PRACTICING LGBT FAMILY LAW IN A POST-*OBERGEFELL* WORLD

By Deborah H. Wald

State court and administrative agencies have reacted to the U.S. Supreme Court decision in *Obergefell v. Hodges,* 576 U.S. ___ (2015), in a variety of ways. While some states have been quick to embrace the decision, others have proven quite resistant. Some of the issues arising in post-*Obergefell* family cases relate to retroactivity and the Full Faith and Credit Clause.

Retroactivity. Because in *Obergefell* the Supreme Court found that state statutes and constitutional amendments prohibiting same-sex couples from marrying violate the Equal Protection and Due Process Clauses of the U.S. Constitution, the decision should be interpreted to void these statutes and amendments *ab initio*. Assuming the marriages were legal at the time and in the place they were celebrated, same-sex marriages should be recognized as lawful back to the date they were solemnized.

However, retroactivity of marriage recognition does not come close to providing equality for same-sex couples, many of whom spent decades cohabiting before having the opportunity to wed. Other approaches are needed to ensure these couples genuine equality when it comes to recognition of their intimate partnerships. These approaches include: recognition of domestic partnerships and civil unions; liberal application of common law marriage principles; and broadening of protections under "palimony" principles.

By the time of the *Obergefell* ruling, approximately 15 states had adopted either domestic partnerships or civil unions as a way of offering some degree of protection to same-sex couples. These domestic partnerships and civil unions varied from full marriage equivalents to little more than ways of ensuring hospital visitation privileges. Now, with same-sex marriage in all 50 states, many couples find themselves in multiple relationships that make it difficult to determine what the actual "operative date" of their legal union is. Take the following hypothetical.

> RETROACTIVITY OF MARRIAGE RECOGNITION DOES NOT PROVIDE EQUALITY FOR SAME-SEX COUPLES.

Adam and Bruce have been together for 35 years and reside in Nowhere. They held a wedding in 1990. Rings and vows were exchanged, with a minister presiding. When Vermont started allowing same-sex couples to enter into civil unions in 2000, they flew to Vermont to enter into a civil union, even though it would not be recognized in Nowhere. When Massachusetts legalized marriage for same-sex couples in 2004, they got married in Provincetown. However, this, too, was not recognized in Nowhere. When California made state-registered domestic partnerships equivalent to marriages in 2005, they registered with the California Secretary of State's office as domestic partners. Then, when a court found their home state's Defense of Marriage Act (DOMA) unconstitutional in 2014, they married again in Nowhere.

What is their date of marriage for purposes of divorce or to qualify them for spousal retirement benefits? The answer to this question is important for a variety of reasons. For example, in community property states, the date of marriage generally sets the date upon which the "community" starts accruing both assets and debts. In equitable distribution states, the date of marriage can have a significant impact on the property division.

If Adam and Bruce live in a common-law-marriage state, they may argue they have been married since their 1990 wedding. Most states that allow or recognize common law marriages require at least three things: (1) The couple must live together; (2) be legally eligible to marry; and (3) intend to be married. For same-sex couples in committed long-term relationships, the second requirement is the one likely to give them trouble: If their home state did not allow same-sex couples to marry, were they "legally eligible" to marry? The fact that they *now* are allowed to marry—and that the previous bar to their marriage has been declared unconstitutional by the Supreme Court—may provide them with an argument that their relationship should be recognized as a common law marriage dating to when they moved in together and clearly expressed their intention to marry.

If Adam and Bruce never lived in a state that recognized common law marriages, their next approach should be to try to gain recognition of their earliest nonmarital union. The Vermont civil

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union was equivalent to marriage, requiring both solemnizing at its inception and a court divorce for its dissolution.

Finally, the Massachusetts marriage should be recognized without question, based on retroactivity of the holding in *Obergefell*. Adam and Bruce may have been married for family law purposes: since 1990 (at common law), since 2000 (due to the civil union), or since 2004 (based on the Massachusetts marriage), but they certainly should not be limited for recognition purposes to 2014, when their home state finally allowed them to marry.

Full Faith and Credit finality. The Full Faith and Credit Clause ensures that judgments, once rendered, are final, not only in the state where they were rendered, but nationwide. Application of the Full Faith and Credit Clause post-*Obergefell* is unlikely to impact directly recognition of a couple's marriage because marriage is an administrative act and not a judgment. While there is a long history of states recognizing marriages solemnized in sister states, regardless of whether the couple could have married in their home state, states never have been constitutionally required to do so. However, the Full Faith and Credit Clause is likely to play a prominent role in struggles around broader family recognition for same-sex couples—and especially in the context of adoptions.

In *Finstuen v. Crutcher,* 496 F.3d 1139 (10th Cir. 2007), the Tenth Circuit found that a statute passed by Oklahoma, by which it refused to recognize any adoption resulting in an Oklahoma child having two parents of the same sex, was unconstitutional under the Full Faith and Credit Clause.

Although *Finstuen* seemed decisive on the issue of interstate recognition of same-sex adoption, hostile states have continued to try to undermine *Finstuen* in a variety of ways. For example, in *Adar v. Smith,* 639 F.3d 146, 159 (5th Cir. 2011), the Fifth Circuit upheld Louisiana's refusal to issue a new, post-adoption birth certificate of a child born in Louisiana but subsequently adopted by a same-sex couple in New York. According to the *Adar* court, Louisiana's refusal to issue an accurate birth certificate for the child did not violate Full Faith and Credit because it involved *enforcement* of the New York adoption order, rather than *recognition* of the order.

More recently, the Supreme Court of Alabama has gone much further. It set aside a final judgment of adoption rendered eight years earlier in Georgia, on the ground that the Georgia court lacked subject matter jurisdiction to grant the adoption. According to the court, Georgia adoption law barred adoptive mother V.L. from adopting the children unless birth mother E.L. relinquished her own parental rights. Having found that the Georgia court misapplied its own state's adoption law, the Alabama court then found that the Georgia court's error was "jurisdictional" and, therefore, need not be honored under the Full Faith and Credit Clause. By this decision, the Alabama Supreme Court effectively stripped V.L. of parental rights over children she has raised since they were born, and which rights continue to be recognized in Georgia and presumably in any other state that will honor the Georgia adoption. The U.S. Supreme Court reversed the Alabama Supreme Court and held that the Georgia superior court had subject-matter jurisdiction to hear and decide the adoption petition, triggering Alabama courts' Full Faith and Credit obligation. *V.L. v. E.L.,* 136 S. Ct. 1017 (2016).

As people continue to react to the *Obergefell* decision, we are likely to see more desperate efforts to avoid the inevitable march toward equality. These efforts may lead to further attempts to undermine the Full Faith and Credit Clause or to create "gay loopholes" in other well-established laws and principles. ■