

CAUSE NO.: 2019-CI-12058

IN THE MATTER OF
THE MARRIAGE OF

CHRISTOPHER HOFFMAN

and

MOISES ORTIZ

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IN THE DISTRICT COURT

45th JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

**PETITIONER'S RESPONSE TO
RESPONDENT'S MOTION FOR DECLARATORY JUDGMENT**

TO THE HONORABLE COURT:

COMES NOW the Petitioner, CHRISTOPHER HOFFMAN, and files this response to Respondent, MOISES ORTIZ's Motion for Declaratory Judgment and will show:

I. BACKGROUND & PROCEDURAL HISTORY

1. Petitioner filed this case as a divorce action, alleging he and Respondent (a same sex couple) we married without formalities in 1994.
2. Respondent answered, denying the existence of a marriage.
3. On July 30, 2019, after a hearing on temporary orders, Judge Mary Lou Alvarez found "Petitioner met his burden to establish his prima facie case of a marriage without formalities,"¹ ordered Respondent to pay monthly temporary support to Petitioner, and rendered various injunctions concerning the parties' conduct. The temporary orders remain in effect as of this date.

¹ Judge Alvarez rendered her order on July 30, 2019, but signed the order on January 27, 2020.

4. On January 22, 2021, Petitioner filed an amended petition,² this time seeking relief under the Texas Declaratory Judgment Act, and asking the Court to declare the parties were married, and that Petitioner is entitled to all lawful benefits as an (ex)spouse arising from the dates the parties were marriage. Petitioner also seeks dissolution of the marriage.
5. On July 7, 2021, Respondent filed the instant motion entitled “Respondent’s Motion for Declaratory Judgment First Amended Required Notice (Fiat).” Petitioner files this response showing why the motion is not properly before the Court, and even if it was, it should be denied.

II. ARGUMENT & AUTHORITIES

A. Respondent’s motion is not properly before the Court.

6. Respondent’s motion is not properly before the Court on the following grounds:
 - a. Respondent has *never* filed a counterclaim or pleading asserting any cause of action in this suit, and as such, no judgment can be rendered without a supporting pleading. See TEX. R. CIV. P. 301; see *also* In the Interest of J.O., No. 04-19-00381-CV, 2019 Tex. App. LEXIS 10701, at *10 (Tex. App. Dec. 11, 2019, no pet.) (holding a judgment which is not supported by the pleadings is void).
 - b. Respondent never paid a filing fee for any counterclaim as required by TEX. GOV’T CODE § 101.0611(5);
 - c. Respondent’s motion is tantamount to a motion for summary judgment based on the pleadings, but the motion does not contain the requisites of a

² In his amended Petition, Petitioner corrected the alleged date of the marriage to February 2016.

motion for summary judgment and the hearing on this motion is set with less than 21 days' notice, as would be required by TEX. R. CIV. P. 166A(c).

7. For these reasons, Respondent's motion is not properly before the Court, the Court cannot take action on the same, and the motion must be denied.

B. Respondent misstates the current law in Texas.

8. Respondent contends the Supreme Court's holding in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the "state courts are split as to whether the ruling (in *Obergefell*) applies retroactively to any marriage." Respondent's Mtn. for Declaratory Judgment at 3. Respondent goes on to cite a 2018 opinion by the Fifth Court of Appeals in Dallas acknowledging that neither the Texas Supreme Court nor the U.S. Supreme Court have addressed the issue directly, and then citing a trial court decision in the U.S. District Court for the Eastern District of Texas in 2016, holding that *Obergefell*, in fact, *does* apply retroactively. Respondent cites no authority which supports the contention that there is a split amongst Texas state courts as to whether *Obergefell* applies retroactively, and provides no authority that *any* Texas court has held *Obergefell* does not apply retroactively to same sex couples.
9. Respondent goes on to argue that, until *Obergefell*, it was impossible for the parties to have "agreed to be married" as required by TEX. FAM. CODE § 2.401(a)(2), because the statute only provides only that the marriage of a "man and woman" can be proved, and same sex marriage wasn't allowed prior to *Obergefell*. Thus, Respondent argues, the parties could not possibly have agreed to be married.
10. Only 10 states still allow marriage without formalities – and Texas is one of them. Texas allows a marriage to be proven by evidence that: (1) the parties agreed to

be married, (2) after the agreement, they lived together in Texas as spouses, and (3) they represented to others they were married. See TEX. FAM. CODE § 2.401(a)(2). That said, **direct evidence of an agreement is not required, and may be proved by circumstantial evidence.** *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). And once established, whether formal or informal, a marriage can only be dissolved by legal proceedings or the death of a spouse. *Villegas v. Griffin Indus.*, 975 S.W.2d 745, 750 (Tex. App – Corpus Christi 1998, pet. denied).

11. In 2015, the U.S. Supreme Court held: “... laws ... are ... invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” *Obergefell v. Hodges*, 576 U.S. 644 (2015).
12. Almost all the states which permit informal marriage, including Texas, have (or had at one time) statutory or constitutional prohibitions against same sex marriage.
13. So far, only two state supreme courts have weighed in on the issue. Colorado’s supreme court held that same sex common law marriage *could* exist prior to *Obergefell*. See *In re Marriage of Hogsett & Neale*, 2021 CO 1, ___ P.3d ___ (Colo. 2021). Conversely, South Carolina’s supreme court has held, as a matter of law, same sex common law marriage pre-dating *Obergefell* could *not* exist. See *Spicewood v. Thompson*, 431 S.C. 130, 847 S.E.2d 104 (S.C. 2020).³
14. Thus far, this issue “remains an open question in Texas.” *Hinojosa v. LaFredo*, No. 05-18-01543-CV, 2020 Tex. App. LEXIS 10475, at *20 (Tex. App. – Dallas, Dec. 31, 2020, no pet.) (sidestepping the substantive question and holding instead

³ Conveniently, Respondent only cites the South Carolina case in his motion, but ignores Colorado.

the appellant failed to properly preserve the issue for appeal).⁴ While there have been incidents of courts in Texas recognizing a pre-*Obergefell* same sex common law marriage,⁵ no Texas appellate court has issued any binding authority on the issue, and Respondent's insinuation of the same is just plain false.

C. This is a fact intensive case that requires a trial.

15. Petitioner has demanded a trial by jury and paid the jury fee.

16. At the temporary orders hearing, the following evidence was already admitted:

- a) Matching rings purchased and worn by the parties;
- b) Photographs of the parties wearing the rings at a Christmas party;
- c) Photos of the couple dressed up as king and queen;
- d) A warranty deed from 2000 conveying property to be held jointly by both parties;
- e) A deed of trust for a home equity loan secured by property, executed by both parties;
- f) A Texas Home Equity Affidavit and Agreement secured by property, signed by both parties;
- g) A warranty deed from 2006 conveying property to be held jointly by both parties;
- h) Correspondence from JPMorgan Chase Bank, N.A., addressed to both parties, confirming a joint mortgage loan had been satisfied and released; and

⁴ Respondent cites cherry-picked portions of *Hinojosa* which seemingly supports his position, but fails to disclose to this Court the crux of the case. In fact, the opinion cited by Respondent has been withdrawn and replaced by *Hinojosa v. LaFredo*, No. 05-18-01543-CV, 2021 Tex. App. LEXIS 4309 (Tex. App. – Dallas, June 2, 2021) (which largely omits any analysis of *Obergefell*, and focuses on appellant's failure properly preserve the issue for appeal).

⁵ See, e.g., *Ford v. Freeman*, No. 3:18-cv-3095-B, 2020 U.S. Dist. LEXIS 149176 (N.D. Tex. Aug. 17, 2020) (citing *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 624 (E.D. Tex. 2016) (holding *Obergefell* applies retroactively to same sex couples).

- i) An article from the *San Antonio Express News* in 2015, featuring, by name and in great detail, the parties' new downtown apartment, in which Respondent describes it as "... the culmination of a lifetime."

17. Notwithstanding Respondent's failure to file a pleading supporting the relief he seeks, Petitioner has asserted a declaratory judgment claim, and is entitled to a jury trial on the same. See TEX. CIV. PRAC. & REM. CODE § 37.007 (authorizing a jury trial to determine issues of fact).

18. Even in *Hinojosa* (cited by Respondent to support his position) the trial court held a jury trial to make factual findings (the jury ultimately found no marriage existed, but a jury trial was held, nonetheless). And yet, Respondent attempts to deprive Petitioner of the same in this case.

19. There exist multiple issues of fact in this case, and at least one judge has already found Petitioner has made a *prima facie* showing a marriage existed – a ruling that has been upheld and unchanged at least two more times when attacked by Respondent. This is a case that needs to be decided by a factfinder, and cannot be decided by Respondent's motion.

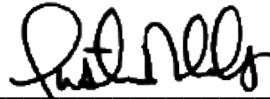
III. PRAYER

WHEREFORE, for the reasons set forth above, Petitioner prays and requests the Court deny Respondent's motion for declaratory judgment, and prays for general relief.

Signature on following page...

Respectfully submitted,

THE NICHOLS LAW FIRM, P.L.L.C.



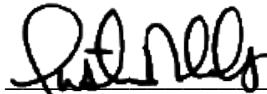
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Certificate of Service

I certify a true and correct copy of the foregoing instrument was served upon all parties/attorneys of record in accordance with TEX. R. CIV. P. 21a on July 20, 2021.

Via E-File

Hector Garza, Esq.
Attorney for Moises Ortiz



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