

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

45<sup>th</sup> JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

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RESPONDENT'S MOTION FOR DECLARATORY JUDGMENT  
FIRST AMENDED REQUIRED NOTICE (FIAT)

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Pursuant to the Second Amended Bexar County Civil District Courts COVID-19 Court Operations Plan, the following information is provided for this setting:

Respondent's, MOISES ORTIZ, **Motion for Declaratory Judgment** is set for hearing on **July 21, 2021 at 9:00 a.m.** in Civil Presiding Court, 100 Dolorosa, San Antonio, Texas, 78205.

The hearing will be conducted on ZOOM. Parties may participate in the hearing by phone or Zoom Video. Case assignments will be announced and posted on ZOOM and on You Tube. The hearing is expected to take Two (2) Hours at best.

The link to Presiding Court ZOOM: 917 895 6796

Additional Information

The hearing is expected to take 1 Hour on Movant's motion.

The Contact information for all attorneys is as follows:

Hector R. Garza, Jr.  
(210) 785-0737  
(210) 365-7619 cell phone  
hector@garzalawgroup.com  
Attorney for Moises Ortiz

Justin P. Nichols  
(210) 354-2300  
justin@thenicholslawfirm.com  
Attorney for Christopher Hoffman

Plaintiff, Christopher Hoffman, and Plaintiff's attorney shall announce for themselves.

Respondent and Respondent's attorneys stand ready to proceed.

An interpreter will Not be needed.

This will be a non-evidentiary hearing, as such no witness testimony be had.

Total number of participants anticipated on the call is expected to be four (4).

A record of the proceedings will be necessary.

MOTION FOR DECLARATORY JUDGMENT

**NOW COMES** Respondent, MOISES ORTIZ, and file Respondent's Motion for Declaratory Judgment, and show:

Request for Service

Service of this document may be had in accordance with Rule 21a, Texas Rules of Civil Procedure, by serving Petitioner's Attorney, Justin Nichols, 405 N St Mary's St., Ste 1000, San Antonio, Texas 78205, email efile@thenicholslawfirm.com.

REQUEST FOR DECLARATORY JUDGMENT

OVERVIEW AND FACTS

Plaintiff filed his Original Petition for Divorce on June 17, 2019 alleging that the parties entered into an informal marriage on February 1, 1994. Petitioner subsequently filed a First Amended Petition for Divorce. Plaintiff's Original Petition for Divorce and First Amended Petition for Divorce are incorporated by reference.

Respondent filed his Original Answer on July 19, 2019 and entered a General Denial as well as an Affirmative Denial as to the existence of an informal marriage. Respondent's Original Answer, incorporated by reference.

A hearing was held on Temporary Orders and a ruling rendered on July 30, 2019. A hearing was held for further Temporary Orders and a ruling rendered on September 4, 2020.

Plaintiff asserts that an informal marriage existed between Mr. Hoffman and Mr. Ortiz as of February 1, 1994. It is undisputed that, prior to June 26, 2015, marriage between two men was not legally permitted in the State of Texas. It was only with the issuance of the Supreme Court's ruling in *Obergefell* that a legal marriage could be entered into by these parties.

*Obergefell v Hodges*, 135 S. Ct. 2584 (2015).

Respondent asserts that, as a matter of law, no informal marriage could have been present prior to June 26, 2015. The Texas Family Code provides two methods for establishing an informal marriage. The first is to file a declaration of informal marriage with the county clerk. Tex. Fam. Code 2.401(a)(1). The second is by showing that 1) the parties "agreed to be married"; 2) that the parties lived together as spouses; and 3) that they "represented to others that they were married. Tex. Fam. Code 2.401(a)(2). The party seeking to establish the existence of an informal marriage "bears the burden of demonstrating the three elements by a preponderance

of the evidence." *Farrell v. Farrell*, 459 S.W.3d 114, 117 (Tex. App.—El Paso 2015, no pet.) (citing *Small v. McMaster*, 352 S.W.3d 280, 282-83 (Tex. App.—Houston [14th Dist.] 2011, pet. denied)); *Miller v Berryhill*, 5:16-CV-078-BQ, , 2017 WL 2493626, at \*5 (N.D. Tex. May 16, 2017). It is undisputed that no declaration of informal marriage has been filed in this case. Plaintiff elects to argue that Obergefell retroactively removed the legal impediment to recognizing an informal marriage between the parties. Respondent would argue that no such determination was established or ruled on by *Obergefell*.

The state courts are split as to whether the ruling applies retroactively as to any marriage, formal or informal. See *In re LaFredo*, No. 05-18-01034-CV, 2018 WL 4561215, at \*1 (Tex. App.—Dallas Sept. 24, 2018, orig. proceeding) (mem. op.) ("The legal question of whether Obergefell is retroactive has not been determined by the Supreme Court of Texas or by the U.S. Supreme Court."); but see *Ford v. Freeman*, 3:18-CV-3095-B, 2020 WL 4784635, at \*1 (N.D. Tex. Aug. 18, 2020) ("the Obergefell holding applies retroactively") (citing *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 624 (E.D. Tex. 2016)).

Prior to *Obergefell*, the Texas Family Code explicitly stated an informal marriage could only be between a man and a woman. Tex. Fam. Code 2.401. This Code was in place at the purported initiation of these parties' informal marriage until June 26, 2015.

The issue of whether *Obergefell* is retroactive is not the deciding factor here, however. Even assuming, arguendo, that Obergefell does apply retroactively, the parties could not have met the requirements of an informal marriage because they could not have "agreed to be married." The Obergefell ruling cannot be held to force parties into a marriage that they did not agree to. See *Lecuona v. Lecuona*, NO. 03-17-00138-CV (Tex. App. Jun. 15, 2018) (declining to find that "Obergefell recognizes an affirmative constitutional right of one spouse to compel an unwilling other spouse to remain married"); *Hinojosa v. LaFredo*, No. 05-18-01543-CV (Tex. App. December 31, 2020) ("Obergefell did not transform every same-sex relationship in the United States into a government-sanctioned marriage overnight."); *Swicegood v Thompson*, 431 S.C. 130 (2020) (finding that the existence of a common-law marriage is precluded prior to Obergefell as a matter of law).

The parties could not have "agreed to be married" as they believed they lacked the legal right to be a married couple during that time. They therefore could not have formed an informal marriage unless they renewed their intention and agreement to be married after Obergefell. See

*Swicegood v. Thompson*, 431 S.C. 130 at 137 (2020). There is no assertion by Petitioner that any such renewal occurred.

Plaintiff cannot overcome the legal impediment to the existence of a common law marriage between these parties prior to June 26, 2015. *Obergefell* enacted a major change in Texas law as it applies to marriage between two men; however, the courts have consistently held that this change is not a blanket ruling recognizing all purported marital relationships from the beginning of time. In this case, the parties did not enter into a formal marriage and did not reassert their intention to be married after the *Obergefell* ruling was entered. There can be no finding that they were married prior to June 26, 2015.

Respondent moves that the Court find that *Obergefell* did not apply retractably, as a result No Marriage could have or did exist between the parties and moves pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code for a declaratory judgment from this court declaring that No Marriage could have or did exist between the parties.

Pursuant to § 37.009 of the Texas Civil Practice and Remedies Code and giving the bad faith displayed and exhibited by Plaintiff, Respondent is and should be entitled to an award of attorney fees for this declaratory action.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that an entry of judgment:

1. Declaring that No Marriage could have or did exist between the parties; and
2. That any and all temporary spousal support paid by Respondent to Petitioner be reimbursed to Respondent; and
3. Awarding attorney's fees in the amount of Two Thousand Five Hundred Dollars (\$2500.00) to be paid Petitioner.

#### **PRAYER**

Plaintiff prays the Court, after notice and hearing or trial, enter judgment in favor of

Respondent, enter a Declaratory Judgment as requested, award Respondent the paid spousal maintenance and attorney fees as requested and such other and further relief as Plaintiff may be entitled to in law or in equity.

Respectfully Submitted,

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By: /s/ Hector R. Garza, Jr.  
Hector R. Garza, Jr.  
State Bar No. 24048483  
Attorney for Moises Ortiz

SIGNED on \_\_\_\_\_.

\_\_\_\_\_  
JUDGE PRESIDING

**Certificate of Service**

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on July 7, 2021.

Christopher Hoffman  
Justin Nichols  
405 N St Mary's St., Ste 1000  
San Antonio, Texas 78205  
Efile: [efile@thenicholslawfirm.com](mailto:efile@thenicholslawfirm.com)

/s/ Hector R. Garza, Jr.