Family Law Focused.
LGBTQ Advocate.

Advocating for the LGBTQ community has always been an important focus for Tim Cordes. He understands what's at stake and will be your voice in and out of the courtroom. Whether you're looking to adopt, going through a divorce or are dealing with challenges related to being part of the LGBTQ community, you have an ally in Tim Cordes. Learn more at **cordeslaw.com**.

Family Law Adoption Guardianship Probate

CORDES LAW PLLC

Civil Unions: Marriage Equality's Forgotten Stepchildren

By Tim Cordes

Prior to the United States Supreme Court's decision in *Obergefell v. Hodges,*[1] more than a dozen states enacted various statutory schemes to offer "marriage-like" rights to gay and lesbian couples. While the debate over marriage equality raged on in the media and statehouses across the county, legislatures created new laws to offer some stability to same-sex couples, while avoiding the political backlash over granting them outright marriage. These new legal rights went by the titles "civil unions" and "domestic partnerships." While these new statutory creations were sometimes open to heterosexual as well as homosexual couples, it is believed that very few straight couples availed themselves of these laws.

Once the United States Supreme Court ruled that it was unconstitutional for states to deny same-sex couples the ability to marry and have those marriages recognized in all fifty states, gays and lesbians were free to marry and divorce and enjoy all the protections of domestic relations laws available to heterosexual couples in every jurisdiction. While each state has its own laws regarding marriage and dissolution, long-established principles of comity offered predictability for couples—both gay and straight— when their marriages ended in divorce.

However, for gay and lesbian couples in pre-*Obergefell* statutory creations like civil unions and domestic partnerships, no such protection or predictability was available. By and large, states with such statutory creations allowed residents to convert their civil unions to formal marriages, or to dissolve their civil unions through specific statutory provisions or ordinary domestic relations law applicable to marriage. But for couples that had relocated to a different state after becoming "civil-unioned" with their partner, predictability in dissolution may remain elusive.

Before the *Obergefell* ruling, most states that enacted civil unions or domestic partnerships crafted provisions within their statutes that allowed couples to dissolve their legal relationship without meeting strict residency requirements (see e.g., Vermont, New Jersey), but such provisions were often only available to couples that resided in states that did not recognize same-sex marriages. Now that the *Obergefell* ruling has eliminated all such "non-recognition" states, couples in these kinds of relationships will now have to establish residency, or avail themselves of the courts in their home jurisdiction. And here is where the problem lies: different states are applying different legal interpretations to civil unions and domestic partnerships in dissolution actions.

In 2000, the legislature of the State of Vermont created a new legal entity, the civil union, which provided some of the benefits and protections of marriage to same-sex couples, through a statutory system entirely separate from that of marriage. In an explicit acknowledgment of the turbulent state of affairs across the country on the issue of same-sex marriage, Vermont enacted a new statute (15 V.S.A. § 1206(b)), which allowed for dissolution of Vermont civil unions for couples where "[n]either party's state of legal residence recognizes the couple's Vermont civil union for purposes of dissolution" (15 V.S.A. § 1206(b)(4)(C)(iv)). In 2016, the Vermont Supreme Court was confronted with the case of *Solomon v. Guidry*, in which two women, now residing in North Carolina, sought to have their civil union dissolved in Vermont, where it was it was entered into in 2001. After a dismissal by the trial court because the parties had not attempted to file for dissolution in North Carolina first, the Vermont Supreme Court ruled that they could dissolve their civil union pursuant to 15 V.S.A. § 1206(b), *Obergefell* notwithstanding.

In making its ruling, the Court observed:

> However, because civil marriage and civil unions remain legally distinct entities in Vermont and because *Obergefell* mandated that states recognize only same-sex marriage, uncertainty remains as to whether *Obergefell* requires other states to recognize and dissolve civil unions established in Vermont. For that reason, § 1206(b) is still necessary to remedy the issue originally addressed by the Legislature in 2012-that "there are many same-sex couples who established a civil union . . . in Vermont who are no longer together, yet they continue to be legally bound with no recourse other than moving to Vermont and becoming residents." Thus, nonresident couples who wish to dissolve their Vermont civil unions may do so in Vermont courts, as long as they follow the requirements of § 1206(b). (*Solomon v. Guidry*, 2016 V.T. 108, 2016 Vt L.E.X.I.S. 111 (Vt. 2016)).

For couples that do try to avail themselves of dissolution proceedings in their local jurisdiction, it is not entirely clear

how their "marriage-like" rights will be handled. The State of New York was faced with one such couple in late 2015, in the case of *O'Reilly-Morshead v. O'Reilly-Morshead*, which involved two women who entered into a Vermont civil union in 2004, and later married in Canada in 2006. At issue was how the property division should be determined for assets acquired prior to the 2006 Canadian marriage, but subsequent to the parties' 2004 civil union. In a ruling that offered the couple the worst of both worlds, the New York court ruled that while it did have the authority to recognize and dissolve the parties' civil union, the court held that "as a matter of law, [n]either party is entitled to equitable distribution of any assets, acquired in their own names during the period of the civil union, prior to the date of marriage." This ruling would deny the parties the ability to dissolve their civil union under Vermont's nonresident dissolution law (§ 1206(b)), while at the same time denying them the property protections intended by Vermont's civil union statute.

> In 2003, the couple before this court acquired, under Vermont law, "the same benefits, protections, and responsibilities" as granted to parties to a civil marriage. … However, in 2003, the laws of Vermont did not recognize the parties' civil union as a marriage. Thus, at the time this couple entered the civil union, Vermont did not recognize that union as a marriage." [*O'Reilly-Morshead v. O'Reilly-Morshead*, 50 Misc. 3d 402 at 405, 19 N.Y.S.3d 689 (NY: Supreme Court, Monroe 2015) *citations omitted]*.

In a long and technical analysis, the court stated:

> Under these circumstances, this court does have jurisdiction to dissolve this civil union, but that does not solve the property distribution dilemma. The court must decide whether it can distribute "civil union property" that is outside the scope of "marital property" as defined in the Domestic Relations Law. The mere fact that this court has the power to dissolve the civil union does not dictate that it must apply New York's statutory rules to relief under the dissolution. In that respect, it is important to note that other New York courts have concluded that a civil union is not the equivalent of a marriage in New York." (*Id.* at 406).

In contrast, Illinois applied their state's traditional divorce rules in determining the property rights in the dissolution of the 2002 Vermont civil union of a lesbian couple in 2015, immediately following the *Obergefell* decision.[2] Because the Illinois Marriage and Dissolution of Marriage Act expressly refers to "civil unions," and provides explicit reciprocity of civil unions entered into in other states,[3] the Illinois court used their divorce rules and caselaw to effect an equitable distribution of the parties' significant corporate interests. Even though the act in question was not implemented until 2011, the court held that its application should include any civil unions entered into before that date. "Thus, we hold that section 60 operates to recognize, as of the Act's effective date, any civil union that was, at any time, legally entered into in a foreign jurisdiction."[4] Similar to the New York couple in *O'Reilly-Morshead*, referenced above, the women in Illinois had married in Canada in 2003, following their 2002 Vermont civil union. In its analysis, the Illinois court drew no material distinction in property rights between the civil union period and the beginning of the parties' Canadian marriage, even analyzing whether the imposition of maintenance (alimony) against one party would be appropriate.

While Illinois relied upon its own express statutory provisions to equitably divide property acquired during a Vermont civil union, and New York rejected any such division based upon its caselaw, Pennsylvania applied a more general principle of comity to address the problems arising from the problem of how to handle the dissolution of civil unions.

> The application of the principle of comity to Vermont civil unions further promotes interstate uniformity and would limit forum shopping aimed at avoiding the responsibilities imposed by Vermont law in the event of dissolution. For instance, if a party to a Vermont civil union wished to avoid the equitable distribution of "marital" property or other domestic support obligations, that party could search for a jurisdiction that would decline to recognize such obligations even though they are expressly provided under the Vermont statute." [*NEYMAN v. Buckley*, 2016 P.A. Super 307 (Pa. Super. Ct. 2016)].

Following an analysis of Vermont's civil union statutes, and noting that *Obergefell* removed any public policy exceptions to the recognition of same-sex relationships, the Superior Court of Pennsylvania ruled that their courts should cut through the distinctions between civil unions and marriage, and look to the underlying nature of what the parties intended their 2002 civil union to mean.

> For the foregoing reasons, we conclude that a Vermont civil union should be considered the legal equivalent of a marriage for the purposes of dissolution under the Pennsylvania Divorce Code. Precluding family court jurisdiction simply due to the use of the word "marriage" and "divorce" in Pennsylvania jurisdictional authority elevates mere semantics over the fundamental domestic character of the relationship at issue." (*Id.*)

Pennsylvania's ruling in *Neyman* presents a compelling argument for applying divorce protections to the dissolutions of civil unions. In contrast, New York's formalistic approach in applying caselaw and precedent in rejecting those same protections presents a complicated and unpredictable environment

for the various "marriage-like" statutory creations enacted for same-sex couples in the run-up to *Obergefell's* mandate of full marriage equality for gays and lesbians. Michigan has yet to have its own case of first impression at the appellate level addressing civil unions or domestic partnerships for same-sex couple. Family law practitioners in our state who serve members of the LGBT community need to be aware that this is far from a settled issue in other jurisdictions. Because Michigan has no statutory authority like Illinois, nor a well-developed history of caselaw like New York, Michigan attorneys should be prepared to argue compellingly for application of principles of comity for their clients.

Links to cases on Google Scholar:

- *Obergefell v. Hodges*, 135 S. Ct. 1732 (U.S. 2015)
- *Solomon v. Guidry,* 2016 V.T. 108, 2016 Vt L.E.X.I.S. 111 (Vt. 2016)
- *O'Reilly-Morshead v. O'Reilly-Morshead*, 50 Misc. 3d 402 at 405, 19 N.Y.S.3d 689 (NY: Supreme Court, Monroe 2015)
- *IN RE CIVIL UNION OF HAMLIN & VASCONCELLOS*, 42 N.E.3d 866, 397 Ill. Dec. 620 (App. Ct. 2015)
- *NEYMAN v. Buckley*, 2016 P.A. Super 307 (Pa. Super. Ct. 2016)

About the Author

Tim Cordes *focuses his solo practice on family law and probate administration. He is currently Secretary/Treasurer for the LGBTQA Law Section of the State Bar of Michigan, and is proud to be one of the Section's founding members. He is also a member of the Family Law Section of the State Bar, and the Oakland County Bar Association Family Court Committee. Tim has been a member of the Stonewall Bar Association of Michigan since 2008, and served as President of the group from 2011 through 2014. As a straight ally, Tim has sought to be an advocate for the LGBT community on the issues of marriage equality and the discrimination that same-sex families with children face in our courts. Following a career in software and management consulting, Tim began law school in 2002 at what was then the Detroit College of Law at Michigan State University. By the time he graduated in 2005, the school had merged identities and become Michigan State University College of Law. In his spare time, Tim enjoys sailing the Great Lakes and writing and performing plays at the Players Club in downtown Detroit. He and his wife (and their little dog, Spike) live in Bloomfield Township.*

Endnotes

1 135 S. Ct. 1732 (U.S. 2015).

2 *IN RE Civil Union Of Hamlin & Vasconcellos*, 42 N.E.3d 866, 397 Ill. Dec. 620 (App. Ct. 2015).

3 750 ILCS 75/60.

4 42 N.E.3d 866 at 878.