

AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
Date: October 2019
From: A. Eric Johnston
Re: Alabama's New Marriage Law

Effective August 29, 2019, the process for how to marry in Alabama changed. Previously, marriage in Alabama was by a state issued license, later clarified to be between one man and one woman, both by statute and constitutional amendment. SLI co-authored those laws. The Judge of Probate issued the license in the county where the man and woman lived. The statute provided that the probate judge “may” issue a marriage license. It appeared not to be a mandatory requirement. While the sentence structure caused some confusion, it was generally held that probate judges would issue marriage licenses.

On August 26, 2015, the U.S. Supreme Court decided the case of *Obergefell v. Hodges*. It held that same-sex marriage is a constitutional right in all states. The Alabama Supreme Court in *Ex Parte State of Alabama ex rel Alabama Policy Institute and Alabama Citizens Action Program* had decided on March 3, 2015 that Alabama's marriage laws were constitutional. SLI represented API and ALCAP in that case. Pursuant to the Supremacy Clause of the U.S. Constitution, the *Obergefell* opinion would overrule the Alabama opinion and therefore Alabama's law requiring marriage to be between one man and one woman was unconstitutional. *Obergefell* became the law of the land and Alabama, like the rest of the states, would now be required to recognize same-sex marriage.

This put Christian probate judges in a dilemma. A number of those judges refused to issue marriage licenses and seemed to come under the “may” exception mentioned above. However, there was still a very real possibility of additional litigation against those judges for violating the new civil marriage rights accorded to homosexuals by *Obergefell*. In response to this, SLI proposed to legislators legislation that would protect the religious rights of those judges. We drafted very specific proposals that would have recognized the judges' religious rights to be excused from having to issue same-sex marriage licenses. However, legislators failed and, in some cases, refused to support those proposals. As an alternative, Senator Greg Albritton proposed a change to the marriage law which would return it to a “contractual” basis thereby removing the need for a probate judge to “approve” a license. This would remove the threat to the religious principles of those objecting judges. This became the only alternative. Understanding how we have come to this point, the following paragraphs will give information on the new law. There are references to links for additional information.

The new “Alabama Marriage Certificate” is issued by the Alabama Department of Public Health and is available in county probate offices. Information is provided on the form by the persons who are marrying to the Probate Court. When it is properly filed with the court, the marriage exists officially. The certificate and a list of frequently asked questions are found at: <https://www.Alabamapublichealth.gov/vitalrecords/marriage-certificates.html>.

This is a contractual form of marriage. It dates back to earlier times before marriage licenses and the participation of Probate Courts were involved. One of the main reasons for the involvement of courts initially was to combat sexually transmitted diseases. Blood tests were required to be done before a marriage license would be issued. Tests for STDs are no longer required. However, the process of requiring marriage licenses continued. Because of the issues explained above, those licenses no longer are issued. By having a contractual form of marriage, it takes away the confrontation between the Christian principles of believing probate judges and the marriages of same-sex persons. Since the new law envisions same-sex marriages as well as traditional marriage, “man and wife” or similar references are omitted and the word “spouse” is substituted. Spouse is a legal term often used in estate planning and other such documents, however here, it is meant to avoid the gender issue.

For churches and Christians, the biggest question is whether this new law obviates the need for a ceremony. It does not. The wedding ceremony before a minister is a sacrament in most religions and a requirement of Scripture. That predates laws regulating marriage. Additionally, couples may have a civil ceremony. Civil ceremonies are customarily done by persons who do not have religious beliefs concerning marriage or who are getting married quickly for convenience and less expense. In some countries, couples have civil and church ceremonies. This affects the laws of inheritance and other rights. That is not the case in Alabama. Marriage pursuant to the new contract, with or without a civil or religious ceremony, commits the married persons to all of the rights and privileges of laws.

We are saddened by the advent of same-sex marriage in America. We tried to preserve traditional marriage in Alabama and having been overruled by *Obergefell*, we tried to reserve religious rights, but having been overruled by the Legislature, we are left, in essence, with the new marriage contract law. This law is not a statement of “gay marriage,” but a recognition of the unfortunate situation in which we find ourselves, but with protection to religious principles of those who do not wish to be required to participate in what they believe to be sinful activities. The war of rights and words over the various aspects of the LGBTQ+ agenda will continue. This is just one aspect of it.