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## Whatever Your Thoughts on Marriage, Gay Divorce is a Concern

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# Deseret News

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## Nathan B. Oman: Whatever your thoughts on marriage, gay divorce is a concern

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Later this year, the Supreme Court will consider whether the Constitution contains a right to same-sex marriage. The great irony of this debate is that it focuses almost exclusively on happy families. The reality, however, is that the law of marriage has very little to do with happy families. It exists mainly to manage failure.

Advocates of same-sex marriage point to the happiness of newly married gay couples in Seattle or Boston. For them, same-sex marriage is about facilitating these joyful moments. Advocates for traditional marriage focus on happily intact nuclear families with a father and a mother. Their worry is that declaring gender irrelevant to marriage will undermine the web of social expectations that support such families.

This is all a bit odd. In theory these debates are about the law of marriage. That law, however, makes very little difference for happy families. To be sure, this is not entirely true. Tax laws confer a benefit on (some) married couples, and there are a few other legal benefits that the blissfully wedded can claim.

Mainly, however, the law of marriage is about divorce. When a long-term relationship fails, the economic expectations around which the couple has ordered its life also fail. The disappointment of those expectations creates losses that must be allocated, and the property relations ordered by those expectations must be unwound. This is what the law of marriage actually does when it isn't providing a symbolic focus for public debates over homosexuality.

Regardless of whether states choose to allow same-sex couples to formally marry, the reality is that gay people will meet, fall in love and choose to live their lives together. Many of these same-sex unions will fail, leaving the predictable squabbles over property and legal obligations. Society has no interest in creating legal uncertainty in such cases. Without clear rules regarding gay divorce, we encourage wasteful wrangling that is to the benefit of no one but the lawyers.

In 2003, Julie and Hillary Goodridge were the successful plaintiffs in the Massachusetts case declaring for the first time a right to same-sex marriage. Pictures of the happy couple were published around the country. By 2006, however, their relationship had broken down, and they filed for divorce in 2009.

Divorce is hardly the goal for same-sex marriage advocates, but it is the major function of the law of same-sex marriage. Indeed, the law to which the Goodridges' gained access in 2003 was largely dormant until their relationship began to sour three years later.

Of course, the Goodridges' relationship could have dissolved regardless of what the Massachusetts Supreme Court held in 2003, leaving essentially the same set of legal questions that the Suffolk County Probate and Family Court was asked to resolve in 2009.

In the face of cases like the Goodridges', courts across America have been doing what courts always do: struggling for just and sensible outcomes where the law is unclear. Even in states where same-

sex marriage is not recognized, the courts must find ways of dealing with the reality of gay divorce.

Amid the rhetoric of equality and family values, it's worth remembering that every day, in every state there are same-sex couples that are tearing apart lives that have been long intertwined. They are not the happy families that dominate the debates over same-sex marriage. They are, however, the kind of people for whom the law of marriage is designed.

We are better off providing them with clear, fair rules. Doing that involves giving them de facto access to the rules of marriage. Those who wish to preserve the label of "marriage" for traditional marriage should favor civil union laws providing such rules. They should also realize, however, that clear, fair rules governing separation and divorce are largely what the law of marriage is about, regardless of political sturm und drang over happy families.

Whatever one thinks about the politics of same-sex marriage, it seems to me, everyone ought to be in favor of a law of gay divorce.

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