

Dear friends,

As 2022 comes to a close, I want to thank those of you who were able to attend the celebration this September. It was a great day and meaningful to have you there.

We have passed through another tumultuous year – the attack on Q Club, war in Europe, demonization of members of our community, state governments working to withhold needed medical care for members of our community. 2022 was also punctuated by bi-partisan passage of the Respect for Marriage Act (more below) and victorious LGBTQ candidates in races nationwide.

Here are some thoughts about 2022 and looking forward. I have put in bold the important thoughts so you don't have to wade through all of the detailed legal analyses.

Respect for Marriage Act

With the passage of the Respect for Marriage Act (RMA), Congress and President Biden delivered a bipartisan victory for recognition of same-sex and interracial marriages. Thank you to the queer children of legislators. Those children's decisions to lead authentic lives drove home to their parent legislators the necessity to protect their own family.

RMA is an important step, but it is only a step. The reach of the act is limited.

The Respect for Marriage Act has two major aspects.

First, it revokes the 1996 federal Defense of Marriage Act (DOMA) which prohibited the federal government from recognizing same-sex marriages.

The US Supreme Court had already voided DOMA in 2013 when it ruled in Windsor v. U.S. that the federal government was required to recognize same-sex marriages no matter where celebrated.

The RMA repeals DOMA from the statute books.

The second part of the RMA anticipates the possible reversal of the Obergefell decision which granted a constitutional right to marriage equality.

RMA requires one state to recognize a same-sex marriage celebrated in another state -- even if Obergefell is overruled.

I have reservations about this part of the act.

Can the federal government mandate one state to recognize a marriage from another state?

Before Obergefell, no state was required to recognize a same-sex marriage from another state. Recognition of marriage has never before been included in what acts of one state must recognize under the full faith and credit clause of the US Constitution.

Even if the new act is found to require one state to recognize the marriage from another state, how effective is that mandate?

The state forced to recognize that marriage may not necessarily be required to provide any of the rights and benefits which flow from the marriage.

There is already a case which demonstrates the inadequacy of RMA. In the Adar case in 2011, the federal court of appeals held that Louisiana was required to recognize an adoption order from New York allowing a father's same-sex partner to become a co-equal parent to a child originally adopted in Louisiana.

However, the federal court of appeals ruled that full faith and credit clause did not apply to executive branch action. Thus, the bureau of vital statistics in Louisiana was not required to undertake an administrative act like issuing a new birth certificate with both fathers' names.

Thus, if Obergefell is overruled, despite RMA, states hostile to same-sex marriage could use the Adar holding as rationale for discrimination.

Although forced by RMA to recognize a same-sex marriage from another state, the hostile state can refuse to take any action to provide the married couple any rights or benefits that they may be due. It could lead to a two-tier, separate and unequal system.

So, what about Obergefell?

In 2015, in a 5-4 decision in Obergefell v. Hodges, the 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. He stated, “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 other Supreme Court justices have continued to decry and question Obergefell. 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.”

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.”

During the December 2021 oral argument in Dobbs v. Jackson (the case reversing Roe v. Wade), 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.”

These judicial statements are an invitation for forces hostile to same-sex marriage to bring a lawsuit to overrule Obergefell. Given the present composition of the court, Obergefell is in danger.

If Obergefell is overruled, 34 states have laws or court decisions prohibiting same-sex marriage. Those laws and court decisions would be revived.

Here in New Jersey, we are protected. Last year, the legislature and Governor Murphy codified marriage equality. But if Obergefell is overruled, if you travel or move the recognition of your rights as married will be vulnerable.

Here's a link to an article I wrote on these issues in November for the American Bar Association [the troubling world of what ifs for same-sex parents as marriage equality is threatened.pdf](https://www.americanbar.org/publications/abablog/wp-content/uploads/2015/11/the-troubling-world-of-what-ifs-for-same-sex-parents-as-marriage-equality-is-threatened.pdf) (singerfedun.com)

Marriage equality is not parent equality

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. Based on its decision in Obergefell, the US Supreme Court required that the parties to 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).

After a reversal of Obergefell, the Pavan holding and those parental rights garnered through marriage could be lost to married parents living in states which do not recognize same-sex marriage.

A parent's name on a birth certificate is not proof of parentage. The spouse of the woman who gave birth is listed on the birth certificate based on the heteronormative concept that the spouse of the woman who gave birth is the second parent. That is a rebuttable presumption which DNA tests can disprove. A birth certificate is not proof of parentage for government benefits, for example.

In New Jersey, there are three ways one can be recognized as a legal parent – you gestate the child contribute genetic material or obtain a judicial order.

If a child’s relationship to an adult is not based on gestation, genetics or a judicial judgment, that child’s relationship to the adult parent could be at risk. The child could be disqualified from governmental benefits, not allowed to inherit through intestacy and become subject to inheritance tax.

A non-biological, non-gestational parent should obtain a second parent, stepparent or confirmatory adoption or parentage order to protect their child.

Parents should carry a copy of that judgment on their handheld device. Adoptions are the gold standard and recognized throughout the Unites States and abroad. If an adoption is not possible, get some type of judicial order confirming parentage.

Transgender and gender non-binary

Shannon Minter, Legal Director of the National Center for Lesbian Rights, said it right:

Even in a year of unprecedented attacks on transgender kids and their families, the news that Republican Texas Attorney General Ken Paxton pressured state agencies to create a list of transgender people marks a dangerous new low.

<https://www.losangelesblade.com/2022/12/15/paxtons-transgender>

What’s next? Making us wear pink triangles? Fomenting hate should that we don’t feel safe? Unfortunately, there seems to be no end.

Trans and gender non-binary folks are subject to all sorts of harassment. In order to protect them, we need to keep their records insulated from unnecessary public inspection.

This year, I helped write an Executive Order signed by Governor Murphy which extended to the executive branch of government confidentiality of all record relating to name changes.

Given the hostile action by the Texas Attorney General described above, colleagues and I are now working on making sure that government records about gender marker changes are also confidential.

I wish you all a productive and fulfilling 2023!

Very truly yours,

Bill

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