Same-Sex Marriages and Gender Identity Issues

<http://www.orsinger.com/PDFFiles/Same-sex-marriage.pdf>

Richard R. Orsinger
richard@ondafamilylaw.com
http://www.orsinger.com

Orsinger, Nelson, Downing & Anderson, L.L.P.
San Antonio Office:
1717 Tower Life Building
San Antonio, Texas 78205
(210) 225-5567
http://www.orsinger.com

and

Dallas Office:
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
(214) 273-2400
http://www.ondafamilylaw.com

2015 Family Justice Conference
Texas Center for the Judiciary
January 28-29, 2015
Westin Riverwalk, San Antonio, Texas

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Certified: Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

Texas Bar Foundation *Dan Rugeley Price Award* for "an unreserved commitment to clients and to the practice of our profession" (2014)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2013)
State Bar of Texas Family Law Section Best Family Law CLE Article (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
State Bar of Texas *Certificate of Merit*, June 2004
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
Association for Continuing Legal Education's Award for Best Program (*Enron, The Legal Issues*) (Co-director, March, 2002)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)

State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Certificate of Merit*, June 1997
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1996
State Bar of Texas *Certificate of Merit*, June 1995

Professional Recognition:

Listed as San Antonio Scene's Best Lawyers in San Antonio (2014)
Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2014)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2013)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2012)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Listed as Family Lawyer of the Year by BEST LAWYERS (2012)
Listed as Family Lawyer of the Year by BEST LAWYERS (2011)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2013)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2014); Appellate Law (2007-2014)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011, 2013 & 2015)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course.
- Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
—Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)

—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)

—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)

—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); *Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code* (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Property Puzzles: 30 Characterization Rules, Explanations & Examples (2009); Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003); Court-Imposed Sanctions in Texas (2012)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeals and Mandamus) (2012)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

Other CLE: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991); Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers` - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); Texas Supreme Court Historical Assn: 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); Family Law Update - 2013, Judicial Conference (2013); Family Law and Fiduciary Duty, Fiduciary Litigation Course (2013); Two Hot Topics in Family Law: Same-Sex Marriage; Mediated Settlement Agreements, 2014 Judicial Conference, Texas Center for the Judiciary (2014); SBOT Advanced Personal Injury Course (2014), Court-Ordered Sanctions; Family Justice Conference (2015), Same-Sex Marriage and Gender Identity Issues

Continuing Legal Education Webinars: *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012); *Family Law Update - 2013*, Texas Center for the Judiciary Video

Preface

1. The assigned topic was same-sex marriage, but in writing the paper it became apparent that same-sex marriage is inextricably intertwined with the legal status of homosexuality (more generally gay and lesbian relationships) and closely connected to developing ideas about gender identity.

2. On these subjects the law is changing as the culture changes, and the culture is changing as the law changes.

3. As was true with race relations, same-sex marriage raises issues of Federalism, of a Federal government born of defined powers, expanding its area of control by entering a domain originally and traditionally reserved to the states, in this case family relations, in order to protect the rights of individuals as against state power.

4. The evolution of ideas surrounding same-sex marriage also involves interactions between the President, Congress, Governors, Legislatures, people voting on constitutional amendments and referenda, and judges ruling on cases, particularly Federal judges, and ultimately Justices on the U.S. Supreme Court.

5. The paramount legal issue on same-sex marriage for Texas is whether the 14th Amendment to the U.S. Constitution requires Texas to grant and/or recognize same-sex marriages. If not, then does the Full Faith and Credit Clause of the U.S. Constitution require recognition of same-sex marriages from elsewhere. If not, then the same question arises for choice-of-law principles and comity.

6. If the answer is "no" to these three questions, then we must address alternative theories of recovery that are not family law doctrines.

7. The culture and the law are also changing with respect to the idea of gender, how to determine it and the legal consequences that flow from gender and changes in gender identity. In this area, cultural changes in segments of our society are ahead of changes in the law. It seems likely, though, that changes relating to the legal status of gay and lesbian relationships will lead to changes in the legal status of gender, and that process of legal change has already begun.

8. We live in interesting times.

Richard R. Orsinger
January 28, 2015

Table of Contents

SAME SEX MARRIAGES AND GENDER IDENTITY ISSUES

by

Richard R. Orsinger
Board Certified in Family Law
& Civil Appellate Law by the
Texas Board of Legal Specialization

I. INTRODUCTION. The United States is in the midst of a rapid and dramatic change of cultural mores and laws governing same-sex marriages. The Texas Constitution and Family Code prohibit same-sex marriage in Texas and deny recognition in our State to same-sex marriages created elsewhere. Those Texas laws have been held unconstitutional by a Federal District Judge in San Antonio, whose decision is stayed pending resolution of the appeal to the U.S. Court of Appeals for the Fifth Circuit. These laws have also been declared unconstitutional by a Bexar County district judge, whose decision is on appeal to the San Antonio Court of Appeals. A Dallas County District Judge previously declared the laws to be unconstitutional, but that decision was reversed by the Dallas Court of Appeals, whose decision in turn is under submission to the Texas Supreme Court. A Travis County district judge granted an agreed same-sex divorce, and the Austin Court of Appeals ruled it could not be appealed. That decision also is under submission to the Texas Supreme Court.

At this moment in time (mid-January, 2015), the preeminent question is whether the validity of a marriage is a question of state law or Federal law. If Federal law, then all states will be required to create same-sex marriages and to recognize the validity of same-sex marriages celebrated elsewhere. If Federal law does not control the question, then the validity of a marriage will continue to be governed by state law, and the question becomes "which state's law?"

State laws on same-sex marriage differ, some specifically authorizing same-sex marriage, some disallowing it but allowing civil unions instead, some explicitly banning same-sex marriage, and some making no statement for or against same-sex marriage. Some states which ban same-sex marriage do so by legislation alone, and some (like Texas) by constitutional amendment and legislation.

While the main focus has recently been on same-sex marriage, there are also important cultural and legal changes occurring regarding gender identity. Gender was once a simple matter of anatomy at birth, but no longer. Now doctors can use surgery and medicines to alter the sexual features of a person. There is increasing acceptance of the idea that gender is a self-perception that is not exclusively based on anatomy at birth, or anatomy at all. Some countries and some American states have formally recognized a person's ability to change his/her legally-recognized gender, with or without surgery. Texas has a statute and case law on the issue of gender identity.

II. POPULAR OPINION ON SAME-SEX MARRIAGE. According to analysis of the 2010 U.S. Census, conducted by the Williams Institute on Sexual Orientation and Gender Identity Law of the UCLA School of Law, nearly 1.3 million Americans identify themselves as belonging to a same-sex couple. According to the study, 46,400 same-sex couples live in Texas, with the greatest percentages being in Dallas and Travis Counties, followed by El Paso, Bexar, and Harris Counties.

Popular opinion is shifting in favor of same-sex marriage. Components of the medical and psychological community were in the vanguard of the shift. The American Psychiatric Association classified homosexuality as a mental disorder in the 1952 edition of its Diagnostic and Statistical Manual of Mental Disorders. That group of psychiatrists declassified homosexuality as a mental disorder in 1973. The American Psychological Association (APA) followed suit in 1974. In 1975, the APA adopted a resolution stating that "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities" and urging "all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations."[1] Components of the business community were early to shift their opinions. Walt Disney Company started offering health benefits for partners of its gay and lesbian employees in 1997. Marriott International, which manages hotels worldwide, started the same policy in 1999. Technology companies like Lotus and Apple did likewise. On February 7, 2013, 278 employers or organizations representing employers filed a amicus curiae brief in U.S. Supreme Court, in the *U.S. v. Windsor* case, urging the Court to invalidate Section three of the United States Congress' Defense of Marriage Act.[2] A July, 2013, Gallup Poll asked 1,055 respondents "Would you vote for or against a federal law that would make same-sex marriages legal in all 50 states?" 52 said "yes," 43 said "no," and 4 said "no opinion."[3] An exit poll taken by NBC during the November 2014 election showed that respondents were equally divided, 48%–48%, on whether same-sex marriage should be recognized in their state.[4] Surveys of Texas residents over the last four years show support for same-sex marriage varying from 29% to 48%, but never exceeding 50%. In all but one poll, the number of those opposed exceeded the number of those in favor of same-sex marriage.[5]

III. IS RECOGNITION OF SAME-SEX MARRIAGE REQUIRED BY THE 14TH AMENDMENT?

A. OVERVIEW. The validity of a marriage in the USA has historically been a question of state law. *In re Burris*, 136 U.S. 586 (1890) ("The whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States"); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930) ("when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States"). Recently, however, litigants have successfully argued that the 14th Amendment to the U.S. Constitution requires states to grant same-sex marriages and to recognize as valid same-sex marriages that were created elsewhere. The winning argument couples U.S. Supreme Court precedent recognizing that the right to marry is a fundamental right with Supreme Court precedent that the 14th Amendment's equal protection and due process of law clauses invalidate state laws that impinge on the fundamental right to marry, and to lead to the conclusion that choosing a spouse, even of the same gender, is a fundamental right.

The Federal Courts of Appeals are falling in line with the view that the 14th Amendment preempts state laws that refuse to recognize the validity of same-sex marriage, with the notable exception of the 6th Circuit which ruled the other way, and not including the 5th Circuit (Texas, Louisiana and Mississippi) which has several such cases under advisement. The U.S. Supreme Court has avoided the question several times, but shortly before this article was written the Supreme Court granted review of the 6th Circuit Court of Appeals' decision to allow Tennessee, Kentucky, Ohio and Michigan to continue to enforce laws that bar recognition of same-sex marriages.

The actions of the U.S. Supreme Court in this area so far have been odd. In *Baker v. Nelson*, 409 U.S.

810 (1972), the Supreme Court dismissed an appeal claiming that the 14th Amendment required states to recognize same-sex marriage, saying in a single sentence that the case presented no substantial federal question. In *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the Supreme Court dismissed an appeal from a ruling invalidating California's constitutional bar against same-sex marriages, in which the California Secretary of State refused to defend the law on appeal. The Supreme Court said that no case or controversy was presented. In *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), a 5-to-4 majority of the Supreme Court invalidated Section 2 of the Federal Defense of Marriage Act. Justice Kennedy's Majority Opinion said that Congress's vote to recognize only same-sex marriage was attributable to bias against homosexuality, but he rested the decision on the principle that Congress did not have the authority to define marriage, a matter traditionally reserved to state law.

On January 6, 2014, the U.S. Supreme Court denied certiorari in three cases where U.S. courts of appeals had invalidated state constitutions and statutes that denied the validity of same-sex marriages. The result was to leave in place circuit court decisions invalidating such laws in West Virginia, North Carolina, South Carolina, Kansas, Colorado, and Wyoming.

One year later, on January 16, 2015, the U.S. Supreme Court consolidated four appeals from the 6th Circuit and granted certiorari in: 14-556, *Obergefell, James, et al. v. Hodges, Richard, et al.*; 14-562, *Tanco, Valeria, et al. v. Haslam, Gov. of Tenn., et al.*; 14-571, *Deboer, April, et al. v. Snyder, Gov. of Michigan, et al.*; and 14-574, *Bourke, Gregory, et al. v. Beshear, Gov. of Ky, et al.* The Court issued the following order:

> The cases are consolidated and the petitions for writs of certiorari are granted limited to the following questions:
>
> 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
>
> 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?
>
> A total of ninety minutes is allotted for oral argument on Question 1. A total of one hour is allotted for oral argument on Question 2. The parties are limited to filing briefs on the merits and presenting oral argument on the questions presented in their respective petitions. The briefs of petitioners are to be filed on or before 2 p.m., Friday, February 27, 2015. The briefs of respondents are to be filed on or before 2 p.m., Friday, March 27, 2015. The reply briefs are to be filed on or before 2 p.m., Friday, April 17, 2015.

It is interesting to note that the Supreme Court did not indicate that it would consider whether the Full Faith and Credit Clause of the U.S. Constitution requires a state to recognize the same-sex marriage validly created in another state.

B. ANALOGY TO RACE-BASED DISCRIMINATION. The legal issues surrounding same-sex marriage and civil unions bear a resemblance to racial discrimination. The post-Civil War adoption of the Fourteenth Amendment created a right of U.S. citizens to be free from illegal discrimination under state law (i.e., discrimination based on race, creed, national origin). The 1871 Civil Rights Act (the Anti Ku Klux Klan Act), codified at 28 U.S.C. § 1938, permits a person who is the victim of illegal discrimination to sue defendants, including state officials, for money damages. Section 1983 interfaces with other Federal laws to permit Federal judges to grant injunctive relief and declaratory judgment relief apart from damages.

Solving the problem of racial discrimination involved a shifting of power from the states to the Federal government. Since the Federal court system is where lawsuits to enforce Federal statutes and U.S. Constitutional provisions are typically brought, solving the problem of racial discrimination also involved a shifting of power from the state legislatures, state courts, and state voters, to Federal judges.

Proponents of equal treatment for same-sex marriage ("marriage equality") are following the path blazed by Thurgood Marshall and others to eliminate racial discrimination, in order to invalidate laws prohibiting and refusing to recognize same-sex marriages. In some states, when state judges have used state constitutional equal protection and due process provisions to invalidate laws rejecting same-sex marriages, the voters responded by amending the state constitution to specifically exclude same-sex marriage from equal protection and due process guarantees. Where this occurred, it essentially eliminated the power of state court judges to invalidate such laws based on the state constitutions. That forced the focus to shift to the U.S. Constitution to try to override laws passed by legislatures and constitutional amendments adopted by voters.

C. THE 2013 VIOLENCE AGAINST WOMEN ACT. On March 7, 2013, President Obama signed the new amended Violence Against Women Act, which contained the following non-discrimination clause:

> No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, *gender identity* (as defined in paragraph 249(c)(4) of title 18, United States Code), *sexual orientation*, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994 (title IV of Public Law 103-322; 108 Stat. 1902), the Violence Against Women Act of 2000 (division B of Public Law 106-386; 114 Stat. 1491), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (title IX of Public Law 109-162; 119 Stat. 3080), the Violence Against Women Reauthorization Act of 2013, and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women. [Emphasis added.]

This portion of the Act was criticized in a March 6, 2013 statement by the chairmen of four committees and one subcommittee of the U.S. Conference of Catholic Bishops, which said:

> Unfortunately, we cannot support the version of the "Violence Against Women Reauthorization Act of 2013" passed by the House of Representatives and the Senate (S. 47) because of certain language it contains. Among our concerns are those provisions in S. 47 that refer to "sexual orientation" and "gender identity." All persons must be protected from violence, but codifying the classifications "sexual orientation" and "gender identity" as contained in S. 47 is problematic. These two classifications are unnecessary to establish the just protections due to all persons. They undermine the meaning and importance of sexual difference. They are unjustly exploited for purposes of marriage redefinition, and marriage is the only institution that unites a man and a woman with each other and with any children born from their union.[6]

The provision only prohibits discrimination against gays and lesbians and transgender persons in the delivery of services funded under the statute, but the Bishops were no doubt reacting to Congress's decision to associate disparate treatment of gays, lesbians and transgender persons with

discrimination based on race, religion, national origin or sex, which is constitutionally prohibited.

D. FEDERAL COURT CASES. While a number of relevant Federal Court cases have been decided by Federal district judges, the focus has shifted to the Federal courts of appeals and ultimately to the U.S. Supreme Court. The following review of Federal cases is at the Federal appellate level, except for the one Federal district court case invalidating Texas law banning same-sex marriage, a decision which, at the time of this writing, is under submission to the Fifth Circuit Court of Appeals.

1. U.S. Supreme Court Decisions.

a. ***Baker v. Nelson.*** In *Baker v. Nelson*, 409 U.S. 810 (1972), the U.S. Supreme Court considered an appeal from the Minnesota Supreme Court, which had rejected a claim that a Minnesota law banning same-sex marriage did not violate the U.S. Constitution. The U.S. Supreme Court dismissed the appeal "for want of substantial federal question."

b. ***Hollingsworth v. Perry.*** After the California Supreme Court held that limiting marriage to opposite-sex couples violated the California Constitution, California voters passed a ballot initiative known as Proposition 8, amending the California Constitution to define marriage as being a union between a man and a woman. Some same-sex couples brought suit in Federal district court in California to declare the state constitutional provision unenforceable. The State of California refused to defend the validity of the constitutional provision, but proponents of the constitutional amendment were allowed to intervene to defend the amendment. The Federal district judge declared that the constitutional provision violated the Fourteenth Amendment's Equal Protection and Due Process of Law Clauses. The State of California refused to appeal, but the proponents of the constitutional amendment were given leave to conduct the appeal. The U.S. Court of Appeals for the Ninth Circuit certified a question to the California Supreme Court asking whether the appellants had standing to appeal. The California Supreme Court said "yes." The Ninth Circuit then considered the merits, and affirmed the district judge's ruling, invalidating the provision in the California constitution. On June 26, 2013, in a 5-to-4 vote, in *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) (Chief Justice Roberts voting in the majority, with Justices Kennedy, Thomas, Alito, and Sotomayor dissenting), the U. S. Supreme Court held that, because the court order did not grant or deny relief to or against the intervenors, as a matter of Federal law the intervenors had no standing to appeal the case. The U.S. Supreme Court vacated the Ninth Court of Appeals' decision and dismissed the appeal, leaving the Federal District Court's ruling standing unreviewable and the California constitutional provision unenforceable.

c. ***U.S. v. Windsor***. On June 26, 2013, in *U.S. v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675 (June 26, 2013), the U.S. Supreme Court declared Section 3 of the Defense of Marriage Act of 1996 ("DOMA") unconstitutional. The Majority Opinion was written by Justice Kennedy, who sided with the Court's four "liberal" judges. The Court held that it was unconstitutional for the Federal government to refuse to recognize a marriage between persons of the same sex when that same-sex marriage was recognized under the law of the state where the parties reside. The Supreme Court did *not* rule that states are required to permit same-sex marriages or that states are required recognize same-sex marriages originating elsewhere. The Texas law that courts must ignore same sex marriages is still in force, except to the extent federal law preempts state law, primarily with regard to federal benefits and reporting income to the IRS.

Although Justice Kennedy attributed DOMA to an indefensible bias on the part of Congress against gays and lesbians, decried the legal basis for the decision was not that such discrimination was

unlawful but rather that principles of federalism protected the States' right to regulate marriage without interference from Congress. Justice Kennedy's Opinion promulgated the rule that the law of the state of *residence* controlled the validity of a marriage. This outcome was not very satisfactory to proponents of marriage equality, who would have preferred that the law of the *place of celebration* be determinitive.

In *State v. Naylor*, 11-0114, now pending in the Texas Supreme Court, the Texas Attorney General filed a brief arguing that the decision in *U.S. v. Windsor* did not invalidate Texas law banning same-sex marriages.[7] The AG's Brief says:

> The U.S. Supreme Court's decision in *United States v. Windsor* reaffirms the sovereign authority of each State to define marriage and make laws concerning the marital status of its residents. While the Court's holding invalidates Congress's decision to use the traditional definition of marriage for all federal-law purposes, the Court's reasoning relies in large part on Section 3's interference with the States' ability to define and regulate marriage within their borders. Any attempt to use *Windsor*'s holding to attack state laws that limit marriage and its attendant rights—such as divorce—to the union of one man and one woman would contravene the principles of federalism enunciated in the *Windsor* decision.

The AG's Brief points out that "Section 2 of federal DOMA, which codifies the longstanding principle that States may refuse to recognize same-sex marriages performed in other States, was not at issue in *Windsor*. See 28 U.S.C. § 1738c." The Respondents filed a Brief saying: "In *United States v. Windsor* the Court held that a law that 'impose[s] inequality' on gays and lesbians, and that treats same-sex marriages as 'second class,' violates the constitutional principles of due process and equal protection. But neither Naylor nor Daly challenged the constitutionality of any law in their divorce action—and neither the trial court nor the court of appeals addressed the constitutionality of any Texas law in its decision."[8]

There are some significant uncertainties after the *Windsor* decision. The Supreme Court relied in part upon the historical tradition that the validity of a marriage is a matter for state law, not federal law. Thus, the Court ruled that the Federal government was bound by a state's decision to recognize same-sex marriage. Is the Federal government likewise bound by a state's refusal to recognize a same-sex marriage? Also, Federal law and many Federal regulations assess the validity of a marriage based on the law where the parties reside. For same-sex couples who married legally but now live in a state that does not recognize the validity of same-sex marriages, applying the law of the residence instead of the law of the place of celebration would lead to non-recognition of the marriage. Hovering above the dispute like Hamlet's apparition is the case of *Loving v. Virginia*, 388 U.S. 1 (1967), in which a unanimous Supreme Court invalidated a Virginia statute prohibiting the state from recognizing an interracial marriage celebrated elsewhere, on the ground that the right to marry is a fundamental right and abrogating that right based on racial discrimination violated the Fourteenth Amendment's Due Process of Law Clause and Equal Protection Clause.

d. Grant and Denial of Stays. On January 13, 2010, by a vote of 5-to-4, the U.S. Supreme Court granted a stay prohibiting the Federal District Judge in *Hollingsworth v. Perry*, from allowing a video broadcast of the trial on the constitutionality of California's Proposition 8, a state constitutional amendment banning recognition of same-sex marriages in California. The Court's majority found that the procedural rule change which allowed the broadcast was not done in compliance with Federal law. The Court's Opinion explained the standards for the Supreme Court's issuance of a stay:

> To obtain a stay pending the filing and disposition of a petition for a writ of certiorari,

> an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari, (2) a fair prospect that a majority of the Court will vote to revers the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice of the Court will balance the equities and weigh the relative harms to the applicant and to the respondent . . . To obtain a stay pending the filing and disposition of a petition for a writ of mandamus, an applicant must show a fair prospect that a majority of the Court will vote to grant mandamus and a likelihood that irreparable harm will result from the denial of a stay.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

On March 2, 2010, Chief Justice Roberts declined to grant a stay to prohibit an act from going into effect in the District of Columbia that would expand the definition of marriage to include same-sex couples. Chief Justice Roberts issued an opinion, justifying his denial by saying that the Supreme Court was unlikely to grant certiorari. *See Jackson v. D.C. Board of Elections and Ethics*, 559 U.S. 1301 (2010).

In *Kitchen v. Herbert*, 2013 WL 6697874 (D. Utah Dec. 20, 2013), a Federal district judge held that Utah's prohibition of same-sex marriages, and refusal to recognize the validity of same-sex marriages validly created in other states, violated the plaintiffs' right to marry under the Fourteenth Amendment's Due Process Clause and denied the plaintiffs' equal protection of the law required by the Fourteenth Amendment's Equal Protection Clause. In *Kitchen v. Herbert*, 2013 WL 6834634 (D. Utah Dec. 23, 2013), Judge Shelby refused to stay his injunction pending appeal, and even refused to grant a temporary stay long enough to allow the State of Utah to request a stay from the Tenth Circuit Court of Appeals. On January 26, 2014, in *Herbert v. Kitchen*, 2014 WL 30367 (U.S. Sup. Ct.), the United States Supreme Court suspended the effect of the judge's ruling. In granting the stay, the U.S. Supreme Court wrote:

> The application for stay presented to Justice Sotomayor and by her referred to the Court is granted. The permanent injunction issued by the United States District Court for the District of Utah, case No. 2:13-CV-217, on December 20, 2013, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit.

On July 18, 2014, the day of the 10th Circuit's decision, the Supreme Court extended the stay. On August 20, 2014, the U.S. Supreme Court granted a stay of an order invalidating a Virginia statute banning same-sex marriages. *See McQuigg v. Bostic*, No. 14A196, 2014 WL 4096232 (August 20, 2014). On October 6, 2014, the Supreme Court denied certiorari in the case, which dissolved the stay. On October 10, 2014, the Supreme Court refused a stay in *Otter v. Latta*, 135 S.Ct. 345 (2014), where the 9th Circuit had invalidated the same-sex marriage bans of Idaho and Nevada. On October 17, 2014, the U.S. Supreme Court denied a stay in an appeal of a Federal district court decision invalidating Alaska's law against same-sex marriage. On November 12, 2014, the U.S. Supreme Court denied a stay in the appeal of a Federal district court's ruling invalidating Kansas' ban on same-sex marriage. *See Moser v. Marie*, 14A503. Justices Thomas and Scalia noted that they would have granted the stay. On November 20, 2014, the Supreme Court refused to grant a stay of a Federal district court order holding South Carolina's ban on same-sex marriage unconstitutional. Justices Thomas and Scalia disagreed. On December 19, 2014, the U.S. Supreme Court refused to grant a stay of an order invalidating a Florida law prohibiting same-sex marriage. *See Armstrong v. Brenner*, No. 14A650 (order with a notation saying that Justices Scalia and Thomas would grant the application for stay).

e. Denial of Review of Circuit Court Decisions. On October 6, 2014, the U.S. Supreme Court denied certiorari review of decisions by the 4th, 7th and 10th Circuit Courts of Appeals that had held state laws denying same-sex marriage unconstitutional. That left each court of appeals' decision as the constitutional law of that circuit. In *Maricopa County v. Lopez-Valenzuela*, 135 S. Ct. 428 (Nov. 13, 2014), a case involving the invalidation of portions of Arizona law pertaining to setting bail for detainees in the U.S. illegally, the Supreme Court refused to grant a stay. Justice Thomas, joined by Justice Scalia, issued a statement saying: "we often review decisions striking down state laws, even in the absence of a disagreement among lower courts . . . . But for reasons that escape me, we have not done so with any consistency, especially in recent months. . . . At the very least, we owe the people of Arizona the respect of our review before we let stand a decision facially invalidating a state constitutional amendment." *Id.* at 428.

2. U.S. Courts of Appeals. The following same-sex marriage cases are listed in chronological order.

a. 10th Circuit. On June 25, 2014, in *Herbert v. Kitchen*, 755 F.3d 1193 (10th Cir. 2014), a panel of the Court of Appeals for the 10th Circuit held a Utah law banning same-sex marriage to be unconstitutional. On July 18, 2014, in *Bishop v. Smith*, a panel of that same Court of Appeals held that Oklahoma's law banning same-sex marriage was unconstitutional. The U.S. Supreme Court denied certiorari in both cases on October 6, 2014.

b. 4th Circuit. On July 28, 2014, a panel of the U.S. Court of Appeals for the 4th Circuit ruled 2-to-1 that a Virginia law banning same-sex marriage was unconstitutional under the Fourteenth Amendment's due process and equal protection clauses. The court applied strict scrutiny review. The U.S. Supreme Court denied certiorari on October 6, 2014.

c. 7th Circuit. On September 4, 2014, the U.S. Court of Appeals for the 7th Circuit held that Indiana and Wisconsin laws that banned same-sex marriage were unconstitutional, in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014). The U.S. Supreme Court denied certiorari on October 6, 2014.

d. 9th Circuit. On October 7, 2014, in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), the Ninth Circuit Court of Appeals applied heightened scrutiny to Idaho and Nevada's constitutional and statutory provisions banning same-sex marriage, and found that they violated the Fourteenth Amendment. On January 9, 2015, the combined court denied rehearing en banc, with three justice dissenting. *Latta v. Otter*, 2015 WL 128117 (9th Cir. 2015).

e. 6th Circuit. On October 7, 2014, a three-justice panel of the U.S. Court of Appeals for the Sixth Circuit, by a 2-to-1 vote, upheld Michigan, Ohio, Kentucky and Tennessee constitutional provisions and statutes preventing same-sex marriages and refusing to recognize such marriages from elsewhere. *See DeBoer v. Schneider*, 772 F.3d 388 (6th Cir. 2014). On January 16, 2015, the U. S. Supreme Court, consolidated this case with three others and granted certiorari.

f. 5th Circuit. The Court of Appeals for the 5th Circuit held oral argument on January 9, 2015, in three cases where Federal district judges had ruled on the constitutionality of state laws banning same-sex marriage: *De Leon v. Perry* (Texas law invalidated), *Mississippi's Campaign for Southern Equality v. Bryant* (Mississippi law invalidated), and *Robicheaux v. Caldwell* (Louisiana law upheld). A decision is pending. A stay was imposed by the trial judge in the Texas case; a stay was imposed by the 5th Circuit Court of Appeals in the Mississippi case. *See Campaign for Southern Equality v. Bryant*, 773 F.3d 55 (5th Cir. 2014).

g. 11th Circuit. The Court of Appeals for the 11th Circuit has pending a Florida Federal district

court's ruling that the same-sex marriage ban in Florida law is unconstitutional. *See Brenner v. Armstrong*, No. 14-14061. The U.S. Supreme Court refused to grant a stay of the district court's ruling on December 19, 2014 (Scalia and Thomas, dissenting). The Florida representatives declined to file a brief. As of the writing of this article, no date for submission has been set. The district court's stay expired on January 6, 2015, and same-sex marriages are now being performed in Florida.

3. Texas Federal District Court. On February 26, 2014, in *De Leon v. Perry*, No. 5:13-CV-00982-OLG, Federal District Judge Orlando Garcia declared the Texas law banning same-sex marriages unconstitutional. Judge Garcia stayed the effect of his ruling through appeal to the Fifth Circuit Court of Appeals. The case was orally argued to the Fifth Circuit on January 9, 2015. No ruling has been issued by the time this article was written.

E. U.S. EXECUTIVE DEPARTMENT. Many previously existing federal policies and regulations can no longer be enforced after *U.S. v. Windsor*. On July 1, 2013, Secretary of Homeland Security Janet Napolitano issued a directive to the Immigration Service to review immigration visa petitions treating a same-sex spouse the same as an opposite-sex spouse. On July 17, 2013, the United States Office of Personnel Management issued a letter advising Federal employees that spousal benefits would be extended to same-sex spouses. On August 13, 2013, Secretary of Defense Chuck Hagel issued a press release saying that all spousal and family benefits offered to the military would be made available to same-sex spouses no later than September 3, 2013.[9] Note that the Defense Department policy was not limited to persons residing in states that recognize same-sex marriages as valid. The Secretary of Defense has thus gone beyond the holding in *U.S. v. Windsor*, which did not invalidate DOMA in states that did not recognize same-sex marriage. On February 10, 2014, U.S. Attorney General Holder issued a memorandum saying that the Justice Department would "recognize all marriage valid in the jurisdiction where the marriage was celebrated."[10] More changes in Federal policies and procedures were issued by various Federal departments in the following months. These activities are described in Holder, *U.S. Attorney General's Memorandum to the President* on "The Implementation of *United States v. Windsor*" (June 20, 2014).[11]

IV. IF THE 14TH AMENDMENT DOES NOT CONTROL, IS FULL FAITH AND CREDIT REQUIRED FOR SAME-SEX MARRIAGES?

If there is no 14th Amendment basis to force states to permit and recognize same-sex marriages, then the question arises whether the Full Faith and Credit Clause of the U.S. Constitution requires each state to acknowledge the validity of same-sex marriages and civil unions that are validly created under the law of any other American state. If the same-sex marriage was created under the law of a foreign country, full faith and credit does not apply and a court would have to rely on some U.S. treaty to preempt state law on the issue, or rest such recognition on the doctrine of comity.

A. FULL FAITH AND CREDIT FOR SAME-SEX MARRIAGE FROM OTHER STATES. U.S. Constitution, art. IV, § 1 provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The applicable Federal statute, 28 United States Code § 1738, provides:

> Section 1738 State and Territorial statutes and judicial proceedings; full faith and credit
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by

> affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Since a state-sanctioned marriage is a "public act" and a marriage certificate is a "public record," the constitutional provision might be interpreted to apply to marriage, and these two provisions of Federal law could require the State of Texas to recognize the validity of a same-sex marriage or civil union lawfully established under the law of a sister state. The application of the Full Faith and Credit Clause to same-sex marriage has been discounted by the Dean of Creighton University School of Law, in various writings including Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353 (2005). As discussed in the next section, in 1996 Congress took action to avoid such an argument.

B. THE DEFENSE OF MARRIAGE ACT. In 1996, the U.S. Congress passed the Defense of Marriage Act ("DOMA"),[12] signed by President Clinton. Section 1 of the Act described the Bill as "the Defense of Marriage Act." Section 2 of the Act added 28 U.S.C. § 1738C to the full faith and credit statutes in the United States Code. Section 1738C provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Section 3 of DOMA added to the U.S. Code a definition of "marriage" and "spouse," appearing at 1 U.S. Code § 7, which says:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

Section 3 of DOMA was declared unconstitutional in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), but the ruling did not affect Section 2 of DOMA. With Section 1738C, Congress purported to circumscribe the broadly-worded Full Faith and Credit Clause of the U.S. Constitution, so that it could not be used by judges to force a state to recognize a same-sex marriage or civil union from another state. However, Congress can neither enlarge nor narrow the effect of the U.S. Constitution. *Marbury v. Madison*, 5 U.S. 137 (1803). The courts, and ultimately the U.S. Supreme Court, could decide that the Full Faith and Credit Clause of the U.S. Constitution requires recognition of same-sex marriage and civil unions in other states, thus effectively holding 28 U.S.C. § 1738C, § 2 to be an unconstitutional narrowing of the constitutional principle.

Congress's power to define the scope of the Full Faith and Credit Clause with regard to same-sex marriage was explored in Schmitt, *A Historical*

Reassessment of Full Faith and Credit, 20 GEO. MASON L. REV. 485 (2013).

C. JUDICIAL PROCEEDINGS. The Full Faith and Credit Clause of the U.S. Constitution applies also to "judicial proceedings." What if persons who have a same-sex marriage from a state secure a declaratory judgment from a court in that state that their same-sex marriage is valid? If there is no true controversy, such a ruling may be a void advisory opinion. If the judicial proceeding is bona fide, like a divorce decree, is the argument stronger that the Full Faith and Credit Clause of the U.S. Constitution requires recognition of the sister-state's decree? If not, can comity be extended by the Texas court?

Sister-state decrees of divorce have a stronger claim to full faith and credit than marriage certificates. Texas Family Code Section 6.204(c)(2) prohibits Texas courts from giving effect to a "judicial proceeding that . . . recognizes a marriage between persons of the same sex . . . ." It would seem that a same-sex decree would recognize the underlying same-sex marriage. This issue arose in oral argument on November 5, 2013, in the Texas Supreme Court in *In re J.B. & H.B.*, where several members of the Court seemed to have difficulty accepting the idea that a Texas court could grant a divorce without recognizing the validity of the underlying marriage.[13]

D. RECENT U.S. SUPREME COURT ACTIVITY CASTS A DOUBT. On January 16, 2015, the U.S. Supreme Court consolidated four appeals from the 6th Circuit Court of Appeals and granted certiorari: 14-556, *Obergefell, James, et al. v. Hodges, Richard, et al.*; 14-562, *Tanco, Valeria, et al. v. Haslam, Gov. of Tenn., et al.*; 14-571, *Deboer, April, et al. v. Snyder, Gov. of Michigan, et al.*; and 14-574, *Bourke, Gregory, et al. v. Beshear, Gov. of Ky, et al*. The Court issued the following order:

> The cases are consolidated and the petitions for writs of certiorari are granted limited to the following questions:
>
> 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
>
> 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

The second ground for granting certiorari is interesting. The Supreme Court did not mention the Full Faith and Credit Clause of the U.S. Constitution. Instead, it asked whether recognition of same-sex sister state marriages is required by the Fourteenth Amendment. So the Supreme Court appears to be side-stepping full faith and credit analysis in favor of the fundamental right to marry, due process of law, and equal protection of the law, analysis. This suggests that full faith and credit will not be the legal principle that answers the question of whether all states must recognize the same-sex marriages of any state. It could also be noted that fixing the right on the 14th Amendment would more readily permit the requirement of recognition to be extended to foreign same-sex marriage if the protections of the 14th Amendment are extended to non-citizens of the U.S.

V. CHOICE OF LAW ISSUES. If the Fourteenth Amendment does not require all states to recognize a same-sex marriage validly created in one state, and if full faith and credit for a same-sex marriage lawfully established in another state is not required, there is the question of whether Texas choice-of-law rules import the law of other states or nations into a Texas court proceeding. Generally speaking, there are three places whose law could be applied to the validity of a same-sex marriage: (i) the law of the parties' domicile at the time of

marriage; (ii) the law of the place of celebration; (iii) the law of the forum where the lawsuit is filed.

A. OVERVIEW OF CHOICE OF LAW PRINCIPLES, OLD AND NEW. Choice of law rules divide into three eras: the oldest predates the Restatement (First) of Conflict of Laws; then there is the era of Restatement (First) of Conflict of Laws; and finally there is the era of the Restatement (Second) of Conflict of Laws. The first two eras are similar. Speaking in broad terms, in olden days contracts were governed by the law of the place of contracting (lex loci contractu), and torts were governed by the law of the place where the tort occurred (lex loci delictu). In olden days, ownership rights in movables were governed by the law of the domicile of the owner, while ownership rights in immovables was governed by the law of the situs of the real estate. In olden days, marital property rights in movables were governed by the law of the marital domicile at the time of acquisition, while marital property rights in immovables were governed by the law of the situs. Under the Restatement (Second) of Conflict of Laws, the categorical rules described above were replaced by a balancing test, sometimes called "governmental interest analysis" and sometimes called "the most significant relationship test." Under the Restatement (Second), the "rules" were replaced with "principles," and the principles were as follows:

> Sec. 6. Choice-of-Law Principles
>
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> > (a) the needs of the interstate and international systems,
> > (b) the relevant policies of the forum,
> > (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> > (d) the protection of justified expectations,
> > (e) the basic policies underlying the particular field of law,
> > (f) certainty, predictability and uniformity of result, and
> > (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS sec. 6 (1971).

Texas has been in transition away from the categorical rules of the Restatement (First) and toward the most significant relationship principle of the Restatement (Second). The transition has been accomplished in contract and tort law, but the Texas Supreme Court has not yet announced the transition in marital property law and the courts of appeals tend to apply both the old and new approaches to the same case.

B. IMPORTING SUBSTANTIVE BUT NOT PROCEDURAL LAW. An important point recognized in choice of law discussions is the principle that a state may be bound to import the substantive law of a sister state, but it is not required to import the remedies of sister states. *See State of Cal. v. Copus*, 309 S.W.2d 227, 230 (Tex. 1958) ("the general rule is that questions of substantive law are controlled by the laws of the state where the cause of action arose, but that matters of remedy and of procedure are governed by the laws of the state where the action is sought to be maintained"); Tex. Civ. Prac. & Rem. Code § 71.031(a) (in suit for damages for death or personal injury, "all matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state"). This principle argues against importing the divorce law of another state to

resolve a dispute in Texas between persons who were married in that state.

C. PUBLIC POLICY EXCEPTION. It is generally recognized that a state is not required to apply the law of a sister state where that borrowed law would violate the public policy of the forum state. In *Larchmont Farms, Inc. v. Parra,* 941 S.W.2d 93, 95 (Tex. 1997), the Court said: "The basic rule is that a court need not enforce a foreign law if enforcement would be contrary to Texas public policy." That concept is expressed in RESTATEMENT (SECOND) OF CONFLICT OF LAW § 187, pertaining to the law chosen by parties to a contract:

> § 187 Law of the State Chosen by the Parties
>
> * * *
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless . . .
>
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Comment g to Section 187 states:

> g. When application of chosen law would be contrary to fundamental policy of state of otherwise applicable law. Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interests and for state regulation. The chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties. The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law. Application of the chosen law will be refused only (1) to protect a fundamental policy of the state which, under the rule of § 188, would be the state of the otherwise applicable law, provided (2) that this state has a materially greater interest than the state of the chosen law in the determination of the particular issue. The forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule and whether the other state has a materially greater interest than the state of the chosen law in the determination of the particular issue.

D. CHOICE OF LAW REGARDING CONTRACTS. With regard to contract litigation, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 governs choice of applicable law. Section 188 provides:

> § 188 Law Governing in Absence of Effective Choice by the Parties
>
> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> > (a) the place of contracting,

(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

In *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984), the Texas Supreme Court discontinued the Restatement (First) of Conflict of Laws rule of lex loci contractu and announced that henceforth the Restatement (Second) of Conflict of Laws' most significant relationship test would be applied to contract litigation. Note: the Texas Legislature has adopted a special choice-of-law rule for survivorship provisions applying to deposited funds, retirement accounts, insurance policies, and annuity contracts. See Section XI.J. below.

Because a marriage is in some senses a "contract" between spouses, will the choice of law standards for contract litigation be applied to the issue of same-sex marriage?

E. CHOICE OF LAW ISSUES REGARDING THE MARRIAGE RELATIONSHIP. The traditional choice-of-law rules relating to the relationship between married parties was stable for many years, but is now uncertain. Texas courts long applied the rule that the validity of a marriage was determined by the *law of the place of celebration*. In other words, a marriage that was valid in the state or nation where it occurred would remain valid even if the parties relocated to another state or nation, and vice-versa. *Texas Employers' Ins. Ass'n v. Borum*, 834 S.W.2d 395, 399 (Tex. App.--San Antonio 1992, pet. denied) ("the validity of a marriage is generally determined by the law of the place where it is celebrated rather than the law of the place where suit is filed"); *Husband v. Pierce*, 800 S.W.2d 661, 663 (Tex. App.--Tyler 1990, orig. proceeding) ("The validity of a marriage is generally determined by the law of the place where it is celebrated"); *Williams v. Home Indem. Co.*, 722 S.W.2d 786, 787 (Tex. App.--Houston [1st Dist.] 1987, no writ) ("in determining the validity of a marriage, Texas courts have applied the law of the place where it was celebrated"); *Seth v. Seth*, 694 S.W.2d 459, 462 (Tex. App.–Fort Worth 1985, no writ); *Braddock v. Taylor*, 592 S.W.2d 40, 42 (Tex. Civ. App.--Beaumont 1979, writ ref'd n.r.e.) ("The validity of a marriage is determined by the law of the place where it was celebrated"); *Nevarez v. Bailon*, 287 S.W.2d 521, 523 (Tex. Civ. App.--El Paso 1956, writ ref'd) (rejecting a claim of common law marriage between Mexican residents, "because the relationship between appellant and deceased was entered into and existed wholly within the state of Chihuahua, it must be regulated and defined by the Code Law of that state," and Chihuahua did not recognize informal marriages). However, such a rule applied to same-sex marriage would result in Texas having to give recognition to a same-sex marriage that could not be lawfully created and cannot be recognized under the current law of Texas, provided that the marriage relationship was created in a state or nation that permitted same-sex marriages. In the *Seth* case just cited, the appellate court did not use the rule that the law of the place of celebration applies. Instead, it used the "most significant relationship" principle developed in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS. *Id.* at 463.

Another choice-of-law rule that might apply to the question of whether a Texas court can grant a divorce to a same-sex married couple is the rule that choice of law principles apply to substantive

rights but not to procedures. Divorce is a procedure, not a substantive right.

Another choice-of-law rule is that a court is not required to import the law of another state that violates the forum state's public policy. Both the Texas Family Code and the Texas Constitution indicate that the public policy of the state is to not recognize same-sex marriages.

There is a possible distinction between Texas domiciliaries who go to another state just to create a same-sex marriage and domiciliaries of another state who enter into a same-sex marriage while living there and who later move to Texas. There is precedent that Texas residents cannot travel to another jurisdiction to engage in actions that would circumvent the public policy of the state of Texas. *See*, *King v. Bruce*, 201 S.W.2d 803, 809 (Tex. 1947). However, that case applied to spouses attempting to circumvent Texas marital property law, not Texas law governing the creation of the marriage relationship. Additionally, the public policy in *King v. Bruce* (Texas domiciliaries cannot evade the marital property law of Texas by going elsewhere to sign a contract and then invoking the law of the place of contracting) would not apply to people who were lawfully married under the law of their earlier residence or legal domicile and then later moved to Texas. In oral argument on November 5, 2013, in the Texas Supreme Court of *In re J.B. & H.B.*, Justice Jeffrey Boyd asked whether there was a residency requirement in order to marry in jurisdictions of the United States that grant same-sex marriages. The attorney for the same-sex litigants said "no," just a waiting period to issue the license.[14]

Texas has a statutory choice of law rule for married persons who relocate to Texas. Texas Family Code Section 1.103 says: "The law of this state applies to persons married elsewhere who are domiciled in this state."

The Texas voters and Texas Legislature have adopted a choice of law rule for the validity of same-sex marriages. Texas Constitution, art. 1, Section 32 says that marriage is between one man and one woman only and no state or political subdivision of the State may create or recognize any legal status identical or similar to marriage. Texas Family Code Section 6.204(c)(1) forbids Texas departments and courts from recognizing the validity of a same-sex marriage that occurred "in this state or in any other jurisdiction." Thus, the constitutional provision implicitly, and the Family Code provision explicitly, override any conflict of law rule that a same sex marriage can be valid based on the law of the place of celebration. Based on these two provisions, the appellate court in *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 658 (Tex. App.–Dallas 2010, pet. granted), held that a Texas district court does not have subject-matter jurisdiction over a divorce case arising from a same-sex marriage that occurred lawfully in Massachusetts.

In *Williams v. North Carolina*, 325 U.S. 226 (1945), the Supreme Court ruled that a state has the power to dissolve the marriage of a domiciliary even if the other spouse is not a domiciliary and has no actual notice of the divorce proceeding and has no connection with the state of divorce. A difficulty can arise when one spouse in a same-sex marriage is a domiciliary and one is a domiciliary of another state, and someone wants to file for divorce. Under the current law, the spouse domiciled in Texas could not file for divorce, but the spouse domiciled in another state could file for divorce if that state recognizes same-sex marriage.

F. CHOICE OF LAW ISSUES REGARDING THE PROPERTY RIGHTS AND CLAIMS OF THE PARTIES. The Texas Family Code contains provisions designed to avoid conflict of laws problems regarding the division of property in Texas divorces. These provisions do not, by their own terms, apply outside of a divorce and annulment, and thus would not govern a Texas court's division of property upon the break-up of a same-sex relationship. Non-marital choice-of-law

rules would likely need to be applied to a same-sex breakup in Texas. These are examined below.

1. Traditional Conflict of Laws Rules for Marital Property. Under traditional choice-of-law rules (pre-Restatement and Restatement (First)), the rights of a spouse in movable assets owned by the other spouse at the time of marriage were determined by the law of the first marital domicile. *See Avery v. Avery*, 12 Tex. 54, 56-57 (1854). The rights of a spouse in immovable assets owned by the other spouse at the time of marriage were determined by the law of the situs of the immovables. See 3 L. Simpkins, TEXAS FAMILY LAW § 16.2, at 177 (Spear's 5th ed. 1976). Under traditional conflict of law rules, the rights of the spouses in movable property acquired during marriage were controlled by the law of the marital domicile at the time of acquisition. *Oliver v. Robertson*, 41 Tex. 422, 425 (1974); *Tirado v. Tirado*, 357 S.W.2d 468, 471-72 (Tex. Civ. App.–Texarkana 1962, writ dism'd); *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 233 (Tex. Civ. App.--El Paso 1954, writ ref'd n.r.e.). Traditionally, the rights of spouses in immovables acquired during marriage was determined by the law of the situs. *Commissioner v. Skaggs*, 122 F.2d 721, 723 (5th Cir. 1941), *cert. denied*, 315 U.S. 811 (1942); *Kaherl v. Kaherl*, 357 S.W.2d 622, 624 (Tex. Civ. App.--Dallas 1962, no writ); *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 233-34 (Tex. Civ. App.--El Paso 1954, writ ref'd n.r.e.); *Bell v. Bell*, 180 S.W.2d 466, 469 (Tex. Civ. App.--El Paso 1944, writ ref'd w.o.m.). Traditional choice-of-law rules held that spouses' changing domiciles during marriage did not affect their rights in their property acquired while domiciled at the earlier domicile. *See Avery v. Avery*, 12 Tex. 54, 56-57 (1854) (under the law of Georgia, the first marital domicile, the husband became the owner of all personal property owned by the wife at the time of marriage; upon removal of the spouses to Texas, the husband continued to be the owner of such property).

2. Marital Property Rights Under the Restatement (Second) of Conflict of Laws. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) ushered in the "most significant relationship" test as to movables but not immovables.

a. The Restatement Rule. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258 (1971) applies the most significant relationship standard to movable property acquired during marriage:

> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258:
>
> (1) The interest of a spouse in a movable acquired by the other spouse during the marriage is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the movable under the principles stated in section 6.
>
> (2) In the absence of an effective choice of law by the spouses, greater weight will usually be given to the state where the spouses were domiciled at the time the movable was acquired than to any other contact in determining the state of the applicable law.

Note that the Restatement (Second) continues to give paramount weight to the law of the place of domicile at the time of acquisition, which was the rule under the Restatement (First). The Restatement (Second) continued to apply the law of the situs to real property acquired during marriage, but that includes the choice-of-law rules of the situs:

> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 234:
>
> (1) The effect of marriage upon an interest in land acquired by either of the spouses during coverture is determined by the law that would be applied by the courts of the situs.

(2) These courts would usually apply their own local law in determining such questions.

b. The Texas Case Law Since the Restatement (Second) of Conflict of Laws. In 1979, the Supreme Court of Texas rejected the traditional lex loci delicti choice-of-law rule for tort cases, and announced that henceforth the "most significant relationship" standard of the Restatement (Second) would apply to tort cases. *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). In 1984, the Texas Supreme Court overturned the lex loci contractu choice-of-law rule for contract cases, and adopted Section 6 of the Restatement (Second), for all cases except contract cases containing a choice-of-law provision. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984). The Texas Supreme Court has not decided a case applying the most significant relationship test to marital property issues upon divorce. However, that test has been applied to marital property issues upon divorce in several court of appeals decisions.

In one dispute arising from the death of a married Mexican citizen who had money on deposit in a Texas bank, the appellate court applied the law of Mexico, saying:

> In choice of law questions dealing with ownership of personal property, as between spouses, the rule of domicile predominates. *King v. Bruce*, 145 Tex. 647, 201 S.W.2d 803, 809 (1947), *cert. denied*, 332 U.S. 769.

Ossorio v. Leon, 705 S.W.2d 219, 222-23 (Tex. App.--San Antonio 1985, no writ). The court backed up its "rule of domicile" statement with a "most significant relationship" analysis, and arrived at the same answer–that Mexican marital property law should apply. The case of *Ramirez v. Lagunes*, 794 S.W.2d 501 (Tex. App.–Corpus Christi 1990, no writ), was a bill of discovery brought by a former wife, seeking information about money on deposit in Texas offices of financial institutions where she suspected that her former husband had hidden money from her. Both former spouses were Mexican citizens and domiciliaries of Mexico. The financial accounts were opened during marriage. The appellate court affirmed the denial of discovery to the ex-wife, partially due to lack of personal jurisdiction over the ex-husband. The appellate court also turned to Texas choice-of-law rules to justify its decision, saying that money on deposit is personalty as to which the law of marital domicile applies, and further that Mexico was the country with the most significant relationship to the parties and the issues. The appellate court then reasoned that because Mexican law applied, the ownership of the funds was a matter within the jurisdiction of the Mexican divorce court, thus depriving the Texas court of jurisdiction over the res of the lawsuit. This last step in reasoning was perhaps a misunderstanding of the use of role of choice-of-law rules (which determine what law to apply, not whether the court has jurisdiction), but the opinion nonetheless reflects a tendency on the part of Texas courts of appeals to evaluate marital property choice-of-law issues from the standpoint of both 1) the law of marital domicile as to personalty and 2) the most significant relationship standard. In *Ismail v. Ismail*, 702 S.W.2d 216, 222 (Tex. App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.), the appellate court rejected the husband's complaint about the trial court not applying Egyptian law in a Texas divorce. The court pointed out that the Family Code provision, about dividing property that would have been community had the acquiring spouse been domiciled in Texas at the time of acquisition, specifically applied to the situation.

3. The Texas Family Code's Choice-of-Law Provisions. Texas Family Code Section 7.001 provides that a court, in a decree of divorce, must divide "the estate of the parties." The "estate of the parties" has been defined to include only community property and community liabilities. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (1977). Choice-of-law issues do not arise in Texas divorces because Texas Family Code §7.002(a)(1)

provides that, in a divorce, a court must divide real and personal property, "wherever situated," that was acquired while the acquiring spouse was domiciled in another state and that would have been community property had the acquiring spouse been domiciled in Texas at the time of acquisition. Under Section 7.002(a)(2), the same rule applies to property that can be traced to category (a)(1) property. These provisions apply only to a divorce or annulment, and not to inheritance rights upon death. *See Estate of Hanau v. Hanau*, 730 S.W.2d 663, 665 (Tex. 1987) (when a spouse dies in Texas, property acquired by that spouse during marriage, but while domiciled elsewhere, is governed by the marital property law of the earlier domicile, and not by Texas marital property law).

It should be noted that, during the interim between the enactment of the forerunner statute to Section 7.002 and its effective date, the Texas Supreme Court, in *Cameron v. Cameron*, 641 S.W.2d 210, 220 (Tex. 1982), adopted the same rule as a matter of common law, saying:

> [P]roperty spouses acquire during marriage, except by gift, devise or descent should be divided upon divorce in Texas in the same manner as community property, irrespective of the domicile of the spouses when they acquire the property.

Thus, both our common law and our statutes say that a Texas court in a Texas divorce should apply Texas marital property law to property acquired prior to coming to Texas.

But under current Texas law these divorce-related provisions do not apply when persons in a same-sex marriage are "breaking up" and their dispute winds up in a Texas court. The non-divorce break-up of a same-sex relationship that has crossed state lines would seem to raise choice-of-law issues that are governed by common law choice-of-law principles.

4. Claims Under Sister-State Law. Some states have adopted special legal principles that give same-sex cohabitants non-divorce remedies upon the break-up of the relationship. That raises the question of whether such relationship-based rights acquired in another state will be recognized if the same-sex couple comes to Texas and then breaks up and seeks redress in a Texas court.

We can take, as an example, the law of the State of Washington. Under the case of *Creasman v. Boyle*, 31 Wash.2d 345, 356, 196 P.2d 835 (1948), Washington considered property acquired by a person during a period of non-marital cohabitation to belong to the holder of record title. Washington courts subsequently recognized various legal theories to permit the sharing of property rights in such a situation, including implied partnership or joint venture, resulting trust, constructive trust, tracing source of funds, tenancy in common, and contract theory. *See In re Marriage of Pennington*, 14 P.3d 764, 769 (Wash. 2000) (listing cases adopting alternative theories of recovery). Then, in *Matter of Marriage of Lindsey*, 101 Wash.2d 299, 678 P.2d 328 (Wash. 1984), the Supreme Court of Washington held that property acquired by a married couple during a premarital cohabitation (which the Court called a "meretricious relationship") could be divided on an equitable basis in the couple's divorce. In *Connell v. Francisco*, 127 Wash.2d 339, 898 P.2d 831 (Wash. 1995), the Supreme Court of Washington extended that concept to the break up of a couple who formed a meretricious relationship but never married. In *Connell*, the Court defined a "meretricious relationship" as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Id.* at 834. The Court said that "[r]elevant factors establishing a meretricious relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties." *Id.* at 834. The Court in *Connell* stated that a meretricious relationship was

not a marriage and that the remedies available upon divorce were different from the remedies available upon termination of a meretricious relationship. *Id.* at 835. Thus, although a court in a Washington divorce could divide both community and separate property, the court in the break-up of a meretricious relationship could divide only property acquired during the meretricious relationship and not property acquired before that relationship started. *Id.* at 836. The Court did, however, apply a rule similar to the presumption of community, that all property acquired during the meretricious relationship would presumptively be divisible. *Id.* at 836. In *In re Kelly and Moesslang*, 287 P.3d 12 (Wash. App. 2012), the appellate court held that a claim for division of property acquired during a committed intimate relationship was an equitable claim, not an ownership right, and that the 3-year statute of limitations for equitable claims applied, limitations beginning upon the termination of the committed intimate relationship. In *Rinaldi v. Bailey*, 171 Wash. App. 1018, 2012 WL 5292816 (Wash. App. 2012) (unpublished opinion), the meretricious relationship principles were applied to two women whom the trial court found had entered into a "committed intimate relationship." *Id.* at *6. Effective December 6, 2012, Washington began to allow and recognize same-sex marriages.

Assume that a same-sex couple who formed a committed intimate relationship in Washington moves to Texas and then breaks up. The parties were never married to each other. Assume that one party asks the Texas court to divide property acquired while the parties lived together in Washington. Is the principle underlying *Connell v. Francisco* one that can transfer to a Texas court? Texas Family Code Section 6.204 says that a Texas court cannot give effect to a "right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union." The Washington state claims that arise upon the break-up of a committed intimate relationship do not arise from a same-sex marriage or civil union, so Texas Family Code Section 6.204 would seem not to apply. As far as choice-of-law is concerned, the Washington case law suggests that the claim in question is an equitable claim, not a right in property. That suggests that the claim is a remedy, and choice-of-law rules generally do not require Texas courts to import another state's remedies.

If the *Connell v. Francisco* remedy is not available in Texas, what about the alternative theories recognized under earlier Washington case law, including implied partnership or joint venture, resulting trust, constructive trust, tracing source of funds, tenancy in common, and contract theory? Those appear to involve rights not remedies, perhaps even vested rights. Under traditional choice-of-law rules, vested rights do not change when domicile changes, so that a partnership under Washington law would continue after the parties relocate to Texas. Under the more modern most significant relationship test, a Texas court might well decide that Washington law should apply to property acquired while the parties were domiciled in Washington, but Texas law would apply to property acquired after the parties relocated to Texas.

A more general statement of the problem is whether rights that same-sex spouses acquired while living in a state that recognizes same-sex marriage become fixed at the time of acquisition, and those rights remain in place when the spouses migrate to Texas. The is particularly a problem where rights in property become vested before the spouses come to Texas, since the traditional choice-of-law rule is that vested rights in property do not change as residency changes. Under the Restatements (Second) of Conflict of Laws, a Texas court could find that the former domicile has a more significant relationship to the issue of ownership or interpersonal claims. If a divorce is not available to a same-sex couple that is splitting up, in Texas, perhaps a suit could be brought to partition co-owned property.

VI. COMITY. In *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895), the United States Supreme Court wrote:

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.
>
> "In Texas, comity has been described as 'a principle of mutual convenience whereby one state or jurisdiction will give effect to the laws and judicial decisions of another.' . . . No state or nation can demand that its laws have effect beyond the limits of its sovereignty." *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986) [citations omitted].

If recognition of same-sex marriage (or divorces) is not required by the Fourteenth Amendment, or the Full Faith and Credit Clause, or by prevailing choice-of-law principles, then a Texas court may still give recognition to sister-state acts or judicial proceedings as a matter of comity, *provided that is not prohibited by Texas law*. The Constitutional and statutory provisions in current Texas law banning recognition of same-sex marriage or civil unions would preclude extending recognition based on the doctrine of comity.

VII. TEXAS LAW ON SAME-SEX MARRIAGE.

A. THE TEXAS FAMILY CODE. When Title 1 of the Family Code was first enacted in 1969, Section 1.91 provided that "the marriage of a man and woman may be proved" by evidence of an informal marriage. Section 1.01 said that "[p]ersons desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state." The statute was amended in 1973 to say "A man and a woman desiring to enter into a ceremonial marriage . . . ." The statute is carried forward in current Family Code Section 2.001, which also contains a prohibition against issuing a marriage certificate to persons of the same sex. In 2003, the Texas Legislature enacted Section 6.204 of the Family Code, which reads:

> **§ 6.204. Recognition of Same-Sex Marriage or Civil Union.**
>
> (a) In this section, "civil union" means any relationship status other than marriage that:
> (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
> (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.
>
> (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.
>
> (c) The state or an agency or political subdivision of the state may not give effect to a:
>
> (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
> (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

Added by Acts 2003, 78th Leg., ch. 124, § 1, eff. Sept. 1, 2003.

B. THE TEXAS CONSTITUTION. On November 8, 2005, Texas voters passed a constitutional amendment, by a vote of 76% to 24%, forbidding the creation or recognition of same-sex marriage. The provision reads:

> Sec. 32. MARRIAGE.
>
> (a) Marriage in this state shall consist only of the union of one man and one woman.
>
> (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

With the amendment, it can no longer be argued that refusing to recognize same-sex marriage or civil unions violates the Texas Constitution. The only recourse to proponents of same-sex marriage in Texas is preemption by Federal law, based either on the fundamental right to marry coupled with the Fourteenth Amendment's Equal Protection or Due Process of Law Clauses, or the Full Faith and Credit.

C. TEXAS COURT DECISIONS. In *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.–Houston [14th Dist.] 2006, no pet.), the appellate court declined to recognize an equitable remedy in probate recognizing a "marriage-like relationship" doctrine. The court cited a Texas Legislative Resolution saying that "[t]his state recognizes that through the designation of guardians, the appointment of agents, and the use of private contracts, persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legal status identical or similar to marriage."

In the case of *Mireles v. Mireles*, 2009 WL 884815, at *2 (Tex. App.–Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.), the appellate court said that "[a] Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person."

In the case of *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 658-59 (Tex. App.–Dallas 2010, pet. granted), the Dallas Court of Appeals held that a Texas court does not have subject-matter jurisdiction over a divorce case arising from a same-sex marriage that occurred in Massachusetts. District Judge Tena Callahan had ruled that Tex. Const. Art. I, §32(a) and Tex. Fam. Code § 6.204 violated the Equal Protection Clause of the Fourteenth Amendment. The appellate court ruled that the State of Texas, through the Attorney General, had the right to intervene in the lawsuit to raise the trial court's lack of jurisdiction, and that mandamus would lie to overturn the trial court's dismissal of the AG's intervention. The appellate court also ruled that, because of Family Code Section 6.204, the trial court had no subject matter jurisdiction over the purported divorce proceeding involving a same-sex marriage. 326 S.W.3d at 667. The appellate court held that in Texas same-sex marriages are void, meaning that they have no legal effect. *Id.* at 665. This case was consolidated by the Texas Supreme Court with *State v. Naylor* and was argued to the Supreme Court on November 5, 2013.

In *State v. Naylor*, 330 S.W.3d 434 (Tex. App.–Austin 2011), *pet. granted sub nom State v. Angelique Naylor and Sabina Daly*, No. 11-0114, the Austin Court of Appeals ruled that the State of Texas did not have standing to appeal a divorce between two women who were legally married in Massachusetts, that was granted by Travis County District Judge Scott Jenkins based on an agreement between the parties. The Court also said that Texas law can be interpreted "in a manner that would allow the trial court to grant a divorce in this case." *Id.* at 441. On March 21, 2011, the State filed a petition for review[15] in the Texas Supreme Court, and on March 25, 2011 the State filed a petition for mandamus as well. Briefs were filed, including numerous amicus curiae briefs. On July 3, 2013, the Clerk of the Supreme Court asked the parties to

submit additional briefs on the impact if any of the U.S. Supreme Court's decision in *U.S. v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675 (June 26, 2013). Those briefs are discussed in Section III.D.1.c. On Friday, August 23, 2103, two years and five months after the case was filed, the Supreme Court granted review. This appeal and mandamus were both consolidated with the appeal in *In the Matter of the Marriage of J.B. and H.B.* and they were all argued on November 5, 2013.

The oral argument can be watched on-line at: <http://texassupremecourt.mediasite.com/mediasite/Play/c90b48105cb6409d9f3b0092ee45ebd61d>.

D. TEXAS ATTORNEY GENERAL OPINIONS. On December 16, 1999, Texas Attorney General John Cornyn (now a U.S. Senator) issued an AG's Opinion that county clerks were not required or permitted to accept for filing a "declaration of domestic partnership."[16] On October 27, 2005, Texas Attorney General Abbott sent a letter to a Texas Senator and a State Representative, on the subject of the then-proposed constitutional amendment relating to same-sex marriage. General Abbott said that the proposed amendment "would in fact safeguard traditional marriage in Texas."

On November 2, 2012, State Senator Dan Patrick sent a letter to Attorney General Abbott asking about the legality of certain government entities offering benefits to "domestic partners" of government employees. Senator Patrick listed El Paso County and Travis County, and the cities of Fort Worth, Austin, San Antonio, and El Paso. Several school districts had also had adopted similar policies. On April 29, 2013, Texas Attorney General Abbott issued Opinion GA-1003, which concluded that Texas cities, counties and school districts could not lawfully offer insurance benefits to domestic partners as part of their employee benefit programs. General Abbott noted that Tex. Const. Art. I § 32(b) was held to be "unambiguous, clear, and controlling" in *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.–Houston [14th Dist.] 2006, no pet.). He found that the entities in question had essentially created a "legal status" of same-sex domestic partnership in violation of the constitutional provision.[17] In mid-2013, the City of San Antonio adopted a non-discrimination policy against GLBT. The AG objected but did not sue over the ordinance. On 2-4-2014, Bexar County adopted a policy extending health insurance benefits to unmarried companions of employees, with no specification of gender.

E. PREEMPTION OF STATE MARITAL PROPERTY LAW BY FEDERAL LAW. There are instances in which Texas marital property law or divorce law has been held to have been preempted by contrary Federal law. For a good discussion of preemption, see *Ex parte Hovermale*, 636 S.W.2d 828, 837 (Tex. App.–San Antonio 1982, orig. proceeding) (Cadena, C.J., dissenting). A list of cases preempting state marital property law includes: *Boggs v. Boggs*, 520 U.S. 833, (1997) (ERISA preempted a Louisiana community-property law that would have allowed a plan participant's first wife to transfer by will her interest in the participant's undistributed retirement benefits); *Mansell v. Mansell*, 490 U.S. 581 (1989) (state law relating to military retirement benefits is preempted except as provided in the USFSPA); *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (provisions of the Serviceman's Group Life Insurance Act of 1965, giving an insured service member the right to freely designate and alter the beneficiaries named under the contract, prevail over and displace a constructive trust for the benefit of the service member's children imposed upon the policy proceeds by a state court divorce decree); *McCarty v. McCarty*, 453 U.S. 210 (1981) (federal law preempted power of state court to divide military retirement benefits in a divorce); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (federal law preempted power of state court to divide railroad retirement benefits on divorce); *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964); *Free v. Bland*, 369 U.S. 663 (1962) (U.S. savings bond survivorship provisions in treasury regulations

preempted inconsistent Texas community property law); *Wissner v. Wissner*, 338 U.S. 655 (1950) (National Service Life Policy benefits are the sole property of the beneficiary, and are not community property); *McCune v. Essig*, 199 U.S. 382 (1905) (veteran's right, under federal statute, to designate beneficiary of life insurance could not be controlled by state court); *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001) (ERISA preempts a claim by a widow seeking to impose a constructive trust on insurance policy proceeds to remedy constructive fraud on the community); *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981) (Veterans Administration disability payments are not property and cannot be divided upon divorce); *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979) (railroad retirement preempted); *Perez v. Perez*, 587 S.W.2d 671 (Tex. 1979) (military adjustment benefits held to be separate property due to gratuitous nature under federal statute); *United States v. Stelter*, 567 S.W.2d 797 (Tex. 1978) (ex-Wife could not garnish ex-Husband's retirement pay, under federal statute); *Valdez v. Ramirez*, 574 S.W.2d 748 (Tex. 1978) (joint survivor annuity permitted by Civil Service Retirement Act preempted contrary state law); *Ex parte Johnson*, 591 S.W.2d 453 (Tex. 1979) (federal statute precluded division of V.A. disability benefits upon divorce); *Arrambide v. Arrambide*, 601 S.W.2d 197 (Tex. Civ. App.–El Paso 1980, no writ) (federal law prohibits division of Veterans Administration disability payments upon divorce).

F. TEXAS LAW DECLARED UN-CONSTITUTIONAL. The provisions in the Texas Constitution and Family Code, banning the granting of same-sex marriage and the recognition of same-sex marriage from elsewhere, have been declared unconstitutional by a Federal district judge in San Antonio. See Section III.D.3 above.

VIII. OTHER NON-TRADITIONAL MARRIAGES.

A. POLYGAMOUS MARRIAGES. The states of the United States permit only marriages of two persons, not more. The attitude of the United States to the issue of "plural marriages" was plainly stated in *Reynolds v. U.S.*, 98 U.S. 145, 165 (1878):

> Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England, polygamy has been treated as an offence against society.

In *Potter v. Murray City*, 585 F. Supp. 1126 (1984), *aff'd*, 760 F.2d 1-065 (10th Cir. 1985), the Federal district judge ruled that the state of Utah, who fired an employee for polygamy, had a compelling interest in protecting and advancing traditional marriage that supported the ban on polygamous marriage.

Islamic law (Shari'a law) permits "plural marriages" in some situations, and in Africa polygamy is widely accepted when not widely practiced. It is estimated that 1 to 3% of marriages in the Islamic world are polygamous. Under Shari'a law, a man can take up to four wives, provided he can afford to support them all and the children he has with them. Polygamy is legal, subject to varying conditions, in Iraq, Syria, Morocco, Algeria, Jordan, Yemen, Egypt, Indonesia, Muslims in India, Bangladesh, Pakistan, Muslims in Sri Lanka, Singapore, Camaroon, Burkina Faso, Gabon (where polygamy is the default), Bhutan, and nations in Africa that apply "African customary law." Polygamous marriage validly entered into in another country are recognized in England, Australia and New Zealand. The courts of France, Belgium, Spain, and Canada do not recognize plural marriage but will afford some marital-rights to persons in such

relationships. *See* Angela Campbell, et al., *Polygamy in Canada: Legal and Social Implications for Women and Children (A Collection of Policy Research Reports)* (Nov. 2005).[18] One National Public Radio report related that academics researching the issue estimate that 50,000 to 100,000 people in the United States live in polygamous families. "Some Muslims in U.S. Quietly Engage in Polygamy" National Public Radio (May 27, 2008). At some point, American courts will have to address persons in the United States in polygamous marriages that were valid in the country where they were celebrated. The argument that the freedom to choose whom to marry is a right protected by the Fourteenth Amendment will have to be reconciled to the view that you are free to marry whomever you want, including more than one other person. Some American polygamists have one legal marriage to one woman and "spiritual" marriages to one or more other women. The state of Utah criminalizes such relationships. On December 13, 2013, Federal District Judge Clark Waddoups invalidated the part of Utah's anti-bigamy statute that purported to criminalize cohabitation with more than one woman, in a 91-page opinion that delved deeply into the history of polygamy and efforts to ban it in the United States. *Brown v.Buhman*, 947 F.Supp.2d 1170 (U.S. Dist. Ct. Utah 2013). The Judge did find, however, no fundamental right to enter into a second legal marital union when already legally married.

Texas Penal Code Section 25.01 criminalizes bigamy, which it defines as a married persons purporting to marry or marrying someone other than his spouse "in this state, or any other state or foreign country . . . ." This statute purports to criminalize valid polygamous marriages conducted in accordance with the law or customs of other nations.

B. TEMPORARY MARRIAGES. The Islamic law recognized by Shi'i Muslims makes a distinction between permanent marriage (nikah) and temporary marriage (nikah mut'ah). Permanent marriage, like marriage in "the West," lasts until divorce or death. Mut'ah, in contrast, lasts for a period of time agreed upon in advance, and when the end is reached the marriage automatically annuls itself. The BBC News reports that the practice is followed by many Muslims in England. Nikah mut'ah is not recognized as valid in the Suni branch of Islam.

When a Texas court encounters persons who have a nikah mut'ah, will it respect the temporary nature of the marriage? Will it enforce provisions in the agreement for the payment of a dowry (mahr) to the woman, or her parents, to the exclusion of a property division or spousal maintenance?

C. CONSANGUINEAL MARRIAGES. In Texas, a person cannot marry a brother or sister, an ancestor or descendant, an aunt or uncle, a niece or nephew, a first cousin, or a present or former step-child. Tex. Fam. Code Section 2.004(b)(6). Marriage between first cousins is permitted in Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Maryland, Massachusetts, New Jersey, New Mexico, New York, North Carolina, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia. Some states allow first cousins to marry under certain circumstances: Arizona, if both are 65 or older, or one is unable to reproduce; in Illinois, if both are 50 or older, or one is unable to reproduce; in Indiana, if both are at least 65; in Maine, if the couple obtains a physician's certificate of genetic counseling; in Utah, if both persons are 65 or older, or if both are 55 or older and one is unable to reproduce; Wisconsin, if the woman is 55 or older, or one is unable to reproduce.[19] If two first cousins married in a place that permitted such marriages, will a Texas court recognize the validity of that marriage?

D. UNDER AGE MARRIAGE. In Texas, ordinarily a person must be 18 years of age or older, in order to marry. Tex. Fam. Code Section 2.101. However, a person as young as 16 years can

marry with parental consent. Tex. Fam. Code Section 2.102. And a court can authorize a minor to enter into a marriage. Tex. Fam. Code Section 2.103. If persons divorcing in Texas were married in a place that permitted marriage at a younger age, will a Texas court recognize the validity of that marriage?

IX. GENDER IDENTITY ISSUES. Gender identity issues are making their way into the cultural and legal consciousness in America, but there is a war of words going on, and this struggle reflects divergent views on what constitutes gender, and whether and how a person can change their gender for social and legal purposes.

A. DEFINITIONS. The American Psychiatric Association's DSM-5 notes: "The area of sex and gender is highly controversial and has led to a proliferation of terms whose meanings vary over time and within and between disciplines." DSM-5, p. 451 (2013). An example is the phrase "sexual preference" versus the phrase "sexual orientation." The former connotes a subjective choice while the latter connotes a genetic or biological condition[20]. Clarity of discussion will be aided by agreeing on terms. The following definitions are offered by the American Psychological Association:

> **Sex** refers to a person's biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia.
>
> **Gender** refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Behavior that is compatible with cultural expectations is referred to as gender-normative; behaviors that are viewed as incompatible with these expectations constitute gender non-conformity.
>
> **Gender identity** refers to "one's sense of oneself as male, female, or transgender" (American Psychological Association, 2006). When one's gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category (cf. Gainor, 2000).
>
> **Gender expression** refers to the "…way in which a person acts to communicate gender within a given culture; for example, in terms of clothing, communication patterns and interests. A person's gender expression may or may not be consistent with socially prescribed gender roles, and may or may not reflect his or her gender identity" (American Psychological Association, 2008, p. 28).
>
> **Sexual orientation** refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals). While these categories continue to be widely used, research has suggested that sexual orientation does not always appear in such definable categories and instead occurs on a continuum (e.g., Kinsey, Pomeroy, Martin, & Gebhard, 1953; Klein, 1993; Klein, Sepekoff, & Wolff, 1985; Shiveley & DeCecco, 1977) In addition, some research indicates that sexual orientation is fluid for some people; this may be especially true for women (e.g., Diamond, 2007; Golden, 1987; Peplau & Garnets, 2000).

According to an American Psychological Association publication, "*Transgender* is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth." [Italics added.][21]

The DSM-5 defines *gender assignment* as "the initial assignment as male or female. This occurs usually at birth, and, thereby, yields the 'natal gender.'" "*Gender reassignment* denotes an official (and usually legal) change of gender." DSM-5, p. 451 (2013). The DSM-5 uses the term "posttransition" when "[t]he individual has transitioned to full-time living in the desired gender (with or without legalization of gender change) and has undergone (or is preparing to have) at least one cross-sex medical procedure or treatment regimen–namely, regular cross-sex hormone treatment or gender reassignment surgery confirming the desired gender (e.g., penectomy, vaginoplasty in a natal male; mastectomy or phalloplasty in a natal female)." DSM-V p. 453 (2013).

B. THE DSM-5's GENDER DYSPHORIA DISORDER. The American Psychiatric Association publishes the leading authority on naming and diagnosing mental disorders in the United States, the Diagnostic and Statistical Manual of Mental Disorders (DSM). The Manual is updated every few decades. The Fourth Edition, the DSM-4, was published in 1994. In the DSM-4, the Association defined "Gender Identity Disorder" as a condition where the person has a "strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex." The diagnosis also requires "evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex." In order for the condition to be considered a "disorder," "there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning." DSM-4, pp. 532-33.

In 2013, the American Psychiatric Association published the Diagnostic and Statistical Manual (5th edition) (DSM-5). The Manual dropped the "Gender Identity Disorder" reflected in DSM-4 and in its stead has the new Gender Dysphoria Disorder. The Association said: "[P]eople whose gender at birth is contrary to the one they identify with will be diagnosed with gender dysphoria." The Association states:

> For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual's expressed/ experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children, the desire to be of the other gender must be present and verbalized. This condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.[22]

DSM-5 does not consider cross-gender identity in and of itself a disorder. Rather the disorder exists only if the cross-gender identity causes distress or impairment. The focus of treatment thus is not attempting to reduce or eliminate the cross-gender identity, but rather to reduce or eliminate the distress associated with the condition. This view is supported by assigning Gender Dysphoria Disorder to its own chapter, in contrast to Gender Identity Disorder which was lumped together in the same chapter with Sexual Disorders in DSM-4. The subgroup that developed the new Disorder indicated that separating the Gender Dysphoria Disorder from Sexual Disorders was intended to reduce the stigma associated with the diagnosis.[23]

C. THE TRANSGENDER "TIPPING POINT." The June 2014 edition of Time Magazine had a cover of trans-gender television actress Laverne Cox, and contained an article by Katy Steinmetz arguing that American society was close to crossing a threshold of acceptance of trans-gendered persons. According to an article by Dr. Jillian T. Weiss, there are approximately 700,000 trans-gendered persons in the USA.[24] In *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), the Court of Appeals held that Title VII of the 1964 Civil Rights Act prohibits discrimination based on "sexual identity" not just "biological sex." In *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir.

2011), the court said: "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination." On April 20, 2012, the Equal Employment Opportunity Commission ruled that deciding not to hire a person based on their transgender status was prohibited discrimination based on sex.[25] There are Federal regulations and court rulings that prohibit discrimination based on sexual orientation or gender identity in housing and extending credit.

In Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 Harv. Civil Rights. -- Civil Liberties L. Rev. 51 (2011), a Professor at the University of Southern California Gould School of Law writes about possible application of the Full Faith and Credit Clause of the U.S. Constitution to trans-gender adjudications.

D. GENDER IDENTITY UNDER TEXAS LAW. In *Littleton v. Prang*, 9 S.W.3d 223 (Tex. App.–San Antonio 1999, pet. denied), the appellate court held that a person's gender was not changed by a sex change operation, and that the designation of gender on the birth certificate controlled over a sex-change operation. That view of the law was confirmed in *Mireles v. Mireles*, No. 01–08–00499–CV, 2009 WL 884815, at *1 (Tex. App.--Houston [1st Dist.] April 2, 2009, pet. denied) (mem. opinion). However, in 2009, the Legislature amended Section 2.005(8) of the Family Code to provide that proof of identity for purposes of obtaining a marriage license could consist of "an original or certified copy of a court order relating to the applicant's name change or sex change . . . ." This impliedly says that a court can judicially recognize a change in gender for purposes of marrying. In February of 2104, the Corpus Christi Court of Appeals decided *In the Estate of Thomas Trevino Araguz III, Deceased*, 443 SW3d 233 (Tex. App.–Corpus Christi 2014), *pet. granted sub nom. Delgado v. Araguz*, a case involving a marriage between a man (Thomas) and another man (Nikki) who was born with male genitalia but claimed to have a female brain, and who said she was miss-typed on her birth certificate. The facts showed that Thomas married Nikki at a time when both Thomas and Nikki had male sex organs. After the marriage ceremony, Nikki underwent surgery which removed her male sex organs and created female sex organs. District Judge Randy Clapp dismissed Nikki's claims in probate on the grounds that Thomas and Nikki had a same-sex marriage that was prohibited under Texas law. The Corpus Christi Court of Appeals reversed, saying a fact issue was presented as to whether Nikki was male or female at the time of the marriage ceremony and thereafter. The appellate court held that genitalia at birth or at the time of marriage is not determinative of gender, and the Nikki's expert testimony that she was "medically and psychologically" a female created a fact issue that precluded summary judgment. *Araguz*, 443 S.W.3d at 248-49. In doing so, the appellate court credited Nikki's medical expert's opinion that "sexuality per se is a complex phenomenon which involves a number of underlying factors . . . includ[ing] chromosomes, hormones, sexual anatomy, gender identity, sexual orientation, and sexual expression." *Id.* at 246. The import of the Corpus Christi Court of Appeals' decision is that that a person's self-perceived gender identity can prevail over physical attributes in determining whether a person is male or female. The court specifically said that a sex-change operation is not determinative. Thomas's ex-wife appealed has on behalf of Thomas' children from his first marriage to the Texas Supreme Court, where the case is styled *Heather Delgado, In Her Capacity a/n/f Trevor Araguz and Tyler Araguz and Simona Longoria v. Nikki Araguz*, 14-0404. On December 19, 2014, the Texas Supreme Court requested briefs. Petitioner's Brief was due on January 20, 2015, the Response Brief is due February 9, and Petitioner's Reply is due on February 24.[26] One consequence of the Court of Appeals' ruling is that a fact issue may exist in almost any circumstance about the gender of a person.

Since the appellate court did not take a position on whether and when the marriage was valid, the appellate opinion did not discuss the possibility that the marriage became valid after the sex change operation was concluded, or that an informal marriage may have arisen at that time. At this point in time, there is no definitive indication of how and when a sex change, mentioned in Family Code Section 2.005(8), becomes legally effective. The fact that Section 2.005(8) mentions a "court order relating to sex change" suggests that the law does not recognize the sex change until a court issues an order to that effect. A bright line such as that would have the advantage of eliminating fact issues over when a person's gender changes.

Imagine a circumstance in which a man and a woman marry, then the man has a sex-change operation and becomes a woman. If the gender switch is legally recognized, did the parties' marriage become void as a same-sex marriage?

On April 4, 2005, the Gender Recognition Act of 2004 went into effect in Great Britain. The Act creates a process by which a person can legally change his or her gender. This is done by presenting evidence to a Gender Recognition Panel which is authorized to issue a Gender Recognition Certificate.

X. BRINGING A CONSTITUTIONAL CHALLENGE. There are established rules regarding bringing a constitutional challenge to Texas law in a Texas court.

1. Notice to the Attorney General. A party who files motion or pleading, claiming unconstitutionality of state statute, must file an Office of Court Administration form telling the court which pleading to serve on the Attorney General. The court must then serve notice on the Texas Attorney General. The Government Code spells out the procedure:

> § 402.010. Legal Challenges to Constitutionality of State Statutes
>
> (a) In an action in which a party to the litigation files a petition, motion, or other pleading challenging the constitutionality of a statute of this state, the party shall file the form required by Subsection (a-1). The court shall, if the attorney general is not a party to or counsel involved in the litigation, serve notice of the constitutional challenge and a copy of the petition, motion, or other pleading that raises the challenge on the attorney general either by certified or registered mail or electronically to an e-mail address designated by the attorney general for the purposes of this section.
>
> (a-1) The Office of Court Administration of the Texas Judicial System shall adopt the form that a party challenging the constitutionality of a statute of this state must file with the court in which the action is pending indicating which pleading should be served on the attorney general in accordance with this section.
>
> (b) A court may not enter a final judgment holding a statute of this state unconstitutional before the 45th day after the date notice required by Subsection (a) is served on the attorney general.
>
> (c) A party's failure to file as required by Subsection (a) or a court's failure to serve notice as required by Subsection (a) does not deprive the court of jurisdiction or forfeit an otherwise timely filed claim or defense based on the challenge to the constitutionality of a statute of this state.
>
> (d) This section or the state's intervention in litigation in response to notice under this section does not constitute a waiver of sovereign immunity.

Tex. Gov't Code § 402.010 (as amended in 2013). The OCA has put the form required by Section a-1 on-line.[27]

In oral argument on November 5, 2013, in the Texas Supreme Court case of *In re J.B. & H.B.*, the attorney for the same-sex couples argued that notice need not be given to the Texas Attorney General if neither party raises the unconstitutionality of the Texas Constitution and Texas Family Code.[28]

2. Legislation Up To Constitutional Limits. As stated in *State v. Texas Mun. Power Agency*, 565 S.W.2d 258, 271 (Tex. Civ. App.--Houston [1st Dist.] 1978, writ dism'd):

> The Texas legislature may make any law not prohibited by the Constitution of the State of Texas or that of the United States of America.

3. Due Course of Law Attack Only For Constitutionally-Protected Right. In asserting a due course of law claim under the Texas Constitution, the complaining party must establish that his interest is constitutionally protected. *In re J.W.T.*, 872 S.W.2d 189, 190 (Tex.1994).

4. Complaining Party Must Be Injured. Courts will not pass on the constitutionality of a statute upon that complaint of one who fails to show he is injured by its operation. *See Friedrich Air Conditioning & Refrigeration Co. v. Bexar Appraisal Dist.*, 762 S.W.2d 763, 771 (Tex. App.--San Antonio 1988, no writ) (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1935)). When challenging the constitutionality of a statute, a defendant [in a criminal case] must show that in its operation, the statute is unconstitutional as applied to him in his situation; that it may be unconstitutional as to others is not sufficient. *Bynum v. State*, 767 S.W.2d at 769, 774 (Tex. Crim. App. 1989).

5. Limit Inquiry to Record in Case. Constitutional issues will not be decided upon a broader basis than the record requires. *State v. Garcia*, 823 S.W.2d 793, 799 (Tex. App.--San Antonio 1992, pet. ref'd).

6. Presumption of Validity. An analysis of the constitutionality of a statute begins with a presumption of validity. *HL Farm Corp. v. Self*, 877 S.W.2d 288, 290 (Tex. 1994); *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 558 (Tex. 1985). "The burden of proof is on those parties challenging this presumption." *General Services Com'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001). The same requirements are applied under the Texas Constitution as under the United States Constitution. *Reid v. Rolling Fork Pub. Util. Dist.*, 979 F.2d 1084, 1089 (5th Cir.1992); *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex. 1990).

7. Interpret to Avoid Unconstitutionality. "When possible, we are to interpret enactments in a manner to avoid constitutional infirmities." *General Services Com'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996); *Texas State Bd. of Barber Examiners v. Beaumont Barber Coll., Inc.*, 454 S.W.2d 729, 732 (Tex. 1970). "Legislative enactments will not be held unconstitutional and invalid unless it is absolutely necessary to so hold." *Texas State Bd. of Barber Examiners v. Beaumont Barber College, Inc.*, 454 S.W.2d 729, 731 (Tex.1970). The statute must be upheld if a reasonable construction can be ascertained which will render the statute constitutional and carry out the legislative intent. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App.1979). "Before a legislative act will be set aside, it must clearly appear that its validity cannot be supported by any reasonable intendment or allowable presumption." *Ex parte Austin Indep. Sch. Dist.*, 23 S.W.3d 596, 599 (Tex. App.--Austin 2000, no pet.).

8. "Facial Invalidity." A statute can be challenged for unconstitutionality based upon "facial invalidity." A statute is not facially invalid unless it could not be constitutional under any circumstances. *See Appraisal Review Bd. of Galveston County v. Tex-Air Helicopters, Inc.*, 970

S.W.2d 530, 534 (Tex. 1998). A statute need not be declared unconstitutional simply because it might be unconstitutional as applied to the facts of another case. *See Weiner v. Wasson*, 900 S.W.2d 316, 332 (Tex. 1995). *See Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 463 (Tex.1997) ("We may not hold the statute facially invalid simply because it may be unconstitutionally applied under hypothetical facts which have not yet arisen").

9. Unconstitutional "As Applied." As noted in 12A Tex. Jur. 3d *Constitutional Law* § 38 (1993):

> A statute otherwise constitutional may be declared unconstitutional in its operation as applied to particular persons, circumstances, or subject matter.

The Austin Court of Appeals explained an "as applied" challenge as follows:

> In an "as applied" constitutional challenge, the challenger must show the statute in issue is unconstitutional when applied to the challenger because of the challenger's particular circumstances. *See Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995). To so do, the challenger could show either that (1) the circumstances complained of exist under the facts of the particular case or (2) such circumstances necessarily exist in every case, so that the statute always acts unconstitutionally when applied to the challenger. It is not enough to show that the statute may operate unconstitutionally against the challenger or someone in a similar position in another case.

Texas Workers Compensation Com'n v. Texas Mun. League Intergovernmental Risk Pool, 38 S.W.3d 591, 599 (Tex. App.–Austin 2000) *aff'd*, 74 S.W.3d 377 (Tex. 2002).

10. Challenges Based on Texas Vs. Federal Constitution. In *University of Texas Medical School v. Than*, 901 S.W.2d 926, 929 (Tex.1995) (a procedural due process case), the Texas Supreme Court stated that:

> The Texas due course clause is nearly identical to the federal due process clause, which provides: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . U.S. CONST. amend. XIV, § 1. While the Texas Constitution is textually different in that it refers to "due course" rather than "due process," we regard these terms as without meaningful distinction. *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252-53 (1887). As a result, in matters of procedural due process, we have traditionally followed contemporary federal due process interpretations of procedural due process issues. . . . Although not bound by federal due process jurisprudence in this case, we consider federal interpretations of procedural due process to be persuasive authority in applying our due course of law guarantee.

However, *in Davenport v. Garcia*, 834 S.W.2d 4, 20 (Tex. 1992), the Texas Supreme Court differentiated constitutional attacks based on the Texas Constitution from attacks based on the U.S. Constitution:

> In interpreting our constitution, this state's courts should be neither unduly active nor deferential; rather, they should be independent and thoughtful in considering the unique values, customs, and traditions of our citizens. With a strongly independent state judiciary, Texas should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful, [FN53] but should never feel compelled to parrot the federal judiciary. [FN54] With the approach we adopt, the appropriate role of relevant

federal case law should be clearly noted, in accord with *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476- 77, 77 L.Ed.2d 1201 (1983) (presuming that a state court opinion not explicitly announcing reliance on state law is assumed to rest on reviewable federal law). A state court must definitely provide a "plain statement" that it is relying on independent and adequate state law, [FN55] and that federal cases are cited only for guidance and do not compel the result reached. Id. at 1040-41, 103 S.Ct. at 3476-77. See also William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U.L.Rev. 535, 552 (1986). Long offers further reason for developing state constitutional law, since now courts, rather than merely adjudicating state constitutional claims, must be prepared to defend their integrity by both quantitatively and qualitatively supporting their opinion with state authority." Duncan, STATE COURTS, at 838. Consistent with this method, we may also look to helpful precedent from sister states in what New Jersey Justice Stewart Pollock has described as "horizontal federalism." Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985). [Footnotes omitted]

11. A Substantive Due Process Challenge. A "substantive due process" of law challenge was described in the case of *In re B--M--N--*, 570 S.W.2d 493, 503 (Tex. Civ. App.--Texarkana 1978, no writ), as follows:

> In substantive due process cases, the courts balance the gain to the public welfare resulting from the legislation against the severity of its effect on personal and property rights. A law is unconstitutional as violating due process when it is arbitrary or unreasonable, and the latter occurs when the social necessity the law is to serve is not a sufficient justification of the restriction of the liberty or rights involved.

12. Must Raise Constitutional Challenge in Trial Court. Constitutional challenges not expressly presented to the trial court by written motion, answer or other response will not be considered by the appellate courts as grounds for reversal. *City of San Antonio v. Schautteet*, 706 S.W.2d 103, 104 (Tex. 1986); *see In re C.T.H.*, 112 S.W.3d 262 (Tex. App.–Beaumont 2003, no pet.), a constitutional challenge to Family Code § 156.101 ("Grounds for Modification of Order Establishing Conservatorship or Possession and Access") was held not to be reviewable because it was not preserved in the trial court).

13. Avoid Constitutional Ruling if Other Grounds Are Available. *In San Antonio General Drivers, Helpers Local No. 657 v. Thornton*, 156 Tex. 641, 299 S.W.2d 911 (1957), the Supreme Court said that "[a] court will not pass on the constitutionality of a statute if the particular case before it may be decided without doing so."

XI. NON-MARITAL CLAIMS BETWEEN UNMARRIED DOMESTIC PARTNERS. Tex. H.R.J. Res. 6, § 2, 79th Leg., R.S. (2005) stated: "This state recognizes that through the designation of guardians, the appointment of agents, and the use of private contracts, persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legal status identical or similar to marriage." *Cited in Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.--Houston [14 Dist.] 2006, no pet.). What kinds of issue might courts face as participants in same-sex relationships turn to non-marital property law as the foundation for their claims?

A. CONTRIBUTING MONEY OR LABOR TO PURCHASE PRICE. The case of *Ayala v. Valderas*, 2008 WL 4661846 (Tex. App.--Fort Worth 2008, no pet.) (memo. opinion), involved an

unmarried heterosexual couple who purchased real property while together. The appellate court said:

> The record demonstrates that Valderas had a meretricious relationship or a "live-in" relationship with Antonio. If the relationship was meretricious, neither one of the individuals has a good faith belief that they are entering into a marital relationship. *Id*. Each party is entitled to the property acquired during the relationship in proportion to the value that his or her labor contributed to its acquisition. *Hovious v. Hovious*, No. 02–04–00169–CV, 2005 WL 555219, at *6 (Tex. pp.–Fort Worth Mar. 10, 2005, pet. denied) (mem.op.). If Valderas and Antonio had a live-in relationship, Valderas would be entitled to a share of the property in the same proportion that her labor contributed to the purchase price so long as she could show that the money used to buy the property was acquired in whole or in part by her labor before the property was purchased. See *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. App.--Houston [1st Dist.] 1982, writ ref'd n.r.e.); see also 39 Aloysius Leopold, Texas Practice: Marital Property and Homesteads § 21.9–.10 (1993) (discussing live-in relationships). Thus, to the extent there is any difference between a meretricious relationship and a live-in relationship, ownership interests in property arising from such relationships are the same.FN5
>
> > FN5. Valderas and Antonio may have also held the property as tenants in common. See 16 Tex. Jur.3d Cotenancy and Joint Ownership, §§ 2, 7 (2006) (stating that tenancy in common is an undivided possessory interest in property and that a cotenancy is created when two or more persons share the unity of exclusive use and possession of the same property).

Here, Valderas testified that she did not purchase all of the converted property with her separate assets but that she deposited her earned money in an account with Antonio's money and that they used the commingled money to jointly purchase the personal property in the residence. According to Valderas, "All I know is that when Tony and I put our money together, it came out from the same thing." Valderas thus contributed her money to the acquisition of the property. Whether Valderas and Antonio had a meretricious relationship or a live-in relationship, Valderas consequently acquired some ownership or a right of ownership interest in the purchased property as a result of her contribution to the purchase price of the property. See *Small*, 638 S.W.2d at 28; *Sanger*, 1999 WL 742607, at *3. Utilizing the appropriate standards of review, we hold that the evidence is legally and factually sufficient to show that Valderas had ownership or a right of ownership interest in the property the subject of the suit.

The court in *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. App.–Houston [1st Dist.] 1982, writ ref'd n.r.e.), held that unmarried same-sex companions who both contributed labor or cash to the acquisition of assets had joint ownership interests in proportion to the labor or money each party contributed to the purchase money. The appellate court did not explicitly comment on the partnership theory also advanced by the plaintiff. *Small v. Harper* relied on *Hayworth v. Williams*, 116 S.W. 43 (1909), which held that a woman, who lived with a man she know was married to someone else, could establish her ownership of real property to the extent that the money used to buy the land was attributable to her labor. *Accord*, *Cluck v. Sheets*, 171 S.W.2d 860 (Tex. 1943). The appellate court in *Small v. Harper* held that there were no public policy considerations that would prevent the plaintiff from applying that law to her benefit. *Id.* at 28. *See Hovious v. Hovious*, 2005 WL 555219 (Tex. App.--Fort Worth 2005, pet. denied) (memo. opinion) (upon declaring a marriage void, "each party is entitled to the property acquired during the relationship in proportion to the value that his or her labor contributed to its acquisition") (citing Professor Leopold's publication on Texas

marital property law and homesteads). In *Aaron v. Aaron*, 2012 WL 273766, *4 (Tex. App.--Houston [14th Dist.] 2012, no pet.), "[t]he trial court found that, even after Daryl and Kimberly had decided that the house would be purchased in Daryl's name alone, they purchased the Green Top Residence jointly and intended to be joint owners of the house, and that Kimberly paid one-half of the down payment and closing costs. The trial court concluded that Daryl and Kimberly jointly owned the Green Top Residence as tenants in common, each owning a one-half, undivided separate property interest in the house." The appellate court affirmed.

B. PARTNERSHIP. In *Jewell v. Jewell*, 602 S.W.2d 315, 317 (Tex. Civ. App.--Texarkana 1980, no writ), the court said: "If real property is purchased or paid for by partnership funds but record title is in one of the partners only, a court of equity may, in a proper case, impress it with a constructive or resulting trust in favor of the partnership, under the doctrine of equitable conversion." The interests in the partnership are not necessarily in proportion to the capital contributed, if the partnership agreement is otherwise. In *In re Marriage of Sanger*, 1999 WL 742607, *3 (Tex. App.--Texarkana 1999, no pet.) (not for publication), the court said: "when a meretricious relationship ends, a party only has an interest in the property that he separately purchased and that he acquired an interest in through an express trust, a resulting trust, or the existence of a partnership." Although the relationship in that case was between a man and a woman, there would seem to be no prohibition against applying the same rule to an intimate same-sex relationship that is known not to be a marriage relationship. A similar statement was made in *Faglie v. Williams*, 569 S.W.2d 557, 566 (Tex. Civ. App.–Austin 1978, writ ref'd n.r.e.) (involving a heterosexual relationship): "No rights in the property flow from appellant's meretricious relationship with Mike Williams, without proof of an express trust, or a resulting trust in her favor, or existence of a partnership. In the absence of proof of one of these three theories, the courts refuse to award anything to a pretended wife who knows the nature of the relationship." In *Harrington v. Harrington*, 742 S.W.2d 722, 725 (Tex. App.–-Houston [1st Dist.] 1987, no pet.), "[t]he trial court concluded that the parties entered into an oral partnership/joint venture to own and occupy the home located on Talbot Street jointly; that they took title to the home in appellant's name for convenience and credit purposes only; and that the parties owned the home as tenants in common." The appellate court affirmed saying: "The appellee pled that an oral partnership existed in the parties' purchase and ownership of the property, entitling her to an undivided one-half interest in the property. After making the findings of fact described above, the trial judge also reached that conclusion and entered judgment for the appellee on this question. After reviewing the record, we find that there is some evidence of probative force to support the court's findings and conclusion." *Id.* at 724.

The Texas Revised Partnership Act [TRPA] was in effect from January 1, 1994 until December 31, 2005, when it was replaced by the Texas Business Organizations Code. TRPA said that "an association of two or more persons to carry on a business for profit as owners creates a partnership." *Ingram v. Deere*, 288 S.W.3d 886, 895 (Tex. 2009). Under TRPA, the court looked at five factors to determine whether a partnership existed: (1) the receipt or right to receive a share of profits of the business; (2) an expression of intent to be partners in the business; (3) participation or right to participate in control of the business; (4) the sharing or agreeing to share losses and liabilities of the business; and (5) contributing or agreeing to contribute money or property to the business. *Id.* at 895. Evidence of all five factors is not required. *Id.* at 896. ". . . TRPA does not require direct proof of the parties' intent to form a partnership." *Id.* at 895. Since January 1, 2006, the formation of partnerships in Texas has been governed by the Texas Business Organizations Code. The Code provide the following standards

for determining when a partnership has been created:

> § 152.052. Rules for Determining if Partnership is Created
>
> (a) Factors indicating that persons have created a partnership include the persons':
>
> (1) receipt or right to receive a share of profits of the business;
> (2) expression of an intent to be partners in the business;
> (3) participation or right to participate in control of the business;
> (4) agreement to share or sharing:
> (A) losses of the business; or
> (B) liability for claims by third parties against the business; and
> (5) agreement to contribute or contributing money or property to the business.
>
> (b) One of the following circumstances, by itself, does not indicate that a person is a partner in the business:
>
> (1) the receipt or right to receive a share of profits as payment:
> (A) of a debt, including repayment by installments;
> (B) of wages or other compensation to an employee or independent contractor;
> (C) of rent;
> (D) to a former partner, surviving spouse or representative of a deceased or disabled partner, or transferee of a partnership interest;
> (E) of interest or other charge on a loan, regardless of whether the amount varies with the profits of the business, including a direct or indirect present or future ownership interest in collateral or rights to income, proceeds, or increase in value derived from collateral; or
> (F) of consideration for the sale of a business or other property, including payment by installments;
>
> (2) co-ownership of property, regardless of whether the co-ownership:
> (A) is a joint tenancy, tenancy in common, tenancy by the entirety, joint property, community property, or part ownership; or
> (B) is combined with sharing of profits from the property;
>
> (3) the right to share or sharing gross returns or revenues, regardless of whether the persons sharing the gross returns or revenues have a common or joint interest in the property from which the returns or revenues are derived; or
>
> (4) ownership of mineral property under a joint operating agreement.
>
> (c) An agreement by the owners of a business to share losses is not necessary to create a partnership.

A partnership agreement may be oral or in writing. Tex. Bus. Org. Code § 151.001(5). The partnership agreement governs the relations of the partners. Tex. Bus. Org. Code § 152.002.

Tex. R. Civ. P. 93.5 requires a party wishing to deny an allegation of partnership to file a verified denial of partnership, and the failure to do so generally constitutes an admission of partnership, which cannot be controverted at trial. *Washburn v. Krenek*, 684 S.W.2d 187, 191 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.).

C. JOINT VENTURE. "A joint venture is similar to a partnership, but it is ordinarily limited to a particular transaction or enterprise." *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 319

(Tex. App.--Houston [1st Dist.] 2011, no pet.). "A joint venture, being 'ex contractu,' must be based upon an agreement, either express or implied." *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978). The Court continued: "Beyond this threshold requirement, several essential elements are generally recognized. These elements are (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise." *Id.* at 287. "The intention of the parties to a contract is a prime element in determining whether or not a partnership or joint venture exists." *Id.* at 287. "A joint venture and a partnership are not synonymous, and many joint ventures are not partnerships even though there may be a sharing of profits." *Texas. Milberg Factors, Inc. v. Hurwitz-Nordlicht Joint Venture*, 676 S.W.2d 613, 616 (Tex. App.--Austin 1984, writ ref'd n.r.e.).

D. CONTRACT CLAIM. "In a suit based on contract, whether written or oral, the plaintiff is required to establish the basic elements of a contract, i. e. offer, acceptance, and consideration." *Dallas Bldg. & Repair v. Butler*, 589 S.W.2d 794, 795-97 (Tex. Civ. App.--Dallas 1979, writ denied). "A binding contract exists when each of the following elements are established: (1) offer; (2) acceptance in strict compliance with terms of offer; (3) meeting of the minds; (4) communication that each party has consented to terms of the agreement; and (5) execution and delivery of the contract with intent that it become mutual and binding on both parties." *McCulley Fine Arts Gallery v. X Partners*, 860 S.W.2d 473, 477 (Tex. App.--El Paso 1993, no writ). "In order to be legally binding, a contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook." *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).

Contracts can be oral as well as written. The terms of an oral contract must be definite, certain, and clear as to all essential terms, and if they are not, the oral contract fails for indefiniteness. *Southern v. Goetting*, 353 S.W.3d 295, 299–300 (Tex. App.--El Paso 2011, pet. denied). "[E]ssential or material terms are those that parties would reasonably regard as vitally important elements of their bargain." *Heartland Holdings, Inc. v. U.S. Trust Co. of Tex., N.A.*, 316 S.W.3d 1, 9 (Tex. App.--Houston [14th Dist.] 2010, no pet.).

E. CLAIMS FOR SERVICES RENDERED (QUANTUM MERUIT). Non-marital companions, both same-sex and opposite sex, sometimes assert claims for services rendered. "It has long been the rule that one cannot voluntarily provide goods and services which one has no duty to provide, and then demand payment as restitution." *Intermarque Auto. Prods. v. Deldman*, 21 S.W.3d 544, 553 (Tex. App.--Texarkana 2000, no pet.). In *Martin v. de la Garza*, 38 S.W.2d 157 (Tex. Civ. App.--San Antonio 1931, writ dism'd), the appellate court quoted *Rockowitz v. Rockowitz*, 146 S.W. 1070, 1071-72 (Tex. Civ. App. 1912, no writ), where the appellate court said: "The rule is well settled that, where persons are living together as one household, services performed for each other are presumed to be gratuitous, and an express contract for remuneration must be shown or that circumstances existed showing a reasonable and proper expectation that there would be compensation." The same language was again quoted in *Salmon v. Salmon*, 406 S.W.2d 949, 951 (Tex. Civ. App.--Ft. Worth 1966, writ ref'd n.r.e.). A claim for services and money provided was rejected on summary judgment in *Coons-Andersen v. Andersen*, 104 S.W.3d 630 (Tex. App.--Dallas 2003, no pet.). There is a four-year statute of limitations on such claims, whether the claim is based on an express contract or lies in implied contract/quantum meruit. *Quigley v. Bennett*, 256 S.W.3d 356, 361 (Tex. App.--San Antonio 2008, no pet.). The limitations period begins when payment was due under an express contract. If no contract is proved, limitations on the quantum meruit claim begins to run at the time the services

are rendered. *Scott v. Walker*, 141 Tex. 181, 170 S.W.2d 718 (1943).

F. EXPRESS, RESULTING AND CONSTRUCTIVE TRUST. The Supreme Court of Texas has recognized three categories of trusts: express trusts, resulting trusts, and constructive trusts. *Mills v. Gray*, 210 S.W.2d at 987-88.

1. Express Trust. An express trust comes into existence by the execution of an intention to create it by one having legal and equitable dominion over the property made subject to the trust. *Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985, 987-88 (1948). "(4) Under Tex. Prop. Code § 111.004, the term "'Express trust' means a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person." The key to an express trust is the actual intent to create a trust relationship. Thus, in *Cluck v. Sheets*, 171 S.W.2d 860, 862 (Tex. 1943), the Supreme Court upheld a jury finding "that at the time the title was conveyed to G. C. Cluck there was an agreement between him and Mrs. Kallaher that it should be taken in the name of Cluck for the benefit of both." The Supreme Court made it clear that the claim established was an express trust, not a resulting trust. *Id.* In *Faglie v. Williams*, 569 S.W.2d 557, 566 (Tex. Civ. App.--Austin 1978, writ ref'd n.r.e.), the court considered a failed claim of common law marriage, and an alternate claim for co-ownership of land. The appellate court said: "To establish an express trust, appellant had the burden to show that at the time title was conveyed to Mike Williams there existed an agreement between appellant and Williams that the property would be taken in his name for the benefit of both of them." The appellate court cited *Cluck v. Sheets* as support.

2. Resulting Trust. A resulting trust arises by operation of law when title is conveyed to one party while consideration is provided by another. *Cohrs v. Scott*, 338 S.W.2d 127, 130 (Tex. 1960). Generally, a resulting trust can arise only when title passes, not at a later time. *Id.* at 130. A resulting trust also arises when a conveyance is made to a trustee pursuant to an express trust, which fails for any reason. *Nolana Development Ass'n v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984). Ordinarily, the proponent of a resulting trust has the burden of overcoming the presumption of ownership arising from title by "clear, satisfactory and convincing" proof of the facts giving rise to the resulting trust. *Stone v. Parker*, 446 S.W.2d 734, 736 (Tex. Civ. App.--Houston [14th Dist.] 1969, writ ref'd n.r.e.).

3. Constructive Trust. A "constructive trust" is not really a trust; it is an equitable remedy. The court imposes a "constructive trust" when an equitable title or interest ought to be, as a matter of equity, recognized in someone other than the taker or holder of legal title. The Supreme Court described the doctrine as follows:

> A constructive trust does not, like an express trust, arise because of a manifestation of intention to create it. It is imposed by law because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property.

Omohundro v. Matthews, 341 S.W.2d 401, 405 (Tex. 1960). *Accord*, *Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985, (1948).

In *Mills v. Gray*, 210 S.W.2d at 987-88, the Texas Supreme Court drew the following distinction between a resulting trust and a constructive trust:

> Resulting and constructive trusts are distinguishable, but there is some confusion between them. From a practical viewpoint, a resulting trust involves primarily the operation of the equitable doctrine of consideration - the doctrine that valuable consideration and not legal title determines the equitable title or

> interest resulting from a transaction - whereas a constructive trust generally involves primarily a presence of fraud, in view of which equitable title or interest should be recognized in some person other than the taker or holder of the legal title.

G. STATUTE OF FRAUDS. Under the general Statute of Frauds, to be enforceable a promise, agreement, or contract for the sale of real property must be in writing and signed by the party to be charged with the promise or agreement. Tex. Bus. & Com. Code § 26.01. The Statute of Frauds also applies to "an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation." *Id*. at § 26.01(b)(3). The Statute of Frauds also applies to "an agreement which is not to be performed within one year from the date of making the agreement." *Id*. at § 26.01(b)(6).

The Texas Family Code contains its own statute of frauds provision:

> § 1.108. Promise or Agreement Must be in Writing
>
> A promise or agreement made on consideration of marriage or nonmarital conjugal cohabitation is not enforceable unless the promise or agreement or a memorandum of the promise or agreement is in writing and signed by the person obligated by the promise or agreement.

Several courts have held that the Section 26.01 Statute of Frauds does not prohibit the enforcement of an agreement to hold land in a partnership, or trust, or to divide the proceeds from sale of the land. *Berne v. Keith*, 361 S.W.2d 592, 597 (Tex. Civ. App.--Houston 1962, writ ref'd n.r.e.) ("[A]n agreement to share in the profits of contemplated speculative deals in real estate simply does not involve the transfer of real estate, or an interest in real estate, within the meaning of the Statute of Frauds"); *Wiley v. Bertelsen*, 770 S.W.2d 878, 881 (Tex. App.--Texarkana 1989, no pet.) ("The statute of frauds does not apply to an agreement to pay a certain sum of money out of the proceeds of a future sale of land"); *Newton v. Gardner*, 225 S.W.2d 598, 601 (Tex. Civ. App.--Eastland 1949, write ref'd n.r.e.) ("an oral agreement between Gardner and Newton for the future joint acquisition of leases in the name of Newton, with the understanding that Gardner's interest was to be a 1/32nd overriding royalty . . . is not within the Statute of Frauds"); *Lanier v. Looney*, Tex. Civ. App., 2 S.W.2d 347, 350 (Tex. Civ. App.–Dallas 1928, writ ref.) ("Parties contemplating the joint purchase or lease of land may orally agree to such an undertaking in advance of such purchases and leases, and may orally agree, for a valuable consideration passing from the one to the other, that the deeds or leases acquired shall be taken in the name of one of them, but that the interest of each in the land shall be in a named proportion. The party in whose name the deed is taken, as between himself and the other party to such transaction, holds the interest in trust for the party unnamed in the deed. Such an agreement is not an oral transfer of the title to the land, for the party in whose name the title stands took such title, not only for himself, to the extent of his agreed interest, but also as trustee for the other party to the extent of his agreed interest."). However, in *Zaremba v. Cliburn*, 949 S.W.2d 822, 825 (Tex. App.--Fort Worth 1997, writ denied), the appellate court held that the claims of "purported oral or implied partnership agreement" between two men in a same-sex relationship were "founded on the basis that [the plaintiff] was entitled to recovery for any services rendered in consideration of nonmarital, conjugal cohabitation" and that "those claims are barred by the statute of frauds . . . ."

At one time Texas Business & Commerce Code § 8.319 operated as a Statute of Frauds for the sale of corporate stock. In *Williams v. Gaines*, 943 S.W.2d 185, 189 (Tex. App.--Amarillo 1997, pet. denied), the court held that this Statute of Frauds did not apply to an oral agreement that contemplated the formation of a corporation and

future issuance of stock. The court went on to say that "[t]he general law of contracts applies to pre-incorporation agreements." *Id.* at 190. In *GNG Gas Systems, Inc. v. Dean*, 921 S.W.2d 421, 428 (Tex. App.--Amarillo 1996, writ denied), the court held that an "agreement . . . for the parties to form the two corporations and to provide for the percentages of ownership of them" was not within the Statute of Frauds in Section 8.319. That provision of the Business and Commerce Code has been eliminated, but the view that an agreement for the future issuance of stock was not governed by the Statute of Frauds is instructive.

Tex. R. Civ. P. 94 requires that the defense of Statute of Frauds be pled, or it is waived.

H. FINANCIAL ACCOUNTS. There are special rules for ownership of money on deposit in financial institutions.

1. Jointly-Held Accounts. The new Texas Estates Code § 113.102, effective January 1, 2014, provides that a jointly-held account belongs to the parties in proportion to the net contributions by each party to the sum on deposit, unless there is clear and convincing evidence of a different intent.

2. Pay-on-Death Accounts. The new Texas Estates Code § 113.103 provides that a pay-on-death account belongs to the original depositor and not to the designated beneficiary, during the lifetime of the depositor.

3. Trust Accounts. The new Texas Estates Code § 113.104 provides that a trust account belongs beneficially to the trustee during his/her lifetime, unless the terms of the trust agreement manifest a contrary intent, or there is clear and convincing evidence of an irrevocable trust.

I. TORT CLAIMS. There is a possibility that same-sex cohabitants might sue in tort, such as fraud, conversion, breach of fiduciary duty, and the like.

J. CHOICE OF LAW FOR SURVIVORSHIP PROVISIONS. The new Texas Estates Code § 111.001, effective January 1, 2014, provides that a survivorship agreement must be in writing. Additionally, a survivorship agreement cannot be inferred from that fact that property is held in joint names. Texas Estates Code § 111.054 provides that, if more than 50% of the assets in an account at a financial institution or retirement account are owned by a Texas domiciliary, then Texas law applies to determine what the various ownership interests are after death, despite a choice-of-law clause to the contrary. The same rule applies to insurance policies, annuities, or other similar arrangement. *Id.*

XII. PARENT-CHILD ISSUES INVOLVING SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS. The way that parent-child relationships are conceived and described in the Texas Family Code is for the most part not sensitive to whether the adults seeking court intervention regarding a minor child are involved in a heterosexual or a same-sex relationship, or how they perceive their own sexual identity. An adult either fits the definition of parent, or s/he doesn't. The term "parent" is defined for SAPCRs in the following way:

> § 101.024. Parent
>
> (a) "Parent" means the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father. . . .

Parents automatically have standing to litigate parental rights of their children. If only one adult in a same-sex relationship is the natural or adoptive parent of a child, the adult who is not a parent will have to meet the standing requirements of non-parents in order to litigate parental rights. That typically will be "actual care, control, and

possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." Tex. Fam. Code § 102.003(9). If the break-up is agreed-upon, parental rights and responsibilities can be awarded to the non-parent adult by an agreed order, subject to approval of the court.

So, if it happens that a child is born to a female couple by assisted reproduction followed by childbirth to one of the women, the child will have a biological mother and the other female partner will not have the status of parent unless she adopts the child. If a child is introduced to a male-male relationship, it could be by adoption by one or both males, or by one male contributing sperms for in vitro fertilization of a surrogate mother. In the latter case, the biological father will be a parent, and the other male partner will not be a parent unless he adopts the child. In this regard, Family Code Section 153.131 creates a presumption that a parent should be appointed as sole managing conservator in a custody fight with a non-parent, unless the non-parent proves that the appointment would significantly impair the child's physical health or emotional develpment.

Another issue is Family Code Section 153.003 which bars consideration of "marital status or sex" in determining custody and visitation issues. In keeping with the view that discrimination based on sex under Federal law includes discrimination based on sexual identity, the term "sex" in Section 153.003 may preclude consideration of sexual preference or sexual identity in deciding custody. This could, for example, bar testimony or argument that the fact-finder should consider the fact that a person seeking custody or visitation is gay or transgender.

There is no prohibition in Texas law against two persons of the same sex having a parent-child relationship with a child (i.e., two mothers or two fathers). However, Texas law prohibits the issuance of a supplemental birth certificate to same-sex parents of a child. Texas Health & Safety Code Section 192.008(a) (supplemental birth certificate must "be in the names of the adoptive parents, one of whom must be a female, named as the mother, and the other of whom must be a male, named as the father").

XIV. FAMILY VIOLENCE BETWEEN SAME-SEX DOMESTIC PARTNERS. The Texas Family Code's family violence provisions protect individuals in same-sex relationships just as in traditional marital relationships. Texas Family Code Section 71.004 defines "family violence" as an act by a member of a family or household. Texas Family Code Section 71.003 defines "family" as including "individuals related by consanguinity or affinity," individuals who are former spouses, individuals who are parents of the same child, and a foster child and foster parent. Texas Family Code Section 71.005 defines "household" as "a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other." Texas Family Code Section 71.0021 defines "dating violence" as an act against someone with whom the actor has or had a dating relationship. Texas Family Code Section 71.0021(b) defines "dating relationship" as "a continuing relationship of a romantic or intimate nature." The court in *Ochoa v. State*, 355 S.W.3d 48 (Tex. App.--Houston [1st Dist.] 2010, pet. ref'd), held that "dating relationship" applies to both same-sex and opposite-sex relationships.

ENDNOTES

The following endnotes are web-enabled links in the electronic version of this Article, available at <http://www.orsinger.com/PDFFiles/family-law-update-2013.pdf>.

1. <http://www.apa.org/pi/lgbt/resources/guidelines.aspx> [1-18-2015].

2. <http://media.npr.org/documents/2013/mar/BusinessDOMAbrief.pdf> [1-20-2015].

3. <http://www.gallup.com/file/poll/163733/Gay_Marriage_Legal_50_States_130729%20.pdf> [1-20-2015].

4. <http://w ww.nbcnews.com/politics/elections/2014/US/house/exitpoll> [1-18-2015].

5. *Same-sex Marriage in Texas* <http://en.wikipedia.org/wiki/Same-sex_marriage_in_Texas> [1-18-2015]; *LGBT Rights in Texas*, <http://en.wikipedia.org/wiki/LGBT_rights_in_Texas> [1-19-2015].

6. USCCB Committees Express Concerns Over Domestic Violence Legislation <http://www.usccb.org/news/2013/13-046.cfm>.

7. *State v. Naylor*, No. 11-0114, Petitioner's Supplemental Brief Addressing Recent U.S. Supreme Court Decisions <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=b463d8eb-2586-41e5-8f72-943bf4e43828&coa=cossup&DT=BRIEFS&MediaID=c225882a-381e-429c-a5e8-0152bfb5a2ca>.

8. *State v. Naylor*, No. 11-0114, Respondents' Joint Supplemental Response on Windsor and Perry p. 3 <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=93226dab-75b3-4b80-bbae-b1b7ba51420e&coa=cossup&DT=BRIEFS&MediaID=99ea6ca3-cc8e-4f3c-8316-0b9ba9c99cfe>.

9. Secretary of Defense press release relating to same-sex marriage <http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf>.

10. <http://www.justice.gov/iso/opa/resources/9201421014257314255.pdf> [1-20-2015].

11. <http://www.justice.gov/iso/opa/resources/972201462010393090478 5.pdf> [1-20-2015].

12. The Defense of Marriage Act can be found at <http://www.gpo.gov/fdsys/pkg/BILLS-104hr3396enr/pdf/BILLS-104hr3396enr.pdf>.

13. <http://texassupremecourt.mediasite.com/mediasite/Play/c90b48105cb6409d9f3b0092ee45ebd61d> [1-19-2015].

14. <http://texassupremecourt.mediasite.com/mediasite/Play/c90b48105cb6409d9f3b0092ee45ebd61d> [1-19-2015].

15. Petition for Review of the State of Texas <http://www.supreme.courts.state.tx.us/ebriefs/11/11011401.pdf>.

16. Opinion No. JC-0156, Re: Whether a county clerk must accept for filing a "declaration of domestic partnership" <https://www.texasattorneygeneral.gov/opinions/opinions/49cornyn/op/1999/htm/jc0156.htm>

17. The Texas ACLU submission in support of the trial court's action is at <http://www.aclutx.org/download/119>.

18. <www.vancouversun.com/pdf/polygamy_021209.pdf> [last visited 1-13-2015].

19. <http://www.ncsl.org/ research/human-services/state-laws-regarding-marriages-between-first-cousi.aspx> [1-14-2015]..

20. "I consider the constitutional debate over same sex marriage in light of the distinction between sexual orientation and sexual preference. On one end on the spectrum is the language of preference, connoting the full range of choice. As a mere preference, sexuality may be freely and voluntary chosen or even rejected just as one may prefer one flavor of ice cream to another. On the other end is the language of orientation, connoting the immutable and fixed nature of being gay. Here sexuality is special; it is not ordinary like a mere preference. Given this spectrum, I argue that there is a dilemma in seeking to overturn a prohibition on same sex marriage. If we speak in the language of sexual preference, we do so at the cost of undermining an objection to a prohibition on same sex marriage. If preferring a man over a woman (or vice versa) is a mere preference, it unravels the very idea of gay rights by denying the specialness of identity, or so I argue. But if being gay is indeed special and integral to an

individual's identity unlike an ordinary desire for one kind of ice cream over another, this forces us to posit a gay identity that may be exclusionary. A fixed view of identity invites concerns over intersectionality, problematically reifying the identity affiliation." Bedi, Sonu, *Sexual Preference vs. Sexual Orientation: Identity and Same Sex Marriage*, Paper presented at the annual meeting of the Northeastern Political Science Association, Crowne Plaza, Philadelphia, PA, Nov. 17, 2011 <http://citation.allacademic.com/meta/p_mla_apa_research_citation/5/2/6/2/0/p526209_index.html> [1-20-2015].

21. <http://www.apa.org/topics/lgbt/transgender.aspx> [1-20-2015].

22. <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf> [1-18-2015].

23. Mark Moran, *New Gender Dysphoria Criteria Replace GID* <http://psychnews.psychiatryonline.org/doi/full/10.1176%2Fappi.pn.2013.4a19> [1-18-2015].

24. Jilliam T. Weiss, *The Transgernder Tipping Point: An Overview for the Advocate* <https://www.acslaw.org/sites/default/files/Weiss_-_The_Transgender_Tipping_Point.pdf> [1-19-2015].

25. *Macy v. Holder*, ATF-2011-00751 (April 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt> [1-19-2015].

26. <http://www.search.txcourts.gov/Case.aspx?cn=14-0404&coa=cossup> [1-18-2015].

27. <http://www.courts.state.tx.us/pdf/Constitutionality.pdf> [1-14-2015].

28. <http://texassupremecourt.mediasite.com/mediasite/Play/c90b48105cb6409d9f3b0092ee45ebd61d> [1-19-2015].