, entered into marriages under the laws there, and then returned to Texas. While the Attorney General may have felt that declaring such a marriage void met the requirements of Texas laws, a serious question remains whether the states in which the marriage was entered into would consider the marriage void.

Several attorneys did obtain voidance orders for their clients. The smart practitioner crafted orders that addressed the voidance statute in effect at the time of the dissolution, *and then* included language stating something along the lines of, "however if this State were to recognize the validity of the marriage at a future date, this Order should be construed as a divorce validly granted and which is entitled full faith and credit in any State."

PRACTICE TIP: For practitioners who obtained voidance orders for their clients without any language addressing the future possibility of marriage equality, prudence dictates that clients perhaps deserve a letter offering to remedy the possibility that their former marriage might still be in place. For clients who have gone on to marry a different person, or subsequently had children, this would seem especially important.

Texas Family Code § 1.102 states that "the most recent marriage is presumed to be valid as against each marriage that precedes the most recent marriage" until the validity of the prior marriage is proven. So for same-sex couples who married, then parted ways and went on to marry other partners, the last marriage would seem to be safe unless the prior partner or a party inheriting from that person wanted to claim the first marriage was still intact. Think: winning the lottery. Suddenly people might appear to claim their community property share whom the client never figured they'd hear from again.

2. Reverse Evasion Statutes

Some states, including Massachusetts which was the first state to recognize same-sex marriage, had reverse evasion statutes. Until it repealed its reverse evasion law in 2008 (Mass. Gen L. 207, secs. 11-13), any couple who married in that state could not legally do so if a marriage in their home state would be prohibited. The town clerks referred to this as "a legal impediment to the marriage" and referred to a list issued by the Mass. Dept. of Public Health for authority to deny issuing licenses. http://www.mass.gov/eohhs/docs/dph/vital-records/legal-impediments-marriage.pdf

Even though it recognized the repeal of the reverse evasion statute, an Ohio appellate court ruled in February of 2015 that lesbians who married in Massachusetts in 2006 (before the repeal) and returned to Ohio were *not* legally married for two reasons: the voidness in Massachusetts and the prohibition against same-sex marriage in Ohio. *McKettrick v. McKettrick*, 2015-Ohio-366.

New Hampshire's law (457:44 "Nonresidents" and repealed in July of 2014 by SB 394), stated that "No marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void."

The Social Security Administration keeps track of which states have evasion statutes, because that will have consequences for couples who seek social security benefits based on their date of marriage. See the following from the SSA POMS:

> **GN 00305.155 The Uniform Marriage Evasion Act.**
>
> The Uniform Marriage Evasion Act, which has two main provisions, has been adopted by the following States:
>
> - Illinois
> - Louisiana

- Massachusetts (**NOTE**: as of 07/31/08 the second provision of the UMEA no longer applies in Massachusetts)
- Vermont (**NOTE**: as of 09/01/09 the second provision of the UMEA no longer applies in Vermont)
- Wisconsin

The first provision: If a resident prohibited from marrying under the law of the State goes to another State for the purpose of avoiding this prohibition and contracts a marriage which would be void within his/her home State, that marriage will be held to be void by the home State, just as if the marriage had been entered into there. (Several States which have not adopted the Uniform Marriage Evasion Act as a whole have adopted this first provision; see summary of State laws in GN 00305.165.)

The second provision: Prohibits the marriage within the State of persons residing and intending to continue residing in another State, if the marriage would be void if contracted in the individual's home State. A marriage in violation of this prohibition is void in the State of marriage, just as it would be void in the State of divorce or in the individual's home State. It is also void in all jurisdictions by the general rule that, in determining the validity of a marriage, the courts will look to the law of the jurisdiction where the marriage occurred.

These issues may arise within the context of a divorce because one needs to establish the date of divorce. With the retroactivity issue and *void ab initio* argument, if the prohibitions were never valid to begin with, then the couple should not have to worry about being prohibited from marrying in reverse evasion jurisdictions. They would have been entitled to marry there at any time, since *Obergefell* invalided any prohibitions against same-sex couples marrying.

3. Evasion Statutes

Some states with evasion statutes (as opposed to *reverse* evasion statutes) subjected their citizens to criminal as well as civil penalties if they could not legally marry in their home state, left the state to marry where it was not illegal, and returned home as a married couple. *See* Wis. Stat. 765.04 which made it a crime for Wisconsin residents to leave the state to contract a marriage that was prohibited in Wisconsin, including a same-sex marriage. Possible penalties included 9 months in jail and a $10,000 fine.

4. After June 26, 2015

The short and simple answer to the question, "What is a valid marriage after *Obergefell*?" is, "whatever opposite-sex couples had before *Obergefell*." It starts with Texas Family Code, subchapter B (§ 2.001). Texas statutes provide for ceremonial (i.e. formal) marriage and informal (sometimes called "common law") marriages.

§ 1.101 clearly states that "it is the policy of this state to preserve and uphold each marriage against claims of invalidity" in order to:

- provide stability for those entering into the marriage relationship in good faith
- provide for an orderly determination of parentage and
- provide security for the children of the relationship.

Also, § 1.103 says that "The law of this state applies to persons married elsewhere who are domiciled in this state." This helps emphasize the importance of the public policy behind marriage.

Marriages in Texas are prohibited under § 2.004(6) if the couple is related as:

(A) an ancestor or descendant, by blood or adoption;
(B) A brother or sister, of the whole or half blood or by adoption;
(C) A parent's brother or sister, of the whole or half blood or by adoption;
(D) A son or daughter of a brother or sister, of the whole or half blood or by adoption;
(E) A current or former stepchild or stepparent; or
(F) A son or daughter of a parent's brother or sister, of the whole or half blood or by adoption.

This provision differs from many other states in that it prohibits marriage by adopted relatives (the term "consanguinity" in most jurisdictions refers to relationship by blood).

PRACTICE TIP: Some same-sex couples, seeking a legal relationship for inheritance or estate planning purposes, entered into adult adoptions. These couples need to end their parent-child relationship (i.e. termination or adoption by a different adult) to legally marry.

Given recent media events in Kentucky, practitioners should know that Subchapter A of Chapter 2 of the Texas Family Code sets out the requirements for county clerks to issue marriage licenses. Texas

Family Code § 2.012 states that "A county clerk of deputy county clerk who violates or fails to comply with this subchapter commits an offense [which] is a misdemeanor punishable by a fine of not less than $200 and not more than $500."

5. A word about transgender married folks

Texas Family Code § 2.005(b) sets out a laundry list of documents that will conclusively establish proof of age and identity of an applicant for a marriage license. In 2009 the Legislature amended that section to include "(8) an original or certified copy of a court order relating to the applicant's name change or sex change." This was huge: it meant that transgender individuals could legally marry, and finally overturned the holding in *Littleton v. Prange, 9 S.W.3d 223* (Tex.App.--San Antonio 1999, pet. denied). *See In re Estate of Araguz*, 443 S.W.3d 233, 245 (Tex. App.-Corpus Christi 2014, pet. denied on September 4, 2015).

As states came on line with marriage equality, some employers operating in different jurisdictions tried to figure out what to do. A few – perhaps in an attempt to be politically correct – tried to change spousal benefits for their employees who transitioned during employment in a way that was contrary to existing law. When companies offered domestic partner benefits, the employee spouse typically had to pay taxes on the value of the health insurance for his or her partner (of course legally married spouses did not have to do so). For employees receiving benefits for their opposite-sex spouse, and who then transitioned, companies tried to morph their spousal benefits into taxable domestic partner benefits. Two social security administration opinions hold that the transitioned employees did not end their marriages by transitioning; and therefore the right to spousal benefits did not end. http://transgenderlawcenter.org/archives/2783 and http://www.lambdalegal.org/news/ny_20140224_victory_robina.

6. Common Law Marriage

Texas is one of a handful of states with common law (or informal) marriage. Some states require a certain period of cohabitation. Subchapter E of Section 2 of the Texas Family Code sets out, at § 2.401(a)(2), the requirements for a couple to be "common-law married" here:

- an agreement to be married; and
- cohabitation within the State of Texas; and
- holding out to others that they were married.

The relevance of this statutes cannot be understated: for same-sex couples who met these requirements even before *Obergefell*, a retroactive application of the unconstitutionality argument means that their marriage could have existed in Texas long before June of 2015. This has implications in any issues regarding the length of the marriage: spousal support, accrual of community property, presumptions of parentage, even social security benefits.

A Travis County probate judge found a common law marriage existed between two women even prior to *Obergefell*. *In re Estate of Powell*, No. C-1-PB-14-001695 (Probate Court 1, Travis County, Tex. Feb. 17, 2015), available at http://www.freedomtomarry.org/page/-/files/pdfs/TexasTravisCountyOrder.pdf. The women had a marriage ceremony in Texas, resided together in Texas, and held themselves out as married in Texas. When Stella Powell died of cancer, her family alleged that her widow had no interest in the estate. Judge Guy Herman found that a common law marriage existed because the Texas ban on marriage equality was unconstitutional, and the widow was entitled to some of the estate. The attorney general intervened in the case to argue that a marriage could not have existed. http://www.scribd.com/doc/279530977/Motion-for-summary-judgment Ultimately, Judge Herman ruled against the intervention and granted the widow her inheritance. The AG has not yet appealed.

For same-sex couples in which one partner died, the Social Security Administration will recognize a common-law marriage for purposes of meeting the 9-months required for surviving spouse benefits. Those couples who divorced or whose marriages ended after more than 10 years may use informal marriage to tack onto a formal marriage and seek old age social security spousal benefits.

Keep in mind, however, that the statute of limitations to allege an informal marriage is only two years. In other words, if a couple with a common law marriage breaks up, there is a rebuttable presumption after two years that the marriage never existed. Texas Family Code § 2.401(b).

Finally, practitioners should keep in mind the availability of post-nuptial agreements between couples to clarify their property. Although the marriage may not have been recognized prior to June of 2015, as a common law state our same-sex couples can tack on pre-*Obergefell* acquisition of community property, and can now sign post-nups called "partition or exchange agreements" to convert or treat all possible community property to separate pursuant to Texas Family Code § 4.102 to confirm this. It's a great way to handle possible accrual of community property for formerly "wedlocked" couples.

7. Putative Marriage

Texas Family Code § 1.102 states that "the most recent marriage is presumed to be valid as against each marriage that precedes the most recent marriage" until the validity of the prior marriage is proven.

*In re Estate of Collie*r, No. 09-10-00263-CV (Tex.App.-Beaumont, June 16, 2011, no pet.) defines a putative marriage and its effect on what is usually the primary issue:

> "A putative marriage is one that was entered into in good faith by at least one of the parties, but which is invalid by reason of an existing impediment on the part of one or both parties." *Garduno v. Garduno,* 760 S.W.2d 735, 738 (Tex. App.—Corpus Christi 1988, no writ) (citing *Dean v. Goldwire,* 480 S.W.2d 494, 496 (Tex. Civ. App.—Waco 1972, writ ref d n.r.e.)). "A putative marriage may arise out of either a ceremonial or common law marriage." *See id.*; *but see Papoutsis v. Trevino,* 167 S.W.2d 777, 779 (Tex. Civ. App.—San Antonio 1942, writ dism'd) (stating "it appears to be well settled that one asserting under a putative marriage cannot claim good faith in the absence of a ceremonial marriage attended by the formalities prescribed by law"). Generally, a putative spouse has the same right in the property acquired during a putative marital relationship as a lawful spouse. *See Davis v. Davis,* 521 S.W.2d 603, 606 (Tex. 1975). "However, there being no legally recognized marriage, property acquired during a putative marriage is not community property, but jointly owned separate property." *Garduno,* 760 S.W.2d at 739.

PRACTICE TIP: Keep in mind the fact that couples may have sought voidance in Texas of their out-of-state marriages, and then gone on to marry other partners. And adding to the complication, some states had domestic partnerships or civil unions that converted automatically at some point in time to marriages. Get a good look at any order purporting to void a marriage prior to *Obergefell*.

F. Civil Unions and Domestic Partnerships

As marriage equality came on line state by state, some states implemented marriage-like equivalents including civil unions, domestic partnerships and reciprocal beneficiaries. Civil unions are currently still available in several states including Illinois, New Jersey, Hawaii and Colorado. Hawaii and Colorado still have "reciprocal beneficiary" status available, but in both states if couples marry or enter into a civil union, the RB status is deemed revoked. Illinois allows parties to affirmatively convert their CU into a marriage. Connecticut Civil Unions converted automatically to marriage on October 1, 2010 (Conn. Gen. Stat. Ann. § 46b-28a (West)), New Hampshire on January 1, 2011 and Delaware on July 1, 2014. Washington State domestic partnerships automatically converted to marriages on June 30, 2014 except in cases where one or both parties are over the age of 62.

Washington, DC has both marriage and Domestic Partnership. The latter gives residents all the benefits of marriage on the local level without being "married" for federal purposes.

California, D.C., Nevada and Oregon still have Domestic Partnership statutes that are virtually marriage equivalents.

Vermont had civil unions (15 V.S.A. § 1201 et seq.) up to September 1, 2009 at which point it began issuing marriage licenses. Unlike Washington and Connecticut, it did NOT automatically convert the civil unions to marriage, but if a couple who had a Vermont civil union decided to marry in Vermont, then they had the option to check a box on the license that said "dissolve my civil union now that we're getting married" and the statute automatically did so upon the marriage.
http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf

Some municipalities have domestic partnerships but they do not convey parentage (i.e. NY: http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml#termination).

Several federal agencies draw a very bright line between marriage and other statuses. The internal revenue service will not allow couples to file joint tax returns if they have merely a civil union or domestic partnership; they must be married to file "married". However other agencies allow couples to "stack" these different relationship statuses to meet eligibility requirements for, say, length of marriage to be eligible for survivor benefits. It's critical to check the current POMS when advising clients regarding their estate planning, division of retirement or pension benefits or social security eligibility.

As noted above, couples have myriad opportunities to obtain a marriage-equivalent status, which has potentially significant impact on parentage *and* property division. The important issue is disentangling couples who no longer want a legal relationship with one another – which, in the case of happy same-sex couples jurisdiction-hopping, may involve more than one dissolution lawsuit. Before June of 2015, those couples had to return to other states or hope for a way to dissolve from afar the RDPs and CUs. Some states (like California) amended their statutes to allow just such an event. Now, post-*Obergefell*, courts in formerly non-recognition states may be willing to enter a judgment of dissolution for those pesky non-Texan CUs or RDPs if they are indeed the type that conveys *marriage-equivalent* rights and benefits.

For a complete and excellent resource on a state-by-state basis, please look at the publication put out by NCLR (National Center for Lesbian Rights) at:

http://www.nclrights.org/wp-content/uploads/2015/07/Relationship-Recognition.pdf

G. Cohabitation Agreements

Cohabitation agreements vary so completely by state that to analyze all of them is outside the scope of this paper. Very few states have total bars, although Illinois was one. The Illinois Supreme Court just heard oral argument against its prohibition. *See Blumenthal v. Brewer*, 2014 Il App (1st) 132250, 2014 Ill. App. LEXIS 904 (Dec. 19, 2014), where the intermediate court ruled that Illinois' ban against lawsuits between unmarried former partners (instituted in *Hewitt v. Hewitt*, 394 N.E.2d 1204) should be overturned on an unjust enrichment theory.

In Utah, *Layton v. Layton*, 777 P.2d 504 (Utah App. 1989) held that even though the parties' relationship could not be characterized as a common law marriage because the common law marriage statute was passed after this complaint was filed, equitable division of property accumulated by unmarried cohabitants may be made upon a finding of partnership, contract for services, or trust.

Arizona has a great case which is old but has been affirmed numerous times. It allows enforcement of an agreement made by "non-marital co-habitants" (in this case a non-married opposite-sex couple). It would be a "common law marriage" except that Arizona doesn't recognize common law marriages. The couple's agreement was not in writing but proved by words and actions. The case has a good result and good reasoning, and has been the basis of trial decisions for same-sex couples there. *See Cook v Cook*, 691 P.2d 664, 142 Ariz. 573 (Ariz. October 31, 1984).

H. Temporary Orders Issues While Divorce is Pending

There should be no reason why same-sex parents, while a divorce is pending, should not be able to seek relief in temporary orders. Prior to *Obergefell*, however, that was another matter.

In re State, No. 04-14-00282-CV (TexApp-San Antonio, May 28, 2014) involved a couple who married in Washington, DC, then returned to Texas and had a child through donor insemination. They broke up five months later. One parent registered the parties' marriage certificate as a foreign judgment without objection, and the non-bio mom filed for divorce. Bio mom responded with a motion to dismiss, a plea to the jurisdiction, a request to decline jurisdiction and an original answer claiming that same-sex marriage did not exist in Texas. Non-bio mom then asserted that the statutes prohibiting such recognition were unconstitutional.

After the hearing on the plea to the jurisdiction, Bexar County District Judge Barbara Nellermoe found that Article 1, Section 32 of the Texas Constitution and Texas Family Code section 6.204(a)(1) were unconstitutional and set the matter for temporary orders regarding the child. She also ordered that the AG's office be notified of her finding, and of the litigation. In response, the AG filed an intervention and a petition for writ of mandamus to stay the divorce proceeding.

> "Nevertheless, that the trial court did not comply with Section 402.010 before entering its order does not constitute a clear abuse of discretion, as the trial court was not strictly required to do so in this situation. Because I agree with the Court of Criminal Appeals that subsections (a) and (b) of Section 402.010 impermissibly suspend a court's power to enter an order or judgment, I decline to hold that the trial court abused its discretion in denying the plea to the jurisdiction in the absence of notice to the attorney general of a constitutional challenge. *See Ex parte Lo*, 424 S.W.3d 10, 29-30 (Tex. Crim. App. 2013) (op. on reh'g)."

While the AG attacked the temporary order as invalidating a state statute, the court stayed its order while the matter went up on appeal. The appellate court stayed the entire divorce proceeding (not merely Judge Nellermoe's order). Non-bio mom requested clarification of the stay in Cause No. 04-14-00364-CV (Tex.App.-San Antonio, December 18, 2014), asking the court to address the issues of temporary orders regarding the child while the action was stayed. The Fourth Court of Appeals gave the State three weeks to respond to the motion for clarification.

In her dissent, Justice Martinez' opined that the State has no interest in the SAPCR, and the delay ignores the best interests of the child.

> "Our stay held the trial court's June 30, 2014 ruling regarding the constitutionality of the same-sex marriage law in abeyance to allow an appellate court to review it and only temporarily suspends the trial court's authority to enter orders or judgment for a divorce. It does not and cannot prohibit the trial court from acting or entering orders affecting the child over which it maintains continuing jurisdiction.
>
> "The State has failed to adequately address the contention that the stay precludes enforcement of the temporary orders or, more importantly, the potential harm to the minor child. The State simply repeats its suggestion that the Appellee file a voidance suit instead of seeking a divorce, which does not resolve the ongoing issues of possession relating to the

> minor child already pending before the trial court. Although our Corrected Order clearly grants the State's request to stay the enforcement of the June 30, 2014 order or final judgment in the divorce action, Appellee's Motion for Clarification should be granted to resolve any further dispute. Any further clarification necessary to avoid further harm to the child merits Supreme Court review."

Now, after *Obergefell*, the case has gone back to the trial court to finish the divorce.

III. PROPERTY

The authors believe that property – along with parentage – may raise the most interesting issues for married same-sex couples post-*Obergefell*. That's because Texas is a community property state and, therefore, the date of the inception of the marriage has real-life consequences. The primary question is, when did the marriage begin? When did the spouses begin to accrue community property? A couple could have been formally married on a certain date outside of Texas. They could have lived together prior to that date and held themselves out as married in Texas. They could have entered into a civil union or registered domestic partnership in another state which carried with it all the rights and duties of marriage, including accrual of community property. It's important to find out when and where clients began their relationship and whether they have any CU or RDP statuses.

The brilliant Patricia A. Cain, Professor of Law at Santa Clara University and formerly at the University of Texas, wrote just after the *Obergefell* decision and posited several hypotheticals which practitioners and, maybe more importantly, judges, will be facing. Her July 7, 2015 blog post at http://law.scu.edu/same-sex-tax/obergefell-aftermath/ is worth quoting here in its entirety:

> "I just finished doing a webinar for ABA Section on Real Property Trusts and Estates focusing on issues raised by the Supreme Court's ruling in the same-sex marriage case, *Obergefell v Hodges*. George Karibjanian of Boca Raton was my co-panelist. He raised some interesting questions about retroactivity. I thought them worth sharing.
>
> 1. I have for years warned couples married in California in 2008 but living in Texas that they probably have been acquiring community property whether they knew it or not because the Texas DOMA was likely to fall. That seemed pretty clear after *Windsor* was decided, and even more clear since October 6, 2014 when the Supreme Court denied cert in a number of successful marriage equality cases. If you are a couple like this and have been residing in a community property non-recognition state that just became a recognition state (e.g., Wisconsin as of that October 6 denial of cert) and if you don't want to own that property as community, you probably ought to consider transmuting into the separate property of one spouse. Fortunately there will be no gift tax because the marriage is recognized and there is an unlimited marital deduction.
> 2. George raises the same issue regarding Tenancy by the Entirety (TBE). In some states any property jointly titled during marriage (even though not titled as TBE property) is presumptively TBE property. So spouses in Florida who acquired joint property before Florida recognized their marriages might actually own that property as TBE (which gives them super protection from creditors).
> 3. George's other hypo: A and B get married in Vermont while living in Texas. After marriage and while still living in Texas, A starts a business that becomes very successful. After an IPO, he ends up with stock that is worth $80M. Now A and B want to dissolve their relationship. The year is 2013 and they can't get a divorce in Texas because Texas won't recognize their marriage.
>
> "[Short aside: A Dallas same-sex couple did get a divorce before 2013 but the AG intervened and appealed to the Dallas Court of Appeals which ruled the divorce invalid because the state did not recognize the marriage in the first place; that case then went to the Texas Supreme Court, but was dismissed this June as moot because one of the spouses had died. I'm still not sure about the status of the surviving spouse – is he a surviving spouse or not? The Dallas Court said no marriage and no divorce, but federal law recognizes the marriage. I don't think federal law can grant a divorce. This one is a puzzler. In other words, I don't think the case was really moot. After all, Obergefell's spouse had died and the U.S. Supreme Court did not think his case was moot.]
> "OK, back to George's hypo: In 2014, A and B get a divorce in Vermont which has a statute saying if you married here and can't get divorced in your home state, the state of

> Vermont will divorce you even though you do not meet the residency requirements for divorce. Under the Vermont statute the parties agree that A will pay B $500,000 and says nothing about the stock in A's business.
>
> "Now that the *Obergefell* opinion has effectively ruled that the Texas DOMA is unconstitutional, doesn't that mean that the stock was in fact community property and B is entitled to his half? I think so.
>
> "But what about res judicata and that Vermont decree of divorce? Well, under Texas law if the divorce decree fails to distribute any community property, the spouses become tenants in common as to that property at the moment of divorce. B's claim to half of that community property is valid. The Vermont final judgment did not resolve the issue of ownership of the stock so res judicata does not apply. See *Yeo v. Yeo*, 581 S.W.2d 734 (Tex. App. 1979) (retirement benefits were community property and were not divided by husband and wife at divorce; wife can sue husband for her community share of the benefits)." *Obergefell Aftermath*, Pat Cain, Same Sex Tax Law Blogpost, July 7, 2015.

Before Obergefell, community property wasn't an issue for same-sex Texas couples who had married in other jurisdictions. Both the constitutional amendment and the Family Code prohibited recognition of a marriage between two people of the same gender, so courts lacked jurisdiction to decide issues relating to community property.

The Texas Supreme Court found that the court could, within the context of a suit for voidance, divide property alleged to be community, but that community property could only exist within the context of a marriage. *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App.-Dallas 2010), *cause dism'd* (June 19, 2015), (reh'g den. September 11, 2015).

The Court recognized that "Community property is a paradigmatic legal benefit that is associated intimately and solely with marriage. *See* TEX. FAM.CODE ANN. § 3.002 (" Community property consists of the property, other than separate property, acquired by either spouse during marriage."). *Id* at p. 666.

An extremely recent case, *O'Reilly-Morshead v. O'Reilly-Morshead*, 2015 N.Y. Misc. LEXIS 3843, 2015 NY Slip Op 25354 (Supreme Ct., Monroe County) addressed the whole issue of marital property and date of inception of the marriage. This occurred within the context of two women who entered into a civil union in Vermont, *then* married in Canada, all while residing in New York. The court drew a very fine line between marital property and non-marital property, and discussed extensively the basis of its power to divide marital property. Professor Art Leonard ("Law Notes") has a great discussion of this case at http://www.artleonardobservations.com/new-york-trial-court-holds-new-york-property-acquired-during-a-vermont-civil-union-is-not-subject-to-equitable-distribution-in-new-york-dissolution-proceeding/.

This case may have import in Texas because many clients have entered into various types of relationships: civil unions; marriages; domestic partnership. Depending on the laws of the jurisdiction in which they entered into these relationships, those various statuses may or may not have joint property implications. Practitioners *must* research these venues and laws to clarify what rights and duties they carry with them, and advise clients accordingly.

IV. CHILDREN

A companion paper to this one – "Adoption and SAPCRs after *Obergefell*" – contains significant information that is relevant to divorces. We address standing, establishment of a legal relationship between same-sex parents and children, adoptions, presumptions, the Uniform Parentage Act, and Full Faith & Credit.

Texas has many statutes that afford standing to a non-parent to bring a SAPCR. The standing statutes (generally Texas Family Code §§ 102.003, 102.004 and 102.005) evolved over a long period and Justice Ann McClure in *Doncer v. Dickerson*, 81 S.W.3d 349, 354 (Tex.App.--El Paso 2002, no pet.) lays out the history beautifully.

The other companion paper – "Assisted Reproductive Technology" – addresses surrogacy and other issues associated with the parent-child relationship in that situation. This paper will focus on custody, conservatorship and possession issues regarding children *assuming* the two parties have standing to address them.

A. Parentage

Because Texas has the Uniform Parentage Act, the statute sets out who is a parent, who is a presumed parent, who is an alleged parent, and how they get there. See Texas Family Code Chapter 160. For a longer discussion, see the "Adoption and SAPCRs" paper. Also, query whether the fact that the *void ab initio* status of *Obergefell* might also provide an opportunity for estranged same-sex couples revisit the issue of standing for kids they have lost in previous cases. This would apply to couples who married elsewhere, returned to Texas, had a child, broke up, and the court shut out a non-bio, non-adoptive marital partner. We discuss a few more interesting situations, below.

1. Presumption of Paternity

In the Interest of N.I.V.S. and M.C.V.S., Minor Children No. 04-14-00108-CV (March 11, 2015) held that a transgender man lacked standing as the father of two children under the holding out provision of the UPA, because he did not secure a gender change order until after he filed the parentage action.

> "In order to have standing under subsection 102.003(a)(8), Villarreal was required to be a man at the time he brought suit. As previously discussed, there is no evidence in the record before us that Villarreal was legally recognized as a man on December 9, 2013. To the contrary, the fact that Villarreal sought a court order changing his identity from female to male on January 3, 2014 demonstrates to us that he was legally a female on December 9, 2013. Thus, Villarreal does not have standing to bring suit under subsection 102.003(a)(8). TEX. FAM. CODE ANN. § 102.003(a)(8)." *Id* at p. 9.

From this opinion one would assume that if the father filed the SAPCR after obtaining a gender change order, he would have had standing because then he would have been a "man" alleging himself to be the father of a child. Texas Family Code § 102.003(a)(8). No, said the Fourth Court of Appeals, in a very troubling decision.

After he lost the first appeal, Villarreal filed a second SAPCR – this time it was filed *after* he had obtained the order that changed his gender. While we don't know the language of the order (whether it was confirming he was male or in fact "changed" his gender to male), the court of appeals again ended up with this case. This time the trial court had agreed that Villarreal was male and allowed the case to proceed. On Mom's mandamus of that decision, the Fourth Court said this:

> "While the clear language of the Family Code recognizes such an order as sufficient to provide proof of Dino's identity and age for the purpose of obtaining a marriage license, we conclude that it is not sufficient to confer statutory standing to maintain a suit to adjudicate parentage under subsection 160.602(a)(3). The Order Granting Change of Identity is a recognized form of proof of Dino's identity and age for the purpose of obtaining a marriage license. However, we decline to extend the applicability of subsection 2.005(b)(8) of the Family Code to confer standing as, "a man whose paternity of the child is to be adjudicated." Tex. Fam. Code Ann. § 160.602(a)(3)." *In re Sandoval*, No. 04-15-00244-CV (Tex.App.-San Antonio, August 12, 2015, *en banc* review requested).

This conclusion makes no sense, given the language of the court's first opinion – that Dad was not "legally recognized as a man" on the date he filed the petition to confirm himself as the father. The court references the order to change gender, and then dismissed that order altogether in its second opinion as being merely the equivalent of correcting documents. We would argue that the order confirmed the fact that Dad was actually a male and, as such, could seek to establish himself as the father of the children. This is a particularly heartbreaking result in that all evidence in the record shows that he was a model parent.

2. In loco parentis

Two common law arguments have evolved in several states, although they are extremely disfavored in Texas: the doctrines of *in loco parentis* and the concept of psychological parent. The primary case discussing *in loco parentis* is *Coons-Andersen v. Andersen,* 104 S.W.3d 630, 636 (Tex.App.-Dallas 2003, no pet.), in which two women fought over non-bio, non-adoptive mom's standing to bring a custody suit. The court found that, despite their 10-year relationship and the fact that they planned and had the child while they were together, non-bio non-adoptive mom had no standing. The court in *N.I.V.S., supra,* explained the concept:

> "The phrase *in loco parentis* means "in the place of a parent" and "refers to a relationship a person assumes toward a child not his or her own." *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 634-35 (Tex. App.—Dallas 2003, no pet.); *Cunningham v. Ansorena-Cunningham*, 03-08-00493-CV, 2009 WL 2902718, at *2 (Tex. App.—Austin, Aug. 26, 2009, no pet.) (mem. op.). Under common law, a person *in loco parentis* to a child had the same rights, duties, and liabilities as the child's parents. *See McDonald v. Tex. Employers' Ins. Ass'n*, 267 S.W. 1074, 1076 (Tex. Civ. App.—Dallas 1924, writ ref'd). These rights may include, in appropriate circumstances, having standing as a party in a lawsuit involving custody of the child. *Trotter v. Pollan*, 311 S.W.2d 723, 729 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.) (op. on reh'g) (persons *in loco parentis* have "existing justiciable interest" in controversy involving custody of child). As noted by the court in *Coons-Andersen*, however, "Texas courts have never applied the common law doctrine of *in loco parentis* to grant custodial or visitation rights to a non-parent, against the parent's wishes, when the parent maintains actual custody of the child." 104 S.W.3d at 635. "The defining characteristic of the relationship is actual care and control of a

> child by a non-parent who assumes parental duties." *Id.* The relationship generally occurs only when a parent is unwilling or unable to care for the child. *Id.*
>
> "Here, Sandoval was at all times willing and able to care for her children and she, in fact, did, and continues to do so. Villarreal does not, therefore, have standing under the doctrine of *in loco parentis*." *N.I.V.S.* at p. 5.

3. Psychological parent

The concept of a "psychological parent" lies in the arguments that focus on the best interests of the child. When a child has bonded to an adult as a parent, it harms the child to legally remove that person from the child's life. Currently at least 21 states have adopted the concept, and utilize a four-part test first set out in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wisc. 1995) to find whether an unrelated adult should have standing regarding a child.

> "The plaintiff must demonstrate that: (1) the biological or adoptive parent consented to, and fostered, the establishment of a "parent-like" relationship between the nonparent and the child; (2) the nonparent lived in the same household with the child; (3) the nonparent undertook parental obligations, assumed a "significant responsibility" for the "care, education and development" of the child, and contributed toward the child's support without expectation of financial repayment; and (4) the nonparent assumed a parental role for a sufficiently long period of time to have established a "bonded, dependent relationship parental in nature" with the child." Spiezia, "In the Courts: State Views on the Psychological Parent and DeFacto Parent Doctrines" *Children's Legal Rights Journal*, Vol. 33, Fall 2013.

No Texas courts, however, have recognized this concept. Or at least they don't agree with it. The Fourth Court of Appeals talked about it within the *N.I.V.S.* case, as follows:

> "Finally, we disagree that Villarreal has standing under the concept of a psychological parent. The psychological parent doctrine is not discussed in Texas case law. Villarreal contends that a 1995 Wisconsin case set forth a four-element test that is now a common definition of the psychological parent doctrine. *See In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wisc. 1995). However, we need not discuss the elements of the psychological parent doctrine because we are confined to examining standing within the statutory framework of the Family Code. *See In re H.G.*, 267 S.W.3d at 123-24." *In the Interest of N.I.V.S. and M.C.V.S., Minor Children* No. 04-14-00108-CV (March 11, 2015).
>
> "As this court stated in its prior opinion, Dino does not have standing under the doctrine of *in loco parentis*, the common law doctrines of unconscionability or estoppel, or the psychological parent doctrine, which has never been recognized under Texas law. *See In the Interest of N.I.V.S.*, 2015 WL 1120913, at *6-7." *N.I.V.S., supra* at fn 5.

The reasoning in this case is beyond the authors' understanding, because of two things: first, the petitioner in this case is a male and under generally accepted medical standards set forth by the World Professional Association for Transgender Health ("WPATH") he was always a male. The court order merely corrected his identifying documents. As such, he should have met the standards of a presumed parent under the UPA or as a man alleging himself to be the father of the children.

Second, and probably more importantly, the decision clearly states that it must ignore the best interests of the children, who by all accounts lost their only father they had ever known. The "bad bio mom" phenomenon extend to situations involving opposite-sex couples as well. Professor Tanya Washington has done extensive work on the emerging area of law regarding the constitutional rights of children to associate with their parents or parent-like figures. *See* Tanya M. Washington, Once Born, Twice Orphaned: Children's Constitutional Case Against Same-Sex Adoption Bans, 2013 Utah L. Rev. 1003 (2013) (also published at 15 J.L. & Fam. Stud. 19 (2013)). Her amicus brief in support of the plaintiffs in *Obergefell* was cited in the majority opinion of the Court, and points out the importance placed on the best interests of the children in deciding these cases. *See* https://www.law.whittier.edu/resources/news/Brief-for-Scholars-of-the-Constitutional-Rights-of-Children-as-Amici-Curiae.pdf

B. Conservatorship

The Texas Family Code requires courts to act in the best interests of the children involved (§ 153.002), and clearly admonishes parents to "play nice" with each other. It instructs the courts to take a parent's actions into consideration when naming conservators. Section 153.134(a)(3) requires consideration of "whether each parent can encourage and accept a positive relationship between the child and the other parent."

Too often we see the havoc of parents' animosity toward one another play out in their children. It's important for practitioners to remember the "counselor at law" part of their license and we encourage them to advise clients of the bad effects of child custody litigation. For years, non-bio, non-adoptive parents have had to work around the Family Code to maintain relationships with their children. The incidence of "bad bio mom" cases will continue after *Obergefell* because not everyone married (nor should they have to).

Ultimately, conservatorship decisions rest on (a) standing to bring the lawsuit and (b) the fitness of the proposed conservators – just as in any other opposite-sex SAPCR or divorce. The court should take into consideration all the factors set forth in the Family Code, and render a decision that is not based on gender or marital status. Texas Family Code § 153.003.

C. Standing

We've already discussed the fact that a divorce action must include a SAPCR regarding any child of the parties to the divorce. For unmarried couples, the primary path for a non-adoptive, non-biological parent to get legal rights to a child falls under the standing section of Texas Family code § 102.003(a)(9). We discuss this extensively in the companion paper to this CLE under "Adoptions and SAPCRs", but the *N.I.V.S.* case was decided very recently and defines the analysis under this standing section.

> "Villarreal also argues that he has standing under subsection 102.003(a)(9) of the Family Code. *See* TEX. FAM. CODE ANN. § 102.003(a)(9). The purpose of section 102.003(a)(9) is to create standing for those who have developed and maintained a relationship with a child over time. *In re A.C.F.H.*, 373 S.W.3d 148, 153 (Tex. App.—San Antonio 2012, no pet.); *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 808 (Tex. App.—San Antonio 1992, no writ) (examining former Family Code section 11.03(a)(8)). In computing the time necessary for standing under subsection (a)(9), "the court may not require that the time be continuous and uninterrupted but *shall consider the child's principal residence* during the relevant time preceding the date of commencement of the suit." TEX. FAM. CODE ANN. § 102.003(b) (West 2014) (emphasis added); *In re Y.B.*, 300 S.W.3d 1, 4 (Tex. App.—San Antonio 2009, pet. denied). A determination of standing under this subsection is necessarily fact specific and resolved on an *ad hoc* basis. *In re M.P.B.*, 257 S.W.3d 804, 809 (Tex. App.—Dallas 2008, no pet.).
>
> "Generally, courts have found "actual care, control, and possession" when the person asserting standing (1) lived in a home where the child consistently and frequently stayed overnight; (2) financially supported the child; (3) participated in the child's education; and (4) fed, clothed, and provided health care to the child. *Jasek v. Tex. Dep't of Fam. & Protect. Servs.*, 348 S.W.3d 523, 534 (Tex. App.—Austin 2011, no pet.) (citing *Smith v. Hawkins*, No. 01–09–00060–CV, 2010 WL 3718546, at *3 (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, pet. denied) (mem. op.)); *In re B.A.G.*, 11-11-00354-CV, 2013 WL 364240, at *10 (Tex. App.—Eastland Jan. 31, 2013, no pet.) (mem. op.). The statute does not require that the care, control, and possession be exclusive. *In re A.C.F.H.*, 373 S.W.3d at 153; *Jasek*, 348 S.W.3d at 534; *M.P.B.*, 257 S.W.3d at 809.
>
> "At the hearing on the plea to the jurisdiction, evidence was presented showing that Villarreal acted as a committed father, even quitting his job to care for the children after school. The children's speech therapist testified that Villarreal was present for most of the children's therapy sessions and that he is a great father who was an integral part of the progress the children have made. It is undisputed that Villarreal moved out of the family home in January 2011, almost three years prior to filing suit and that the children continued to principally reside with Sandoval.
>
> "While we do not take lightly the evidence of Villarreal's significant involvement in the children's lives, we are once again constrained by the Family Code and must look at the evidence relating to care, control, **and** possession during the relevant time period. *See* TEX. FAM. CODE ANN. § 102.003(a)(9). Even though Villarreal cared for the children after school and on many weekends, the record does not reflect that he also had actual control of the children during the relevant time period. Control denotes a caregiver's power or authority to guide or manage the child, including the authority to make decisions of legal significance for the child. *See Jasek*, 348 S.W.3d at 537; *In re K.K.C.*, 292 S.W.3d 788, 792-93 (Tex. App.—Beaumont 2009, orig. proceeding)." [Emphasis in original.] *N.I.V.S.*, *supra* at p. 4.

1. Standard Possession Schedule

Practitioners should keep in mind the fact that the default standard possession schedule applies to *all* couples – same-sex and opposite-sex. There should be no real difference in the legal analysis between the two types of families. Cultural differences may play a factor in these cases – i.e. celebration of mothers'/mother's and fathers'/father's days, below. Sometimes families choose to celebrate certain holidays instead of others. But really there are very few differences for lawyers to consider when working with same-sex parents and families.

2. Mother's Day/Father's Day

In a Standard Possession Schedule, fathers get Father's Day (or weekend) and Mothers get Mother's Day (or weekend) which supersedes the other parent's 1st/3rd/5th weekend schedule. What happens when a child has two moms and no dads, or two dads and no moms?

We encourage clients to work out their own schedules for the final order, because in non-traditional families the lawyers are less familiar with the family's schedule than are the parents. Certainly courts don't have time to get to know a family before rendering a decision.

A real plug for ADR here: it *works.* It works better than litigation, nearly 85% of the time.[2] It works for same-sex and opposite sex couples. Failing agreements, however, families can choose to alternate which parent gets "Mother's" or "Father's" days in even and odd years; some are happy to pick either holiday; and some choose to substitute the parents' birthdays as "Parents' Day" instead and then split the remaining gender-specific holiday.

D. Financial Support

The agency rules and regulations coming down on both the federal and states levels have been fast and furious after *Obergefell* – sometimes changing daily. While family law practitioners will address the obvious issues of spousal support and contractual alimony now that their clients are married, they should also keep in mind the issue of taxes. Married couples are required to file "married filing single" or "married filing jointly" – there is no way around that. For those couples who married in recognition states and returned to Texas and then broke up, this can be a HUGE issue. If they couldn't divorce, they're still married. Even if they don't know where their spouse is located. Below we include the most recent guidance from the Treasury Department on federal income tax returns.

EMBARGOED UNTIL 4:15 PM EDT: October 21, 2015
CONTACT: Ryan Daniels, Treasury Public Affairs (202) 622-2960

TREASURY ANNOUNCES PROPOSED REGULATIONS IMPLEMENTING THE SUPREME COURT'S SAME-SEX MARRIAGE DECISION FOR FEDERAL TAX PURPOSES

Regulations Would Clarify and Strengthen Previous Guidance

WASHINGTON — The U.S. Department of the Treasury and the Internal Revenue Service (IRS) today announced proposed regulations providing that a marriage of two individuals, whether of the same sex or the opposite sex, will be recognized for federal tax purposes if that marriage is recognized by any state, possession, or territory of the United States. The proposed regulations would also interpret the terms "husband" and "wife" to include same-sex spouses as well as opposite-sex spouses. These regulations implement the Supreme Court's decision in *Obergefell v. Hodges*.

"The proposed regulations confirm that terms in the federal tax code relating to marriage should be interpreted to include same-sex spouses as well as opposite-sex spouses, ensuring that all are treated equally under the law," said Secretary Lew. "These regulations provide additional clarity on how the federal government will treat same-sex couples for tax purposes in light of the Supreme Court's historic decision on same-sex marriage."

Today's announcement would clarify and strengthen guidance provided in a 2013 IRS revenue ruling implementing the Supreme Court's decision in *United States v. Windsor*. That revenue ruling said that same-sex couples legally married in jurisdictions that authorize same-sex marriage will be treated as married for federal tax purposes. The proposed regulations update these rules to reflect that same-sex couples can now marry in all states and that all states will recognize these marriages.

[2] According to the statistics promulgated by the Collaborative Law Institute of Texas.

> The proposed regulations will apply to all federal tax provisions where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA, and claiming the earned income tax credit or child tax credit.
>
> The proposed regulations would not treat registered domestic partnerships, civil unions, or similar relationships not denominated as marriage under state law as marriage for federal tax purposes. This rule protects individuals who have specifically chosen to enter into a state law registered domestic partnership, civil union, or similar relationship rather than a marriage, because they can retain their status as single for federal tax purposes.

The problems associated with a missing spouse are not insignificant. It would be best to have the client file correctly (even amending the past three years, the statutorily-allowed period, if necessary) and do a diligence search for the missing spouse.

1. Spousal Support

Traditionally, Texas law did not favor awards of alimony and the Texas Constitution specifically prohibited it. In 1967, the Texas Supreme Court distinguished between court-ordered alimony and agreements between spouses upon divorce to pay alimony, allowing agreements to stand even where a court could not order them. Then, in 1995, Texas became the last state to pass a statutory scheme for court-ordered alimony – now called "maintenance" in Texas. Thus, in Texas, use of the term "alimony" implies the right of spouses to agree upon post-divorce support in accordance with Section 71 of the Internal Revenue Code; whereas, "maintenance" implies a court-ordered obligation under the Texas statutory scheme found in Chapter 8 of the Texas Family Code.

The main distinction under Texas law involves the enforceability of alimony as opposed to maintenance. Alimony is a contractual obligation only and enforceable only by contractual remedies – usually by entry of a judgment. On the other hand, the remedy for failure to pay maintenance can be income withholding, wage garnishment, or even jail time.

Determining eligibility for an award of maintenance in Texas begins with evaluating whether the spouse seeking maintenance will lack sufficient property after the divorce to provide for his or her minimum reasonable needs. If so, then a spouse can be awarded alimony/maintenance under the Texas Family Code only if one of two specific conditions exists.

First, where the other spouse was convicted of a crime involving family violence within the two years prior to the filing of the divorce suit or while the divorce is pending, the victim-spouse may be eligible for an award of maintenance. This includes class C misdemeanor convictions if the allegation involved family violence. It also includes occasions where the defendant received deferred adjudication in exchange for a plea of guilty.

The second eligibility category for maintenance requires a minimum of a 10-year marriage. Then, a spouse can be eligible for maintenance where the spouse seeking maintenance lacks the ability to earn sufficient income to support his or her minimum reasonable needs lacks sufficient property (including property awarded in the divorce) to provide for his or her minimum reasonable needs. Or, alternatively, the spouse can be eligible for maintenance if he or she is the custodian of a child of the marriage of any age that requires substantial care and personal supervision because of a physical or mental disability that prevents the spouse from earning sufficient income to provide for the spouse's minimum reasonable needs.

Most alimony claims rely on the second of the conditions. But for the request to be successful, the spouse must be able to show a reasonable attempt to find an appropriate job or get job training.

Judges are further limited in the right to award maintenance by state law that says support can continue for no longer than necessary to earn sufficient income to provide for the spouse's needs unless the ability to provide for the spouse's needs id substantially or totally diminished because of a mental or physical disability of the spouse, the duties as custodian of an infant or young child of the marriage, or another compelling reason.

The duration of a maintenance order is determined by the length of the marriage. If the spouses were married to each other for less than 10 years, but maintenance is awarded based upon the criminal conviction for family violence, maintenance is limited to 5 years duration. If the spouses were married at least 10 years and not more than 20 years, the duration of maintenance is also limited to 5 years. If the spouses were married to each other for at least 20 years, but not more than 30 years, duration is limited to 7 years. If the spouses were married to each other for at least 30 years or more, the maintenance order cannot exceed 10 years.

Because *Obergefell* came down so recently, practitioners might claim that there is no way same-sex couples could possibly have been married for more than 10 years – however that's not true. Decisions from other jurisdictions and agency directives are holding that couples who lived together and relied upon one another financially in an intimate, committed relationship, may be considered "married" for the look-back period. Some couples may have entered into Civil Unions or Registered Domestic Partnerships prior to marrying, and these periods are coming into play when determining the length of the marriage. Massachusetts

has two unpublished opinions [*Londergan v. Carrillo*, 74 Mass.App.Ct. 1126, 2009 WL 2163186 (Mass.App.Ct.)) and *Hickson v. Hickson*, 2009 WL 3030373 (Mass.App.Ct.)], and Alaska has been doing this for purposes of property division since the 1960s. See the Illinois case on this point, which attorney Elizabeth Schwartz of Miami calls "credit for time served": http://www.illinoiscourts.gov/Opinions/AppellateCourt/2015/2ndDistrict/2140231.pdf

The amount of maintenance is limited to the *lesser* of 20% of the paying spouse's average monthly gross income (before taxes) or $5,000. Generally, alimony is tax deductible to the paying spouse and included as income to the receiving spouse.

The obligation to pay maintenance under the statute terminates earlier than the above limitation upon the death of either spouse or the remarriage of the spouse receiving maintenance. It can also be terminated based upon the romantic cohabitation of the receiving spouse.

A maintenance order remains modifiable during the duration of the order and can be reviewed for continued eligibility of the receiving spouse until terminated.

2. Child Support – Non-Parents Don't Pay

Only parents can be ordered to pay child support. A reference to a "parent" under the family code includes a person ordered to pay child support or to provide medical support for a child. See §101.024(b).

The Texas Family Code provides that a court may order either or both parents to pay support a child. See Tex.Fam.Code Ann §154.001(a) (Vernon Supp.2009). "By virtue of the maximum *inclusio unius est exclusio alterius*, only the parents may be ordered to support their child." *Sampson & Tindall's Texas Family Code Annotated*, at 589 comment to §154.001 (West 2009). Grandparents, nonparent conservators, and former managing conservators have no obligation to support a child. *Id*. Therefore, a court may order an individual to pay child support only if it determines that a parent-child relationship exists. *In the Interest of A.J.L. and E.M.L.*, 108 S.W.3d 414, 421 (Tex.App.-Fort Worth, 2003 pet. dism'd.) citing *Mata v. Moreno*, 601 S.W. 2d 58, 59 (Tex.Civ.App.-Houston [1st Dist] 1980, no writ).

In the case *In the Interest of A.J.L. and E.M.L.*, 108 S.W.3d 414 (Tex.App.-Fort Worth, 2003 pet. dism'd.), a stepdad filed to modify a custody order governing possession of and access to his former step children. Ultimately the trial court found that he lacked standing to bring the modification and entered an order against him for attorney's fees that were "incurred in relation to the issue of child custody and are therefore adjudged in the nature of child support for the benefit of the minor children . . . and are further hereby taxed as costs and shall be a non dischargeable support obligation within the meaning of Section 523(a)(5) of the U.S. Bankruptcy Code." *Id*. at 421. The Appellate Court disagreed, saying that stepdad "may only be ordered to pay true child support if he meets the definition of a "parent" under the family code." Since he did not meet the definition of "parent" pursuant to §101.024(a) the trial court could not order him to pay child support for the benefit of the children. *Id*. at 421-22.

The Court said "it is inconsistent to levy the nondischargable burden of child support upon a person whom the law refuses to recognize as a parent of the child at issue." *Id.* at 422. (Alas, stepdad didn't get off scott-free. The court went on to uphold the award of fees based upon him being the losing party.)

3. Child Support – Can't modify for Non-parents

Mata v. Moreno, 601 S.W. 2d 58 (Tex.Civ.App. - Houston [1st Dist.] 1980, no writ) involved a lawsuit in 1973 alleging a common law marriage, that a child was born of that marriage, and that alleged husband should be required to pay child support. *Id*. at 58. The parties reached an agreement which stated that no marriage existed between the parties, that the respondent denied being the father but was willing to "buy his peace" and pay $115.00 per month in child support. Mom disagreed about the parentage, but accepted the child support agreed upon. *Id.* at 58-59. Based on that agreement, the trial court denied the petition for divorce and ordered alleged Dad to pay the agreed upon child support. *Id*. at 59. Six years later, Mom filed a motion to modify the 1973 order seeking to increase the amount of the child support obligation. *Id.* Dad filed a motion to dismiss which was granted by the trial court.

Mom appealed, claiming a right to bring a modification pursuant to §14.08(a) of the Texas Family Code which provided that "A court order or the portion of a decree that provides for the support of a child may be modified . . . only by the court having jurisdiction of the suit affecting the parent-child relationship."

The Houston Court of Appeals noted that the appellee voluntarily assumed the child support obligation without conceding that he was the parent and there was no finding by the trial court of paternity. Thus the appellate court held that, pursuant to §14.08(a) (now §156.001) of the Texas Family Code, "a consent judgment which fails to predicate the payment of child support upon either an express or implied finding that a parent-child relationship exists is not subject to modification." *Id* at 59.

4. No contempt for Non-parents

Ex parte Riley, 691 S.W.2d 16 (Tex.App. - Beaumont 1985) is a grandparent versus parent case. Grandma filed an original petition alleging Riley to be the natural father of the child and seeking managing conservatorship. In 1981, an agreed decree named the maternal grandmother as the managing conservator, Riley as the possessory conservator, and ordered Riley

to pay child support. Three years later maternal grandmother sought enforcement and the court found Riley in contempt, sentenced him to jail suspended for five years. Because he didn't pay, the court revoked Riley's probation and committed him to jail for a period of six months. Riley filed a writ of habeas corpus with the Beaumont Court of Appeals, which was a smart move. Riley argued that he had not been shown to be a parent of the child, that only parents can be ordered to pay child support, and that the agreed decree of 1981 imposed only a contractual obligation upon him to pay the support and not enforceable by contempt. *Id.* at 17.

The Court reviewed §11.01(3) of the Texas Family Code (Vernon 1975) (now §101.024(a)(Vernon Supp 2009), defining "parent" to mean the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated, and §12.02 c) of the Texas Family Code (Vernon 1975) stating that a child is the legitimate child of a man if the man's paternity is established. It found that the 1981 decree contained no finding of paternity or any parent child relationship, which supported Riley's argument that there was never a judicial finding of any factors that would create such a relationship. *Id.* at 17-18. Citing *Mata v. Moreno, supra*, the Court held that the clear and unambiguous language of the Family Code meant that only parents can be ordered to make child support payments. Because the 1981 decree did not make an express or implied finding that Riley was a parent of the child and therefore the child support provision of the decree was not enforceable by contempt.

Practice Tip: Absent an agreement, only a parent of a child can be ordered to pay child support. A nonparent can "agree" and therefore contract to pay child support, however, that contract cannot be enforced by contempt (breach of contract would be the remedy), and that order cannot be modified by the obligee absent further agreement by the nonparent obligor.

V. CONCLUSION

Now that marriage is marriage for all couples everywhere – regardless of their gender – divorce is also divorce. Right? Not so fast. Because so many same-sex couples sought to solemnize their relationships in other jurisdictions, and because of the patchwork quilt of laws, statuses (civil unions/domestic partnerships/reciprocal beneficiaries) and timing across the country before *Obergefell*, practitioners have to do extensive research on behalf of their clients.

Bringing the rest of the world up to speed will take some time. But for now, those family law attorneys who serve same-sex couples at the beginning or at the end of their relationships must take care and educate not only their clients but the jurisdictions in which we practice - both in front of and behind the bar.

This paper is just a first step. And we look forward to learning more from you, too.