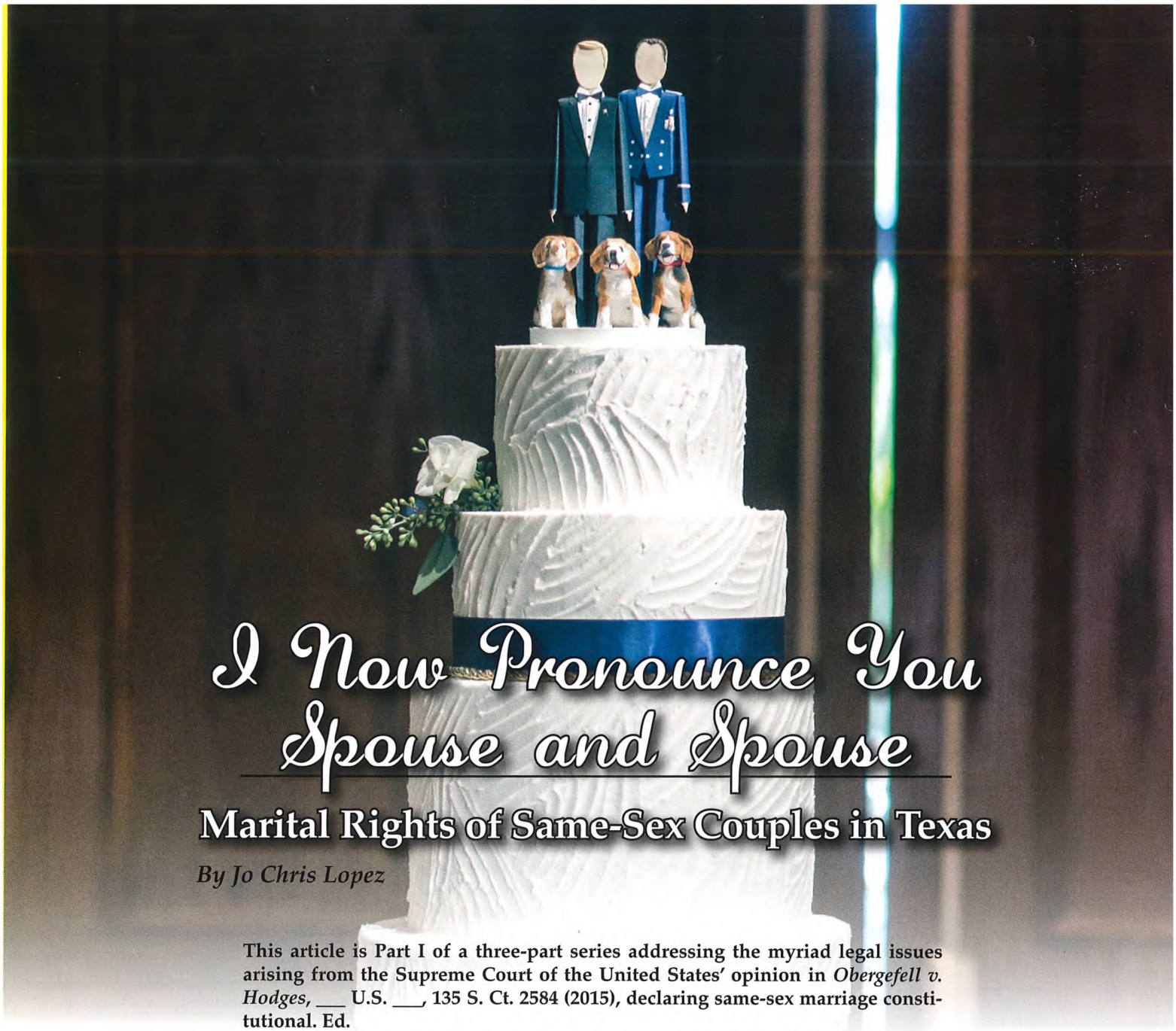

I Now Pronounce You Spouse and Spouse

Marital Rights of Same-Sex Couples in Texas

By Jo Chris Lopez

This article is Part I of a three-part series addressing the myriad legal issues arising from the Supreme Court of the United States' opinion in *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584 (2015), declaring same-sex marriage constitutional. Ed.

> The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.
>
> *Obergefell v. Hodges*, ___U.S. ___, ___, 135 S. Ct. 2584, 2595 (2015).

Texas Proscribes Same-Sex Unions

The Texas proscription against same-sex unions was formalized in 2003 when the Legislature enacted Texas Family Code § 6.204, declaring that a marriage between persons of the same sex or a civil union is contrary to the public policy of the state and is void. Tex. Fam. Code Ann. § 6.204(b) (West 2006). Then, in 2005, Texas voters amended the Texas Constitution to add a provision that "[m]arriage in this state shall consist only of the union of one man and one woman," and "[t]his state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage." Tex. Const. art. I, § 32(b).

Several challenges in the Texas courts followed. In 2008, two men, who had legally married in Massachusetts before they moved to Texas, filed for divorce in Dallas County. *In the Matter of the Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas

2010, pet. dism'd). The men argued that Texas was required to recognize a marriage validly conducted in another state under principles of comity. *Id.* at 667–68. Although the trial court agreed and struck the state's intervention, the Fifth Court of Appeals reversed, holding that Texas courts lacked subject-matter jurisdiction to hear a same-sex divorce, even if the marriage was valid in the state issuing the marriage license. *Id.* at 670. The Court of Appeals reasoned that "Texas laws . . . do not violate . . . equal protection, a provision never before construed as a charter for restructuring the traditional institution of marriage by judicial legislation." *Id.* at 681. The Texas Supreme Court granted review and heard oral argument, but the case was dismissed in June 2015, after one of the parties died while the case was pending.

On the same day that *J.B. and H.B.* was dismissed, the Texas Supreme Court, in a consolidated case, affirmed a same-sex divorce involving two women who married in Massachusetts and filed for divorce in Travis County. *State v. Naylor*, 330 S.W.3d 443 (Tex. App.—Austin 2011), *aff'd*, 466 S.W.3d 783 (Tex. 2015). In *Naylor*, one day after the Travis County trial court had orally approved the parties' settlement agreement, granted a divorce, and rendered judgment, the State attempted to intervene "to defend the constitutionality of Texas and federal laws that limit divorce actions to persons of the opposite sex who are married to one another." *Id.* at 787. The trial court struck the intervention because it was too late, and the Third Court of Appeals affirmed, holding that the State was not a proper party and lacked standing to appeal the divorce decree. *Id.* at 789. The Texas Supreme Court agreed, finding that procedurally the State lacked standing, but did not address the merits of the constitutional arguments underlying its position because they were not preserved for review. *Id.* at 795.

LEFT: Grooms Mark Phariss and Vic Holmes admire their wedding cake. BELOW: A Holmes/Phariss wedding photo celebrated the litigation victory with Neel Lane (Akin Gump), Vic Holmes, Mark Phariss, Hon. Charles Gonzalez (Officiated), Cleopatra DeLeon, Nicole Dimetman, Frank Stenger (Akin Gump) and Michael Cooley (Akin Gump)

Similar challenges were also launched in the San Antonio courts. In *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Texas 2014), *aff'd*, 799 F.3d 619 (5th Cir. 2015), the plaintiffs—two women who married in Massachusetts and wanted their marriage recognized in Texas and two men who wanted to marry in Texas—brought suit against the State in federal court to declare the Texas laws unconstitutional and to enjoin enforcement of section 32 of the Constitution. The district court concluded that the Texas "current marriage laws deny homosexual couples the right to marry, and in doing so, demean their dignity for no legitimate reason." *Id.* at 639. The court explained that "even under the most deferential rational basis level of review," the State "failed to identify any rational, much less a compelling, reason that is served by denying same-sex couples the fundamental right to marry." *Id.* at 660.

Another San Antonio case, *In the Matter of the Marriage of A.L.F.L. and K.L.L.*, No. 04-14-00364-CV, 2014 WL 4357457 (Tex. App.—San Antonio 2014, corrected order), *disp. on merits*, 2015 WL 4561231 (Tex. App.—San Antonio 2015, no pet.), involved two women who married in Washington, D.C., and moved to Texas where they had a child by donor insemination. *See In re State of Texas*, No. 04-14-00282 CV, 2014 WL 2443910 (Tex. App.—San Antonio May 28, 2014, orig. proceeding) (mem. op.). A short while later, one of the women filed in Bexar County for divorce and joint custody of the parties' child. *Id.* The other woman responded with a jurisdictional challenge, asserting the Texas ban on recognition of same-sex marriage. *Id.* The trial court denied the plea to jurisdiction and, relying on the district court's reasoning in *De Leon*, held that: (1) Texas marriage laws and sections 102.003 (General Standing to File Suit) and 160.204 (Presumption of Paternity) of the Texas Family Code were unconstitutional; and (2) because of the child involved, the dissolution

proceeding would continue to determine the parentage rights of each woman. *Id.* The State was notified of the litigation and, in response, intervened, gave notice of appeal, and sought mandamus relief on its plea to the jurisdiction. *Id.* The proceedings were stayed by the Fourth Court of Appeals, pending resolution of *J.B. & H.B.* and *Naylor*, both of which were then pending in the Texas Supreme Court. *In the Matter of the Marriage of A.L.F.L. and K.L.L. and In the Interest of K.A.F.L., a Child*, No. 04-14-00364-CV (Tex. App.—San Antonio, July 8, 2014, order), *disp. on merits*, 2015 WL 4561231 (Tex. App.—San Antonio 2015, no pet.).

The United States Supreme Court Decides *Obergefell*

These cases set the stage in Texas for the United States Supreme Court's decision in *Obergefell v. Hodges*, ___, U.S. ___,135 S. Ct. 2584 (2015). *Obergefell* consisted of six lawsuits in which the plaintiffs (fourteen same-sex couples and two men whose same-sex partners were deceased) from four states (all within the jurisdiction of the United States Court of Appeals for the Sixth Circuit—Kentucky, Michigan, Ohio, and Tennessee) challenged same-sex marriage bans in their home states. *Id.* at 2593. In each case, the federal district court ruled in favor of the plaintiffs. *Id.* The Court of Appeals consolidated the cases and reversed the rulings. *Id.* On June 26, 2015, the United States Supreme Court ruled that the United States Constitution requires all states to recognize a marriage between two people of the same sex, and further, that all states must issue marriage licenses for same-sex couples who apply for such licenses. *Id.* at 2591. Following on the heels of *U.S. v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675 (2013)—which set aside parts of the 1996 Congress-enacted Defense of Marriage Act (DOMA) as unconstitutional and validated same-sex marriages for most federal purposes—*Obergefell* requires *all states* to permit same-sex couples to marry and to recognize such marriages wherever performed. *See Obergefell*, 135 S. Ct. at 2607-08.

For Texas citizens, this means that the Texas Constitution's and Family Code's prohibitions against same-sex marriage are invalid. For same-sex couples living in Texas after they were lawfully married in a jurisdiction that permitted same-sex marriage, their marriages are now recognized in Texas. More broadly, *Obegefell*'s legacy is that:

- Same-sex marriage is recognized in all states, territories, and Washington, D.C.
- State courts should be available to same-sex couples for divorce, custody, child support and other family law matters, as they are for other litigants.
- Children born to couples in a same-sex marriage should have two legally recognized parents, regardless of gender or biological connection.

Obergefell also raises several questions for same-sex couples in Texas.

Are Same-Sex Marriages that Predate *Obergefell* Valid in Texas?

Same-sex couples without recourse to a marriage license have spent years, even decades, in marriage-like relationships: they lived together, owned property together, opened bank accounts together, invested together, and raised children together. Although same-sex marriages formally licensed and performed after *Obergefell* (i.e., June 26, 2015) are valid in Texas (and in all other states), those unions that pre-date the Court's decision may be affected, at least in part, by whether Texas Courts apply the decision retroactively to recognize those *de facto* marriages in existence before the clerk's office was open to same-sex couples. If the marriage was licensed and performed lawfully out-of-state, the date of the marriage is technically certain. But when a same-sex couple has been in a long-term marriage-like relationship without the sanction of a license and has lived for all or part of the time in a state where such marriages were not recognized, the anniversary date could be subject to scrutiny.

How Will an Informal Marriage Between Same-Sex Couples Be Treated?

Texas is one of a few states that recognizes an informal marriage (also referred to as "common law marriage"). An informal marriage, i.e. a marriage not solemnized through a legal or religious ceremony, is equivalent legally to a formal or ceremonial marriage. *In re Glasco*, 619 S.W.2d 567, 571 (Tex. App.—San Antonio 1981, no writ). Texas Family Code § 2.401 provides for an informal marriage between a *man* and a *woman* by evidence of:

- a signed declaration of marriage; or
- an agreement to be married and
- cohabitation within the State of Texas as "husband and wife" and
- representation to others that they were married.

An argument that only opposite-sex couples qualify for an informal marriage should not survive the mandate of *Obergefell* that prohibits states from marriage discrimination on the ground of same-sex character. It seems reasonable that, after *Obergefell*, same-sex couples who register an informal marriage by signing a declaration consistent with the statute will be treated as married under state law. And, for divorce purposes, the duration of a marriage begins from the date of the declaration, as it does generally with opposite-sex couples. Aside from creating a marriage by declaration, for same-sex couples who agreed to marry and otherwise satisfy the requirements of section 2.401, an informal marriage could exist by operation of the statute applicable to opposite-sex couples, long before *Obergefell* was decided.

A pending question is whether an informal marriage between same-sex couples will be created like an informal marriage of opposite-sex couples and, if so, can the effective date of such marriages pre-date *Obergefell*? It is interesting to consider the question in light of the proof typically required of opposite-sex couples who claim an informal marriage:

Agreement to be married. To establish an informal marriage, the proponent of the marriage must show that the parties agreed to be married; that is, that the parties "intended to have a present, immediate, and permanent marital relationship and that they did in fact agree to be [spouses]." *Small v. McMaster*, 352 S.W.3d 280, 283 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The agreement to be married must be a present agreement; "it is not sufficient to agree on present cohabitation and future marriage." *See Rosetta v. Rosetta*, 525 S.W.2d 255, 261 (Tex. App.—Tyler 1975, no writ). The agreement to be married may be established by circumstantial evidence, but cannot be inferred from evidence of cohabitation and holding out as married without an agreement to be married. *Russell v. Russell*, 86 S.W.2d 929, 932-33 (Tex. 1993).

The type of evidence typically used by opposite-sex couples to show an agreement to be married may not

ABOVE: Barry Efron represented the biological mother, Kristi Lyn Lesh, in the suit affecting the parent-child relationship. LEFT: Deanna Whitley (left) and Judith Wemmert (right) represented the petitioner, Allison L. Flood Lesh, in the A.L.F.L. and K.L.L. divorce action in Bexar County District Court.

be available to same-sex couples. For example, because of social stigma, references to a same-sex partner as "spouse," "wife," or "husband," or as "stepparent" were sometimes used more guardedly than by opposite-sex couples. Because same-sex couples could not invoke divorce courts to divide property they acquired together, some hesitated to title property, particularly significant purchases, in joint names. For the same reason, bank accounts and other joint investments may not exist for same-sex couples who could not legally marry. Until 2013, the joint filing of federal income tax returns was not available to same-sex couples who could only file their 1040 returns as single individuals.

Cohabitation. A party urging a same-sex marriage may have cohabitated in a jurisdiction that does not recognize informal marriage (same-sex or opposite-sex). *See Farrell v. Farrell*, 459 S.W.3d 114 (Tex. App.—El Paso 2015, no pet.). *Farrell* concerned a man and a woman who lived in New Mexico and later in Texas, and the issue was the beginning date of the informal marriage. *Id.* at 116. Because New Mexico does not recognize informal marriage, the court held that the couple could not have been married until they cohabitated in Texas, where informal marriage was recognized. *Id.* at 117-18. Will Texas, by analogy, recognize cohabitation for purpose of establishing an informal marriage between same-sex couples only if it occurred in a jurisdiction that permitted same-sex marriage? What about same-sex cohabitation in those states that do not recognize informal marriages and also prohibited same-sex marriages? Will cohabitation under these circumstances be considered in Texas to support a claim of an informal marriage where its inception pre-dates *Obergefell*?

Holding out to the public. Texas' informal marriage statute requires that the couple "represented to others that they were married." *Small*, 352 S.W.3d at 284-85. The "holding out to the public" element requires more than an occasional introduction as "a spouse." Rather, the question turns on whether the couple "consistently conducted themselves as [spouses] in the public eye or that the community viewed them as married." *Id.* at 285. There can be no "secret" informal marriage in Texas. *See Ex parte Threet*, 333 S.W.2d 361, 364 (Tex. 1960). The question then is: Could a same-sex couple agree to be married and hold themselves out as married in a state where same-sex marriage was void? Some same-sex couples who could not legally marry in Texas routinely held commitment ceremonies to publicly memorialize their relationship anyway, but policies like "Don't ask, Don't tell" and the perceived social stigma of same-sex relationships kept many same-sex couples in the closet. How will fairness be achieved for same-sex couples in a long-term relationship where a licensed marriage was not available, and the licensed marriage is of very short duration?

Why Does It Matter?

An informal marriage is the equivalent of a formal marriage. *In re Glasco*, 619 S.W.2d at 571. All states provide laws specific to married couples, which create rights and duties during marriage and upon death or divorce. In a community property state, such as Texas, the date of the marriage and its duration may alter:

- the accumulation of community property;
- separate property character;
- the entitlement of a spouse to maintenance upon divorce; and
- other spousal entitlements such as health care, retirement benefits, and life insurance.

In Texas, whether property is community property or separate property will affect its disposition in a divorce because a court cannot divide separate property. *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977). In general, a spouse is entitled to his or her separate property—that is, property owned before marriage or acquired by gift or inheritance—free of any claim of a spouse. *Id.* at 140. Although a trial court has broad discretion in dividing community property, a court may consider myriad factors in making a just and right division. *Murff v. Murff*, 615 S.W.2d 699 (Tex. 1981). The length of the marriage is one factor ordinarily considered. *See Vannerson v. Vannerson*, 857 S.W.2d 659 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

In a dissolution action after *Obergefell*, how will courts consider the length of the relationship vs. the length of the marriage for same-sex couples? Is a

same-sex marriage measured, for divorce purposes, from the date of the beginning of the relationship, which could be many years or decades, or from the earlier of the date of the formal marriage or June 26, 2015? The answer can have an enormous economic effect in allocating for same-sex spouses the same rights that are available to opposite-sex couples upon divorce, including, among many other things, a larger community estate, benefits as the dependent of a spouse, survivor benefits, and joint liability for debts created during the marriage.

Has the Divorce Conundrum Been Solved?

There is no such thing as a "common law divorce" or "informal divorce" in Texas. Once an informal marriage is consummated, it can only terminate by death, divorce, or annulment. *Estate of Clavera v. Clavera*, 615 S.W.2d 164 (Tex. 1981). Those Texas same-sex couples who wanted a legally valid marriage went to Massachusetts, New York, California, and other states which permitted such unions, and then returned to live in a state without the legal framework that ordinarily governs marital relationships. Before *Obergefell*, Texas same-sex couples could not file for divorce in Texas, and those who could not satisfy the residency requirements of the state where they were married were left without a straightforward solution to dissolve their marital status or settle property. Although some parents could file suits affecting the parent-child relationship to address issues regarding their children, and could look to other judicial remedies to divide property and debt, they could not terminate their marriage in a Texas divorce court other than by bringing a suit to declare the marriage void. *See In the Matter of the Marriage of J.B. and H.B.*, 326 S.W.2d at 667. However, such suits did not provide for property rights, maintenance or support, debt allocation, or other rights legally afforded opposite-sex couples. After *Obergefell*, same-sex couples who need the courts should have the same access as other litigants.

How Will Texas Courts Handle "Civil Unions and Domestic Partnerships" Created in Other States?

Some states implemented marriage-like equivalents, including civil unions and domestic partnerships, which afford a marriage-like status to same-sex couples when actual marriage licenses were not permitted. The issue arises as to whether Texas courts can or will dissolve a marriage-equivalent relationship obtained by Texas residents in another jurisdiction.

The effect of *Obergefell* is to create a new frontier for family law in Texas where, in the next few years, the courts will grapple with these questions and determine how our laws evolve into the new millennium. ✤

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