Pre-2014 Same-Sex Common-Law Marriages

Should Federal Precedent Apply Retroactively?

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This article considers the effect of federal precedent on pre-2014 same-sex common-law marriage claims in the context of divorce and probate issues.

Common-law same-sex marriage presents a wrinkle in the family law landscape. When federal courts removed impediments to same-sex marriage, Colorado began to recognize such marriages immediately. But what about common-law same-sex marriages entered into before Colorado recognized same-sex marriages?

This article looks at legal and practical issues practitioners may face in same-sex common law marriage situations, with a focus on the retroactive application of federal decisions "legalizing" same-sex marriage. It sets out Colorado law regarding common-law and same-sex marriages; describes statutory and constitutional retroactivity, including arguments for and against; and discusses some practical considerations in litigating these cases.

Common-Law Marriage in Colorado

Colorado is one of a minority of states that recognizes common-law marriage.[1] The Colorado statutes recognize common-law marriages entered into after September 1, 2006 if both parties are 18 or over and the marriage is not prohibited (i.e., bigamous or incestuous),[2] though common-law marriages are limited to opposite-sex couples.[3] The Colorado Constitution limits marriage to "a union of one man and one woman."[4]

Provided there is no legal impediment to marriage, a common-law marriage arises upon "the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship."[5] In other words, under Colorado's Constitution, statutes, and common law, if a man and a woman agree to be married and hold themselves out as married, they are entitled to the privileges and are burdened with responsibilities of legal marriage. If one party claims the existence of a common-law marriage and the other disagrees, courts resolving the contested claim consider factors such as cohabitation, reputation among community members, co-mingled finances, joint property ownership, name sharing, and the filing of joint tax returns.[6]

Same-Sex Marriage in Colorado

Colorado's statutes still limit marriage to one man and one woman.[7] This prohibition applies to common-law as well as formalized marriages.[8] But federal courts have declared state bans on same-sex marriage to be unconstitutional. In 2014, the U.S. Court of Appeals for the Tenth Circuit determined in *Kitchen v. Herbert* that the Fourteenth Amendment protects the right of same-sex couples to marry.[9] In 2015, the U.S. Supreme Court decided *Obergefell v. Hodges.*[10] Writing for the 5-4 majority, Justice Kennedy stated in closing:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[11]

With those words, the Supreme Court determined that state bans on same-sex marriage violated the U.S. Constitution. Thus, the portions of CRS § 14-2-104 and the Colorado Constitution that limit marriage to opposite-sex couples are unconstitutional and unenforceable, at least from the date *Kitchen* was decided.

How Will Colorado Treat Same-Sex Couples?

It is an open question how same-sex couples who entered into common-law marriages before *Kitchen* will be treated in Colorado legal proceedings. The answer depends on whether *Kitchen* and *Obergefell* apply retroactively to common-law marriage claims. For such couples, the issue of retroactivity may be dispositive of their dissolution of marriage or probate case. If *Kitchen* and *Obergefell* are retroactive, such claims may be pursued. If not, the statutory bans on such unions in place at the time the marriage arose would invalidate such marriages and foreclose the question of divorce or inheritance, at least without a legal instrument such as a cohabitation agreement or a will.

There are two kinds of retroactivity, statutory and constitutional. Colorado courts determine retroactivity according to a three-part test.

Statutory Retroactivity

Whether a statute will be applied retroactively depends on whether it is substantive. When a statute is substantive in nature, the courts presume the statute applies prospectively only.[12] Further, the Colorado Constitution expressly prohibits retrospective application of certain kinds of substantive laws.[13]

This rule has a logical basis. While people can be expected to conform their conduct to current law, they cannot be expected to conform their conduct to an as yet unknown future law. Further, prospective application of a statute is generally sufficient to meet the legislature's goals because legislatures typically act in response to public opinion, a change in political control, or new facts or problems. In such situations, retroactive application is typically unnecessary.

There is also an administrative basis for prohibiting retroactive application of substantive

legal changes: avoiding a flood of attempts to reopen old lawsuits. If every civil suit could be re-litigated when the law changes, the courts' dockets would quickly become unmanageable, not to mention the uncertainty and chaos that would ensue regarding the status of previously established legal rights.

Thus, the general rule prohibiting retroactive application of statutes is understandable, and it is likely that same-sex common-law marriages pre-dating 2014 would not be held valid in Colorado had the legislature changed Colorado law to legalize same-sex marriage.

Constitutional Retroactivity

By contrast, substantive constitutional changes may apply retroactively.[14] The issue most often arises in criminal cases when, for example, the courts have invalidated a punishment scheme or changed the class of persons who can be punished or the type of punishment available.[15] This, too, has a logical basis—when a statute is declared unconstitutional, it may be voided ab initio.[16]

The difference between statutory and constitutional retroactivity arises from the difference between how laws and constitutions are designed to operate. As noted above, there are many reasons for legislatures to change policy, and the flexibility of the legislative process recognizes this. But constitutional provisions concern individual rights that (theoretically) do not change over time. A court's constitutional invalidation of a law is a decision that such a law should never have existed.

Thus, because *Kitchen* and *Obergefell* construed constitutional rather than statutory rights, they essentially instruct Colorado that it should never have banned same-sex marriage. This opens the door for retroactive application of their holdings.

Three-Part Test

Once the question arises whether a decision should have retroactive application, Colorado courts engage in a three-part test: (1) the decision must establish a new rule of law; (2) retroactive application should further the purpose and effect of the rule in question; and (3) the inequity imposed by retroactive application should be outweighed by the benefit.[17]

"The difference between statutory and constitutional retroactivity arises from the difference between how laws and constitutions are designed to operate."

"To establish a new rule of law, a judicial decision must either resolve an issue of first impression not clearly foreshadowed by prior precedent or overrule clear past precedent on which the litigants may have relied."[18] If, however, this test is not clearly met, a court may still consider the second two factors and decide to apply the decision retroactively.[19]

The second factor leaves significant room for a court to analyze the purpose of the rule. Courts rely on the text and reasoning of the decision itself.[20] They may also look to other sources indicating the rule's purpose, including similar decisions, statutory and regulatory text, and legislative history.[21]

Under the third factor, courts should not retroactively apply decisions in a way that harms those who relied on the previous version of the law, nor should the retroactive application of a decision upend "the protection of stability in areas where society attaches particular importance to stability."[22]

Applying the Test

Though Colorado courts have not yet answered the question whether pre-2014 common-law same-sex marriages can be recognized, some decisions are instructive. In Colorado, at least one probate court has recognized a pre-2014 same-sex common-law marriage.[23] At least one non-Colorado court has, similarly, recognized that *Obergefell* applies retroactively.[24]

There are two situations in which the issue will most likely arise. First, one member of a same-sex couple may file for a dissolution of marriage and claim that the marriage arose before 2014, but the other party disagrees that any marriage arose. Here, a court would have to determine whether *Kitchen* or *Obergefell* applies retroactively. Second, in the probate context, a same-sex partner may claim marriage to a decedent and thus claim entitlement to all or part of his or her estate.

Arguments for Recognizing Same-Sex Common-Law Marriages

An argument to establish the retroactivity of *Kitchen* and *Obergefell* would start with the basic premise that the decisions are constitutional and are thus appropriate for retroactive application. The proponent would need to establish that *Kitchen* constitutes a new rule of law. Whether the U.S. Constitution protects the rights of same-sex couples to marry was, at the time of *Kitchen*, a yet undecided issue. Indeed, the policymakers and citizens of many states, including Colorado, apparently believed that laws banning same-sex marriage were constitutional because such laws existed and had not been overruled by state courts.

The party trying to establish the marriage, therefore, would argue that the *Kitchen* rule was new; it resolved a constitutional question of first impression, reversing Colorado's law and creating a new protection that did not exist before. This party would also argue that in cases of ambiguity, a court may still consider the second and third factors to determine whether a decision should apply retroactively.[25]

The strongest argument is on the second factor—whether retroactive application furthers the rule's purpose. The language of *Kitchen*, and even more so *Obergefell*, clarifies that the

purpose of these decisions is to recognize that same-sex couples are to be treated similarly to opposite-sex couples. It follows that retroactive application of these holdings extends equality to more couples, and the decisions' purpose is better fulfilled by retroactive application. This is true both in the marriage and probate context because retroactive application would treat same-sex couples and opposite-sex couples the same both pre- and post-2014.

Further, the underlying purpose of Colorado's marriage laws is to "strengthen and preserve the integrity of marriage and to safeguard meaningful family relationships," which is a purpose that should be "liberally construed."[26] By extending common-law marriage protections to same-sex couples, courts can safeguard precisely those relationships that *Kitchen* and *Obergefell* sought to protect.

On the third factor, proponents would also have to balance that purpose against the inequities of retroactive application by arguing that the parties would not have acted differently had same-sex common-law marriage been legal. Thus, they would argue, retroactive application causes no harm.

Finally, the practical problems involved with re-litigating cases are not presented by retroactive application of *Kitchen* and *Obergefell*. Before 2014, Colorado courts did not recognize same-sex marriage, so divorce or probate cases involving this issue were not frequently filed. To the contrary, retroactive application would allow a new opportunity for same-sex couples to make their claims and is thus required for same-sex couples to exercise their rights under Colorado law.

Arguments against Retroactive Application

Opponents of retroactive application[27] can also make persuasive arguments.

First, an opponent could argue that the *Kitchen* rule is not new because it was foreseeable, given the national movement toward recognition of same-sex marriage. After *United States v. Windsor*[28] was decided, the movement toward marriage equality gained steam, so *Kitchen* was not "new." Second, the purpose of marriage laws is to define the boundaries of marriage to clarify the parties' rights, for example, upon divorce and death. Retroactive application of *Kitchen* upends the parties' expectations from the time they were engaged in their relationships, when such relationships were explicitly not legally recognized.

> "In the marriage context, retroactive application of *Kitchen and Obergefell* may seem grossly unfair to a party who unexpectedly ends up having to divide his or her property with a former partner without having agreed to legal marriage or enjoyed its benefits."

This leads to the opponent's strongest argument: there are substantial reliance interests at stake. In the divorce context, partners may not have taken steps to avoid the appearance of marriage by, for example, separating finances, avoiding the appearance of being considered spouses, or creating documents disavowing marriage. Doing so was unnecessary at the time they were partners. But upon breaking up, they might discover that their property, which they believed was separate, would be divided under Colorado's Uniform Dissolution of Marriage Act. Had they known such a result was possible, they may have behaved differently; instead, they are now saddled with the burdens of divorce without ever having enjoyed the benefits of marriage.

Similarly, in the probate context, the deceased and his or her heirs may have justifiably relied on default rules governing inheritance, so retroactive application of common-law marriage could violate the parties' reasonable expectations.

Opponents could further argue that non-recognition promotes "the protection of stability in areas where society attaches particular importance to stability."[29] Society attaches a particular importance to stability and predictability when it comes to families, which is expressed in the laws that govern such relationships. Retroactively creating legal relationships can profoundly upset the parties' expectations of family stability.

Do Different Case Types Matter?

Retroactivity may affect different case types unequally. In the marriage context, retroactive application of *Kitchen* and *Obergefell* may seem grossly unfair to a party who unexpectedly ends up having to divide his or her property with a former partner without having agreed to legal marriage or enjoyed its benefits.

On the other hand, in the probate context, the equities seem to point in the other direction. Perhaps a surviving partner should be able to receive the benefits that would have been due had *Kitchen* been decided sooner.

Though it would be peculiar for *Kitchen* and *Obergefell* to apply retroactively in some cases (probate) but not in others (divorce), this tension may have courts wrestling with equities on a case-by-case basis.

Practical Considerations

Same-sex partners seeking recognition of common-law marriage may have substantial practical litigation hurdles to overcome. As noted above,

factors such as cohabitation, reputation among community members, co-mingled finances, joint property ownership, name sharing, and joint tax returns are all indications that people may be married. In the same-sex marriage context, some of these factors may apply differently than they do to opposite-sex couples, or at least, they may be more difficult to prove.

Most obviously, until 2013, the Defense of Marriage Act prohibited the federal government from recognizing same-sex marriages, so same-sex partners could not legally file joint federal tax returns as married couples.[30] And Colorado expressly forbade such marriages. It would thus be impossible for a same-sex partner to prove a marriage using tax returns filed before 2013.

Same-sex couples may also intentionally not hold themselves out as married. Despite increased social acceptance of same-sex relationships, in many communities, it is still not safe to be in a same-sex relationship openly. Thus, traditional trappings of marriage, such as joint property or account ownership, name changes, or even cohabitation, may not be present. In fact, it is not uncommon for same-sex couples who have agreed to be married to keep that fact from parents or siblings.

Proving a contested same-sex common-law marriage may thus require some creative lawyering. Attorneys should look for other indications of marriage. For example, though parties may not have combined their finances in the traditional way, they may have split expenses or allowed each other secondary access to bank accounts. And even if family members do not know about a same-sex relationship, friends or community members probably do.

Last but not least, these litigation challenges require a compassionate approach. Careful investigation of facts with sensitivity toward the potential pitfalls, notably public disclosure of someone's otherwise private sexual orientation, will be necessary. Those seeking recognition of a same-sex common-law marriage may struggle with presenting evidence about a relationship that had been deliberately kept private. It is important for lawyers to proceed with care and compassion for clients and opposing parties who may be publicly acknowledging private facts unwillingly and for the first time.

Conclusion

Persuasive arguments based on legal, historical, and social factors exist both for and against recognition of pre-2014 same-sex common-law marriages. But practical impediments to proving such a marriage may present challenges. Lawyers may have to find creative and compassionate approaches to prove these cases. CL

NOTES

1. *See, e.g.,* "Which States Recognize Common Law Marriage?" Nolo, www.nolo.com/legal-encyclopedia/free-books/living-together-book/chapter2-4.html.
2. CRS §§ 14-2-109.5(1) and -110.
3. CRS § 14-2-104(3).
4. Colo. Const. art. II, § 31.
5. *People v. Lucero,* 747 P.2d 660, 663 (Colo. 1987).
6. *Id.* at 664–65.
7. CRS § 14-2-104(1)(b).
8. CRS § 14-2-104(3).
9. *Kitchen v. Herbert,* 755 F.3d 1193, 1198–99 (10th Cir. 2014).
10. *See Obergefell v. Hodges,* 135 S.Ct. 2584 (2015); *Kitchen*, 755 F.3d 1193.
11. *Obergefell,* 135 S.Ct. at 2608.
12. CRS § 2-4-202; *People v. Chavarria-Sanchez,* 207 P.3d 902, 907 (Colo.App. 2009).
13. Colo. Const. art. II, § 11.
14. *See, e.g., People v. Rainer,* 2013 COA 51 ¶ 19, *reversed on other grounds,* 2017 CO 50.
15. *Id.*
16. *Cf. Olin Mathieson Chem. Corp. v. Francis,* 301 P.2d 139, 143 (Colo. 1956).
17. *See, e.g., Martinez v. Indus. Comm'n of Colo.,* 746 P.2d 552, 556–57 (Colo. 1987).
18. *Erskine v. Beim,* 197 P.3d 225, 227 (Colo.App. 2008).
19. *Id.* at 228.
20. *Id.*
21. *See Martinez,* 746 P.2d at 558.
22. *People ex rel. C.A.K.,* 652 P.2d 603, 608 (Colo. 1982).
23. *See* Cashman, "A Probate Judge Finds Same Sex Common Law Marriage in Colorado," The Law Office of Barbara E. Cashman (May 27, 2015), denverelderlaw.org/same-sex-common-law-marriage-ruling-in-colorado.
24. *See, e.g., In re Estate of Carter,* 159 A.3d 970 (Pa.Super. 2017) (recognizing same-sex common-law marriage entered into, and in which one of the partners died, before Obergefell was decided).
25. *Erskine,* 197 P.3d at 228.
26. CRS § 14-2-102(2)(a).
27. It is important to distinguish those who oppose recognition of a particular pre-2014 common-law same-sex marriage from opponents of same-sex marriage generally. Opponents of retroactive application may be former members of a same-sex relationship (as in a divorce) or supportive family members of a same-sex relationship (as in a probate case).
28. *U.S. v. Windsor,* 570 U.S. 744 (2013) (holding the federal Defense of Marriage Act unconstitutional).
29. *C.A.K.,* 652 P.2d at 608.
30. *See Windsor,* 570 U.S. 744.


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