# The Impact of the Supreme Court's Same-Sex Marriage Decision on Bankruptcy Practice

HON. HARLIN DEWAYNE HALE AND SAM GENOVESE

In summer 2015, the Supreme Court delivered its opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), holding that: (1) the right to marry by persons of the same sex is a fundamental right in the liberty of the person and, thus, under the constitutional concepts of equal protection and due process couples of the same sex may not be deprived of that right and liberty; and (2) states must recognize lawful same-sex marriages performed in other states. This decision was a landmark and will affect much of our society. This brief article will touch only on the impact of the case on bankruptcy judges and practitioners.

## The Good News: Not Much Revision Is Needed in the Code

While the Bankruptcy Code[1] is often criticized[2] for its perceived flaws, the Code as it now stands appears to be written with enough flexibility to fulfill the Supreme Court's new charge without much editing. In some places the Code and forms speak in terms of "spouses," which would appear to address same-sex married couples and would not appear to require a change in language. As an example, 11 U.S.C. § 302 contemplates a joint case for an individual debtor and "such individual's spouse," avoiding references to husband or wife altogether. Further, the form petition in several places uses the generic term "spouse" without reference to gender.

Still, there are places in the Code and Rules that mention husband and wife. These will likely need to be altered to comport with the law after *Obergefell*. For example, § 522 of the Code addresses exemptions in cases by or against debtors "who are husband and wife." Also, Federal Rule of Bankruptcy Procedure 1015 provides for consolidation or joint administration of cases of a "husband and wife." After *Obergefell*, there will now be legally married couples with two husbands or two wives. Until the language of the Code and Rules is updated, smart bankruptcy practitioners and judges will be able to equate same-sex couples, spouses under the law, in the same category.

However, there is already some track record suggesting that *Obergefell* will have limited, if any, impact on bankruptcy practice. In 2013, the Supreme Court declared unconstitutional the Defense of Marriage Act (DOMA) in *United States v. Windsor*.[3] In states where same-sex marriage was already legal, bankruptcy courts thereafter handled bankruptcy cases seamlessly, applying the general spouse language to same-sex married couples and construing the "husband and wife" provisions in the Code and rules to mean spouses of any kind.

In spite of the *Obergefell* decision, some state attorneys general have issued opinions or directives to their states' clerks of court opining that clerks could refuse marriage applications by same-sex couples for religious or technical reasons. Some clerks have been sued for failing to issue licenses. Still, one would not expect such actions by the staffs of the bankruptcy clerks for a couple of reasons. First, most filings are now electronic and bypass actual intake desks. Second, most clerks in the bankruptcy system act under the premise that they are to receive all pleadings filed, and the judges will rule on them or sort them out.

## The Not Great, But Probably Not Bad, News: Some State Laws May Need Updating

Bankruptcy courts and practitioners may continue to face challenges at the points where the Bankruptcy Code and state law intersect. As every bankruptcy lawyer and judge knows, state law usually plays some role in a bankruptcy case, providing rights for both creditors and debtors.

Particularly in the areas of exemptions and property rights—usually created by state law—the statutes and processes may need some adjusting after *Obergefell*. Many states have exemption laws or other debtor protections that will need to be clarified. Many states will also need to revise their real property laws. For example, many states retain a concept related to real property of "tenancy by the entirety,"[4] which protects the certain real property of two persons "who are husband and wife." Florida is one such state. Until the language of the entireties statute in such states is changed, courts will probably have to construe such language to simply mean a married couple, which will encompass a married same-sex couple.

Of course, the need for revision is not so severe everywhere. In fact, the exemption laws for many states are written generally for the protection of an individual, a spouse, and/or the family and thus are not gender specific or written to cover "husband and wife." Texas is a good example of a state with laws related to exemptions that probably do not need changing.

Finally, some states have retained the antiquated concepts of dower[5] and curtesy.[6] Those are typically gender specific, and how one sorts out the rights of each party to a same-sex marriage is not clear. Michigan, for example, has a right of dower for widows but has eliminated curtesy for widowers.[7]

## The News Debtors May Not Like To Hear: Domestic Support Obligations

Another key area to watch in bankruptcy after *Obergefell* will be the treatment of domestic support obligations. Prior to the Court's decision, same-sex couples in states that did not recognize same-sex marriage were not covered by the Bankruptcy Code's special protections for domestic support obligations.[8] With the Court's recognition of same-sex marriage as a fundamental right, states are now not only granting same-sex couples the right to marry, but also the rights to divorce, receive alimony, and pursue child support from their former spouses.

The Code defines the term "domestic support obligation" (DSO) to mean a debt owed to or recoverable by a spouse, former spouse, or child of the debtor (or a governmental unit) in the nature of alimony, maintenance, or support, created by a court order, determination of a state or federal government unit, separation agreement, divorce decree, or property settlement agreement.[9] DSO claims are entitled to

first priority among unsecured creditors, and are not dischargeable.[10] Likewise, debts to a spouse, former spouse, or child of the debtor that are not considered domestic support obligations are also excepted from discharge.[11]

Because former spouses in a dissolved same-sex marriage may now be eligible for alimony and/or spousal maintenance, bankruptcy courts are likely to encounter some novel issues. For instance, while the Bankruptcy Code appears rather broad in its definition of a domestic support obligation, it has been interpreted more narrowly, and state laws and the Federal Tax Code often adopt a more narrow definition of what constitutes maintenance or alimony.[12] In some states, former spouses are not entitled to alimony or spousal maintenance unless the marriage lasted a certain number of years. Thus, bankruptcy courts in states where same-sex marriage is newly allowed may not expect to face DSO claims for same-sex spousal support for some time.

However, that expectation might be misplaced. It remains to be seen whether former spouses will be able to retroactively claim common law marriage in the states that allow it. In such cases, it may be possible for former spouses to claim an earlier date than the anniversary of the *Obergefell* decision as the beginning of their now-dissolved marriage. In such states, former spouses who establish the appropriate length of time may be able to obtain spousal support orders that qualify as a DSO.

Equally important may be the developing issue of child support among former same-sex couples. The issue of whether a nonbiological parent must pay child support is governed differently from state to state, due in large part to the fact that many state statutes do not define the term "parent."[13] Thus, whether bankruptcy courts are faced with child support DSOs from former same-sex spouses or partners will likely vary heavily according to the law in the state of their jurisdiction.

## Summary

The Bankruptcy Code and the process for debtors in bankruptcy seem to be in reasonably good shape after *Obergefell*, due in part to the general language in the Code and forms applicable to "spouses" as well as the tendency of bankruptcy judges to use common sense where the language of the Code states "husband and wife." Thankfully, there is already some good case law between *Windsor* and *Obergefell* that may be looked to for guidance.

Still, state legislatures may need to act quickly to modernize their exemption and property laws to replace references to "husband and wife" with the more general "spouses" or to update gender-specific property rights. It may also be interesting to watch state laws develop regarding the dissolution of same-sex marriages and the rights and obligations of nonbiological parents. Until that happens, bankruptcy courts will need to rely heavily on their broad discretionary powers and common sense to fill in the gaps in light of the Supreme Court's landmark decision. ⊙

*Hon. Harlin DeWayne Hale is a judge in U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division. Sam Genovese is a 2015 judicial extern to Judge Hale and a student at Southern Methodist University's Dedman School of Law.*

## Endnotes

1 Usage of the term "Bankruptcy Code" or "Code" shall refer to Title 11 of the U.S. Code.

2 *See, e.g.*, Larry E. Prince & Robert A. Faucher, *Ethical Issues Facing Idaho Bankruptcy Practitioners*, 34 Idaho L. Rev. 309, 311 (1998) ("Certain applicable sections of the Bankruptcy Code are poorly written.").

3 133 S. Ct. 2675 (2013).

4 "If property is held as a joint tenancy with right of survivorship, a creditor of one of the joint tenants may attach the joint tenant's portion of the property to recover that joint tenant's individual debt. However, when property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse." *Beal Bank SSB v. Almand & Assocs.,* 780 So. 2d 45, 53 (Fla. 2001) (citations removed).

5 "The widow of every deceased person, shall be entitled to dower, or the use during her natural life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof." Mich. Comp. Laws Ann. § 558.1 (West).

6 "A husband shall upon the death of his wife hold for his life one-third of all land owned by her at the time of her death. Such estate shall be known as his tenancy by curtesy, and the law relative to dower shall be applicable to curtesy." *Opinion of the Justices*, 337 Mass. 786, 151 N.E.2d 475 (1958).

7 Hawaii allows for dower and curtesy and maintains gender-specific language in their statutes. *See* Haw. Rev. Stat. § 533-16 (West). Arkansas and Kentucky have retained dower and curtesy rights, however they use gender-neutral phrasing in their statutory language: "(b) A person shall have a dower or curtesy right in lands sold in the lifetime of his or her spouse without consent of the spouse in legal form against all creditors of the estate." Ark. Code Ann. § 28-11-301 (1981); "After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half (1/2) of the surplus real estate … unless the survivor's right to such interest has been barred, forfeited, or relinquished." Ky. Rev. Stat. Ann. § 392.020 (West 1956).

8 *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

9 11 U.S.C. § 101(14A).

10 § 523(a)(5).

11 § 523(a)(15).

12 11 U.S.C. § 101(14A)(B) ("in the nature of alimony, maintenance, or support of such spouse, former spouse, or child of the debtor … without regard to whether such debt is expressly so designated"); *cf.* 26 U.S.C. § 71 (defining gross income to include "alimony" and "separate maintenance payments" under the Federal Tax Code but only if in the "divorce or separation instrument"); *see also Matter of Davidson*, 947 F.2d 1294, 1296 (5th Cir. 1991) ("a division of marital property in payments over time will not be declared nondischargeable in bankruptcy merely because the parties have labeled it "alimony.").

13 *Compare Arriaga v. Dukoff*, 999 N.Y.S.2d 504, 508 (N.Y.A.D. 2014) (non-birth-mother partner adjudicated a "parent" in a judicial proceeding in which she was ordered to pay child support to birth-mother parent) with *State ex rel. D.R.M.*, 109 Wash. App. 182, 190, 34 P.3d 887, 892 (2001) (finding child only had one parent, since former same-sex partner of child's mother not a "parent" under state statute).