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# The Troubling World of “What Ifs” for Same-Sex Parents as Marriage Equality is Threatened

By: Bill Singer

In 2015, in a 5♦4 decision in Obergefell v. Hodges, 576 U.S. 644 (2015), the United States Supreme Court held that same-sex marriage is a fundamental right and that all states are required to allow same-sex couples to marry.

At the time of that decision, Chief Justice Roberts for the first time ever read his dissent from the bench. “Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.” He continued, “Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.”

Two justices on the Supreme Court have continued to decry and question the Obergefell decision. In a dissent on a denial of certiorari in October 2020, Justice Thomas, joined by Justice Alito, delivered a fiery, four page critique of Obergefell stating that the holding gave same-sex couples a constitutional right to marry thereby giving priority to LGBT rights over religious freedom. “The Court read a right to same-sex marriage into the Fourteenth

Amendment, even though the right is found nowhere in the text.” Davis v. Ermold, 592 U.S. (2020). Justice Thomas said that these matters were best left to the states to decide how best to accommodate the “religious liberty of the many Americans who believe that marriage is a sacred institution between one man and one woman.”

And during the December 2021 oral argument in Dobbs v. Jackson, Justice Amy Coney Barrett voiced her opinion that respect for precedent in a prior legal case, known as stare decisis, is “not an inexorable command.”

Subsequently, in June 2022, the Supreme Court in the Dobbs case reversed prior precedent and held the Constitution does not confer a right to abortion. 597 U.S. (2022).

Given the present composition of the United States Supreme Court, many advances made by the LGBTQ+ community could be reversed.

Potential issues which may lay ahead if Obergefell is reversed:

- 1 Will an existing same-sex marriage still be valid? Yes. Based on prior court decisions, existing marriages will be recognized
- 2 Will same-sex couples be allowed to marry? If Obergefell is reversed, state law will govern who can marry. A couple can marry in one state but their marriage may not be recognized in another state. Full faith and credit does not apply to marriage. Comity may apply.
- 3 If there is a reversal of Obergefell, prior state laws which banned same-sex marriage will be revived.
- 4 Obergefell is about marriage only; it is not about parentage. That said, there are rights of a parent which flow from or by virtue of marriage. Obergefell requires that same-sex marriages are entitled to the same rights as different sex marriages which include parental status, rights, and benefits to married parents. Pavan v. Smith, 582

U.S. (2017). Those rights garnered through marriage will be lost to parents living in states which do not recognize same-sex marriage and who marry after a reversal of Obergefell.

- 5 Parental rights and marital rights are determined by state law, not federal law. Federal law usually defers to a state determination.
- 6 In all states, parental rights are usually determined without regard to marital status. In most cases, marriage does not determine parentage and parentage does not depend on marriage. Issues like custody, visitation and support are based on the party's relationship to a child, not on marriage or genetics.
- 7 Under the full faith and credit clause of the US Constitution, a court in another state must recognize a decree of another state, including orders about parentage. VL v. EL, 577 U.S. (2016). This holding applies to adoption and parentage judgments.
- 8 The full faith and credit clause does not apply to executive branch offices which can deny full faith and credit based on public policy grounds. Adar v. Smith, 639 F. 3d 148 (5<sup>th</sup> Cir 2011), cert. den. 132 S. Ct. 400 (2011). In that case, the Court of Appeals determined that a state vital records office does not have to follow an out of state adoption decree which required that two same-sex parents be listed on a child's birth certificate.
- 9 Parentage rights based on administrative acts and not a court decision may not be recognized by a foreign state. For example, a voluntary acknowledgment of parentage in one state may not be recognized in a second state.
- 10 If a child's relationship to an adult is not based on gestation, genetics or a judicial judgment, child will be at risk. Child may not be eligible for governmental benefits, allowed to inherit through intestacy and an inheritance may be subject to state inheritance taxes.

**11** Clients should get a second parent, stepparent or confirmatory adoption or parentage order. Clients should carry a copy of that judgment on their handheld device. Adoptions are the gold standard and recognized throughout the United States and abroad. If an adoption is not possible, get some type of judicial order confirming parentage,

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**SECTION OF FAMILY LAW**

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