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# OKLAHOMA LAW REVIEW

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## SAME-SEX MARRIAGE CAME TO OKLAHOMA: NOW WHAT HAPPENS?

ROBERT G. SPECTOR \*

Same-sex marriage arrived in Oklahoma when the United States Supreme Court denied certiorari in *Bishop v. Oklahoma*.<sup>1</sup> For the most part, the issues in dissolving a same-sex marriage are identical to those of an opposite-sex marriage. However, issues concerning parentage, custody, and visitation will require some restructuring of the law, as will some issues in property division and status determination. Oklahoma courts, in a series of cases, have begun to address the issues involving parentage and visitation, although the rationale for deciding the cases needs to be reconsidered and clarified.

### *I. The Cases*

The first of these cases in time is *Dubose v. North*,<sup>2</sup> which involved two women who began living together in 2001. North became pregnant through artificial insemination and gave birth October 11, 2007. Dubose was present throughout the pregnancy and at the child's birth. They co-parented the child from the child's birth in 2007 until December 2012. Dubose alleged that due to concerns regarding the then current United States military policy of "Don't Ask, Don't Tell," and the potential impact on their careers, they

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1. 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014). It came to the rest of the country with the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. 2014 OK CIV APP 68, 332 P.3d 331. *Dubose* was subsequently overruled in *Ramey v. Sutton*, 2015 OK 79, 362 P.3d 217, which is considered later. The case is discussed here to show the progression of Oklahoma's analysis and to highlight the fact that the parentage statutes must play a significant role in future case development.

did not enter into any type of co-parenting agreement. In December, 2012, the parties separated. In February, 2013, North stopped all contact between Dubose and the child.

Dubose filed a parentage action, and North filed a motion to dismiss. The motion to dismiss alleged that the court did not have subject matter jurisdiction to adjudicate the parentage action and that, in any event, the applicable two-year statute of limitations<sup>3</sup> required dismissal. The trial court found that Dubose lacked standing to bring a parentage case. She appealed and the appellate panel affirmed.

The Uniform Parentage Act, as adopted in Oklahoma, provides that a parentage proceeding may be brought by:

- (1) the child;
- (2) the mother of the child;
- (3) a man whose paternity of the child is to be adjudicated;
- (4) the Department of Human Services; or
- (5) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor.<sup>4</sup>

The Act further defines a man as “a male individual of any age.”<sup>5</sup> The appellate panel found that Dubose was not the mother of the child and could not be the father of the child because she is not a man. Therefore, it held that, under the Act, she was not authorized to bring a parentage action and therefore had no standing.

Dubose argued that the parentage provisions, specifically the portions of the statute dealing with the interpretation of man and presumed father, should be read according to an Oklahoma statute that states “[w]ords used in the masculine gender include the feminine and neuter.”<sup>6</sup> The court rejected this because the statute also states that “[w]ords used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears . . . .”<sup>7</sup> The panel found that no contrary intention appeared in the parentage act. The Act states who may bring a proceeding to adjudicate parentage and, therefore, Dubose lacked standing.

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3. 10 OKLA. STAT. § 7700-607(A) (2011).

4. *Id.* § 7700-602.

5. *Id.* § 7702-102(11).

6. 25 OKLA. STAT. § 24 (2011).

7. *Id.* § 1.

The Supreme Court then decided a series of cases involving same-sex female couples. The first of these was *Eldredge v. Taylor*.<sup>8</sup> The plaintiff, Eldredge and the defendant, Taylor, both women, lived together in a family relationship from May 19, 2001, until April 2011. In 2005, the parties entered into a civil union in New Zealand. Two children were born into this civil union. The parties purchased a home together in anticipation of the children's births. The parties agreed to and planned the conception of the children using an anonymous sperm donor with Taylor as the biological mother. Eldredge supported Taylor through both pregnancies and was present during the artificial insemination, subsequent doctor appointments, and each child's birth.

The parties entered into co-parenting agreements following the birth of each child. In accordance with the agreements, both parties were given parental rights and shared parenting responsibilities. Eldredge played the role of caregiver, assuming responsibility for the children's care, education, and development. Eldredge publicly acknowledged the children as hers. Taylor held out Eldredge as the children's mother to family members, government personnel, and the children. Taylor also held out Eldredge's family as the children's family. The children formed a parental relationship and an emotional attachment to Eldredge and her family.

After the parties separated, Taylor changed the children's surnames to Taylor. After dissolving their marital partnership in New Zealand, the parties continued to share parenting responsibilities. Eldredge paid Taylor an average of \$763.29 per month in child support, cared for the children, enrolled them in school, provided them her home, and was named as a parent on school and medical documentation.

Eldredge sued to enforce the parenting contract, and the district court determined that she did not have standing. The Supreme Court of Oklahoma reversed and determined that she did have standing to enforce the contract.<sup>9</sup>

Taylor argued that the contract violated public policy. On that issue, the Court determined that Taylor had the burden of proof and decided that she had not sustained it. The court found that an expression of public policy toward same-sex couples could not be found in the statutory and constitutional provisions prohibiting same-sex marriages because those provisions had been found unconstitutional in the *Bishop* case.<sup>10</sup> Public

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8. 2014 OK 92, 339 P.3d 888.

9. *Id.* ¶ 21, 339 P.3d at 894. The court did not discuss whether the Uniform Parentage Act should apply to cases involving same-sex couples.

10. *Id.* ¶ 14, 339 P.3d at 892.

policy, the court said, cannot be derived from an unconstitutional provision.<sup>11</sup>

The Court then rejected any suggestion that the Adoption Code expressed a public policy that would invalidate the contract. The Adoption Code specifically allows adoption by “[a]n unmarried person who is at least twenty-one (21) years of age.”<sup>12</sup> It also allows a single parent under certain circumstances to consent to the adoption of her child.<sup>13</sup> Nor does it place any restriction on the gender of the person adopting the child. Taylor, therefore, was, according to the Court, unable to point to any place in the Adoption Code that bans an adoption by a person of the same gender as a sole biological parent.

The court held that Taylor had failed to point out any specific provision of Oklahoma law that would invalidate the parenting agreement.<sup>14</sup> The court held that the agreement could only be invalidated if the agreement was contrary to the best interests of the child.<sup>15</sup> This could not be determined absent a hearing on the child’s best interests. However, because Taylor entered into the agreement with Eldredge, it followed that:

As a parent, Taylor is presumed to have acted in the best interests of the children when she conceived the children with the intent that Eldredge would be for all practical purposes a parent to the children. Likewise, Taylor is presumed to have acted in the best interests in the children when she acted in a manner consistent with that intent--she executed Agreements in which she allegedly consented to sharing her parental authority over the children, she encouraged a parental relationship between Eldredge and the children, she held Eldredge out to the world as the children's parent, and she accepted Eldredge's financial and emotional support as a parent even after they separated. These special factors justify state interference into Taylor's decision to withdraw all of Eldredge's contact with the children. However, consistent with *Troxel*, on remand, the district court must place the burden on Eldredge of showing that

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11. *Id.*

12. 10 OKLA. STAT. § 7503-1.1 (2011).

13. *Id.* § 7503-2.1.

14. *Eldredge*, 2014 OK 92, ¶ 17, 339 P.3d at 893.

15. *Id.* ¶ 18, 339 P.3d at 893.

the valid contractual provisions that she seeks to enforce are in the children's best interests.<sup>16</sup>

Finally the Court noted that the decision is to be limited to its facts, and it should not be read to extend rights to step-parents, grandparents, or others. It also said:

Here, a mother entered into a civil union with her long-time partner; purposefully engaged in family planning requiring complicated and costly biological and legal arrangements with the intent of sharing the rights and responsibilities of parenthood with her partner; committed this intent to writing; and, for years, reaffirmed this intent by accepting financial and emotional support from her partner and actively nurturing the relationship between her partner and the children. The public policy of this State mandates that the district court consider the best interests of the children before they lose one of the only two parents they have ever known. Thus, we find that the district court erred in granting the motion to dismiss.<sup>17</sup>

The next case, *Ramey v. Sutton*,<sup>18</sup> involved much the same set of facts as *Elbridge v. Taylor*. Sutton prepared a baby book for their child identifying both Sutton and Ramey as parents. Sutton gave a card to Ramey congratulating her on becoming a “mother” to their son and indicating that she would be a wonderful mom.

The sperm donor understood and agreed that Ramey and Sutton would co-parent and raise any child conceived as their own and that he did not have any obligations. The court specifically noted that the donor did not have a relationship with the child, provide any support, or assert any claim for custody or visitation.

During the first four years of their child's life, Ramey was the primary caregiver due to Sutton's work and sleep schedule. Their child has always referred to Ramey as “mom,” but did not begin to refer to Sutton as “mom” until the age of five or six. Ramey was listed as “other parent” at the child's school. She was active in the child's school, serving as home room mother, and volunteering for school activities.

Throughout the time they were a couple, Ramey and Sutton lived together and held themselves out as a family to friends and relatives. They

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16. *Id.* ¶ 20, 339 P.3d at 895.

17. *Id.* ¶ 21, 339 P.3d at 895.

18. 2015 OK 79, 362 P.3d 217.

took multiple family vacations together. Ramey claimed their child as a “dependent” on her tax return almost every year of the child’s life. After their relationship ended, they continued to live together for another year as roommates while raising their child.

When Ramey filed a parentage petition, the trial court granted Sutton’s motion to dismiss determining that Ramey was essentially a step-parent without rights or obligations because, unlike *Eldredge*, there was no parenting contract between the parties.<sup>19</sup> The Supreme Court retained the appeal and reversed the trial court holding that non-biological care-givers are to be treated as parents when the non-biological care-giver has, in a same-sex relationship, acted *in loco parentis*, and where the couple prior to the decision in *Bishop* (1) were unable to marry legally; (2) engaged in intentional family planning to have a child and to co-parent; and (3) the biological parent acquiesced and encouraged the same-sex partner’s parental role following the birth.<sup>20</sup>

The court noted that when the United States Supreme Court decided that same-sex couples have the right to marry in *Obergefell*, central to its rationale was a consideration of the harm caused to children of same-sex couples who are denied the benefits that states provide to married couples. If Ramey and Sutton had been allowed to marry, the resulting child would have been the child of both of them under long-standing parentage law.<sup>21</sup> That the couple could not marry was not their fault. Oklahoma law denied them the right to marry. Thus, their unmarried status cannot now be used as means to deny parentage to the non-biological mother.

The court also noted that Oklahoma had previously recognized the doctrine of *in loco parentis* and has held that such a person can be awarded custody of a child.<sup>22</sup> Ramey, the court said, “is not a mere ‘third party’ like a nanny, friend, or relative, as suggested by the trial court. On the contrary, Ramey has been intimately involved in the conception, birth and parenting of their child, at the *request* and invitation of *Sutton*.”<sup>23</sup> “The community,

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19. In Oklahoma stepparents have no rights nor obligations toward their stepchildren. 43 OKLA. STAT. § 112.4 (2011) (“A stepparent is not required to maintain his or her spouse’s children from a prior relationship.”). *Steinberg v. Frentz*, 2002 OK CIV APP 94, 57 P.3d 877 (holding that stepparents may not seek visitation with their stepchildren).

20. *Ramey*, 2014 OK 79, ¶ 2, 362 P.3d at 218.

21. See 10 OKLA. STAT. § 7700-204 (2011). The section provides that a man is presumed to be the father of a child if he and the mother are married to each other and the child is born during the marriage. If read in a gender neutral manner, the presumption would apply to the same-sex marriage partner of the woman who gave birth to the child.

22. See, e.g., *Taylor v. Taylor*, 1938 OK 77, 75 P.2d 1132.

23. *Ramey*, 2014 OK 79, ¶ 16, 362 P.3d at 221.

school, medical providers and extended family have all known Ramey as the ‘other parent,’ all with the knowledge and mutual agreement of Sutton.”<sup>24</sup>

The court concluded that:

At the time of the conception of their child, Ramey and Sutton, as competent adults, entered into an intentional intimate relationship and made a conscious decision to have a child and co-parent as a family. In this instance, Ramey does not seek custody in lieu of Sutton, the biological mother. Rather, she seeks to be recognized as a parent and to have a district judge consider these issues in a best interest of the child hearing. The couple, in a committed and long term relationship, collectively decided to have a family and then to raise the child together. Sutton now urges that Ramey should not even be allowed a best interest of the child hearing because they were never married, something that before *Bishop* would have been a legal nullity in Oklahoma. This couple and more importantly, their child, is entitled to the love, protection and support from the only parents the child has known. Sutton's argument must fail in light of the equities before this Court. Ramey is recognized as being *in loco parentis* to their child and is entitled to a best interests of the child hearing.<sup>25</sup>

The court overruled *Dubose v. North*.<sup>26</sup> As in *Eldredge*, the court made it clear that the opinion does not extend any additional rights to step-parents, grandparents, or others.<sup>27</sup>

*Fleming v. Hyde*<sup>28</sup> and *Newland v. Taylor*<sup>29</sup> were both supreme court summary reversals of trial court dismissals of cases involving basically the same fact patterns. In both cases, the court found that *Eldredge* and *Ramey* were controlling, although there are some factual difference between cases that apparently were not considered significant by the court.<sup>30</sup> In *Fleming*,

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24. *Id.*

25. *Id.* ¶ 17, 362 P.3d at 221 (emphasis omitted).

26. *Id.* ¶ 18, 362 P.3d at 221.

27. *Id.* ¶ 19, 362 P.3d at 221.

28. 2016 OK 23, 2016 WL 805530.

29. 2016 OK 24, 2016 WL 805544.

30. The court did not discuss these “factual” differences, but they can be found in the appellee’s response to appellant’s motion for summary reversal. Defendant/Appellee’s Response to Plaintiff/Appellant’s Motion for Summary Reversal Pursuant to Rule 1.201 at 1-2, 4-6, *Fleming v. Hyde*, 2016 OK 23 (No. SD-113844), <http://www.oscn.net/dockets/>



the court noted that there was a proposal of marriage that was accepted by Hyde, although there is nothing in the appellate record to indicate the couple attempted to marry.<sup>31</sup>

The couple exchanged rings to signify their commitment to one another. They expressed interest in having a family and raising a child together. The couple made financial adjustments to prepare for becoming parents. Fleming and Hyde consulted with a fertilization physician to become pregnant. At the request of their physician, the couple met with a counselor for evaluation and a determination as to their fitness to become parents. . . . Fleming was listed as the other “mom” at the daycare. The couple held themselves out as a family to their friends, family and the public.<sup>32</sup>

These fact, according to the court, brought the case within the criteria set forth in *Ramey* to the effect that nonbiological caregivers are to be treated as parents when the nonbiological caregiver has acted *in loco parentis* in a same-sex relationship, and where the couple prior to the decision in *Bishop*, “(1) were unable to marry legally; (2) engaged in intentional family planning to have a child and to co-parent; and, [where] (3) the biological parent acquiesced in and encouraged the same sex partner’s parental role following the birth . . . .”<sup>33</sup>

The court apparently did not think it important that the relationship in *Fleming* was not a long-term relationship in that the couple lived together for only eighteen months.<sup>34</sup> To the extent that the underlying premise of *Ramey* is that the couple would have married had it been allowed, the facts of *Fleming* may suggest that this couple did not wish to marry. The time period also suggests that perhaps Fleming was not really in an *in loco parentis* relationship to the child.

In the second case, “Newland and Taylor engaged in a two year same sex relationship before discussing having a family and raising a child together. The couple was not legally able to marry in Oklahoma in 2003. The couple made arrangements for Taylor’s artificial insemination. Taylor became pregnant. Newland was present at the delivery of their child. The couple’s

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GetCaseInformation.aspx?db=appellate&number=113844 [hereinafter Hyde’s Response to Fleming’s Motion for Summary Reversal].

31. *Fleming*, ¶ 4, 2016 WL 805530 at \*1.

32. *Id.* ¶¶ 4-5, 2016 WL 805530 at \*1.

33. *Ramey v. Sutton*, 2015 OK 79, ¶ 2, 362 P.3d 217, 218.

34. Hyde’s Response to Fleming’s Motion for Summary Reversal, *supra* note 30, at 5.

romantic relationship ended approximately six months after delivery of their child. Taylor and Newland shared custody since the birth of their child. They have both held themselves out to the public as the parents of the minor child. Taylor prepared a baby book reflecting Newland as the other parent.”<sup>35</sup> Again the court summarily reversed the trial court’s dismissal of the petition.

The relationship in *Newland* had apparently been over with for over ten years.<sup>36</sup> It is unclear from the opinion how long Newland served *in loco parentis*, if at all.<sup>37</sup>

## II. The Issues

There are still a large number of issues that need to be resolved, particularly with regard to the court’s rationale in these cases. First, how necessary is the requirement that the parties were unable to marry legally when the children were born? Suppose that the same situation were to occur today and the couple made the conscious choice not to marry?<sup>38</sup> The couple lives together, raises the child and hold themselves out to the community as parents of the child. When this couple separates should the non-biological partner be considered a parent of the child? If the couple were members of the opposite sex, parentage would be a relatively easy determination. In the same-sex situation, if the answer is no, then how is the difference between opposite sex couples and same-sex couples to be justified. In addition if the answer is no, the child is deprived of both a source of support as well as a continuation of a relationship that, to the child, is no different than it would be if the two partners were married.

On the other hand, if the requirement that the parties were unable to marry is abandoned, then what is the difference between the same-sex partner of the biological mother and a step-parent to a child. Both act *in loco parentis*. In the *Fleming* litigation, the respondent’s brief in opposition

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35. *Newland v. Taylor*, 2016 OK 24, ¶¶ 4-5, 2016 WL 805544, at \*1.

36. Appellee’s Response to Appellant’s Motion for Summary Reversal and Brief in Support at 1, *Newland v. Taylor*, 2016 OK 24 (No. SD-113928), <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=113928&db=Appellate&submitted=true>.

37. The court did not address, in any of these cases, how child support should be calculated.

38. Approximately 40% of all children are born to couples who are not married. See Roger Clogg, *Latest Statistics on Out-of-Wedlock Births*, CORNER (Oct. 11, 2013, 9:53 AM), <http://www.nationalreview.com/corner/360990/latest-statistics-out-wedlock-births-roger-clogg>.

to summary reversal points out that there was no allegation below that the couple attempted to marry but could not.<sup>39</sup>

The second issue is whether the *in loco parentis* aspect of the *Ramey* holding should require the non-biological parent to seek visitation with the child. *Ramey* requires that the biological parent acquiesce in and encourage the same-sex partner's parental role following the birth.<sup>40</sup> The court does not discuss how long the non-biological partner must act *in loco parentis* before the requirement is satisfied. In *Ramey*, the parties lived together for ten years, and the non-biological parent was the original stay-home parent.<sup>41</sup> In *Fleming*, the couple apparently lived together for less than eighteen months.<sup>42</sup> This is not a long time given the age of the child. If the crux of the *Ramey* decision is that the non-biological parent acted *in loco parentis*, then it almost becomes impossible to distinguish this line of cases from the law applied to step-parents. Many step parents have acted *in loco parentis* far longer than the eighteen months that *Fleming* and *Hyde* lived together. There seems to be no logical distinction between the two different relationships other than the court's fiat that these cases do not recognize any expansion of the rights of step-parents and grandparents. Abandoning the *in loco parentis* requirement would make it easier to reconcile the *Ramey*, *Fleming*, and *Newland* decisions with the role of step-parents and grandparents.

The third issue is the relationship between these cases and the Uniform Parentage Act. The Uniform Parentage Act was used to determine that the same-sex partner of the biological mother was not and could not be a parent in the *Dubose* case.<sup>43</sup> *Dubose* was overruled in the *Ramey* decision. The parentage act provides that it "applies to a determination of parentage in this state."<sup>44</sup> Yet the act was not mentioned in any of the supreme court opinions. Does that mean that parentage in same-sex couples is to be determined by actions, *i.e.*, one is a parent if one has acted as a parent? This would relegate the parentage act to determine parentage only in opposite-sex couples.

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39. Hyde's Response to Fleming's Motion for Summary Reversal, *supra* note 30, at 5.

40. *Ramey v. Sutton*, 2015 OK 79, ¶ 15, 362 P.3d 217, 221.

41. *Id.* ¶¶ 6, 9, 362 P.3d at 219.

42. Hyde's Response to Fleming's Motion for Summary Reversal, *supra* note 30, at 6.

43. *Dubose v. North*, 2014 OK CIV APP 68, ¶ 10, 332 P.3d 311, 314, *overruled by Ramey v. Sutton*, 2015 OK 79, 362 P.3d 2170

44. 10 OKLA. STAT. § 770-103(A) (2011).

One alternative would be to revisit the issue that was rejected in the *Dubose* case and interpret the parentage act as gender neutral.<sup>45</sup> The parentage act, however, does not fit easily with same-sex couples, although its presumptions of paternity could well apply to a determination of maternity.<sup>46</sup> The parentage provisions, however, are primarily geared to presuming fatherhood couples with parentage proceedings the primary method of determining parentage in non-married couples.<sup>47</sup> With its emphasis upon DNA testing, parentage proceedings work very well with opposite sex couples. But, it has no applicability to same-sex couples.

What is needed is an approach that applies equally to same-sex and opposite-sex couples. Perhaps it is time to revisit an Oklahoma law that

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45. A number of states have done so. *Elisa B. v. Superior Court*, 117 P.3d 660, 665-67 (Cal. 2005); *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 586-87 (Colo. App. 2013); *Chatterjee v. King*, 280 P.3d 283, 287-88 (N.M. 2012). *See generally* Jacob R. Parker, Note, *Uniform Parentage: a Gender Neutral Interpretation of Oklahoma's Uniform Parentage Act*, *Dubose v. North*, 37 U. LA VERNE L. REV. 149 (2015).

46. 10 OKLA. STAT. § 7700-204 (2011). The statute provides that:

A. A man is presumed to be the father of a child if:

1. He and the mother of the child are married to each other and the child is born during the marriage;

2. He and the mother of the child were married to each other and the child is born within three hundred (300) days after the marriage is terminated by death, annulment, declaration of invalidity, dissolution of marriage or after decree of separation;

3. Before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within three hundred (300) days after its termination by death, annulment, declaration of invalidity, a decree of separation, or dissolution of marriage;

4. After the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:

- a. the assertion is in a record with the State Department of Health, Division of Vital Records or the Department of Human Services,
- b. he agreed to be and is named as the child's father on the child's birth certificate, or
- c. he promised in a record to support the child as his own; or

5. For the first two (2) years of the child's life, he resided in the same household with the child and openly held out the child as his own.

B. A presumption of paternity established under this section may be rebutted only by an adjudication under Article 6 of the Uniform Parentage Act.

*Id.*

47. *See* 10 OKLA. STAT. §§ 7700-601 through 7700-637.

was repealed when the Uniform Parentage Act was enacted. Oklahoma law used to provide that a man is presumed to be the father of the child if, before the child's birth, he cohabited with child's mother and the child was born within ten months after the termination of the cohabitation.<sup>48</sup> If that paragraph was still part of the parentage act and if it could be interpreted in a gender neutral manner, it would provide for parentage of children born into either a same-sex or opposite-sex relationship without requiring that the same-sex couple tried to marry but could not prior to *Bishop* and that the non-biological parent acted *in loco parentis*.

A fourth issue concerns the relationship between the supreme court cases and the statutes on artificial reproduction, which were apparently overlooked in all of the cases so far. Oklahoma statutes provide that:

The technique of heterologous artificial insemination may be performed in this state by persons duly authorized to practice medicine at the request and with the consent in writing of the husband and wife desiring the utilization of such technique for the purpose of conceiving a child or children.

Any child or children born as the result thereof shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique.

No person shall perform the technique of heterologous artificial insemination unless currently licensed to practice medicine in this state, and then only at the request and with the written consent of the husband and wife desiring the utilization of such technique. The said consent shall be executed and acknowledged by both the husband and wife and the person who is to perform the technique, and the judge having jurisdiction over adoption of children, and an original thereof shall be filed under the same rules as adoption papers. The written consent so filed shall not be open to the general public, and the information contained therein may be released only to the persons executing such consent, or to persons having a legitimate interest therein as evidenced by a specific court order.<sup>49</sup>

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48. 10 OKLA. STAT. § 2(2), *repealed by* H.B. 2967, ch. 116, § 62 (2006).

49. 10 OKLA. STAT. §§ 551-553 (2011).

When read gender neutral, and, perhaps, not requiring the parents to be married, the statute does provide a method for the establishment of parentage so long as the statutory procedures are followed. This means that the parties must use a physician, the consent to the procedure must be acknowledged by the parties and the doctor, and the judge of the probate division of the district court. The statute would have apparently solved the issue in *Eldredge*, *Newland*, and *Fleming*.<sup>50</sup> In *Ramey*, however, the donor was a friend of the couple, and it is unclear whether a physician was involved or not. Not complying with the statute would probably not provide a different result than in *Ramey* because the decision was not based on statutes but rather an apparent common law right growing out of the non-biological parent's *in loco parentis* status with regard to the child.<sup>51</sup> A somewhat broader interpretation of the artificial insemination statute that found that the use of a physician was not absolutely required would solve the parentage issue with regard to same-sex female households, whether married or not.

In *Ramey*, the court noted that the donor never had a relationship with the child and was not a party to the case. But suppose that *Ramey* and *Sutton* had allowed the donor to assume a parental relationship toward the child. There would then be three people who would stand *in loco parentis* to the child. Should all three be declared parents?

This has occurred elsewhere. California allows three or more adults to have parental status when failure to do so would prove detrimental to the child.<sup>52</sup> In Pennsylvania, a same-sex female couple contracted with a friend to supply the sperm to conceive two children. The sperm donor, father, was actively involved in the children's life. When the couple split up, the appellate court held that principles of equitable estoppel applied so that the father, as well as the non-biological mother, was required to pay child support. The panel opined that "[w]e are not convinced that the calculus of support arrangement cannot be reformulated, for instance, applying to the

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50. The information concerning how the artificial insemination occurred is not in the appellate opinions.

51. In some states the failure to comply with the artificial insemination statute or case law means that the case will be treated as an ordinary paternity case. *Jhordan C. V. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986); *In re Interest of R.C.*, 775 P.2d 27, 35 (Colo. 1989); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 362 (App. Div. 1994); *C.M. v. C.C.*, 377 A.2d 821 (N.J. Super. Ct. 1977).

52. CAL. FAM. CODE § 7612(c) (West 2016).

guidelines amount set . . . [in] fractional shares to incorporate the contributions of another [sic] obligee [or obligor.]”<sup>53</sup>

The final issue is how these cases will be used when the same-sex household consists of two men rather than two women. When the household is composed of two women, the preferred method of conception, artificial insemination, is a relatively simple procedure.<sup>54</sup> But when the household is composed of two men, the procedure is infinitely more complicated. First an egg donor must be procured. Oklahoma’s artificial reproduction statutes provide for egg donations.<sup>55</sup> This requires the use of a physician and a hospital procedure to harvest the egg.

After that, there are two possibilities for a male couple. First, there is traditional surrogacy where a woman is inseminated with the sperm of an intended father. The surrogate carries the child to term and is expected to relinquish her rights to the child after birth.<sup>56</sup> However, there is also gestational surrogacy where the woman who carries the child to term has no genetic connection to the child because a separate woman donated her

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53. *Jacobs v. Schultz-Jacobs*, 923 A.2d 473 (Pa. Super. Ct. 2007). The Supreme Court of Ontario has explicitly held that under these circumstances a child can have three legal parents. *A. (A.) v. B. (B.)*, [2007] W.D.F.L. 1110, 83 O.R. (3d) 561 (Can. Ont. C.A.), 35 R.F.L. (6th) 1. There is also the fascinating scenario involving mitochondrial replacement therapy where the nucleus (containing nuclear DNA) from one egg cell (the “original egg”) is transferred into a different egg cell (the “donor egg”) that has had its nucleus removed but retains its mitochondria and associated mitochondrial DNA. This results in a child genetically related to three people. See Gretchen Vogel, *For Boys Only? Panel Endorses Mitochondrial Therapy, but Says Start with Male Embryos*, SCIENCE (Feb. 3, 2016, 2:00 PM), <http://www.sciencemag.org/news/2016/02/boys-only-panel-endorses-mitochondrial-therapy-says-start-male-embryos>.

54. “The procedure is so simple women can easily perform it themselves. All you need is a mechanical device to suck up and then expel liquid. . . . A turkey baster will . . . do.” *Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 894 & n.3 (1994).

55. 10 OKLA. STAT. §§ 553-554. The sections are practically the same as the sections on artificial insemination. They require the consent of the husband and wife and specify that the child is to be the child of the couple who receive the donated egg and that the egg donor has no rights or obligations.

56. Or in a surrogacy agreement. This was the situation in the infamous Baby M. case where the New Jersey Supreme Court found such an arrangement violated public policy. *In re Baby M*, 537 A.2d 1227, 1247 (N.J. 1988). Parentage of children born of surrogacy or gestational carrier arrangements probably reflects the widest variations of legal schemes today. See, e.g., Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), <http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html>. The legal situation regarding surrogacy is extremely complicated and is beyond the scope of this essay other than to indicate that it is an issue that is must be discussed and decided in order to fully deal with the reproductive problems of same-sex male households.

eggs.<sup>57</sup> Gestational surrogacy requires the process of in vitro fertilization, wherein an embryo is created using sperm and the eggs of a woman other than the surrogate.<sup>58</sup> That embryo is later implanted in the surrogate who has no genetic relation to the eventual child.<sup>59</sup>

Oklahoma is one of the few states with no case or statutory law on surrogacy of either type. There is, however, one unpublished case.<sup>60</sup> In *In re Paternity and Non-Maternity of Infant F.*,<sup>61</sup> the father supplied the sperm to a physician who artificially inseminated an egg donated by an anonymous donor. He then contracted with a surrogate to carry the child to term. The case was brought by the surrogate seeking to be declared not to be the mother of the child. Although the trial court issued the requested order, the Department of Health refused to leave the surrogate off the birth certificate. The appellate panel concluded that although there might be a presumption that the person giving birth to the child is the mother, the presumption could be rebutted by showing a lack of a genetic link between the child and the surrogate.<sup>62</sup>

Eventually, cases with parentage issues involving same-sex male couples will emerge. They will be far more difficult to decide than cases involving same-sex female couples because of the lack of Oklahoma laws on surrogacy and in vitro fertilization.

### III. A Better Rationale

A better rationale for these cases and issues is one that acknowledges that, in same-sex couples, children do not come about by accident. Unlike opposite sex couples, children cannot be the product of a “one-night stand.” On the contrary, children from same-sex families are the product of planned conception that involves some agreement between the parties, either expressly or impliedly.

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57. *Id.*

58. *Id.*

59. See Melissa Jeffries, *In Vitro Fertilization Overview*, DISCOVERY HEALTH (Feb. 1, 2008), <http://health.howstuffworks.com/pregnancy-and-parenting/pregnancy/fertility/in-vitro-fertilization.htm>. Gestational surrogacy was approved in *Johnson v. Calvert*, 851 P.2d 776, 787 (1993).

60. There is also an Attorney General’s Opinion No. 83-162 which provides that surrogacy arrangements violate the provisions on trafficking in children. 1983 OK AG 162. However, it appears that the opinion was directed toward traditional surrogacy and not gestational surrogacy.

61. #97,235 (Okla. Ct. Civ. App. Tulsa 2004) (unpublished), <http://oklegal.onenet.net/oklegal-cgi/isearch>.

62. 10 OKLA. STAT. § 70(A), *repealed by* H.B. 2967, ch. 116, § 62 (2006).



As has been noted by the California Supreme Court in a number of cases, a child that is the result of some form of artificial conception would not have been born without an implicit agreement between the two partners concerning child raising and economic support.<sup>63</sup> As stated in *People v. Sorensen*:<sup>64</sup>

One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible. As noted by the trial court, it is safe to assume that without defendant's active participation and consent the child would not have been procreated.

This means that the parents of a child born through artificial conception are those people that were intended to be the parents.<sup>65</sup> In the case of children born into same-sex relationships, the parents of the children are the couple who set in motion the process by which the children came into being. This rationale eliminates the requirement that the couple were unable to marry, and it also eliminates the requirement that the non-biological parent be *in loco parentis*. It also provides a firm foundation for distinguishing between the intended parents and stepparents and grandparents, and it helps to resolve parentage issues arising out of other artificial reproduction cases.<sup>66</sup>

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63. See *Elisa B v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005).

64. 437 P.2d 495, 499 (Cal. 1968) (citation omitted).

65. There has been an extended discussion in the literature concerning the "intended parents" test for determining parentage in artificial reproduction cases. See, e.g., Heather Kolinsky, *The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights*, 119 PENN ST. L. REV. 801 (2015).

66. Although beyond the scope of this essay, it should be noted that, while this test will resolve most of the family law problems arising out of same-sex relationships, it does nothing for problems of inheritance, particularly intestacy. The statute concerning children born out of wedlock, 84 OKLA. STAT. § 215 (2011), only covers actions by the father of a child born out of wedlock for purposes of making the child a heir. The statute can only apply to same-sex couples if read gender neutral. Thus, the children in *Elbridge*, *Ramey*, and *Fleming* cannot inherit from their non-biological parents, even though those non-biological parents can obtain visitation with the children and are undoubtedly liable for child support. The only avenue for the non-biological parents to ensure inheritance rights for the children is either to make a will or adopt the children in the equivalent of a stepparent adoption. It appears that the adoption statute, 10 OKLA. STAT. § 7503-1.1 (2011), could be read in such a way as to allow stepparent adoptions in same-sex families because it provides that person can adopt who is "either the husband or wife if the other spouse is a parent or a relative of

#### IV. The Retroactivity Issue

One of the thornier issues concerning the legalization of same-sex marriage is the question of retroactivity.<sup>67</sup> There were no doubt a number of same-sex Oklahoma residents that went to one of the states that legalized same-sex marriages and were married there. Or, alternatively, went to a state that recognized civil unions and entered into a civil union.<sup>68</sup> Assume the couple then returned to Oklahoma. Two scenarios could follow from this. First, assume the couple separated. Nobody filed a court action because Oklahoma would not divorce the couple because it did not recognize the marriage and the couple could not afford to return to the place of celebration for the length of time it would take to qualify for a divorce. Second, assume the couple stays together and is still residing in the same household.

The effect on the answer to these fact patterns depends on whether the decision in *Obergefell* is retroactive to facts that occurred prior its date. In one of its recent cases discussing retroactivity in the civil context, *Harper v. Virginia Department of Taxation*,<sup>69</sup> the Supreme Court held that

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.<sup>70</sup>

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the child,” *id.* Thus, the same-sex marriage spouse can adopt because their spouse is the parent of the child.

67. The issue of the retroactivity of *Obergefell* is a much broader issue that can be considered in this essay. There is the issue of whether *Obergefell* can be read to mandate the retroactivity of its decision. And, if so, to what date? The date the couple began to live together; the date they entered into a marriage or civil union in another state; some other date? The answer to this question matters for many of the federal benefits, such as social security and military pension qualification, among other issues. It is also entirely possible that the federal government will work out the answers to federal benefits either for all benefits or on a benefit-by-benefit basis. This essay focuses only on the distinctly family law issues of status and property division.

68. That was indeed the case in *Eldredge* where, as noted, the couple entered into a civil union in New Zealand and also had the union dissolved there.

69. 509 U.S. 86 (1993).

70. *Id.* at 97.

Whether or not the court adheres to this rule will determine a large number of issues with regard to this Oklahoma couple.<sup>71</sup>

A. *The Status Issue*

First, consider the Oklahoma couple that entered into a marriage or a civil union in another state, returned to Oklahoma, and subsequently separated without the blessing of the state. After the decision in the *Bishop* case, is this couple married to each other or not? Does it depend on whether the question is asked in Oklahoma or the state where the marriage took place? Whatever the answer to this question, hopefully the answer will be the same regardless of where it is asked. Otherwise we will find ourselves with the same problems that existed prior to the decision in *Williams v. North Carolina (Williams I)*,<sup>72</sup> when it was possible for a couple to be married in one state and not in another.<sup>73</sup>

If the decisions in *Bishop* and *Obergefell* are to be applied retroactively, then this couple is still married regardless of the fact that the couple is no longer together. Therefore, this couple would need to obtain a divorce before either one of them could marry another person. If, in the meantime, one of them has married another person, the second marriage would be bigamous and invalid.<sup>74</sup>

Couples who lived together in Oklahoma prior to the decision in *Bishop* could have cohabitation arrangements that today would be considered as common law marriages. This will create for same-sex couples in Oklahoma the same problems faced by opposite sex couples with regard to common law marriage. It is entirely possible that, when one member of this couple

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71. Some lower courts are apparently applying *Obergefell* retroactively. In Bucks County, Pennsylvania, a judge ruled that two women were in a valid common-law marriage when one of them passed away in 2013, before marriage equality was recognized in the state. Zack Ford, *Same-Sex Couples Are Securing Retroactive Recognition of Their Marriages*, THINK PROGRESS (Jul. 30, 2015, 11:24 AM), <http://thinkprogress.org/lgbt/2015/07/30/3686006/retroactive-marriage-equality>. In Texas, a district judge ordered the Texas Department of State Health Services to issue an amended death certificate listing a man's same-sex partner as his surviving spouse. Prior to a contempt hearing, the state agreed to amend death certificates for same-sex spouses. Ryan Segall, *Back to the Future: Will Texas Courts Apply Obergefell Retroactively?*, DALL. BAR ASS'N (Sept. 21, 2015, 4:44 PM), <http://www.dallasbar.org/book-page/back-future-will-texas-courts-apply-obergefell-retroactively>.

72. 317 U.S. 287 (1942).

73. One of the benefits of the *Obergefell* decision is it prevented that from happening to same-sex couples who could be determined to be married in the state that performed the marriage but not in the state of their domicile.

74. On the other hand, if *Obergefell* is not retroactive, then this couple is not married in Oklahoma but could be determined to be married in the state where the marriage occurred.

later enters into a ceremonial marriage and, for example, dies, the former cohabitant will come forth claiming to be a common law spouse, resulting in potentially extensive litigation.<sup>75</sup>

It seems that, until this issue is settled, the best practical advice is to counsel a client to obtain a divorce from the former same-sex partner and, if married, to remarry their current spouse.<sup>76</sup>

### *B. The Property Issue*

In the second scenario—where the couple married in another state where it was legal to do so prior to the *Bishop* decision and continued to live together—they no doubt have a common law marriage as of the date the Oklahoma ban on same-sex marriage was declared invalid. If this couple gets divorced, however, the retroactivity issue also will arise.

In Oklahoma, as well as most equitable distribution states, in a divorce case, a trial court must divide between the spouses that property which is classified as marital. However, the separate property must be confirmed to the spouse that owns it.<sup>77</sup> One category of separate property is property that was acquired prior to marriage.<sup>78</sup> Whether property was acquired during the marriage depends on the source of the funds that purchased the property,

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75. For illustrative cases, see *Estate of Allen*, 1987 OK 45, 738 P.2d 142; *Parkhill Trucking Co. v. Row*, 1963 OK 92, 383 P.2d 203.

76. A case somewhat like this is *Estate of Smart v. Smart*, 1983 OK CIV APP 49, 676 P.2d 1379, where Mr. Smart was married to Marie back in Oklahoma. He then went to California and married Gwendolyn. He finally divorced Marie but never remarried Gwendolyn. This led to the issue of whether Gwendolyn was the surviving spouse for property located in Oklahoma. Issues like this are in our future if the *Obergefell* and *Bishop* decisions are retroactive.

77. The property division statute for divorce cases is 43 OKLA. STAT. § 121 (2011). For a full discussion of Oklahoma marital property law, see ROBERT G. SPECTOR, *OKLAHOMA FAMILY LAW: THE HANDBOOK* (2015-2016 ed.)

78. There are many cases. *See, e.g.*, *Colclasure v. Colclasure*, 1995 OK CIV APP 36, ¶ 4, 892 P.2d 676, 677 (“The court properly found the land acquired by Appellee prior to his marriage remained his separate property and that only the improvements to the land, done by joint industry of the parties, were divisible as such.”); *Whitley v. Whitley*, 1988 OK CIV APP 6, ¶ 1, 757 P.2d 849, 850 (“Appellant argues that the trial court erred in ordering her to pay a debt of Appellee acquired prior to the marriage. We agree.”); *Morey v. Morey*, 1981 OK CIV APP 46, ¶ 9, 632 P.2d 773, 775 (“To summarize, at the commencement of this marriage, Wife had virtually no separate property, except what Husband had given her during the courtship. He did not work, nor did he re-invest any of his income. Under these unique circumstances, the couple could not have possibly accumulated any ‘jointly acquired’ property.”); *Chapman v. Chapman*, 1980 OK CIV APP 27, 614 P.2d 90; *Owen v. Owen*, 1938 OK 419, 80 P.2d 628.

not when the property was purchased.<sup>79</sup> Thus, the first day to acquire marital property is the date after the marriage when property is acquired with funds earned during the marriage.<sup>80</sup>

Therefore, in order to determine which property is marital and which property is separate, the court will need to determine when the marriage began. There are three possible dates in the above scenario. If *Bishop* and *Obergefell* are not retroactive, the marriage began when the *Bishop* case declared the Oklahoma law prohibiting same-sex marriage unconstitutional and the parties intended to be married, *i.e.*, a common law marriage as of the date when certiorari was denied on the *Bishop* decision. However, if *Bishop* and *Obergefell* are retroactive, the issue then is retroactive to when? It could be retroactive to the date the couple married in another states. Or, it could be retroactive to the date the couple began cohabiting in Oklahoma and would have been married if they were allowed to do so.

Obviously the earlier the date of the marriage, the greater the size of the marital estate that is available for division.<sup>81</sup> For example, if the couple purchased a home prior to the *Bishop* case then, if *Bishop* is retroactive, the home is marital property to the extent that marital funds were used to purchase equity in the home. However, if the cases are not retroactive, only that part of the equity purchased with marital funds after the *Bishop* case is

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79. See *May v. May*, 1979 OK 82, ¶ 6, 596 P.2d 536, 539 (Okla. 1979), where the husband took a sum from his separate savings account and purchased a house in his name after the marriage. (“Its purchase, though after the marriage in point of time, did not *ipso facto* invest the wife with any greater interest in that property than she would have had in the money [before it was spent for this purpose] if that money had remained intact in husband’s separate pre-marriage account.”).

80. *Herndon v. Herndon*, 1972 OK 134, 503 P.2d 545; *Sylvan v. Sylvan*, 1962 OK 171, ¶ 7, 373 P.2d 232, 234 (“Defendant asserts that there is competent evidence showing that the property which plaintiff asserts was jointly acquired during the marriage resulted from defendant’s investing or expending money on hand as of date of marriage or proceeds from the sale of property owned as of said date. We find that such is the case.”); *Colvin v. Colvin*, 1952 OK 267, ¶ 0, 246 P.2d 744, 745 (“*Syllabus by the Court*. 1. Where separate property of a spouse, owned prior to his marriage, is sold and the proceeds are traced into his investment in other property, the identity of his separate property is not lost, and the mere change of the form of the property is not to be considered property acquired by joint efforts of the husband and wife during coverture.”); *Boyes’ Estate v. Boyes*, 1939 OK 85, 87 P.2d 1102.

81. The problem also arises in the alimony context. One of the factors that has always been considered in whether to award alimony, as well as the amount of the alimony, has been the length of the marriage. *Hutchings v. Hutchings*, 2011 OK 17, 250 P.3d 324; *Peyravy v. Peyravy*, 2003 OK 92, 84 P.3d 720; *McLaughlin v. McLaughlin*, 1999 OK 34, 979 P.2d 257.

marital, as well as any increase in value attributable to marital funds or marital labor.

It is possible that our appellate panels could decide that Oklahoma ought to have a third category of property called pre-marital property. This would be property acquired prior to marriage in the name of one party and was acquired in contemplation of marriage.<sup>82</sup> Another approach might be to designate the start for marital property as the date where the couple began their economic partnership. This would correspond with the end date for the acquisition of marital property which is date the parties separate not intending to reconcile, *i.e.*, the end of the economic partnership.<sup>83</sup> While neither date can always be ascertained with particularity, it would bring the beginning date and the ending date into conformity.

Another possibility is to use the concept of quasi-partnership. The concept arose early in Oklahoma's history in the context of void marriages, such as bigamy and incest. In that context, where a couple lived together in a situation where the marriage was actually void, the court has an equitable power to divide the property the couple accumulated during the void relationship. This comes about by analogizing the relationship to a partnership, hence the term quasi-partnership.<sup>84</sup> The court utilizes partnership law—not family law—when it makes the property division.<sup>85</sup> Thus, a reconciliation of the parties does not vitiate the parties' agreement on property division because they are partners and not husband and wife.<sup>86</sup>

This concept could be applied to same-sex couple who get divorced in Oklahoma and whose cohabitation predated the *Bishop* case. By applying

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82. *Coney v. Coney*, 503 A.2d 912 (N.J. Super. Ct. Ch. Div. 1985); *Berrie v. Berrie*, 600 A.2d 512 (N.J. Super. Ct. App. Div. 1991). See also the discussion in Allison Anna Taite, *Divorce Equality*, 90 WASH. L. REV. 1245 (2015).

83. See, e.g., *Weaver v. Weaver*, 1975 OK CIV APP 25, 545 P.2d 1305; see also *Ettinger v. Ettinger*, 1981 OK 130, 637 P.2d 63; *Estate of Keith*, 1956 OK 178, 298 P.2d 423; *Harden v. Harden*, 1938 OK 54, 77 P.2d 721 (1938). For a recent case, see *Marriage of Janitz*, 2013 OK CIV APP 107, 315 P.3d 410.

84. See *Krauter v. Krauter*, 1920 OK 249, 190 P. 1088; *Tingley v. Tingley*, 1936 OK 791, 64 P.2d 865; *Whitney v. Whitney*, 1942 OK 268, 134 P.2d 357.

85. Of course, the "partnership" law looks very much like the normal rules used in equitable division of property.

86. Compare *Hale v. Hale*, 1913 OK 540, 135 P. 1143 with *Whitney v. Whitney*, 1942 OK 268, 134 P.2d 357. The Court of Civil Appeals has taken that approach in a case where it affirmed a trial court determination that although the parties did not have a common law marriage it could divide the parties' property "using equitable principles." The court then decided that case using the same principles it would have used had the court divided property pursuant to 43 OKLA. STAT. § 121. See *Marriage of Roye*, #103,234 (Tulsa 2007) (unpublished).

this concept, the court could divide the cohabitation acquired property by essentially the same standards that it would in dividing the marital property.

The first of the same-sex divorce cases will soon arrive at the appellate level. The retroactivity issues will, of necessity, play a large part in the decision.

#### *IV. Conclusion*

It took a long time, but same-sex marriage is here to stay. Whatever one thinks of marriage equality, one thing is clear: we are only at the beginning of the long road of incorporating same-sex marriages into the body of family law.