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"The Aftermath of Legalizing Same-Sex Marriages".

October 13, 2016

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This educational meeting summarizes information relating to laws affected by the legalization of same-sex marriages.This information is not intended to establish an attorney-client relationship, or to be construed as legal advice.

We would welcome a chance to discuss these matters further with you.

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Fundamental Right?

16 times since 1888, the United States Supreme Court has stated that marriage is a fundamental right of all individuals:

1. *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888)—**Marriage is "the most important relation in life" and "the foundation of the family and society, without which there would be neither civilization nor progress."**

2. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)—**The right "to marry, establish a home and bring up children" is a central part of liberty protected by the Due Process Clause.**

3. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)—**Marriage "one of the basic civil rights of man," "fundamental to the very existence and survival of the race."**

4. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)—**"Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."**

5. *Loving v. Virginia*, 388 U.S. 1, 12 (1967)—**"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."**

6. *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971)—**"[M]arriage involves interests of basic importance to our society" and is "a fundamental human relationship."**

Fundamental Right?

7. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974)—**"This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."**

8. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality)—**"[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."**

9. *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977)—**"[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education."**

10. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)—**"[T]he right to marry is of fundamental importance for all individuals."**

11. *Turner v. Safley*, 482 U.S. 78, 95 (1987)—**"[T]he decision to marry is a fundamental right" and an "expression[ ] of emotional support and public commitment."**

12. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)—**"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."**

13. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996)—**"Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."**

Fundamental Right?

However, it was not until 2003 did the Supreme Court address issues involving same-sex relationships in the following cases:

14. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)—**"[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, and education . . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."**

15. *United States v. Windsor,* 133 S. Ct. 2675 (2013)—**invalidated Defense of Marriage Act (DOMA).**

17. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)—**held that "same-sex couples have a fundamental right to marry and . . . there is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character."**

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What about the States?

- Through their police power, state legislatures could enact laws defining who, when, and under what circumstances their citizens can marry.
- The 10th Amendment to the U.S. Constitution provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."
- In 2013 in the *Windsor* case, the Supreme Court explicitly stated that state governments remain the primary authority to define marriage and its benefits.
- Yet 2 years later, in *Hodges*, the Supreme Court places a firm limit on the states' power to define "who" is allowed to marry. So how does the court justify it?

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Obergefell v. Hodges

- The case arose out of 4 consolidates cases challenging state refusal to recognize same sex marriage in Michigan, Kentucky, Tennessee, and Ohio.

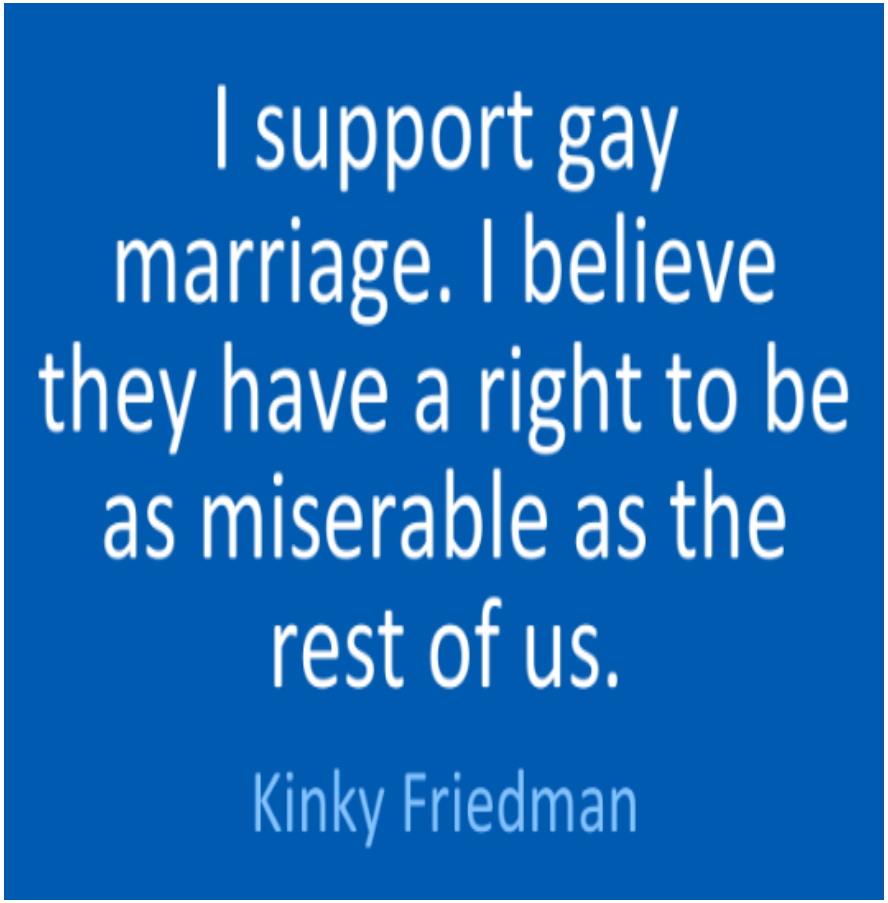
- The Supreme Court addressed two questions:

  1. whether the 14th Amendment requires states to license same-sex marriage; and

  2. whether a state must recognize a lawful same-sex marriage.

- In a 5-4 decision, the Supreme Court answered both questions in the **affirmative**, finding prohibitions on same-sex marriage to violate principles of equal protection and the fundamental right to marry.

- The Supreme Court concluded that the constitutional guarantees of liberty, equal protection, and equal dignity extend to gay and lesbian people.



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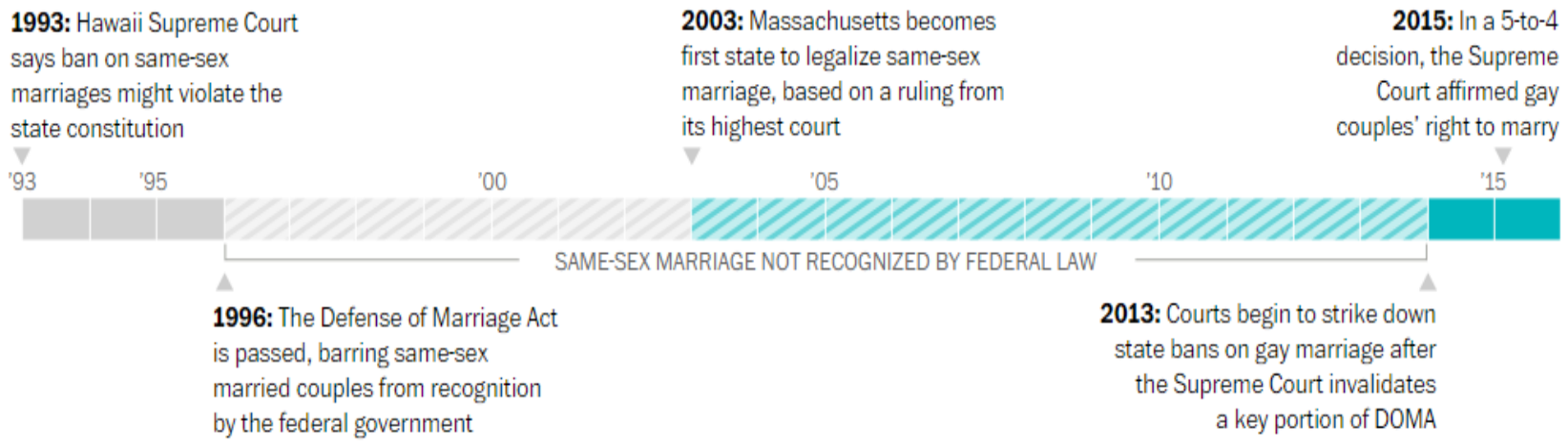
The Road Toward Legalization

Same-sex marriage advocates won a major victory in 1993 when the Hawaii Supreme Court ruled that the denial of marriage to gay couples might violate the state constitution. But the win was short-lived. Hawaii never allowed the marriages to take place, and it produced a backlash elsewhere. Some states began to pass laws and amend their constitutions to forbid gay marriage, and Congress passed the Defense of Marriage Act, which said the federal government would recognize only marriages between one man and one woman.



https://www.washingtonpost.com/graphics/politics/advancements-in-same-sex-marriage/

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Defense Against Marriage Act

- U.S. Congress passed DOMA (28 U.S.C. Section 1738C) in 1996 in response to Hawaii's potential of allowing same-sex marriage.
- Married couples receive numerous rights and benefits that single people do not or couples unable to marry do not.
- DOMA Section 3 provided that for all federal purposes, marriage was defined to include only marriages between a man and woman.
- DOMA Section 2 stated that states have the authority to refuse to recognize same-sex marriages legally performed in other states.

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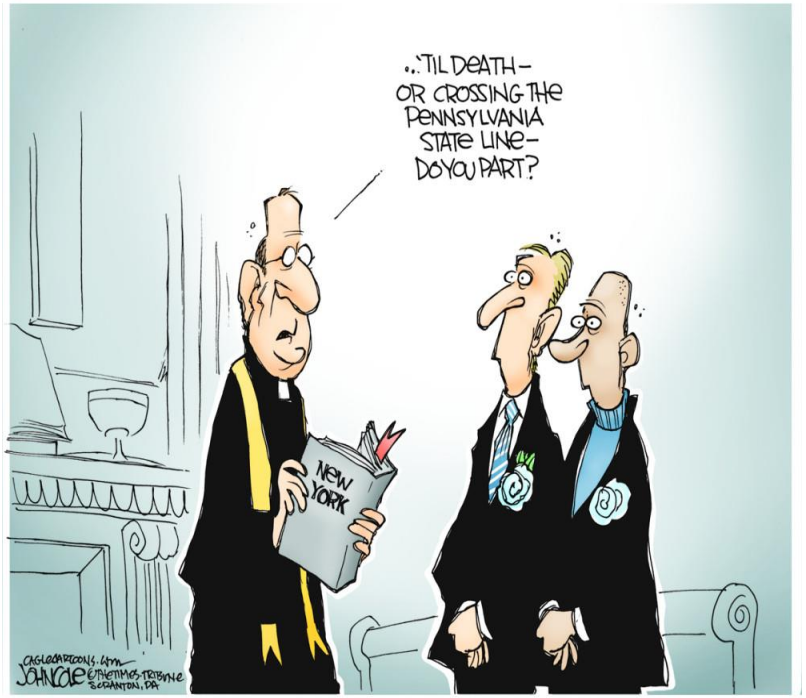
United States v. Windsor

- Edith Windsor married her long-time partner (over 40 years) Thea Spryer in Canada in 2007.
- Thea died in 2009, and Edith was presented with a federal estate tax bill for $363,053, because she did not qualify for the marital deduction that is designed to provide tax relief for surviving spouses.
- In *Windsor*, the Supreme Court found Section 3 of DOMA to be unconstitutional because DOMA's reach and extent, "departs from the history and tradition of reliance on state law to define marriage."
- Thus, Section 2 remained in effect which meant that states had the right to deny recognition of the marriage of same sex couples that originated in states who recognized same-sex marriage (until *Hodges*).



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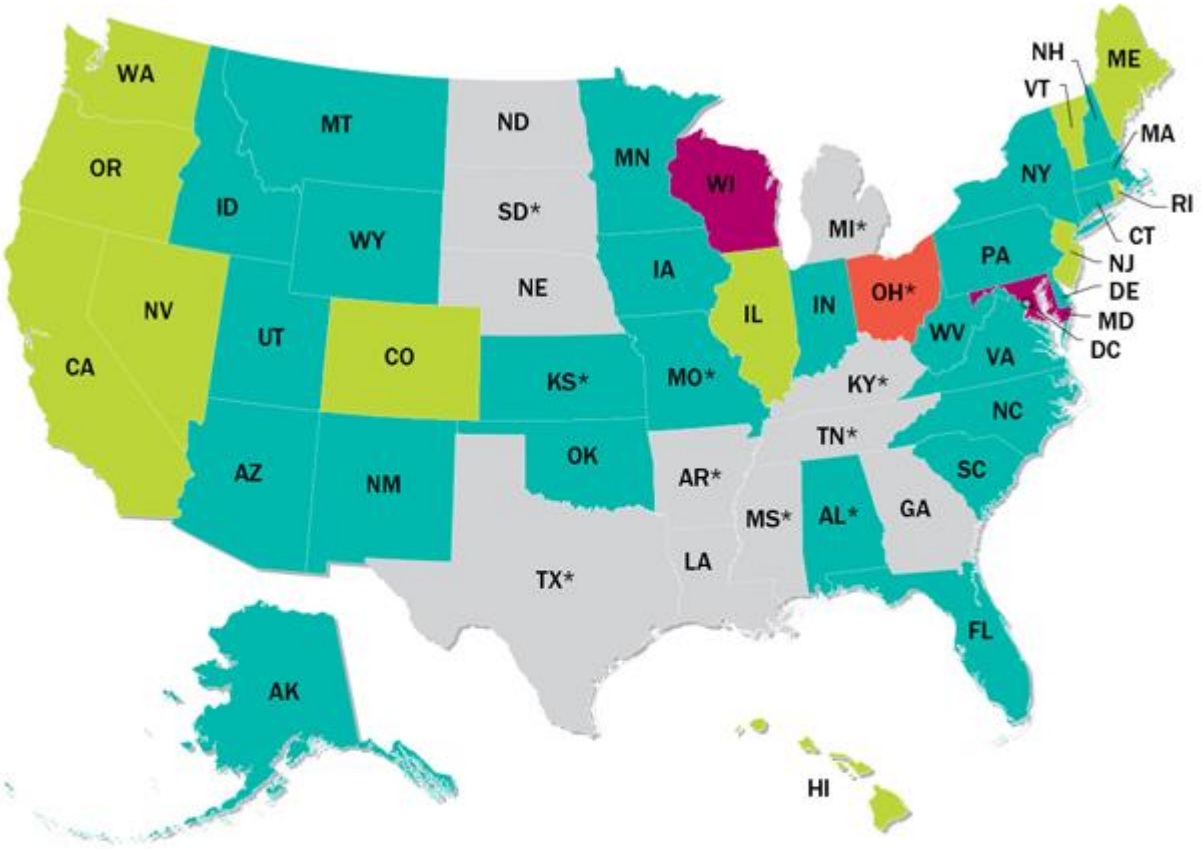
Federal Benefits after *Windsor*

Question: Whether federal laws should respect only marriages that are valid in the couple's state of domicile or whether the state-of-celebration should control?

State-of-Domicile	State-of-Celebration
Social Security	Internal Revenue Service
Medicaid/Medicare (with limited exceptions)	Medicare Part B and C
	ERISA
	Veterans' Benefits
	Workers' Benefits
	COBRA
	HIPAA

Prior to *Hodges*



- Allows same-sex marriages
- Allows same-sex marriages and recognizes civil unions or domestic partnerships
- Allows same-sex marriages and has a limited domestic partnership law
- Bans same-sex marriages; limited recognition of out-of-state same-sex marriages
- Has a statutory or constitutional ban on same-sex marriages

*Legality of state-law bans on same-sex marriages in question

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Deep in the Heart of Texas

- On Oct. 6, 1972, Mr. Antonio Molina (left) and Mr. William "Billie" Ert were married in Texas' first same-sex marriage. Rev. Richard Vincent of the Dallas Metropolitan Community Church officiated the event for Molina, a former high school linebacker and Navy veteran from Brownsville, and Billie, a female impersonator and nightclub performer. The ceremony took place at the Harmony Wedding Chapel, a small chapel off Gulf Freeway about 15 minutes from downtown Houston.

- Wharton County Clerk Delfin Marek refused to record Molina and Ert's marriage license, noting he was unaware the two were both men when he issued the document.

- Molina sued Wharton County Clerk Delfin Marek to have his marriage recognized, but his request was denied.

- On Nov. 28, 1972 he appealed to the Court of Civil Appeals, but his case was dismissed in May 1973 because he filed the documents past the sixth month deadline.

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Deep in the Heart of Texas

- Texas Family Code Section 2.0001 states that a ***man and* woman** desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state.

- Texas Family Code Section 2.401 states that parties to an informal marriage must be ***members of the opposite sex*** ("man and woman agreed to be married and . . . lived together . . . as husband and wife.").

- Texas Family Code Section 6.204 states that same-sex marriage and civil unions that are entered into in Texas or any other jurisdiction ***violate public policy*** and are therefore not recognized in Texas.

- Texas has constitutionally banned same-sex marriage ban since 2005 when more than 1.7 million Texans voted to adopt a state constitutional amendment to proclaim as marriage as between ***one man and one woman.*** Almost 537,000 people voted against the measure.

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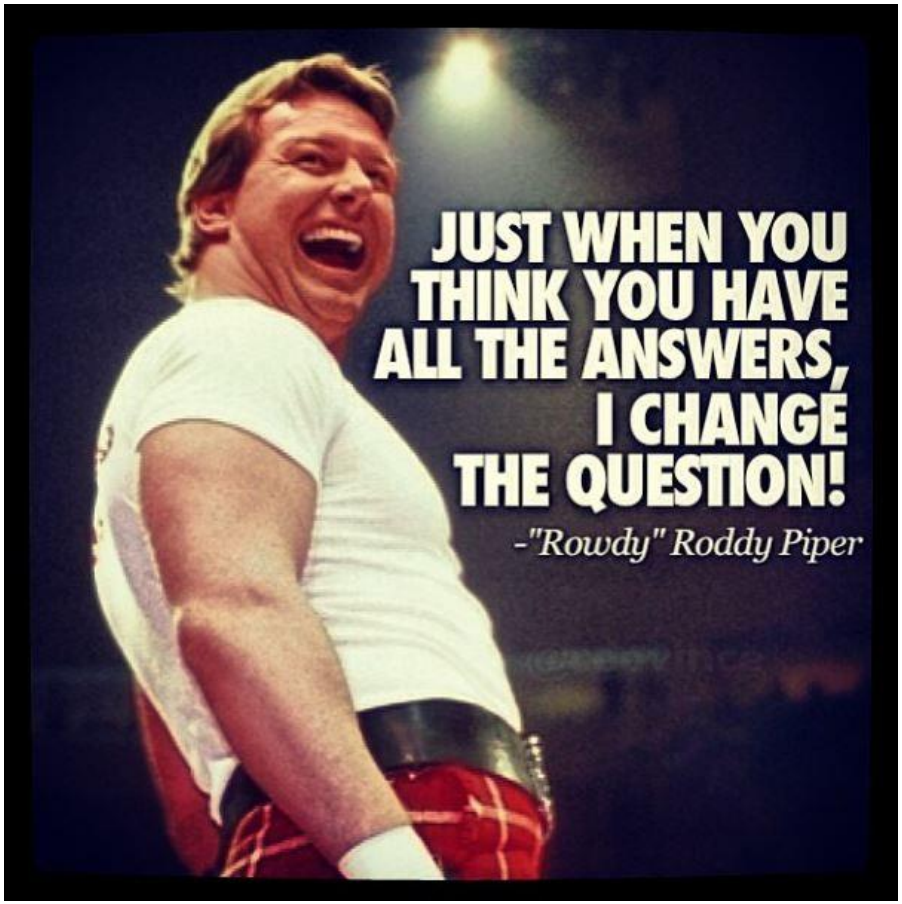
Hodges Decision—Now What?

So where does this leave Texas law—who the heck knows? Texas, through the courts and legislation, will have to figure it out.



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Hodges Decision—Now What?

Marriage:

- In *Hodges*, the U.S. Supreme Court decreed that all laws that limit the marriage to only opposite-sex couples are unconstitutional.

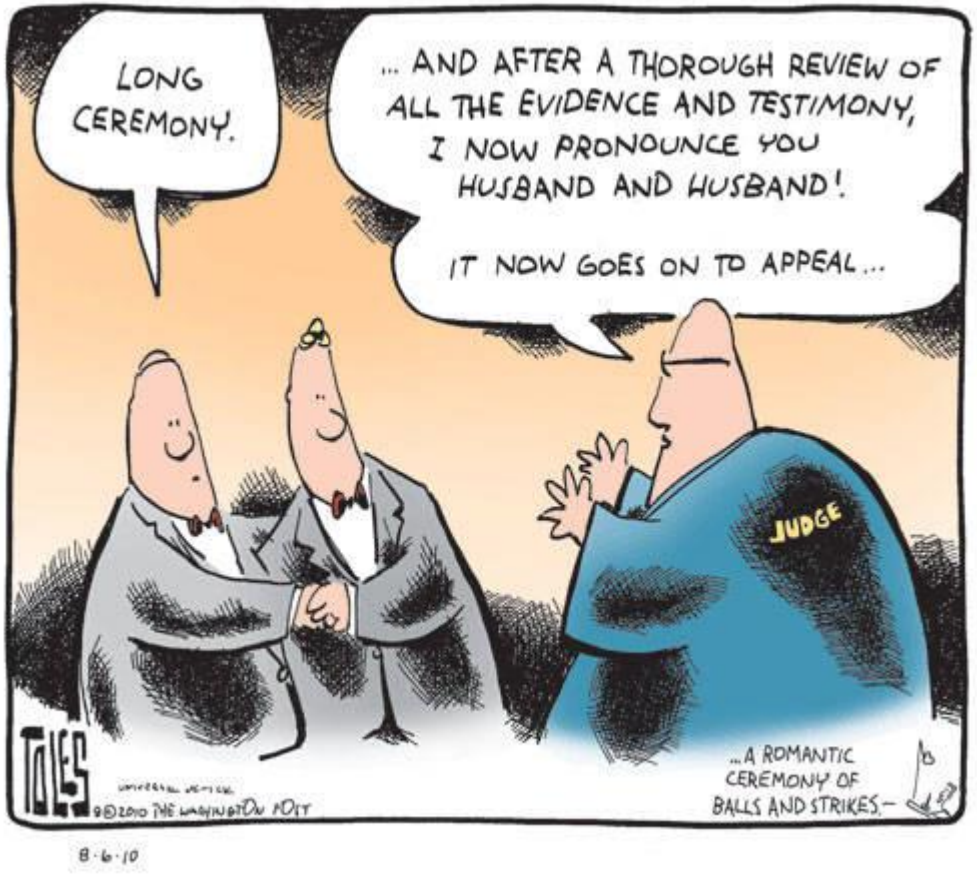
- Texas is a community property state and Texas has two distinct ways of becoming legally married:

    1. a formal, ceremonial, marriage; and

    2. a "common-law" marriage provision technically called "informal marriage."

- Same-sex couples should now be able to obtain a marriage license and also enter into informal marriages. *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. (Tex. 2015).

- Is *Hodges* prospective or retroactive?



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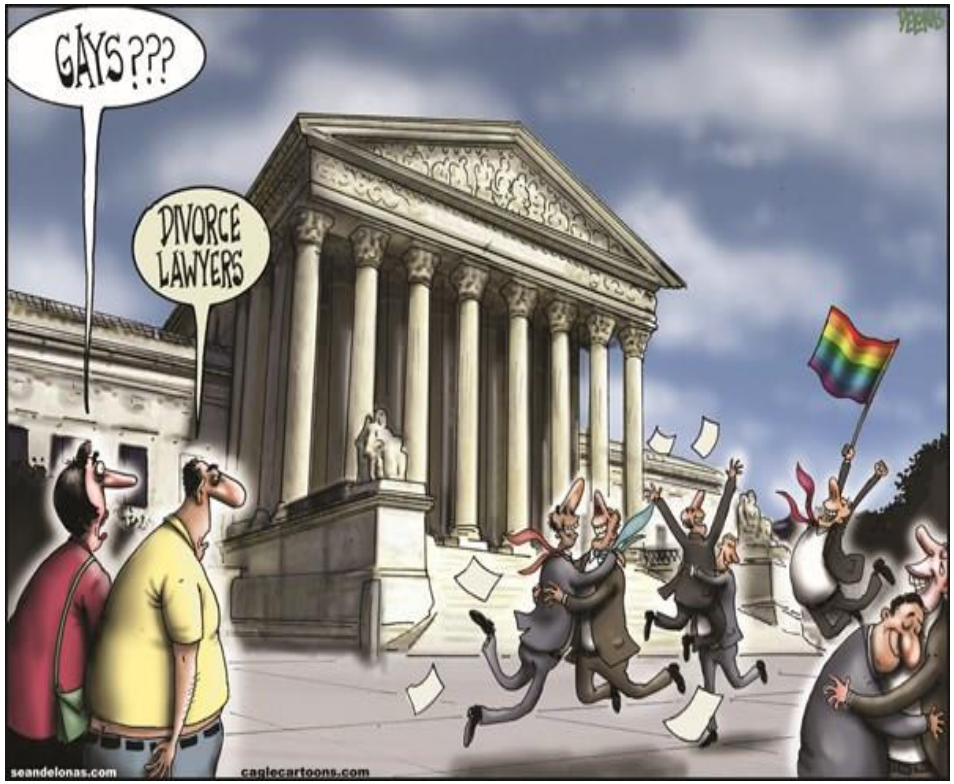
Hodges Decision—Now What?

Divorce:

- Prior to *Hodges*, the Attorney General attempted to prevent same-sex couples legally married in another state to get a divorce if they met the standing requirements under the Texas Family Code. *State v. Naylor*, 466 S.W.3d 783, 787 (Tex. 2015).
- Remember, you cannot get informally divorced even if informally married.
- The same issue of retroactive v. prospective apply.
- If there is a retroactive effect, clients may not even know that they could be common law married because such marriage has always been prohibited for same-sex couples in Texas.



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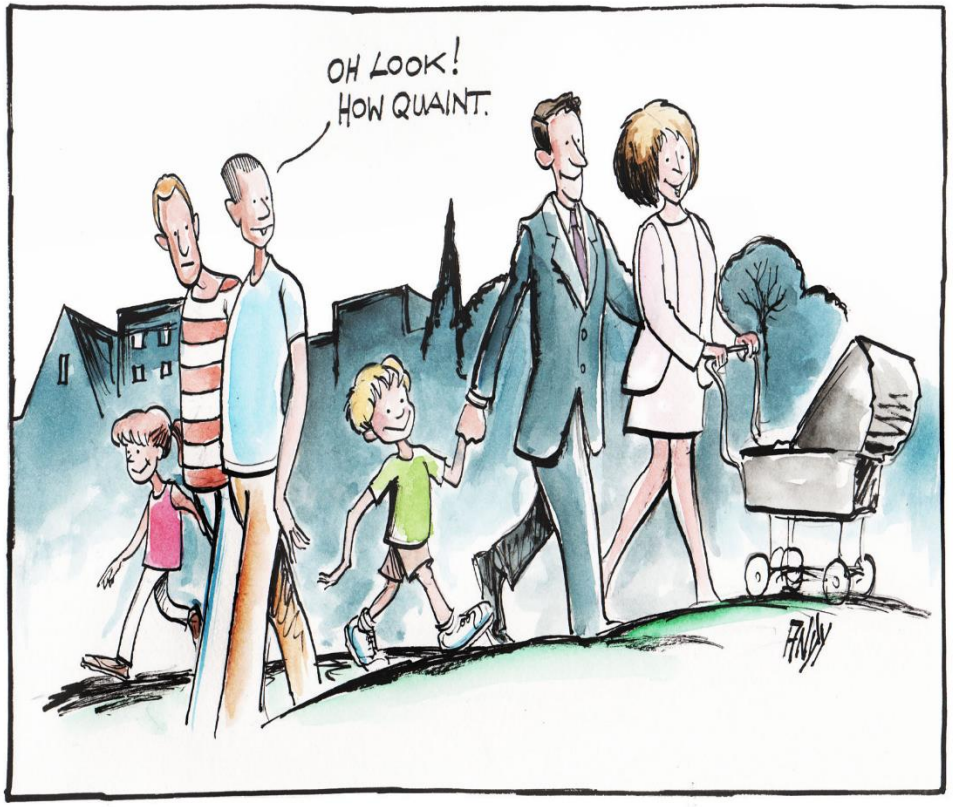
Hodges Decision—Now What?

Children:

- Courts in Texas allowed unmarried people to adopt, including same-sex couples, because there was no law preventing it. So the process varied from court to court.
- Standing in SAPCR cases will be a challenge
- Will the paternal presumption still apply to same-sex couples who are married?
- *Assisted Reproduction* – Under Texas Law, each "intended parent" may enter into a gestational agreement to have a child through assisted production. **Tex. Fam Code Section 160.204(2)(2).**



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Hodges Decision—Now What?

Estate/Probate:

- Texas Estates Code does not define "spouse." Presumably, same-sex spouses will have the same rights as opposite-sex spouses.
- When a married person dies without a will, the surviving spouse has certain inheritance rights to receive a deceased spouse's property.
- Surviving spouses in Texas have certain special rights upon a predeceasing spouse's death.
- Texas Consent to Medical Treatment Act allows a spouse to serve as surrogate to consent to medical treatment.
- Unless another person is designated in a written instrument signed by the predeceasing spouse, the surviving spouse has the right to control the disposition, including cremation, of the predeceasing spouse's remains.

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Hodges Decision—Now What?

Employment:

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Hodges Decision—Now What?

Employment:

Texas does not have any law protecting employees from discrimination based on their sexual orientation.

12 Texas cities have some rules or legislation in place to protect residents and/or city employees based on sexual orientation or gender identity.

The court in *State of Texas v. United States of America*, No 15 Civ 56, ECF No. 45 (N.D. Tex. June 26, 2015) immediately dissolved a preliminary injunction it had imposed on the US Department of Labor from requiring 4 states to extend Family Medical Leave Act coverage to state employees who entered into same-sex marriage in states where it was lawful after the *Hodges* decision.

Hodges did not address Title VII or employment discrimination, but U.S. Equal Employment Opportunity Commission issued a ruling that Title VII prohibits discrimination based on sexual orientation. *See* EEOC Appeal No. 020133080 (2015).

Hodges Decision—Now What?

Employment:

Now that *Hodges* determined that the right to marry is a constitutionally-protected right, policies defining spouses as only married persons of the opposite sex will now conflict with the legal definition of "spouse."

If the employer is providing benefits to an employees' spouse, that definition now includes "same-sex" spouses. *Hodges* is very broad and it is going to take a lot of time and money to find ways to defeat or get around the recognition of same-sex marriages.

Texas businesses should look into updating their tax reporting systems, health insurance enrollment forms, family medical leave act policies, documents on retirement or death benefits distribution elections and other basic policies.

Hodges Decision—Now What?

Religious Objections:

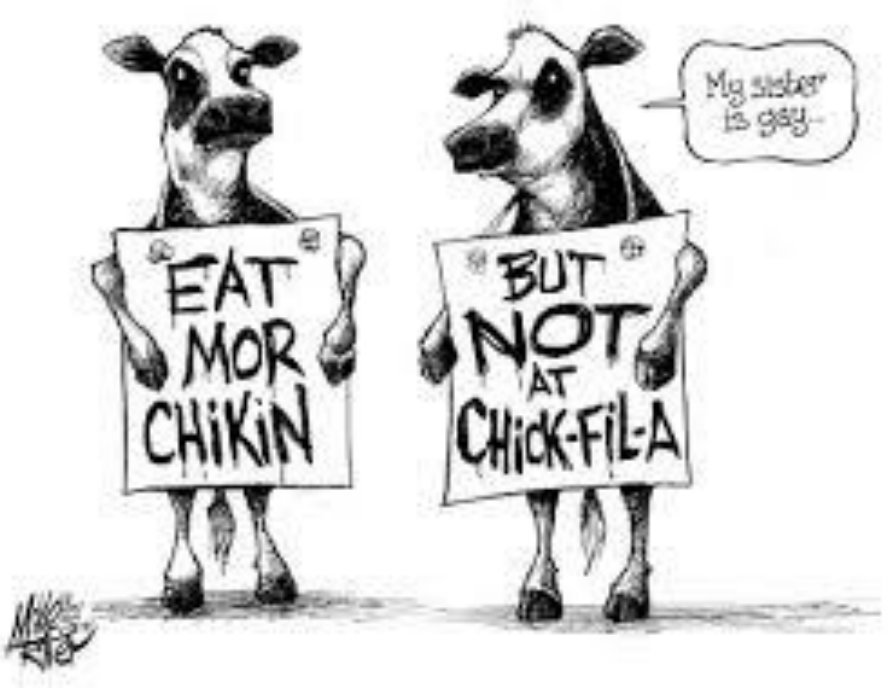
Immediately following the *Hodges* decision, a handful of Texas county clerks refused to issue marriage license.

Religious Freedom Restoration Act (RFRA), which prohibits the government from substantially burdening a person's free exercise of religion unless it has a compelling interest.

Pastor Protection Act allows clergy members to refuse to conduct same-sex marriages.

Litigation is likely to arise as other entities, such as private businesses seek religious exemptions from providing services to same-sex couples.

In Colorado and Oregon, bakeries refused to serve same-sex couples. The Oregon bakery was ordered to pay a fine. The Colorado bakery was found to have violated the state's anti-discrimination law.



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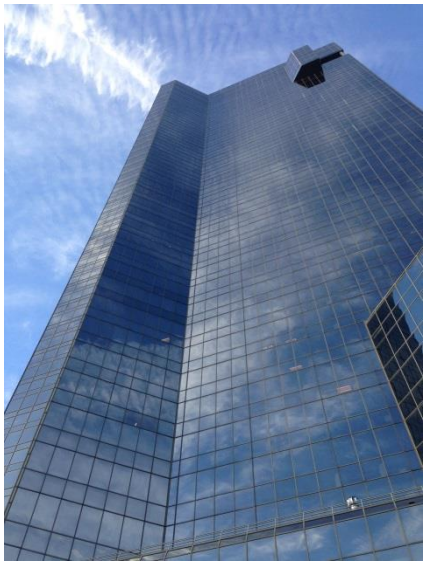

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