Same-Sex Marriage; Emerging Gender Identity Issues

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2016 Family Justice Conference
Texas Center for the Judiciary
January 25-26, 2016
Hyatt Lost Pines, Bastrop, 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 (1994-2015 and appointed through 2018); 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 (2001-2004)
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

Honors Received:

Texas Center for the Judiciary, Exemplary Non-Judicial Faculty Award (2014)
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 (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(2003-2015)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2015); Appellate Law (2007-2015)

Books, Journal and Magazine 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)
—*A New Day: Same Sex Marriages: Emerging Gender Identity Issues*; IN CHAMBERS FALL 2015; Texas Center for the Judiciary, p 10.

Continuing Legal Education Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011, 2013, and 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)

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); Discovery Issues Facing Associate Judges and Title IV-D Masters (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); 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); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014); Probate & Family Law - What a Family Lawyer Can Learn from the Texas Estates Code (2015)

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)

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 (Appeal and Mandamus) (2012)

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); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); 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); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 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, Court-Ordered Sanctions (2014); Texas Center for the Judiciary, Same-Sex Marriage and Gender Identity Issues (2015); History of Texas Supreme Court Jurisprudence, The Rise of Modern American Contract Law (2015); New Frontiers In Marital Property Law, Distributions from Business Entities: Six Possible Approaches to Characterization (2015)

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

Table of Contents

by

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Board Certified in Family Law
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I. INTRODUCTION. The United States is in the midst of a rapid and dramatic change of cultural mores and laws governing same-sex relationships. On June 26, 2015, in *Obergefell v. Hodges*, 35 S. Ct. 2584 (2015), the U.S. Supreme Court ruled that, in the eyes of the law, marriage in America includes marriage between persons of the same sex. The Texas Constitution's and Family Code's prohibitions of same-sex marriage in Texas, and the requirement that Texas officials deny recognition to same-sex marriages created elsewhere, were declared unconstitutional by Federal District Judge Orlando Garcia in San Antonio, who issued an injunction prohibiting the State of Texas from enforcing those laws. That injunction was affirmed by the U.S. Court of Appeals for the Fifth Circuit on July 1, 2015, and the case is now final. Questions remain, including: the retroactive effect of the *Obergefell* ruling, what happens to asserted same-sex marriages that were not valid when originally contracted, the duty of judges to perform same-sex marriages, the status of civil unions and registered domestic partnerships, and other issues.

While the main focus on gender-related laws 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 hormone therapy and body-altering surgery. Texas has a statute and case law on the issue of legal recognition of gender identity. The recent significant legal developments involving same-sex marriage light the path for follow-on litigation regarding legal classifications based on gender.

II. THE CONSTITUTIONAL ARGUMENTS ON SAME-SEX MARRIAGE.

A. WHEN MARRIAGE WAS A MATTER OF STATE LAW. The conditions for creating a marriage relationship in the USA have 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"). In *Baker v. Nelson*, 409 U.S. 810 (1972), the U.S. Supreme Court dismissed an appeal attacking Minnesota's ban on same-sex marriage, saying that it did not involve a federal question. In 1993, the Supreme Court of Hawaii held that a state prohibition against same-sex marriage potentially violated the equal protection clause of the Hawaii constitution as discrimination based on sex, and was subject to strict scrutiny analysis. *Baehr v. Lewin*, 852 P.2d 44 (1993). In 2003, the Massachusetts Supreme Court ruled that the state constitution guaranteed the right of same-sex couples to marry. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (2003). In 2008, the California Supreme Court held that same-sex persons were a suspect classification, and that California laws discriminating against same-sex marriage failed strict scrutiny and thus denied

the California Constitution's guarantee of equal protection of the law and due process of law. *In re Marriage Cases*, 43 Cal.4th 757 (Cal. 2008). Also in 2008, the Connecticut Supreme Court held that offering civil unions but not marriage to same-sex couples violated the equal protetion and due process clauses of the Connecticut constitution. *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008). In 2009, the Iowa Supreme Court held that the state's prohibition against same-sex marriage violated the equal protection clause in Iowa's constitution. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). There were also a host of court decisions that found no fault with statutory or constitutional provisions banning same-sex marriage.

B. MARRIAGE BECOMES A MATTER OF FEDERAL LAW. On August 4 , 2010, a Federal District Judge in San Francisco, California (who later publicly acknowledged that he was gay), ruled that the California constitutional prohibition against same-sex marriage violated the Fourteenth Amendment of the U.S. Constitution, both the due process clause and the equal protection clause. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (ND Cal. 2010). On February 7, 2012, the 9th Circuit Court of Appeals affirmed the District Court's decision, based on equal protection analysis and finding no rational basis for the unequal treatment of same-sex partners. *Perry v. Brown*, 671 F. 3d 1052 (2012). See Section II.C.2 below.

Starting in 2010, the battle shifted to Federal courts, who were presented arguments that the 14th Amendment to the U.S. Constitution requires all states to grant same-sex marriages and to recognize same-sex marriages that were validly created elsewhere. The argument coupled 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 fundamental rights, to lead to the conclusion that choosing a spouse, even of the same gender, is a fundamental right. This argument ultimately won the day.

Here is the progression of recent decisions made by Federal circuit courts on this issue:

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*, 760 F.3d 1070 (10th Cir. 2014), 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.

On July 28, 2014, a divided panel of the U.S. Court of Appeals for the 4th Circuit ruled that a Virginia law banning same-sex marriage was unconstitutional under the Fourteenth Amendment's due process and equal protection clauses. *Bostic v. Schaeffer*, 760 F.3d 352 (4th Cir. 2014). The court applied strict scrutiny review. The U.S. Supreme Court denied certiorari on October 6, 2014.

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.

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. The U.S. Supreme Court denied certiorari on June 30, 2015.

On October 7, 2014, a divided panel of the Sixth Circuit Court of Appeals upheld Michigan, Ohio,

Kentucky and Tennessee constitutional provisions and statutes preventing same-sex marriages and refusing to recognize such marriages from elsewhere. *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. See Section II.C.4 below.

Thus, the 10th, 4th, 7th, and 9th Circuit Courts of Appeals all agreed that the Fourteenth Amendment preempts state laws that refuse to recognize the validity of same-sex marriage. The 6th Circuit which ruled the other way. The U.S. Supreme Court granted review of appeals from the 6th Circuit cases and in *Obergefell v. Hodges* sided with the view that the 14th Amendment required "marriage equality."

In *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the Supreme Court invoked a technicality to dismiss the appeal from a district court ruling invalidating California's constitutional bar against same-sex marriages, where the California Secretary of State refused to defend the law on appeal. Even though the California Supreme Court and Ninth Circuit Court of Appeals found that the state's interests were properly represented on appeal, the Supreme Court said that no case or controversy was presented so the Ninth Circuit decision was set aside and the appeal dismissed. Thus, the California constitutional provision was overturned by a single Federal district judge, without appellate review.

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. At this point, the impact of the 14th Amendment on the issue of marriage equality was developing piecemeal across America.

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?

C. U.S. SUPREME COURT DECISIONS.

1. The Supreme Court Waits. The initial response of the U.S. Supreme Court regarding same-sex marriage appeals was to avoid a ruling on the merits.

2. *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 a substantial federal question."

3. *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 the Northern District of 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 constitution. 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.

4. ***U.S v. Windsor*.** On June 26, 2013, in *U.S. v. Windsor*, 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, because it provided a Federal definition of marriage being only between a man and a woman requiring the Federal government to ignore a same-sex marriage that was valid under state law. The Majority Opinion was written by Justice Kennedy, who sided with the Court's four "liberal" judges. Justice Kennedy wrote that the validity of a marriage is a matter for state law, not Federal law.

5. ***Obergefell v. Hodges*.** On June 26, 2015, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the U.S. Supreme Court, by a vote of 5-to-4, ruled that the Fourteenth Amendment due process of law clause and equal protection clause required same-sex marriages to be treated as equal to heterosexual marriages for all purposes. The Majority Opinion was written by Justice Kennedy, joined by the Court's four "liberal" judges. The staed rationale was substantive due process and the liberty interest in being free to pick your spouse, no matter the gender. An equal protection analysis was also included in the majority opinion. Justice Kennedy used the word "dignity" nine times. Justice Kennedy built his legal argument on *Loving v. Virginia*, *Zablocki v. Redhail* and *Turner v. Safley*, three cases finding the right to marry to be fundamental. Notably Justice Kennedy mentioned *Griswold v. Connecticut*, but no the penumbra of privacy concept relied upon later in *Roe v. Wade*, but rather the emphasis in *Griswold* on the benefits of marriage.

III. 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.

This amendment made it impossible to argue 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 was preemption by Federal law.

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. The trial judge 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 appeal was consolidated by the Texas Supreme Court with *State v. Naylor* and was argued to the Supreme Court on November 5, 2013. However, pending appeal one of the parties died and the appeal was dismissed as moot.

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 June 19, 2015, the Texas Supreme Court affirmed the court of appeals, on the ground that the Attorney General intervened in the case too late to be considered a party who could appeal. *Texas v. Naylor*, 466 S.W.3d 783 (Tex. 2015).

IV. UNANSWERED QUESTIONS.

A. CASES; WEDDINGS. The decision in *Obergefell*, and the few follow-up enforcement proceedings to date, make it clear that Texas judges, in ruling on cases, must recognize same-sex marriages as being valid on the same terms as opposite-sex marriages. Whether the failure to do so would subject a judge to contempt of a Federal court, or a sanction from the Judicial Conduct Commission, as opposed to reversal on appeal, are unanswered questions. Also unclear is whether Texas judges, who by law have the authority to marry couples,[1] are required to perform same-sex marriages. The indications coming from other states suggest that no judge is required to perform marriages, but if s/he does, s/he must perform both opposite-sex and same-sex marriages.[2] However, Texas has no gay anti-discrimination law, so the question of whether Texas judges are obligated to conduct same-sex marriages is more a matter of judicial ethics than law. Texas' Pastor Protection Act allows religious organizations and the clergy to refuse to perform weddings that violate "a sincerely held religious belief."[3] But the foundation for that exemption is the First Amendment freedom of religion, which will not extend to actions by judges acting in their official capacity. Texas Attorney General Ken Paxton wrote, on June 28, 2015:

> Justices of the peace and judges similarly retain religious freedoms, and may claim that the government cannot force them to conduct same-sex wedding ceremonies over their religious objections, when other authorized individuals have no objection, because it is not the least restrictive means of the government ensuring the ceremonies occur. The strength of any such claim depends on the particular facts of each case.[4]

More detail of his reasoning is set out later in the Opinion. On July 1, 2015, the Office of Harris County, Texas Attorney Vince Ryan issued a letter to all Harris County justices of the peace and county judges advising them that "[a] judge or justice of the peace is authorized to perform a marriage but is under no obligation to do so. However, once the judge elects to undertake the performance of marriages, the service must be offered to all (including same-sex couples) in a non-discriminatory manner."[5]

The judicial ethics issue arises under Canon 3 of the Texas Code of Judicial Conduct. Canon 3

relates to "Performing the Duties of Judicial Office Impartially and Diligently." Canon 3.A(5) & 6 provide:

> (5) A judge shall perform judicial duties without bias or prejudice.
>
> (6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, *se*x, religion, national origin, disability, age, *sexual orientation* or socieconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so. [Italics added.]

Justice Kennedy's Majority Opinions in *U.S. v. Windsor* and *Obergefell v. Hodges* characterized legal discrimination against same-sex marriage as bias or prejudice against homosexuals and homosexuality. This is also the tenor of the writings on the judicial ethics aspect of same-sex marriage. As to Canon 3.A(5), although the proscriptions against discrimination based on sex originally targeted gender-based discrimination against women, the idea of sex discrimination is now in the process of being broadened to include discrimination based on sexual preference and sexual self-identity. As to Canon 3.A.(6), bias or prejudice against a person based on "sexual orientation" is explicitly prohibited. As discussed in Section XII.A below, "sexual orientation" is usually taken to mean "the sex of those to whom one is sexually and romantically attracted."

B. RETROACTIVITY. Texas Attorney General Ken Paxton and others have questioned whether *Obergefell* is retroactive in effect. The start date of marriage can affect community property rights, among other things. It seems clear that a same-sex marriage, occurring in a jurisdiction where it was lawful from its inception, is valid in Texas from the inception of the marriage. Not so clear is whether a same-sex purported marriage, that occurred in a jurisdiction where it was then prohibited, is now retroactively validated back to the date of the ceremony. The State of Texas is now (thanks to Federal Judge Garcia) issuing amended death certificates for persons who died before *Obergefell* was decided, which as a practical matter is giving that decision retroactive effect. But the legal question of retroactivity is still unresolved. The IRS applied *U.S. v. Windsor* prospectively from the date it issued the Revenue Ruling implementing that decision.[6] However, the IRS also permits – but does not require -- administrators of qualified retirement plans to recognize same-sex marriage retroactive to a date prior to *U.S. v. Windsor*.[7] And the IRS allows persons to amend tax returns to take advantage of *U.S. v. Windsor* all the way back to when the limitations period has expired.[8]

C. INFORMAL MARRIAGE. Another question is whether an informal same-sex marriage, which in Texas requires the parties to agree to be married, followed by cohabitation and "holding out," all within the State, can exist retroactive to a time when an informal same-sex marriage was not allowed. The Internal Revenue Service has long recognized an informal marriage that was valid under the law of the state where it was entered into, without regard to the law of subsequent domiciles.[9] The IRS is taking the same approach to same-sex marriage: a same-sex marriage is recognized only if it was valid in the state where it was entered into.[10] party claiming an informal same-sex marriage under Texas law prior to *Obergefell* cannot show that the marriage was valid under Texas law at the time it was entered into. Thus, the validity of an alleged same-sex informal marriage predating *Obergefell* turns on whether that decision has retroactive effect–a question that is yet to be answered.

D. DEATH CERTIFICATES. When the decision in *Obergefell* was announced, Federal District Judge Orlando Garcia issued an order enjoining the State of Texas from enforcing any law that prohibits or fails to recognize same-sex

marriages. A new party[11] intervened in the case in Judge Garcia's court, alleging that the Bexar County Clerk, the Texas Attorney General, and the interim State Commissioner of Health Services, were refusing to issue an amended death certificate. Judge Garcia ordered the Attorney General and Commissioner to appear in his court and show cause why they should not be held in contempt of Judge Garcia's earlier order invalidating Texas' ban on same-sex marriage. The Attorney General filed a brief saying that the amended death certificate would issue but that a legal question existed as to the retroactivity of *Obergefell*.

V. DOMESTIC PARTNERSHIPS AND CIVIL UNIONS. After the issue of same-sex relationships came to the fore, a number of states passed statutes providing for a "marriage-like" status, typically a registered domestic partnership or civil union. Some cities adopted this status for purpose of city business. The specifics of domestic partnership or civil union vary from state to state (or city to city). In all instances, however, it takes some overt action or concrete event to bring the domestic partnership or civil union to an end. In many states the termination of the relationship itself occurs after simply giving notice of termination, without having to file suit and obtain a court decree. For example, in California a domestic partnership terminates automatically six months after the filing of a Notice of Termination of Domestic Partnership with the California Secretary of State's office. Under California law, property acquired and debts incurred during the relationship are community property. In the event of a disagreement, the division of property must be accomplished by a court. Either party can file a petition for dissolution of domestic partnership. A petition can be filed to declare the partnership a nullity, on the same grounds that apply to annulment of a marriage. The California Declaration of Domestic Partnership is a form that contains a stipulation that both parties consent to the jurisdiction of a California court "for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership, or for legal separation of partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident or to maintain a domicile in this state."

It is possible that a same-sex couple may have created a domestic partnership and then married. The dissolution of the domestic partnership does not terminate the marriage, and the granting of a divorce does not terminate the domestic partnership. If a divorce is granted in Texas, the parties may then have to go to California to end their status as partners and to resolve claims derived from their domestic partnership. Similar problems can exist for a civil union followed by a marriage.

Article I, Section 32 of the Texas Constitution prohibits Texas government agencies and courts from recognizing "a legal status identical or similar to marriage." This applies to domestic partnerships and civil unions. The meaning of the constitutional provision was addressed in Attorney General Opinion No. GA-1003. Domestic partnerships and civil unions were not litigated in *Obergefell v. Hodges*, and no preemption of Texas law has occurred, so that a Texas court cannot adjudicate claims relating to domestic partnerships or civil unions, whether the claim is to terminate the status or to divide property acquired, during the relationship or other claims.

VI. 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 marriages 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).[12] 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.

It is worth noting that several times in his Opinion in *Obergefell v. Hodges*, Justice Kennedy mentioned the importance of a marriage between *two* people. He seemed to be drawing the line of constitutional protection so as to exclude plural marriages.

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 bride price (mahr) to the woman, or her parents, to the exclusion of a property division or spousal maintenance?

C. CONSANGUINEAL MARRIAGES. 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.[13]

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). This is accomplished by requiring an application form for marriage license in which the applicants must swear that they are not related within the prohibited degree of consanguinity or affinity. Tex. Fam. Code § 2.004(b)(6). False swearing to this part of the application is a Class A misdemeanor. Tex. Fam. Code § 2.004(c). However, falsity in this part of the application does not render the marriage void. Tex. Fam. Code § 2.301. Marriage between first cousins is omitted from the list of void marriages contained in Family Code Section 6.201. Thus, a marriage between first cousins is not supposed to occur in Texas, but such a marriage is not void. However, the Texas Penal Code makes sexual relations between first cousins a third degree felony. Tex. Penal Code § 25.02(a)(6) & (c). The constitutionality of these strictures is in doubt.

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?

VII. 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 CLAIMS. "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 at the time title is acquired, 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 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 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 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. SURVIVORSHIP PROVISIONS. A survivorship agreement provides that, where there are two or more holders of title of property, the ownership interest of the first to die passes to the survivor(s) automatically upon death. Texas Estates Code § 111.001, 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.*

J. 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. The normal standards apply.

VIII. 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. . . .

The term "a man presumed to be the father" refers to Family Code Section 160.204, "Presumption of Paternity," which says that a man is presumed to be the father of a child if: (i) the child is born to his wife, (ii) the child is born to his former wife within 301 days after the marriage ended; (iii) either of the previous two conditions exists except

the marriage is invalid for some reason; (iv) he marries the mother after the child is born and voluntarily asserts paternity in a document filed with the vital statistics unit, or in a birth certificate, or he promises "in a record" to support the child. The presumption can be rebutted in certain ways. Tex. Fam. Code § 1160.204(b). In light of *Obergefell*, the limitation of these terms to *a man* presumed to be the father will have to be interpreted to include a female married to the mother. The presumption could apply to male-male marriages, if "born to his wife" includes a spouse being the biological 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 sperm 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. 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"). This provision is likely not enforceable where the adopting parents are same-sex spouses. One of the companion cases to *Obergefell v. Hughes* was *DeBoer v. Snyder*, which challenged the constitutionality of Michigan law that limited adoptions to opposite-sex married couples and single individuals. The law was struck down because it discriminated against same-sex married couples.

IX. FAMILY VIOLENCE BETWEEN SAME-SEX DOMESTIC PARTNERS. The Texas Family Code's family violence provisions protect individuals in same-sex non-marital relationships just as in 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.

X. CHOICE OF LAW ISSUES. Given the constitutionally-mandated recognition of the validity of same-sex marriages, there are no longer conflict of law issues regarding the validity of same-sex marriages. There still can be conflict of law issues relating to property claims between same-sex spouses. And there can be conflict of law issues involving state laws regarding non-marital relationships such as domestic partners and civil unions.

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 § 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 conflict 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 law of another state to resolve a dispute in Texas between persons who were married in that state, or who entered into domestic partnerships or civil unions.

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.

E. CONFLICT OF LAW ISSUES REGARDING SAME-SEX RELATIONSHIPS. Under traditional conflict-of-law principles Texas courts 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"); *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). In *Seth v. Seth*, 694 S.W.2d 459, 462 (Tex. App.–Fort Worth 1985, no writ), 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.

The question arises to whether full faith and credit will be afforded to domestic partnerships and civil unions and from other states. A Texas 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 civil unions or other same-sex quasi-marriage relationships. That part of Texas law was not affected by the holding in *Obergefell* or by Judge Garcia's rulings in *DeLeon*, so it is still the law of Texas. Domestic partnerships and civil unions cannot be recognized in Texas courts unless and until it is decided that the U.S. Constitution requires it.

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 statute has virtually no interpretive case law.

F. CONFLICT 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.

1. Traditional Conflict of Laws Rules for Marital Property. Under traditional conflict-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 conflict-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 overturned the traditional lex loci delicti conflict-of-law rule for Texas 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 conflict-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 conflict-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 conflict-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 conflict-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 Conflict-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). Conflict-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.

After *Obergefell v. Hodges*, these divorce-related provisions apply to a same-sex divorce. The non-divorce break-up of a same-sex relationship that has crossed state lines would seem to raise conflict-of-law issues that are governed by common law conflict-of-law principles.

4. Claims Under Sister-State Law. Some states have adopted special legal principles that give unmarried 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 an unmarried same-sex couple who cohabitated in Washington moves to Texas and then breaks up. 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 sames-sex cohabitation relationship do not arise from a same-sex marriage or civil union, so Texas Family Code Section 6.204 would seem not to apply. The bar against recognizing "a legal status identical or similar to marriage" in Article I, Section 32, of the Texas Constitution would seem not to apply to the rights of unmarried same-sex cohabitants under Washington law. As far as conflict-of-law is concerned, the Washington case law suggests that the claims in question are equitable claims, not a right in property. That suggests that the claims are remedies, 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 conflict-of-law rules, vested rights do not change when domicile changes, so that ownership rights acquired in property under a "common law" partnership in Washington 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.

XI. 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].

A Texas court may 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 civil unions and other marriage-like relationships would preclude extending recognition based on the doctrine of comity.

XII. 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[14]. 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.][15]

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.[16]

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 diminish 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 of professionals who developed the new Disorder indicated that separating the Gender Dysphoria Disorder from Sexual Disorders was intended to reduce the stigma associated with the diagnosis.[17]

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.[18] 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.[19] 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 was styled *Heather Delgado, In Her Capacity a/n/f Trevor Araguz and Tyler Araguz and Simona Longoria v. Nikki Araguz*, 14-0404. On September 4, 2015, the Texas Supreme Court denied the petition for review. 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 Court of Appeals 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.

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.

ENDNOTES

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

1. Tex. Fam. Code § 2.202(4) & (5).

2. In 2013, the State of Washington's Commission on Judicial Conduct admonished a judge who refused to solemnize same-sex marriages in contravention of state legislation recognizing same-sex marriage. The Commission said the judge was not required to solemnize marriage, but if he chose to do so he could not perform only opposite-sex marriages. The Commission cited Washington's Code of Judicial Conduct, Rules 1.1 & 1.2, and 3.1(C), about avoiding the appearance of impropriety and promoting public confidence in the judiciary's impartiality. In re Tabor, CJC No. 7251-F-158 (October 4, 2013). In May of 2014, the Deputy Counsel for the Pennsylvania Judicial Conduct Board published a newsletter article advising judges that to refuse to perform all marriages would be ethical, but performing opposite-sex marriages while refusing to perform same-sex marriages would violate the Code of Judicial Conduct. Elizabeth Flaherty, Impartiality in Solemnizing Marriages, Newsletter of the Judicial Conduct Board of Pennsylvania (No. 3 Summer 2014). In March of 2015, the Arizona Supreme Court's Judicial Ethics Advisory Board issued an Advisory Opinion stating that judges are not required to perform marriage ceremonies, but if they do perform them for any members of the public they cannot refuse to perform same-sex weddings. The Opinion says a judge can perform marriages for friends and family without triggering the duty to members of the public. Az. Jud. Ethics Advisory Op. 15-01 (March 9, 2015). In May, 2015, North Carolina enacted a statute permitting judges to recuse themselves from performing marriage ceremonies due to "sincerely held religious objection." The recusal applies to all marriages, not just same-sex marriages, and the state has to provide a substitute magistrate to perform the ceremony. N.C. Gen. Stat. 51-5.5. The recusal form is at <http://www.nccourts.org/Forms/Documents/1662.pdf>. In June of 2015, the Nebraska Judicial Ethics Committee issued an Opinion saying that judges are not required to perform marriage ceremonies, but if they do they must not refuse to perform same-sex marriage, regardless of the judge's personal religious views. Neb. Jud. Ethics Com. Op. 15-1 (June 29, 2015). In August of 2015, the Board of Professional Conduct of the Supreme Court of Ohio issued an Opinion saying that a judge who performs opposite-sex marriages cannot refuse to perform same-sex marriages, and further saying that the refusal to perform any marriages in order to avoid performing same-sex marriages reflects a lack of impartiality that may lead to disqualification in cases involving homosexuals. However, the Board acknowledged that it had no authority to opine on a judge's refusal to perform any marriages at all.

3. The Texas Pastor Protection Act established Texas Family Code Section 2.601, Rights of Certain Religious Organizations.

4. Opinion No. KP-2005, p. 2 (June 28, 2015)
<https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf>.

5. Letter from Robert Soard, First Assistant County Attorney for Harris County, Texas, addressed to all Harris County Judges and Justices of the Peace (July 1, 2015), available at
http://www.harriscountytx.gov/cmpdocuments/caoimages/County_Attorney_Vince_Ryan_Opinion_Marriage_Ceremonies.pdf.

6. Rev. Rul. 2013-17, p. 2 (Aug. 29, 2013); IRS Notice 2013-61, ¶ 3.

7. IRS Notice 2014-19.

8. Rev. Rul. 2013-17 (Aug. 29, 2013); IRS Notice 2014-19, pp. 4-5.

9. Rev. Rul. 2013-17, p. 2 (Aug. 29, 2013).

10. Rev. Rul. 2013-17, p. 9 (Aug. 29, 2013).

11. According to The Texas Tribune, the intervening plaintiff needed the amended death certificate in order to obtain surviving spouse benefits to help pay for the cost of cancer treatments.
<http://www.texastribune.org/2015/08/05/federal-judge-rules-gay-spouse-named-death-certifi/>.

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

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

14. "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].

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

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

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

18. 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].

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