On June 26, 2015, the U.S. Supreme Court issued its landmark decision in Obergefell v. Hodges, finding that there is a fundamental right to marry that is guaranteed by the Due Process and Equal Protection clauses. This ruling has already, and will continue to, necessitate changes in the practice of family law and many other areas of law where the definitions of marriage, parentage and family apply. This article highlights a few of the many post-Obergefell developments and some of the many yet-to-be answered questions arising therefrom.

Protecting Freedom of Conscience and Religious Beliefs

Some families and individuals hold sincere religious beliefs that include doctrines opposing same-sex marriage or homosexuality. These beliefs, in light of Obergefell, raise many unanswered questions. For instance, is a court, while considering the wishes of a child—as is permitted by law (see NRS 125C.0035)—permitted to consider a child’s wishes to be placed in the custody of one parent over the other, when such wishes are based on the sexual orientation of the parent or child? Further, can a court consider such religious beliefs when placing a child with a relative, in a foster home, for adoption or in a guardianship? Likewise, is a court (or placing agency) allowed to consider whether the child up to that point had been living in an opposite-sex or same-sex marital home?

In an effort to preemptively respond to some of these questions, state legislatures have enacted laws to protect freedom of conscience and religion for those who oppose same-sex marriage based upon religious beliefs. In one case before the Southern District of Mississippi, a legal challenge was recently brought against one such law that identified three “sincerely held religious beliefs or moral convictions” that would entitle such believers to special legal protections. The three religious beliefs were:

1. “Marriage is, or should be recognized as, the union of one man and one woman;”
2. That “sexual relations are properly reserved to such a marriage;” and
3. That “male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at the time of birth.”

The intention, according to the framers, was to protect those who decline to offer goods or services that would be counter to their beliefs (e.g., a bakery declining to bake a wedding cake for a same-sex wedding).

Upon consideration, the federal court found the law was improper as it protected only a certain set of religious beliefs. The court also reasoned that discrimination was so broadly defined that “[a]n organization or person who acts on [such a religious] belief is essentially immune from State punishment.”

Birth Certificates and Determining Who is a Parent

Paternity laws have long been in place to resolve custody issues between non-married parties and co-habitants based upon biological assumptions. For instance, if a child’s parents are married to each other at the time that child is born, or within 285 days after the marriage is terminated, there is a presumption of paternity under Nevada law. See NRS 126.051. However, in light of Obergefell, will same-sex married couples be entitled to the same rights and presumptions as a married heterosexual couple, even though there may be no biological connection with the children of the relationship? Alternatively, the same-sex spouse of a child’s biological parent may be required to either adopt the child in order to guard against paternity challenges, or rely on other laws, such as those concerning assisted reproduction and surrogacy, to secure their rights.

One example of how courts are already beginning to address this type of question is found in Torres v. Rhoades, No. 15-CV-288-BBC (W.D. Wis. Apr. 4, 2016). While this case directly relates to qualification of a class for a class-action lawsuit, the case involved a married lesbian couple who sought to list both the birth mother and the non-birth mother on their child’s birth certificate. At issue was a Wisconsin statute that provided that the “name of the husband of the mother shall be entered on the birth certificate as the legal father of the registrant.”

In evaluating the issue of qualifying the class, the court identified three possible class subgroups:

1. Same-sex couples who complied with the artificial insemination statute,
2. Same-sex couples who conceived through artificial insemination but did not comply with the artificial insemination statute, and
3. Same-sex couples who conceive through heterosexual intercourse.

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Regarding the first subgroup, the determination was that the birth certificate should include the same-sex spouse of the birth mother because, under the artificial insemination statute, the biological father does not have any parental rights. For the second subgroup, the court determined that the same-sex spouse should not be included on the birth certificate, because the artificial insemination statute expressly provides that if a child is born as the result of artificial insemination without complying with the statute, that even in the case of a heterosexual couple, the father would be omitted from the birth certificate. Finally, for the third subgroup when the child of the same-sex couple was conceived through heterosexual intercourse, the court determined that the non-birth parent would be required to go through adoption proceedings to be placed on the birth certificate, because “the birth certificate statutes cannot be casually applied to same-sex couples as if the rights of biological fathers did not exist.”

Another example is found in a recent Maryland case, Conover v. Conover, 141 A.3d 31, 32 (Md. Ct. App. 2016), which addressed the concept of de facto parenthood as another viable means for a partner in a same-sex relationship to establish standing to contest custody or visitation, thus promulgating the idea that the existence of such a relationship, like biology or legal status, could be used to define parenthood. Similarly, in Brooke S.B. v. Elizabeth A. C.C., a New York court, in overruling a prior case, held that:

in light of more recent delineated legal principles, the definition of “parent” established by this Court 25 years ago … has become unworkable…. Accordingly, today, we … hold that where a partner shows by clear and convincing evidence that the parties agree to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody….


Common-law Marriage, Community Property and Alimony

Some other, yet-to-be answered questions that state legislatures and courts will have to address in light of Obergefell involve common-law marriage and financial matters in a divorce. For instance, in a community property state like Nevada, when a marriage begins and ends is critical for making a determination as to what is separate property and what is community property subject to division. However, do same-sex couples have the ability to assert a common law-marriage if they meet the requirements? And is the marriage retroactive to when the parties began cohabiting, or just to when same-sex marriage became legal?

The length of marriage is also a consideration in alimony determinations. Might courts impose a de facto common-law marriage in such cases by finding that a same-sex couple who began cohabiting before the legalization of same-sex marriage