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Verdict

JUNE 23, 2015 | JOANNA L. GROSSMAN

Last Gasps: Texas Tries to Stop Court From Granting Same-Sex Divorce

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As we await a ruling from the Supreme Court in *Obergefell v. Hodges* (discussed [here](#)



(<https://verdict.justia.com/2015/01/28/final-showdown>), the case that will decide whether states may constitutionally deny the celebration and recognition of marriages by same-sex couples, we see signs of struggle from states that have dreaded this moment. Indiana created a firestorm with the enactment of a law designed to allow various forms of sexual orientation discrimination in the name of religious freedom—a legislative protest of sorts against the growing spread of marriage equality across the nation, including in Indiana. Arkansas was headed in that direction, but held off when it saw the potential economic costs from boycotts and other protests of perceived state intolerance toward gays, lesbians, and their marriages.

Not all last stands take the same form. In Texas, state officials tried to intervene in a case in which a Texas court was asked to dissolve a lesbian couple’s marriage that was celebrated in Massachusetts. In a recent ruling, *State v. Naylor* (<http://law.justia.com/cases/texas/supreme-court/2015/11-0222.html>), the Texas Supreme Court held that those officials had no such right. This divorce was a matter for

the parties and the presiding family court judge.

Dissolution of Same-Sex Unions: Trouble From the Start

Can a couple that marries in one jurisdiction get divorced in another? For most couples, the answer is yes, as long as they reside in the state where the divorce is sought. People can generally get married anywhere—destination weddings abound—but can divorce only in a state where one or both parties legally reside. This seldom presents a problem in the modern age of no-fault divorce—everyone lives somewhere, and the ability to obtain a divorce does not vary greatly. In the days before no-fault divorce, which was “invented” in the early 1970s, so-called migratory divorce was a problem as spouses tried to find ways to evade their home states’ strict divorce laws. But today, there is little to be gained by such forum shopping.

Something that straight couples take for granted, however, has proven a source of frustration and litigation for many same-sex couples. The first iteration of this conflict involved Vermont civil unions. When they were first created by the Vermont legislature—in response to a ruling by the state’s highest court that Vermont must provide same-sex couples with the same benefits available to opposite-sex couples who marry—no other state granted any formal recognition to same-sex couples. Vermont civil unions were available to anyone, and, not surprisingly, hundreds of non-residents flocked to Vermont to celebrate one. Under Vermont law, a civil union (now replaced by marriage) was identical to marriage in every respect, including that it could be dissolved only through annulment or divorce.

Civil union couples who had gone to Vermont to get hitched then returned home and acted much like opposite-sex married couples. Some were blissfully happy—and still are—and some eventually went their separate ways. But what was the legal status of civil union partners who ended their relationship? What many of them found was that they could not get divorced. When they filed a “petition for divorce” in another state, many were met with the judicial version of “huh?” Some cases were dismissed by judges because the state did not have a comparable status and thus had no laws permitting or governing the dissolution of such relationships. Other judges held that divorces were reserved for dissolving marriages, and no relationship involving a same-sex couple could be treated as a marriage. This latter line of reasoning meant that even same-sex couples who married—once that option was available first in Massachusetts and then in other states—would have difficulty having their relationships dissolved unless they happened to live in a marriage equality state. At the high point, more than forty states had laws on the books prohibiting the celebration or recognition of marriages by same-sex couples, so divorce options for same-sex couples were quite limited.

An Earlier Texas Case on Same-Sex Divorce

The burden created by this interplay of divorce residency rules and interstate variation over marriages by same-sex couples is best illustrated by a Texas case, *In re J.B. v. H.B.*

Two men—known in court only by their initials, H.B. and J.B.—were lawfully married in Massachusetts in 2006. Two years later, they moved to Texas; shortly thereafter, they separated.

J.B. then filed for divorce in a Texas court on grounds of “insupportability”—Texas’s no-fault ground for divorce. The statute permits divorce on this ground, on the petition of either party, if “the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.” J.B. included a typical prayer for relief in his complaint, seeking a division of community property, “other general relief,” and the restoration of his birth surname.

H.B. filed no answer to the complaint for divorce, a typical (non)response for an uncontested divorce. But quite atypically, the State of Texas intervened in the action “to oppose the Petition for Divorce and defend the constitutionality of Texas and federal law.” The State’s opposition, in a nutshell, was this: There is no gay marriage in Texas and, thus, there is no gay divorce in Texas.

Texas law prohibits the celebration of same-sex marriage, but also declares such marriages “void” and forbids any state entity from giving “effect” to them. This law was passed in 2003, amid a flurry of similar laws in other states, to ward off the recognition by Texas of same-sex marriages from other states.

Despite the State of Texas’s opposition, the trial court granted the petition for divorce. The trial court found that it had jurisdiction to consider the dissolubility of the marriage, and it also found that the laws purporting to forbid it to do so were themselves in violation of the Equal Protection Clause of the U.S. Constitution.

The Texas appellate court unanimously reversed the trial court’s ruling. The appellate court held that the statutory law did not give Texas courts the jurisdiction to give effect to same-sex marriages from other states, even if the recognition was fleeting—in that the recognition of the marriage was only extended by the court on the way to the court’s granting a divorce and thus dissolving the marriage. The Texas appellate court ruled, moreover, that the laws precluding such an exercise of jurisdiction were constitutionally valid—contrary to the trial court’s view.

Fast Forward Five Years: A New Case and a Different World

When Angeline Naylor and Sabina Daly's marriage broke up, the world had changed dramatically. As I have chronicled in [this column \(https://verdict.justia.com/2015/04/28/interstate-marriage-recognition-when-history-meets-the-supreme-court\)](https://verdict.justia.com/2015/04/28/interstate-marriage-recognition-when-history-meets-the-supreme-court), marriage equality has gone from an elusive dream for advocates to a mainstream reality. More than thirty-five states allow same-sex couples to marry on the same terms as opposite-sex couples. That development has come from the combined force of voluntary legislative enactments and voter referendums and judicial rulings declaring same-sex-marriage bans unconstitutional. And in a very recent development, most of those rulings are from federal, rather than state, courts.

The federal court rulings were fueled by the U.S. Supreme Court's 2013 ruling in [Windsor v. United States \(https://supreme.justia.com/cases/federal/us/570/12-307/\)](https://supreme.justia.com/cases/federal/us/570/12-307/), in which it struck down the federal Defense of Marriage Act, which refused recognition of same-sex marriages for any federal-law purpose, as an unconstitutional violation of equal protection principles. The law, which deviated from the normal federal practice of deferring to state determinations of marital status, was deemed a discrimination of an "unusual character" that raised an inference of animus against an historically disadvantaged group.

The result of the post-*Windsor* rulings is that while many states still have same-sex marriage bans on the books, many cannot enforce those bans without running afoul of federal court orders. Alabama Supreme Court Justice Roy Moore made headlines again—the first time for refusing to follow a court order to remove a ten-commandments monument from the courthouse property—by ordering judges and justices of the peace not to solemnize same-sex marriages despite a federal court's order invalidating Alabama's ban.

The Naylor-Daly divorce arises in Texas, in which a federal court has also ruled that the state's ban on the celebration and recognition of same-sex marriages violates the federal constitution (discussed in more detail [here \(https://verdict.justia.com/2014/03/04/red-state-scare-federal-court-texas-invalidates-ban-marriages-sex-couples\)](https://verdict.justia.com/2014/03/04/red-state-scare-federal-court-texas-invalidates-ban-marriages-sex-couples)). This ruling, however, has been stayed by the U.S. Court of Appeals for the Fifth Circuit, which has yet to issue a ruling in a pending case, *DeLeon v. Perry*. The effort by Texas state officials to defy this ban came in a roundabout way.

Like J.B. and H.B., Naylor and Daly were married in Massachusetts in 2004—the first year in which same-sex couples could marry in the United States (and then, only in Massachusetts). After a few years, Naylor filed for divorce in Texas, where they both lived. Because they were both raising a child and operating a business together, Naylor asked

not only for dissolution of the relationship, but for a ruling on the normal consequences of divorce—children and money.

Unlike with J.B. and H.B., this divorce was not uncontested. In response to the petition for divorce, Daly objected on grounds that the Texas code provides that marriage is reserved for man-woman couples and that Texas courts may not “give effect” to same-sex marriages from other states. Thus, Daly argued, the family court did not have jurisdiction to grant Naylor’s petition for divorce. She conceded that the court had jurisdiction over the “controversy,” but argued that the only order it could issue was to declare the marriage “void.” This may seem like a distinction without a difference, but the court’s ability to issue orders relating to children and the couple’s business may have stood in the balance.

In short order, however, the parties resolved their own dispute. As often happens in divorce, the couple reached a private agreement, which the trial court then memorialized in an order. (The vast majority of divorces everywhere follow this pattern.) Specifically, the trial court orally granted dissolution “pursuant to the agreement [the parties had] recited into the record.” And, to avoid any potential conflict with the Texas laws mentioned above, the court said that the judgment “is intended to be a substitute for . . . a valid and subsisting divorce” and “is intended to dispose of all economic issues and liabilities as between the parties whether they [are] divorced are not.”

Although divorce cases are routine and seldom generate any attention unless they involve celebrities, lawyers from the Texas Attorney General’s Office were sitting in court when the trial judge in this case read his decision into the record. The following day, the State filed a petition seeking to intervene—to oppose the petition for divorce and defend the constitutionality of the state’s bans on recognition of marriages by same-sex couples. The State asked that the trial court either dismiss Naylor’s petition or declare the marriage “void,” but not dissolved by divorce.

Daly, who had raised these arguments herself at an earlier point, objected on grounds that the state had no “justiciable interest” in the case and, in any event, had petitioned to intervene too late. Naylor objected as well; the two women now agreed that the state’s action was inappropriate. The trial court sided with the two women, finding that the state had intervened too late for its petition to be considered. On appeal, the state’s petition was dismissed for lack of jurisdiction. But still the State continued in its quest—filing for review by the state’s highest court. It also sought a writ of mandamus, which, if granted, would order the trial court to vacate its decree in the *Naylor* case and dismiss Naylor’s petition for divorce.

The Ruling From the Texas Supreme Court

The State was turned away by its own highest court. It did not, the court ruled, have standing to appeal the trial court's decree dissolving the marriage of Naylor and Daly. First and foremost, the State had filed its petition to intervene too late. As a general matter, no party can intervene in a case after judgment has been entered—and by all accounts, the trial court in this case gave its judgment orally, the day before the State tried to intervene. The State, therefore, was not a party to the case and did not have standing to appeal.

The State offered up other arguments, but each was rejected. And, importantly, the court did not join issue on the question whether Texas's marriage prohibitions are constitutional. Although the State has the right to defend the constitutionality of its laws, it has to do so within established rules of jurisdiction, standing, and so on. It cannot just ride in on a white horse and undermine a fair and by-the-book judicial proceeding. There is a time and place for everything, and the State failed to make this proceeding the time or place. As the majority concluded, “where the Legislature has given no indication to the contrary the State must abide by the same rules to which private litigants are beholden.”

Conclusion

We now have over a decade of experience with non-uniform laws on same-sex marriage, which have given rise to a number of conundrums, divorce among them. If *Obergefell* goes the way commentators predict—in favor of marriage equality—these conflicts will be resolved in an instant. If same-sex couples can marry everywhere, they can divorce wherever they reside. If the ruling goes the other way, however, and states continue to disagree about this issue, a more humane compromise on dissolution is in order. It is simply untenable in this day and age to say to an unhappily married couple that they must either stay together or move. The *Naylor* court was spared the task of deciding whether to grant a divorce because the couple settled their issues, but other courts will not be. But let's put that project off until next week, as a ruling is expected this Friday.



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