SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY COURT
DOMESTIC RELATIONS BRANCH

[redacted] **Plaintiff,** **v.** [redacted] **Defendant.**	**Case No.** [redacted] **Judge Robert Okun** [redacted]

ORDER

[redacted]

RELEVANT PROCEDURAL HISTORY

On June 4, 2014, Plaintiff filed a Complaint for Legal Separation, in which he sought a legal separation, alimony, and the distribution of marital property, including the marital residence located at 1708 Johnson Avenue, NW, Washington DC (the "marital residence"). In his Complaint, Plaintiff asserted that the parties had entered into a common-law marriage in 2004, and purchased the marital residence in 2005. On August 18, 2014, Defendant filed a Motion to Dismiss any claims in the Complaint arising prior to March 3, 2010, which is the effective date of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009

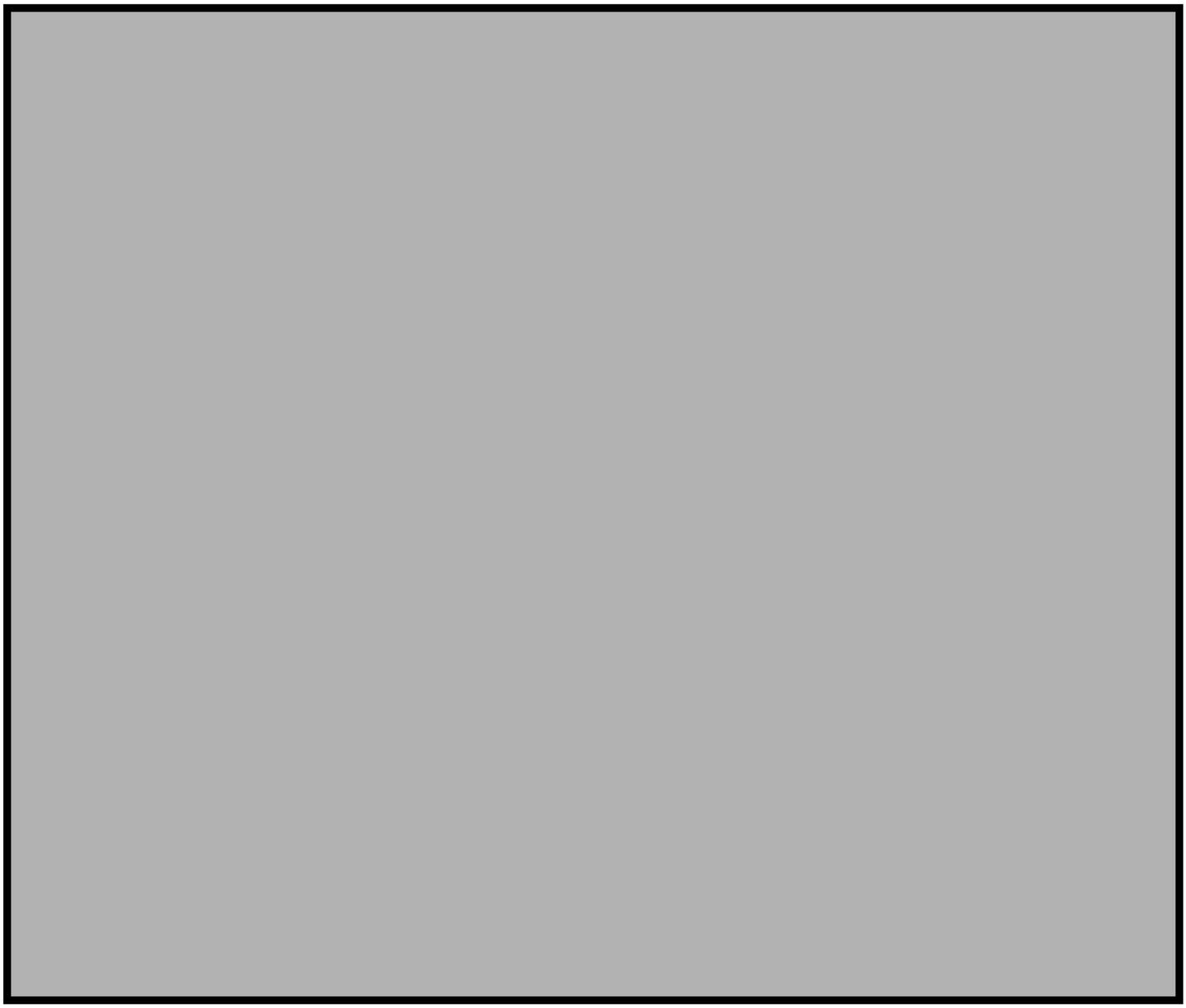
(the "Act"), the statute that legalized same-sex marriage in the District of Columbia. *See* D.C. Code § 46-401(a).

On January 7, 2015, Judge Rigsby issued an Order granting Defendant's request to dismiss all claims from the Complaint that arose prior to March 3, 2010. Plaintiff appealed Judge Rigsby's Order, but the Court of Appeals dismissed the appeal on October 28, 2015 because it had been taken from a non-final and non-appealable order.

On June 7, 2016, this Court conducted a status hearing in the case, during which the Court ordered the parties to submit briefs by June 21, 2016 on the issue of whether this Court could enter a judgment and certify the case to the Court of Appeals pursuant to Super. Ct. Dom. Rel. R. 54(b). On June 27, 2016, Plaintiff submitted a Memorandum in Support of Certification of Issues to the Court of Appeals, arguing that it would serve the interests of judicial economy to certify to the Court of Appeals the issue of whether a common law marriage could have existed prior to the effective date of the Act. Defendant did not file a Memorandum.

On September 13, 2016, Plaintiff filed a Notice of *Lis Pendens* (the "Notice"), stating that there is a legal proceeding pending between the parties that affects real property located in the District, namely the marital residence, and providing a legal description of that property. On October 20, 2016, Defendant filed a Motion to Cancel Notice of *Lis Pendens*, arguing that the Notice should be cancelled because the property described in the Notice is not marital property since it was acquired before the alleged common law marriage occurred.

On December 19, 2016, this Court denied Defendant's Motion to Cancel Notice of *Lis Pendens*, decided not to certify to the Court of Appeals the issue of whether a common law marriage could have existed prior to the effective date of the Act, and required the parties to file



ANALYSIS

A. Motion to Compel

B. Motion to Continue

1. Relevant Legal Principles

The District of Columbia has "long recognized common law marriages," whose traditional elements were "cohabitation as husband and wife, following an express mutual agreement, which must be in words of the present tense." *Mesa v. United States*, 875 A.2d 79, 83 (D.C. 2005). These elements were the traditional elements of common-law marriage because, prior to March 3, 2010, same-sex marriages were not authorized in the District of Columbia. *See, e.g., Jackson v. District of Columbia Bd. of Elections and Ethics*, 999 A.2d 89, 93 (D.C. 2010) (*en banc*); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. 1995). However, in *Obergefell*, *supra*, the U.S. Supreme Court held that state laws that solely

authorized heterosexual marriages violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[1]

The Court of Appeals has not addressed the question of whether *Obergefell* applies to actions occurring prior to the issuance of the decision, but it has addressed the question of whether a decision by the Supreme Court or the Court of Appeals applies to pending cases, even if the events at issue pre-date the relevant appellate decision. In *Davis v. Moore*, 772 A.2d 204, 230 (D.C. 2001) (*en banc*), the Court of Appeals adopted the "firm rule of retroactivity" that the Supreme Court had articulated in cases such as *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), and *Griffith v. Kentucky*, 479 U.S. 314 (1987). More specifically, the Court of Appeals adopted the holdings of the Supreme Court that its decisions "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." *Id.* at 226 (quoting *Harper*, 509 U.S. at 970); *see also The George Washington University v. Violand*, 940 A.2d 965, 978 (D.C. 2007) ("[W]hen (1) the [Supreme] Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events.") (quoting *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995)). The Court of Appeals noted that there may be certain "truly exceptional cases" where new rules of law would not apply retroactively, but held that "simple reliance" interests on the pre-existing rule would be insufficient to create an exception to the firm rule of retroactivity. *Davis*, 772 A.2d at 230-32.[2]

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[1] These clauses apply to the District of Columbia through the Fifth Amendment. *See, e.g., McPherson v. United States*, 692 A.2d 1342, 1347 n.3 (D.C. 1997).

[2] The Court of Appeals noted that new rules would not apply retroactively to cases already closed, or where a court could "find (1) an alternative way of curing . . . the violation, or (2) a previously existing independent legal basis

Although our Court of Appeals has not addressed the issue of whether *Obergefell* applies to actions occurring prior to the issuance of the decision, numerous courts from other jurisdictions have addressed this issue and have consistently held that *Obergefell* applies retroactively to pending cases, even if the events in those cases pre-date the issuance of the *Obergefell* decision. *See, e.g., Ranolls v. Dewling*, _ F.Supp.3d _, 2016 WL 7726597 at *7 (E.D. Tex. 2016) (*Obergefell* applies retroactively to same-sex partner's wrongful death claim); *Ramey v. Sutton*, 362 P.3d 217, 218 (Okl. 2015) (applying *Obergefell* retroactively to same-sex partner's custody claim); *cf. Schuett v. Fedex Corp.*, 119 F.Supp.3d 1155, 1165 (N.D. Cal. 2016) (retroactively applying *United States v. Windsor*, 133 S.Ct. 2675 (2013), which invalidated Defense of Marriage Act's prohibition on recognition of same-sex marriages).

2. Application of Relevant Legal Principles

Plaintiff argues that this Court should retroactively apply the *Obergefell* decision to this case because the case was still pending when *Obergefell* was decided and because none of the exceptions to the firm rule of retroactivity is applicable. The Court agrees.

First, the Supreme Court in *Obergefell* applied its holding to the various parties in those cases, even though the events in those cases pre-dated the issuance of the Court's opinion.[3] Thus, the threshold requirement that the Court apply the new rule to the parties before it has been satisfied.

Second, none of the exceptions to retroactivity is applicable. Indeed, this case was pending when *Obergefell* was decided, and remains pending. Furthermore, there is no alternative way of curing the violation that resulted from the District's ban on same-sex

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(having nothing to do with retroactivity), or (3) . . . a well-established general legal rule that trumps the new rule of law, or (4) a principle of law . . . that limits the principle of retroactivity itself." *Davis*, 772 A.2d at 230; *see also Violand*, 940 A.2d at 978.

[3] *Obergefell* did not involve only one case, but comprised four cases from the states of Michigan, Kentucky, Ohio and Tennessee. *See Obergefell*, 135 S.Ct. at 2593.

marriages prior to March 3, 2010, no previously existing independent legal basis to authorize same-sex marriages prior to March 3, 2010, *see Dean*, 653 A.2d at 308, no general legal rule that would trump the Supreme Court's opinion in *Obergefell*, and no specific anti-retroactivity principle that limits the general principle of retroactivity in this case.[4]

Therefore, the Court finds that *Obergefell* applies retroactively to this case and that the District's prohibition on same-sex marriages prior to March 3, 2010 violated the Due Process and Equal Protection Clauses of the Fifth Amendment.[5] Accordingly, the Court will vacate that portion of Judge Rigsby's January 7, 2015 Order that granted Defendant's Motion to Dismiss any claims arising prior to March 3, 2010, and instead will allow Plaintiff to present any relevant evidence concerning the alleged common-law marriage, regardless of whether that evidence preceded March 3, 2010.

Given the Court's ruling on the *Obergefell* issue, the Court will defer ruling on Plaintiff's Motion to Continue until it hears from the parties at a Status Hearing on May 3, 2017. At this Status Hearing, the parties should be prepared to address the issue of whether they still seek to continue the trial in the case given that the Court has granted Plaintiff's Motion to Compel, and given that it has clarified the scope of the upcoming trial.

Accordingly, it is this 20th day of April 2017, hereby

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[4] The Supreme Court has identified only one anti-retroactivity principle that would trump its general rule of retroactivity – namely, the anti-retroactivity principle set forth by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), where the Court held that new rules of criminal procedure do not apply retroactively to cases on collateral review. *See Reynoldsville Casket Co.*, 514 U.S. at 830. This exception obviously does not apply to this case.

[5] The Court also notes, as further support for its conclusion, the many cases cited by Plaintiff where courts retroactively applied *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated Virginia's anti-miscegenation statute, to inter-racial couples who attempted to marry prior to the *Loving* decision. *See* Plaintiff's Brief at 16-17. The Court further notes the many cases cited by Plaintiff where courts retroactively recognized common law marriages between slaves in Southern states even though slaves were prohibited from marrying each other in these states prior to the Civil War. *See* Plaintiff's Brief at 18-21.

ORDERED that Plaintiff's Motion to Compel Responses to Interrogatories and Request for Production of Documents is **GRANTED**; it is further

ORDERED that Defendant shall provide responses to any outstanding discovery requests by April 27, 2017; it is further

ORDERED that Defendant shall reimburse Plaintiff for the reasonable attorney's fees and costs incurred in filing his Motion to Compel; it is further

ORDERED that Plaintiff shall provide a statement of the reasonable attorney's fees and costs incurred in filing his Motion to Compel within 20 days of the date of this Order; it is further

ORDERED that Plaintiff's Motion to Continue Pending Complete Discovery and Decision on Scope of Trial is **HELD IN ABEYANCE** pending a Status Hearing to be held on May 3, 2017 at 10:30 a.m. in Courtroom JM-13; and it is further

ORDERED that the portion of Judge Rigsby's January 7, 2015 Order granting, in part, Defendant's Motion to Dismiss any claims arising out of an alleged marriage prior to March 3, 2010, is hereby **VACATED**.

Judge Robert Okun
(Signed in Chambers)

Copies via eService to:

Christopher Gowen
Counsel for Plaintiff

[redacted]
Counsel for Defendant