

Life after love wins: What the Obergefell decision means for Ohio

By Jennifer L. Branch

As co-counsel in the Obergefell v. Hodges case that won same-sex marriage rights nationwide, Jennifer Branch shares her account of events leading up to the decision and how the decision affects legal aspects of marriage, divorce, children, employment and death in Ohio.

Like many LGBT advocates,¹ soon after the Supreme Court of the United States' decision in Windsor² was announced on June 26, 2013, I was often asked what it all meant for Ohio. A good friend and soon to be co-counsel, Lisa Meeks, came to our office to meet with my law partner Al Gerhardstein and I to plot our course.³ How do we extend Windsor so women who loved women and men who loved men could finally get married at home, here in Ohio? Al had all our summer law clerks stop what they were doing and start researching. We wanted to prove Justice Scalia right when he lamented in his dissent in Windsor that the other shoe was about to drop.

Al Gerhardstein was ready for this case. He had been advocating for equal rights for the LGBT community for over 25 years. My second trial with Al, a few months after becoming his associate, was on behalf of a gay

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school teacher whose contract was not renewed because he was seen

holding hands with a man as they walked outside one day. We won the *Glover v. Williamsburg School District*⁴ case in 1998. Previously, Al had won a terrific decision at the conclusion of the Equality Foundation bench trial in 1994. U.S. District Court Judge S. Arthur Spiegel held unconstitutional Cincinnati's voter initiative to prohibit City Council from protecting citizens from discrimination based on sexual orientation. Even though the Supreme Court held a similar Colorado voter initiative unconstitutional, the Sixth Circuit did not agree, and in 1997 overturned Judge Spiegel's Equality Foundation decision in *Equality Foundation II*.⁵

After Windsor, there were many people seeking representation. Their impatience was infectious. Ohioans, who had been in love for years, many for decades, did not want to wait any longer to be married in Ohio. Al met Jim Obergefell and John Arthur. They, too, had a compelling love story,⁶ but their situation was even more urgent. John was dying of ALS. They could not wait for Ohio to let them be married. Their response to Windsor was to raise money to fly on a medical plane to Baltimore. They were soon married on the tarmac at BWI, but with only one family member present. They were devastated when they later learned that when John died, Ohio would not recognize Jim as John's husband on John's death certificate. In June 2013, Ohio was one of 40 states that not only prohibited same-sex couples to marry, but also did not recognize out of state same-sex marriages. Imagine all those opposite-sex couples who were married in Las Vegas coming home to learn their marriages did not matter.

On July 19, 2013, *Obergefell v. Kasich*⁷ was filed. Three days later a temporary restraining order was granted and then extended to the end of 2013.⁸ U.S. District Court Judge Timothy Black's Preliminary Injunction, holding unconstitutional Ohio's "one man one woman" marriage statute and constitutional amendment, was issued on Dec. 23, 2013.⁹ Ohio appealed. On Nov. 6, 2014, the Sixth Circuit ruled.¹⁰ By then every other U.S. Circuit Court that had considered the question had ruled that state same-sex marriage bans were unconstitutional. More importantly, in Oct. 2014, the Supreme Court of the United States (SCOTUS) had denied certiorari to five states whose same-sex marriage bans had been overturned by federal courts of appeals. That meant that if the Sixth Circuit affirmed, SCOTUS might never have reached a decision on same-sex marriage bans. The Sixth Circuit reversed and held states could ban same-sex marriages. The Sixth Circuit's decision affected all four states in the circuit: Ohio, Michigan, Kentucky and Tennessee because the Court consolidated five cases pending from those four states. Ohio, along with the other three states in the circuit, was not allowed by the Courts to ban same-sex marriage. It was not obvious that SCOTUS would accept our certiorari petition. The nation was watching. Some who had achieved success in other states and circuits worried SCOTUS was not ready, less than two years after Windsor, to take on marriage again. If certiorari were denied, Ohio and its three sister states in the circuit would be outliers in the nation. But it could have been even worse. What if certiorari were granted and we lost! What a horrible outcome for our clients. Remember, at the time Windsor was decided, only 10 states allowed same-sex marriages. Two years later, before Obergefell was decided, 37 states did.¹¹

Many tea leaves were being read at the end of 2014. We learned more than we needed about the inner workings of SCOTUS. On Jan. 16, 2015, certiorari was granted on two limited questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? Our opening briefs were due in six weeks; our reply briefs were due

April 17. Argument was eventually set for April 28, 2015. On June 26, 2015, SCOTUS answered its two questions in the affirmative: the Fourteenth Amendment requires states to license and to recognize marriages between two people of the same sex. On the one hand, a SCOTUS decision in less than 2 years from filing a case is lightning speed fast. On the other hand, the LGBT community had been advocating for equality for over 46 years.

Next steps: Questions and pending answers

Marriages

The first practical outcome of Obergefell in Ohio was that probate judges started issuing marriage licenses within an hour of the decision being released at 10 a.m. on June 26, 2015. In Hamilton County, where I was monitoring what was happening, marriage licenses were issued to same-sex couples by 11 a.m., and one local judge had married the first couple before noon. The Ohio Association of probate judges was well prepared for the decision and even had a committee working in advance on implementation if SCOTUS reversed. At noon the Association released the decision with an interpretation to the Probate Judges statewide that marriage licenses should be issued to otherwise qualified same-sex couples. That afternoon, the Supreme Court of Ohio issued an Administrative Action¹² ordering terms such as husband, wife, mother, father and parent be interpreted in a gender-neutral fashion wherever they are used in the Rules of Superintendence, the Uniform Domestic Relations Forms, or the Rules of Civil Procedure. The legislature will need to do the same since dozens of statutes will need to become gender-neutral. At 4:30 p.m. that same day, Cincinnati Mayor John Cranley performed a public wedding on Fountain Square and married four couples in front of a cheering crowd. In August, the Board of Professional Conduct issued an Advisory Opinion¹³ interpreting Ohio's Judicial Code of Conduct to prohibit a judge who performs marriages from declining to marry same-sex couples.

Unfortunately, more complicated questions have surfaced and will need to be resolved in the coming months or years. When considering a prenuptial agreement for couples who have lived together, raised children, comingled funds, and had a civil union or registered as domestic partners, how do you decide whose property belonged to who before the wedding? To what extent was the couple legally joined before the wedding (civil unions, domestic partnerships, out of country marriages, etc.), and do any of those need to be undone? To what extent was each person legally joined to someone else in the past? And do any of those relationships need to be dissolved before marriage?



Divorces

On the day of the decision, I heard from a good friend that she had her first call from a woman wanting to file a divorce from her wife. They were married in another state, but since moving to Ohio were unable to get a divorce—that is until Obergefell. I do not practice in this area, but have heard from lawyers who do that one factual dispute may be the duration of the marriage. Couples may have been together for years or decades before they were married. Will the Court look to the ceremonial wedding date to determine the duration of the marriage for purposes of property division? Or will the length of the marriage be based on equitable facts like the date the couple had a civil union, had children together, comingled funds, applied for family healthcare benefits with the spouse's employer, became engaged, or moved in together? I answer hypothetical questions by first asking, "If you change the question to involving an opposite sex couple, what would the answer be?" Sometimes there is an answer. (Compare *Bryan v. Bryan*, 2012-Ohio-3691 (8th Dist.) with *Ward v. Ward*, 2012-Ohio-5658 (9th Dist.)). What about common law marriages? Has the same-sex couple been together so long that their relationship was considered a common law marriage prior to Ohio abolishing common law marriage in 1991? If so, does the couple need to be divorced?

Children

Another benefit of the Obergefell decision is that children born to married same-sex parents in Ohio should now be issued Ohio birth certificates with both parents' names listed. The parents will have the option of being called mother, father or parent.

The Henry case¹⁴ was filed in February 2014 on behalf of four same-sex couples who were legally married outside Ohio, and whose children were born after the marriage. Of the three lesbian couples, one wife was pregnant through artificial insemination and due to give birth in Ohio in June 2014. Ohio would not place both mothers' names on their child's birth certificate. The fourth couple was married in New York and adopted a baby who was born in Ohio. The fathers' New York adoption decree ordered both fathers' names to be placed on their son's birth certificate. Ohio refused. As a result of Obergefell, all of these parents were able to obtain an amended birth certificate with both parents listed as either mother or father or parent. The choice was theirs.

Like the parents in Henry, other parents married in another state should now be allowed to have their children's birth certificates amended to list the names of both mothers or fathers or parents. The Ohio Department of Health has already amended the Certificate of Adoption form to allow parents to choose their title and gender. But is the presumption of parenthood enough protection? Some practitioners are concerned that a birth certificate is only an administrative document and a court order, through a parentage action (in Juvenile Court in Ohio) or a second parent adoption (officially known as a step-parent adoption) would offer the second parent more legal status. What about children born before the marriage? Will Ohio develop an Affidavit of Parentage form so birth certificates can be amended? What if the child is born through a known donor father? What needs to be done so his rights are resolved?

Ohio's second parent adoption law is interpreted in some counties to require a six-month or one-year waiting period between the marriage and the adoption. Will courts waive that requirement for same-sex couples who were banned from being married before the child was born? All of these questions, and many more, will have to be decided by the courts or litigants through mediation or collaborative law venues.

Death

Probate courts handle many life cycle events beyond issuing marriage licenses. Estate planning will change for those unmarried same-sex couples who choose to now marry. But what about someone who died before *Obergefell*? Will the overturning of Ohio's same-sex marriage ban be applied retroactively? If an estate is pending or recently decided where a surviving spouse was excluded because Ohio did not recognize his marriage, will he be able to get relief? Will the estate be reopened? What is required to prove that someone is a surviving spouse? Will the probate court need to issue new forms so they are gender neutral? Will the probate court be able to rule on issues involving statutory terms such as "husbands and wives" and "mothers and fathers" as if they are gender neutral "husband and husband" or "mother and mother," or will the courts have to wait for legislative changes? What different decisions are issued among the 88 probate courts or among the courts of appeal?

Employment

If a woman comes to work on Monday and shows photographs of her wedding to her wife, she can be fired under Ohio law.¹⁵ Neither federal nor Ohio laws protect private employees from being discriminated against on the basis of sexual orientation. Legislation has been introduced for decades to add sexual orientation protection to Title VII, but it has never passed. The Equality Act is currently pending in Congress and it will protect people from sexual orientation and gender identity discrimination at work, in housing, in access to public places and in education. But until it is passed or Ohio passes similar protections, LGBT employees are vulnerable.

In 2012 the Equal Employment Opportunity Commission (EEOC) provided protections for transgender employees under Title VII's prohibition of discrimination because of sex.¹⁶ In July 2015, the EEOC ruled that Title VII's protection from sex discrimination protected an employee from sexual orientation discrimination.¹⁷ In *Baldwin v. Foxx*, the EEOC reasoned that if a man marries a man and is fired for marrying a man, he is being discriminated against based on sex, because if the man had married a woman, he would not have been fired. While the employee's claims were against his employer, the federal government, plaintiff-side employment lawyers, this writer included, will try to use *Baldwin v. Foxx* to extend Title VII protections to private employees discriminated against on the basis of his or her sexual orientation.

Will employers provide more employment benefits to same-sex couples after *Obergefell*? Many Fortune 500 corporations already do. Check out the Human Rights Campaign's Corporate Equality Index,¹⁸ where 13 Ohio corporations, including law firms, earned a 100% rating. Some employers have offered "domestic partner benefits" so same-sex couples who could not marry in Ohio could share in their partners' employment benefits. These may fade away after same-sex couples are given time to marry.

Only time, and creative lawyering, will reveal the full effects of *Obergefell* in Ohio. In 1997 when I started working with Al Gerhardstein and his former partner, Robert Laufman, now retired, I was asked if I wanted to represent employees who were discriminated because of their sexual orientation. "Of course, I do," I replied. Al and Bob thought amendments to Title VII were imminent. I am still waiting for the laws to offer more protection. But in the meantime, *Obergefell*, advocacy for The Equality Act, and *Baldwin v. Foxx* offer hope that before I retire, our LGBT friends and loved ones will enjoy the same equality in all aspects of their lives, as they now do in their married lives.

Author bio

Jennifer L. Branch has been a partner with Alphonse Gerhardstein since 2005. The firm concentrates its practice in civil rights litigation. Jennifer practices civil rights litigation in the areas of race, sex, disability, and sexual orientation discrimination, employment discrimination, police misconduct, prisoner civil rights, special education law, and reproductive rights. In 2015 Gerhardstein & Branch won the landmark case, *Obergefell v. Hodges*, which held that the Fourteenth Amendment requires states to license and recognize marriages between same-sex couples. Jennifer joined the firm as an associate in 1997 and began her legal career in 1987 at the Legal Aid Society of Cincinnati. She graduated from New York University in 1984 with Honors in Politics and from Case Western Reserve University School of Law cum laude in 1987. Jennifer's litigation experience includes bench trials, jury trials, and administrative hearings in state and federal court, as well as arguing appeals in the Ohio Court of Appeals, Ohio Supreme Court, and Sixth U.S. Circuit Court of Appeals.

Endnotes

1 This article is based on my experience and thoughts about Obergefell. I was only one of many lawyers representing the Ohio plaintiffs in the two cases that were decided by the U.S. Supreme Court. Our work was a true team effort, which built on the work of many LGBT advocates over the past two decades. Alphonse A. Gerhardstein was lead counsel. Co-counsel included Lisa T. Meeks, Ellen Essig, Susan L. Sommer of LAMBDA Legal, James Esseks of the ACLU, and our associates at Gerhardstein & Branch Co. LPA, Jacklyn Gonzales Martin and Adam A. Gerhardstein and our dedicated law clerks and paralegals.

2 *United States v. Windsor*, 133 S. Ct. 1675 (2013).

3 In all we filed three separate cases. Obergefell challenged the marriage recognition ban. We sought narrow relief for Jim and John and later David Michener, a widower, and Robert Grunn, a funeral home director who issued death certificates. In February 2014, we filed *Henry v. Wymyslo* on behalf of four married couples who had adopted or were about to give birth to children and Ohio refused to put both parents' names on the birth certificate. We sought and achieved broad relief that the Ohio marriage bans were unconstitutional as applied to all married persons who had or adopted children after their marriage. In April 2014, we filed *Gibson v. Hodges*, seeking a permanent injunction to Ohio's marriage bans and allowing the six brave couples who brought the case to be married in Ohio.

4 *Glover v. Williamsburg Local School District Bd. Of Educ.*, 20 F. Supp. 2d 1160 (1998) (Judge Susan Dlott).

5 *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997) ("Equality Foundation II").

6 Watch the Cincinnati Enquirer's award-winning video of Jim and John's wedding here: www.cincinnati.com/story/news/2014/08/03/enquirer-photojournalists-bring-home-emmys/13543745/.

7 The name of the case changed several times by agreement of the parties. The lead defendant became the director of the Ohio Department of Health, who was the responsible official for implementing rules for death certificates (and birth certificates and marriage licenses). By the time the Supreme Court ruled, the case was titled *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

8 *Obergefell v. Kasich*, SDOH Case No. 1:13-cv-501, Doc. 13, 14, 16, and 19.

9 *Obergefell v. Wymyslo*, 926 F.Supp.2d 968 (SDOH 2013).

10 *DeBoer v. Snyder*, 772 F.2d 288 (6th Cir. 2014) (the Sixth Circuit consolidated five cases from four states including Obergefell and issued its decision in the

10 *Dobson v. Snyder*, 772 F.3d 300 (6th Cir. 2014) (the Sixth Circuit consolidated five cases from four states including *Obergefell*, and issued its decision in the Michigan case where, after trial, the district court ruled Michigan’s ban on same-sex marriage was unconstitutional).

11 www.hrc.org/state_maps.

12 www.supremecourt.ohio.gov/rod/docs/pdf/o/2015/2015-Ohio-2568.pdf.

13 www.sc.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf.

14 *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio). The case was consolidated with *Obergefell* before the Sixth Circuit and was one of the five cases reviewed by the Supreme Court.

15 Public employees are protected under an equal protection theory, as was established in *Glover*.

16 *Macy v. Holder*, 2012 WL 1435995 (EEOC Apr. 20, 2012).

17 *Baldwin v. Foxx*, EEOC July 15, 2015 www.eeoc.gov/decisions/0120133080.pdf.

18 <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/CEI-2015-rev.pdf>.

