

## Layman's Guide to the Obergefell Lawsuit in State Court

### I. Key Elements to the Lawsuit's Legal Theory.

The key thoughts relative to the substantive argument made in the complaint are based on these two main ideas:

#### A. State Law. Our state law says two things critical to the argument:

1. "Before" anyone can marry, they "shall present" to a legally designated officiant (e.g. a minister) a marriage license. It is the license that, by statute, "authorizes" that officiant to solemnize the marriage. Without a license, no state-authorized officiant can actually solemnize a marriage.
2. By statute, no County Clerk can issue a license unless an application has been submitted by the "male and female contracting parties" containing certain information about them.

#### B. Obergefell Holdings.

The Supreme Court had three holdings, only two of which are relevant to our case (the holding that we have to recognize a same-sex marriages from another state is not germane to our argument in our case; we deal only with in-state marriages) and both of which must be given effect by other courts:

1. "state laws ... are ... held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."
2. "same-sex couples may exercise the fundamental right to marry."

How *Obergefell* applies to the process for issuance of in-state marriage licenses was not litigated against Tennessee in the case *Tanco v. Haslam* that was before the U.S. Supreme Court. Tennessee has never "had its day in court" on this particular issue.

### II. Our Legal Argument.

Our legal argument is that the *Obergefell* holding invalidated our marriage license law because our law clearly "excludes same-sex couples from civil marriage." The law does not authorize the issuance of a license to anyone but a "male and female."

### III. Defendant Clerk's Legal Argument.

The Defendant's legal argument is that courts can "elide" the words male and female and the rest of the law continue on as valid because the statute would then make licenses available to the "contracting parties," words that would remain in the statute. In law, this is called the "doctrine of elision." Defendants argue that County Clerks can issue licenses because the words male and female are not necessary because the legislature would have still enacted the statute in order to have a process and procedure by which people could marry.

#### IV. Our Response to Defendant's Argument.

According to the TN Supreme Court, the fundamental issue in regard to whether words can be elided from a statute and the rest of the statute still upheld is "what was the legislature's intent" in 1995?

The TN Supreme Court has said that the doctrine of elision can be applied to delete words from a statute if the legislature "would have enacted" the statute at that time anyway, even without the words to be elided.

So the legal question is would the legislature have enacted the state laws referenced above in 1995 if those laws had allowed same-sex marriages to take place. Was the legislature's intent to authorize only marriages between a man and woman or simply to have a process by which people could get married, regardless of their sex?

Our response is that the legislature never intended for the statute in 1995 to authorize same-sex marriage and would not have enacted the statute had it done so because:

1. According to the TN Supreme Court, each statute must be construed in a way that is consistent with the entire regulatory scheme of which that statute is a part. The intent regarding the marriage license law must therefore be construed in light of the fact that so many other laws that are part of the statutory regulatory scheme governing marriage refer to a man and woman or to a husband and wife. All those other laws would have to be "reinterpreted" if the license law is to be reinterpreted.
2. If the intent to limit marriage to a man and a woman is to be disregarded, then in principle, the intent limiting marriage to only two people would have to be disregarded too. The words "male and female" are the only words in the statute that indicate how many people can constitute the "contracting parties." If the court is going to disregard legislative intent regarding the sex of the parties, then consistency going forward must mean that legislative intent regarding the number of parties must also be disregarded. The court can't say that the limit to two is implied because that's how everyone has always understood marriage because people always understood it to be a man and a woman too.
3. If the intent in 1995 would be to have enacted the statute anyway, even if two people of the same-sex could marry, then the legislature was legitimating for purposes of marriage an act that, if consummated, was then a crime (sodomy). This is to attribute a sort of corporate schizophrenic intention to the legislature.
4. In 1996, the legislature passed the state Defense of Marriage Act that said that the statute enacted in 1995 was to be construed by the courts so as to only allow man and woman marriage. This made clear their intention in 1995 was for a man and woman to marry, not just have a regulatory scheme for marriage.
5. The current Tennessee legislature thinks the law was invalidated by *Obergefell* and is on record as saying they didn't believe the legislature would have enacted the license law in 1995 if it had allowed same-sex marriage. See [House Joint Resolution 529](#).
6. There is no requirement that a state even have a statutory marriage licensing law. Tennessee is a common law state and if the statute is invalid because of *Obergefell*, then the legislature could decide to revert to common law marriage and enact a means

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by which notice of a common law marriage could be given to the public. In other words, the courts cannot presume to know what the legislature would do; the courts must follow the holding in *Obergefell* even if they don't like the result.