

LGBTQ+ clients worried by Dobbs decision, Md. attorneys say

By: Guest Column Hope Keller ◉ July 21, 2022



"Two years ago, most people were saying this is a done deal," says attorney Heather McCabe of the nationwide right to same-sex marriage. (Submitted Photo)

With the overturning of *Roe v. Wade*, family law practitioners in Maryland have been inundated with calls from LGBTQ+ clients worried that the Supreme Court will next set its sights on *Obergefell v. Hodges*, the case that in 2015 recognized the national right to same-sex marriage.

Clients worried that the court could invalidate their legal unions aren't paranoid. Even though the *Dobbs* opinion stated that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion," Justice Clarence Thomas, in a solo concurring opinion, made explicit his desire that the court reconsider *Obergefell*, among other "substantive due process" cases that established rights not specifically outlined in the Bill of Rights.

"Our phones are all ringing off the hook," said Eva Juncker, a partner at Cipriani & Werner's Washington-area office and co-chair of the firm's DMV Family Law practice group. "People are scared."

Juncker, who likened herself to Chicken Little, recommends that all members of the LGBTQ+ community, married and unmarried, make sure their legal documents are complete and up to date, including wills, living wills, powers of attorney and second parent adoption orders.

This is particularly important for those who plan trips out of Maryland, especially to or through states considered unfriendly to same-sex couples, she said.

"The worst possible time to have to prove your right to be with your spouse or your child after a terrible incident like a car accident is at that moment," Juncker said.

Juncker emphasized the difference between identity documents, such as birth certificates, and judicial orders, such as second-parent adoption papers. While a birth certificate might list a child's two mothers, for example, it is not a court order and so might not be recognized in some U.S. jurisdictions. A second-parent adoption order, on the other hand, affords "full faith and credit" protections nationwide.



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"We are absolutely advising everyone, if you are not the gestational parent or donor, that you should be looking at whatever your jurisdiction affords — a parentage order, a custody order," Juncker said. "Once it's an order, a judgment from a court, then ... your legal relationship is shored up. It's as airtight as it can be in the United States."

Heather McCabe, co-managing partner at McCabe Russell in Fulton, also has seen an uptick in inquiries from same-sex couples worried about what Thomas's concurrence might augur.

"Two years ago, most people were saying this is a done deal," McCabe said of the nationwide right to same-sex marriage.

Now, she said, many clients want their legal documents nailed down ASAP in case the court does take a case that could overturn *Obergefell*.

"They want to have it happen by tomorrow, they're that worried," McCabe said of some clients.

McCabe's firm represented LGBTQ+ couples well before same-sex marriage was legalized nationwide.

"Before same-sex (marriage) was legalized across the country, there was a spotty topography where it was recognized and where it was not. We made sure we were maximizing the legal tools that we had available to same-sex couples," McCabe said. "We're sort of defaulting back to that. We're not sure we can rely on marriage the way we thought we could."

Evan Koslow, of the Koslow Law Firm in Annapolis, says he's heard from just one same-sex couple since the *Dobbs* ruling was handed down on June 24.



"My general position even before Dobbs was, why not secure (your rights) sooner than later?" says Evan Koslow of the Koslow Law Firm in Annapolis. (Submitted Photo)

The clients, married women, were worried that other states might not recognize the adoption of their child in Maryland, said Koslow, who advised the couple to make sure their adoption documents were in order.

"My general position even before *Dobbs* was, why not secure (your rights) sooner than later?" Koslow said.

Thomas, in his concurring opinion in *Dobbs* — which overturned *Roe v. Wade*, ending nearly 50 years of a constitutional right to abortion — wrote that “we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”

In *Griswold v. Connecticut*, in 1965, the court recognized the right of married couples to obtain contraceptives. In *Lawrence v. Texas*, from 2003, the court struck down criminal laws against sodomy.

Thomas minced no words about substantive due process: “(W)e should eliminate it from our jurisprudence at the earliest opportunity.”

Dissenting in *Dobbs* were Justices Stephen Breyer, Elena Kagan and Sonia Sotomayor, who wrote that overturning *Roe* indeed threatened other precedents stemming from the “same constitutional fabric, protecting autonomous decision-making over the most personal of life decisions.”

“Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat,” they wrote. “It is one or the other.”

Also overturned by *Dobbs* was *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the 1992 ruling that had preserved *Roe*’s central holding protecting a right to abortion.